

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Alistair White

AND Challenge Trust

REPRESENTATIVES T Oldfield, advocate for Alistair White
M Brelsford-Smith and C Plucknett, advocates
for Challenge Trust

MEMBER OF AUTHORITY R A Monaghan

INVESTIGATION MEETING 6 July 2006

SUBMISSIONS RECEIVED 11 July 2006

DATE OF DETERMINATION 11 September 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Challenge Trust ("the trust") operates several residential facilities in Auckland for people with serious mental health needs. Alistair White is a qualified mental health worker. From June 2004 the trust employed him as a team leader at a facility known as Te Ara Takahanga located in west Auckland.

[2] Mr White says the trust dismissed him unjustifiably. He also says he has a personal grievance in respect of a suspension imposed on him. Both grievances arise from the trust's response to an email message Mr White circulated, and which the trust considered to be derisory and undermining of its management.

[3] Mr White has withdrawn a personal grievance on the ground of duress, and his claim that undue influence was exerted on him to cease being a member of a union. He has also withdrawn his request for reinstatement.

Events leading to dismissal

[4] The prelude to the dismissal came in April 2006, when Mr White sought to organise a union meeting on pay in terms of s 26 of the Employment Relations Act 2000. Although he was not a union delegate he described himself in evidence as a 'keen union member'. He approached Daele O'Connor, the community services division lead organiser at the Service and Food Workers' Union ("the union") of which he was a member, to arrange a meeting.

[5] On 26 April 2006 Mr White circulated an invitation to the meeting using the trust's email system, without limiting the invitees to union members. The agenda items notified were 'how we can organise for a collective employment agreement' and 'working party for skill base pay scales.' The extent to which the arrangements complied with s 26 of the Employment Relations Act was dubious.

[6] For that reason, by email message dated 27 April 2006 the trust's human resources

manager, Marie Brelsford-Smith, emailed Mr White and the rest of the recipients of Mr White's invitation saying the meeting would not proceed. Mrs Brelsford-Smith's message pointed out that attendees must be members of the union, that 14 days' notice of the meeting was required, and that the trust was not currently aware of any staff who were members of the SFWU. It went on to say the trust would not allow stopwork meetings at a residence because of the potential for anxiety to be created for clients. Subsequently, and rather belatedly, the parties entered into discussions about arrangements for the meeting with reference to the requirements of s 26.

[7] By a separate message of 27 April to Mr White, Mrs Brelsford-Smith gave an instruction not to use the trust's systems or resources for the communication of union business. If he did, the matter would be dealt with as a disciplinary one. The trust apparently has a written policy on the use of information technology, although the copy provided to the Authority post-dated the dismissal and the policy was not relied on in the 27 April instruction.

[8] On 2 May 2006 the latest issue of the trust's in-house newsletter, Challenge Chat, was circulated to the staff. The issue included a lengthy article by Mrs Brelsford-Smith, which opened by referring to the trust's own initiatives regarding skill-based pay. That appeared to be a response to Mr White's planned inclusion of a discussion about pay scales in the meeting he had sought to arrange. The Challenge Chat item went on to present an argument against unionising the trust's workforce. The argument included a number of pointed and adverse comments about the union's methods. It was provocative.

[9] Mr White said he found some of the content offensive, and was shocked. He also believed other staff members were concerned by the statements, and said in evidence some expressed their concern to him. He believed it would be empowering if someone responded, so decided to do so himself by email message dated 3 May 2006. It would have been more sensible to refer the matter to the union, and allow it to respond as it saw fit.

[10] It was apparent that the message was intended to have a wide distribution, and it was disingenuous of Mr White to suggest otherwise in his evidence. Mr White also said he wanted to provide a moderate response to Mrs Brelsford-Smith's extreme comments. In his written statement he said his intent was to minimise the harm Mrs Brelsford-Smith's comments might do to employees' perception of the union, and assist in the creation of a 'good faith' relationship. Again, in the circumstances that was primarily a matter for the union.

[11] The 3 May message began by commenting that the trust was 'ill-advised to use resources to circulate anti-union material such as Marie's statements'. It went on, in essence, to indicate Mr White's view of various provisions in the Employment Relations Act. It detailed the obligation to deal in good faith and the undue influence provisions as they related to actions aimed at influencing another person not to become a member of a union, as well as the access to workplace provisions in s 21. It finished by suggesting the trust had 'breached' the law and saying:

"I would invite Marie to reconsider her comments and start 'listening' to the law of NZ and 'listening' and treating Challenge Trust staff as professionals, who are entitled to join and participate in union activities as they choose.

