IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 196
5320297

	BETWEEN	CAROL BROOKSMITH Applicant
	AND	HIBISCUS COAST FAMILY SERVICES INCORPORATED Respondent

Member of Authority:	Robin Arthur
Representatives:	John Cox for Applicant Tom Skinner for Respondent
Investigation Meeting:	13 December 2011
Determination:	11 June 2012

DETERMINATION OF THE AUTHORITY

A. **The decision of the Hibiscus Coast Family Services Incorporated (the Society) committee to dismiss Carol Brooksmith without first hearing from her in person was not what a fair and reasonable employer would have done in all the circumstances at the time.**

B. **The remedy for Ms Brooksmith's personal grievance is reduced by one-third due to her contribution to the situation.**

C. **After allowing for that reduction, the Society must settle Ms Brooksmith's grievance by paying her the sum of $4000 under section 123(1)(c)(i) of the Employment Relations Act 2000.**

D. **Costs are reserved.**

Employment relationship problem

[1] Hibiscus Coast Family Services Incorporated (the Society) dismissed Carol Brooksmith on the grounds, as stated in a letter to her dated 15 December 2009, that its trust and confidence in her had "*irretrievably broken down*". Ms Brooksmith's paid employment was as the Society's financial administrator but she had also been elected to its trust board and, at the time of her dismissal, held the position of President.

[2] Ms Brooksmith was suspended from her duties on 1 December 2009 by the Society's honorary treasurer Daphne McKerras. Ms Brooksmith asked for and was given a letter confirming the suspension. The letter said she was suspended "*pending some further investigation into accounting discrepancies which have occurred and appear in the records*".

[3] The investigation was discussed at a meeting of the Society's management committee on 3 December. Ms Brooksmith attended the meeting but was asked to leave while Ms McKerras and the Society's secretary, Claire Jones briefed other members. Ms Brooksmith was called back into the meeting after about 30 minutes and asked to provide any comments she wished to make. She declined to do so because she did not know what the committee had been told. Ms McKerras gave an oral summary but Ms Brooksmith felt that was unsatisfactory and chose not to say anything. The committee then decided to suspend her from her role as president and as a committee member.

[4] On 8 December the Society's operations manager Karyn Hodge wrote to Ms Brooksmith and told her the investigation into "*various accounting discrepancies*" was completed. Ms Brooksmith was asked to attend a disciplinary meeting to explain "*discrepancies*" set out in a four-page report and cautioned about the prospect of "*some form of disciplinary action being taken, such as a final warning or the termination of your employment*".

[5] The report identified two discrepancies – one involving payment of wages and holiday pay during the December 2008 to January 2009 period and one involving

payment of wages on 22 February 2009 which was said to be an 'advance' on a bonus authorised by the Society's previous operations manager Jennie Denton. The first discrepancy was calculated to have resulted in an overpayment of two amounts – wages of $1062.84 and an allowance of $112. The second discrepancy was calculated to have resulted in an overpayment of $520.

[6] Ms Brooksmith's role as financial administrator included calculating and generating fortnightly pay schedules for all staff, including her. The report said Ms Brooksmith had "*not been transparent*" when asked on an earlier occasion to provide information about holiday pay and bonuses paid to herself and Ms Denton.

[7] Ms Brooksmith attended a disciplinary meeting on 11 December. She was then given the opportunity to provide amendments to a letter prepared by Ms Jones outlining Ms Brooksmith's explanations in response to the allegations. Ms Jones then also provided a copy of some additional comments on those changes that she said she would put before the Society committee in order to note "*points of difference*".

[8] Ms Brooksmith was told her responses would be discussed by the Society's committee at a meeting on 14 December. She asked to attend that meeting but Ms Jones told her that the request would need to be put to the committee. Ms Jones later advised Ms Brooksmith that "*the majority of Committee members*" wanted to discuss the issues without her being present and "*we need to honour this decision*". Ms Brooksmith was told she would be provided by 16 December with "*the minutes of the meeting and the decisions made*".

[9] After the members present heard a report from Ms Jones and discussed it, the Committee passed a resolution instructing Ms Hodge to write to Ms Brooksmith advising her that her employment was to be terminated.

Issues

[10] Some of the decisions made by the Society's committee related to Ms Brooksmith's membership of the committee and as an officeholder of the Society. Those decisions are subject to the rules and law governing the operation of

incorporated societies and are not within the jurisdiction of the Authority. This determination relates solely to matters arising out of the employment relationship.

[11] In making its inquiries and decisions in December 2009 about Ms Brooksmith's conduct and the future of her employment, the Society and its representatives were required to meet the statutory test of justification. As s103A of the Employment Relations Act 2000 (the Act) was then worded, their actions must have been what a fair and reasonable employer would have done in the all circumstances at the time.