Demonstrating a positive relationship with staff who are union members might be a better starting point.
Writing as a concerned Challenge Trust staff member ..."

[12] Unfortunately the problem escalated further. The 3 May message prompted the trust's CEO, Clive Plucknett, to decide a disciplinary investigation into Mr White's actions was necessary. Mr Plucknett prepared a letter dated 4 May 2006, in which he expressed the following concern:

"Challenge Trust's email system is for the dissemination of business information. The use of the Challenge Trust email system to undermine a member of the Executive Management team is totally unacceptable and a breach of the relationship of trust that must exist between you and your employer. ... your inappropriate use of email and the insubordinate tone of your emails to senior management have previously been discussed with you. Your email of 3 May indicates to me that you have not heeded previous warnings and calls into question your ability to be trusted in a leadership role within Challenge Trust. This may be deemed to constitute serious misconduct justifying your dismissal from employment."

[13] The letter also expressed an intention to suspend Mr White effective 4.30 pm that day, because of an inability to trust Mr White not to further misuse the communications system to the trust's detriment. It invited Mr White to meet with Mr Plucknett at 4 pm to provide submissions on the suspension, and required him to attend a disciplinary meeting on 8 May 2006. The letter said that, if Mr White made no submissions on the suspension, it would be deemed to be in effect from 4.30 pm. Mr White's manager, Dave Turner, was to deliver the letter to Mr White at the Te Ara Takahanga premises.

[14] Accordingly at about 2.30 pm on 4 May Mr Turner asked to meet with Mr White. Mr White suspected the meeting might concern a disciplinary matter, so told Mr Turner he did not want to attend without representation. He refused to accept the letter, but was advised of the contents.

[15] Mr White wanted to make submissions on his suspension. In an attempt to obtain representation for the purpose he tried unsuccessfully to contact Ms O'Connor, and two friends of his. By 4.30 pm he had not been able to make contact with any of them and Mr Plucknett's letter was formally handed to him. When he read it Mr White considered himself to have been suspended, and left.

[16] Because of a breakdown in communication Mr White was not advised that Mr Plucknett was willing to extend the time for a reply until 6 pm. Not only that, Mr Plucknett was willing to listen to an approach from Mr White concerning representation, and said in evidence he expected one. However Mr Turner, who was aware Mr White sought representation, did not believe he would be able to obtain it in the short time available. Hence Mr Turner did not convey to Mr White the offer of an extension. This was an error of judgment on his part.

[17] Ms O'Connor and another union organiser attended the disciplinary meeting with Mr White on 8 May. Mr Plucknett and Mrs Brelsford-Smith also attended.

[18] The meeting was not constructive. The union began by seeking to address Mr White's suspension, while the trust sought to address the concerns about Mr White's 3 May email. Then there developed a repetitive and circular argument in which the trust persisted in seeking Mr White's explanation of the email, while the union sought full information bearing on the background to the trust's concerns (and in particular the reference to previous discussions and warnings) before it was prepared to respond. Neither party was impressed with the other's conduct. The meeting ended with Mr White requiring details of the accusations against him before he would provide a response, and the trust taking at face value Mr White's refusal to explain the 3 May email after being asked several times to do so.

[19] The miscommunication between the parties was aggravated by Mr White's unnecessarily confrontational, and itself provocative, behaviour. The behaviour was unacceptable.

[20] Next, by letter dated 12 May Ms O'Connor raised Mr White's personal grievance in respect of his suspension, and concerns that Mr White had not received all information relevant to the allegations of misconduct against him. The letter was misconceived in that the allegation of misconduct on which the trust relied centred on the 3 May email. Other concerns about Mr White's conduct had not themselves been raised as allegations of misconduct which Mr White was required to answer, rather they were raised as background to the trust's decision to invoke the disciplinary process for the 3 May matter.

[21] The trust took the view that Mr White had been given an opportunity on 8 May to answer its concerns, but had not taken it. It wrote Mr White a letter dated 16 May 2006, and sent it to him through Ms O'Connor. The letter described itself as an 'investigation report'. It is 6 pages long, with much of the content setting out the facts as the employer saw them. Grounds for the dismissal were set out under a heading 'evaluation of the evidence', and the letter ended by saying Mr White was dismissed forthwith.

[22] In a passage referring to Mr White's email message of 3 May 2006, the letter said:

"Its tone and content were derisory of Mrs Brelsford-Smith ... and, it appears, designed to undermine Mrs

Brelsford-Smith ... in the eyes of Challenge Trust employees.

Challenge Trust views this to be serious misconduct because Mr White ... has a duty not to undermine management to other employees, especially those less senior to himself. ... Challenge Trust does not feel it can trust Mr White to remain in its employment and not once again conduct himself in a similar manner."

[23] Mr Plucknett put the matter a little differently in his written statement of evidence, which caused some confusion. He said:

"My finding was that Mr White had acted in serious breach of a reasonable and proper instruction from a member of the Executive Management Team. He had been made aware of the process to follow if he had any concerns or issues. He ignored the process. In the absence of any further explanation ... I concluded that his behaviour at the meeting and his past performance (sic)."

[24] Mrs Brelsford-Smith said in her written statement of evidence that the decision to dismiss arose from the 3 May email and the lack of any explanation, and was influenced by Mr White's disgraceful conduct during the 8 May meeting. These concerns occurred against a background of wider concerns about Mr White's disregard for trust policies and lack of respect for the trust's management. Both she and Mr Plucknett assured me that, despite Mr Plucknett's written statement, the decision to dismiss was not based on an alleged breach of a reasonable and proper instruction.

[25] Meanwhile Mr Oldfield had repeated the union's request for further information regarding the allegations of misconduct. He was advised by return of the dismissal, but that otherwise the request for information would be actioned.

Justification for the suspension

[26] The trust's policy on suspension was:

"2.4.1 ... Suspension will normally be on full pay. Suspension is not, of itself, a disciplinary action. It is a step which may be taken in order to investigate a matter and/or to ascertain whether or not disciplinary action is needed.

2.4.2 Examples of circumstances in which an employee may be suspended are:

. while an allegation of serious misconduct or incompetence is being investigated; ..."

[27] The parties' employment agreement provided:

"Where alleged serious misconduct is involved, the Employer may suspend employees on pay for a reasonable period while it conducts an investigation into an incident."

[28] The Employment Court has said:

[104] Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. ... Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct."¹

[29] Here the timeframe for the provision of a response was inherently impractical – Mr White was given two hours in which to seek a representative if he wished, prepare his response, and forward or present it to Mr Plucknett at the trust's head office some distance away in south Auckland. Not only that, the trust expected Mr White would wish to be heard, and Mr Tucker at least was aware Mr White had that wish. The trust should have ensured Mr White had his opportunity to be heard, before regarding the suspension as operative.

[30] The trust said in submissions that the suspension was put in place because the trust had recent experience of 'multiple misuses of communication channels and forums' by Mr White and 'reasonably anticipated that this could continue to be the case during the process of a disciplinary meeting'. I assume the submission is a reference to Mr White's email messages of 27 April and 3 May, and other behaviour I discuss in more detail when addressing the dismissal.

¹ **Graham v Airways Corporation of New Zealand Limited** [2005] 1 ERNZ 587

[31] It may be that Mr White had been exhibiting increasingly disloyal and disruptive behaviour. However I doubt the wisdom of purporting to suspend an employee for serious misconduct when a disagreement over union and employer rights and responsibilities lies at the heart of the incident causing concern. While Mr White's conduct was less than exemplary, I also accept he was provoked.

[32] For these reasons I find Mr White's suspension was unjustified in all of the circumstances. He has a personal grievance on that ground.

Remedy for unjustified suspension

[33] Mr White does not seek the reimbursement of lost remuneration, only compensation for injury to his feelings. The trust is ordered to compensate him under s 123(1)(c)(i) in the sum of \$1,000.

Justification for the dismissal

[34] There was some discussion at the investigation meeting about the nature of the 'previous discussions and warnings' given to Mr White, and about which the union had sought further information in May. From that it seems the 'warnings' took the form of informal discussions with managers and - with the possible exception of a verbal warning regarding procedures for seeking leave - there were no formal disciplinary warnings. The trust was not relying on the prior existence of formal warnings in order to justify the decision to dismiss.

[35] Regarding Mr White's attitude to the trust's management – which, as a team leader, he was expected to support – Mr Plucknett gave evidence of a policy under which individuals were to raise any of their concerns either through their immediate chain of management or directly with Mr Plucknett. Mr White should have followed this when raising his concern about the May Challenge Chat item.

[36] Mr White said in evidence he knew that, but did not approach Mr Plucknett because he felt he had an 'ethical' obligation to minimise harm to staff. By 'ethical' he said he was referring to his ethics as a counsellor – a statement which again I found disingenuous. By 'harm' he said he was referring to the shocked response of the staff to the item. He said further that, in the past, he had not had any success when he raised 'ethical' issues with Mr Plucknett. I did not find this explanation convincing. Mr White sought a platform on which to air his criticisms of the management.

[37] Karna Luke, acting general manager services, gave evidence about the fate of team leaders' fora which had been set up to discuss projects and client issues. The fora were discontinued in April 2006. Mr White did not believe that the fate of the fora had anything to do with him, while Mr Luke said other team leaders did not agree. He said there was a problem in that the fora became sidetracked with one service's issues and constant attacks on management. I understood him to be referring to Mr White's contribution to the fora.

[38] Finally, Mr Plucknett referred in evidence to emails Mr White had sent him, and which he considered insubordinate. One followed Mr Plucknett's calling of an urgent meeting in or about December 2005, to which Mr White responded: "I am not inspired to attend meetings at late notice ...". Mr Plucknett did not provide any detail of a second email sent in March 2006, which he also considered disrespectful.

[39] None of these and other concerns were discussed with Mr White in the course of the disciplinary investigation. They do, however, illustrate why the trust took the 3 May email so seriously.

[40] The problem for the trust is that, although it was justified in being concerned about Mr White's willingness to be openly critical of the management team of which he was a more junior member, it provoked the conduct which led to Mr White's dismissal. It was eminently predictable that a person who was a union supporter would take an adverse view of the

contents of the Challenge Chat item, and seek to express that view. The trust should have recognised the role the item played in the sending of the 3 May email.

[41] Such recognition required more than reliance on a right to express opinions honestly and genuinely held. The trust should have been alert to the link between s 4(1)(b) of the Employment Relations Act, which provides that the parties to an employment relationship must not do anything to mislead or deceive each other, and s 4(3), which refers to communications of fact or opinion reasonably held. The latter is a defence to allegations of misleading or deceptive conduct.² It was not intended to permit statements like those in the Challenge Chat item, which on any reading were undermining of the union.

[42] For these reasons I conclude summary dismissal for serious misconduct was not an action an employer acting fairly and reasonably would have taken in all the circumstances. Accordingly the dismissal was unjustified.

Remedies for unjustified dismissal

[43] Mr White has obtained alternative full time employment. However he was out of work from the date of dismissal until 17 July 2006. During that period he obtained temporary work, for which he earned a total of \$465 (gross). Accordingly Mr White has lost remuneration in the form of his salary for the period he was out of full time work, less the \$465 he earned during that period.

[44] Although I have found Mr White's dismissal was unjustified, I find too that he was guilty of contributory and blameworthy conduct. His behaviour during the 8 May meeting was unnecessary and unacceptable. While there may be room for debate about the extent to which the 3 May email can be called derisory and undermining of the management, Mr White's conduct on 8 May fits both of those descriptions. It also tends to illustrate the trust's broader concern about him.

[45] Accordingly I reduce the award of lost remuneration by one half.

[46] Again taking into account Mr White's contributory conduct, I order the trust to compensate Mr White in the sum of \$4,000 for injury to his feelings.

Summary of orders

[47] The trust is to pay Mr White the sum of \$1,000 under s 123(1)(c)(i) in respect of his personal grievance on the ground that his employment was affected to his disadvantage by an unjustifiable act of the employer's.

[48] The trust is to pay Mr White the sums of, -

- (a) one half of the remuneration lost between the date of dismissal and date of commencement of new employment, less the \$465 earned during that period; and
- (b) \$4,000 as compensation under s 123(1)(c)(i),

- in respect of Mr White's unjustified dismissal.

[49] Finally, the trust has asserted it does not have the resources to meet a substantial award in favour of Mr White without aggravating the commercial jeopardy it says it faces. However - despite the need for evidence in support and procedures relating to the confidentiality of that evidence having been explained and discussed at the investigation meeting - it has declined to provide any more than minimal evidence in support. It cannot expect the Authority to give weight to such an assertion, and moreover to weigh it in the balance when assessing remedies, if it is not prepared to provide evidence in support.

² Refer for example to **EDS (NZ) Ltd v Shaddox** [2004] 1 ERNZ 497

Costs

[50] Costs are reserved.

[51] The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they are to file and exchange memoranda setting out their positions within 28 days of the date of this determination.

R A Monaghan
Member of Employment Relations Authority