[12] Accordingly the Authority must determine whether the following actions of the Society, and how they were carried out, were justified:

(i) The decision to suspend Ms Brooksmith, on full pay, as advised to her on 1 December 2009; and

(ii) The Society's inquiry into allegations about Ms Brooksmith's conduct, including events at the society's committee meetings on 3 and 14 December 2009; and

(iii) The decision to dismiss Ms Brooksmith, made on 14 December 2009.

[13] If some or all of those actions were found to be unjustified, the Authority must consider Ms Brooksmith's claim for remedies of lost wages and compensation for hurt and humiliation. Section 124 of the Act requires the Authority to consider whether any remedies awarded should be reduced due to blameworthy conduct by Ms Brooksmith that contributed to the situation giving rise to her personal grievance.

[14] Ms Brooksmith also had a wage claim for five weeks holiday pay and two weeks pay in lieu of notice, both said to be due to her but not paid.

The Authority's investigation

[15] In preparing this determination I have considered the submissions of the parties' representatives, background documents provided by the parties and the written and oral evidence of Ms Brooksmith, Ms Jones, Ms McKerras and Ms Hodge.

Each of those witnesses attended the investigation meeting and, under oath, confirmed their written witness statement and then answered questions from me and the parties' representative. I have not considered a written witness statement lodged in the name of Ms Denton as she did not attend the investigation meeting to confirm that statement and answer questions under oath. Ms Brooksmith was given an earlier opportunity to have a witness summons issued to ensure Ms Denton's attendance but did not apply for it.

[16] As permitted under s174 of the Act this determination has not set out all evidence and submissions received but has stated the Authority's findings of facts and law and its conclusions on matters requiring determination. The Authority's findings are made on the civil standard of the balance of probabilities, assessing the evidence to determine what was more likely than not to have happened.

[17] There have been considerable delays in this matter being lodged, investigated and determined. Ms Brooksmith lodged her application in the Authority in September 2010 – around nine months after her dismissal. The matter was then referred to mediation which occurred in February 2011. In April 2011 her representative advised the Authority that Ms Brooksmith wished to proceed with an investigation. An investigation meeting was notified for 4 October 2011 but vacated after Ms Brooksmith did not lodge witness statements in accordance with an earlier agreed timetable. Another investigation meeting, notified for 3 November 2011, was postponed due to the unexpected illness of Ms Brooksmith's representative. After the investigation meeting was held on 13 December 2011, preparation of the determination was delayed by the demands of other Authority business. For that latter delay, the patience of the parties is appreciated.

The decision to suspend

[18] On 30 November 2009 Ms Hodge received pay information she had asked Ms Brooksmith to retrieve. On reviewing those figures Ms Hodge identified payments for Ms Brooksmith and Ms Denton which appeared to be above their entitlement for certain periods. The evidence of Ms Brooksmith and Ms Hodge differed on what they each then said to one another but Ms Hodge talked later that day with Ms McKerras,

Ms Jones and two other people – the Society's auditor and its employment advisor. After considering advice, she decided Ms Brooksmith should be suspended while the matter was investigated. Ms McKerras agreed to tell Ms Brooksmith of that decision and left a message at her home asking to meet at the Society offices the next day.

[19] In her oral evidence Ms McKerras confirmed that when she talked to Ms Brooksmith at the office the next day there was no discussion about whether she should be suspended: "*We just said we were suspending her on full pay while there was an investigation*".

[20] The Society submitted that throughout the process of investigating Ms Brooksmith's conduct, it had acted openly and fairly, giving her every opportunity to present her side of the case. In respect of the suspension, that submission can be tested against what the Employment Court has described as a case-by-case measure of fairness:[1]

> *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. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from* Tawhiwhirangi *set out at para 90 of this judgment confirms the case by case, flexible and sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not.*

[21] In Ms Brooksmith's circumstances there were no issues of physical safety but, conceivably, there might have been some legitimate concerns she could interfere with the records if she stayed at work and have unchecked access to them. However that

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[1] *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587 at [104]

was never discussed with her. Rather the Society, on advice, seemed to treat its right to suspend as a *fait accompli*. There was no evidence offered that she could not have continued to work in those days without any real prejudice to its investigation. How the Society went about suspending Ms Brooksmith, without discussion of its proposal to do so and no apparent consideration of alternatives, was in these particular circumstances, an unjustified action.

The inquiry into the allegations

[22] Ms Brooksmith submitted that the Society's conclusion about its lack of trust and confidence in her was not warranted because, in making payments to herself and other employees, she had complied with procedures current at the time and followed directions given to her by Ms Denton. The Society submitted it came to its view after fairly and thoroughly investigating matters surrounding Ms Brooksmith's role in those payments and what she subsequently reported to Ms Hodge some months later.

[23] I have concluded neither submission is correct. Rather, I find, there were reasonable grounds for negative findings about how Ms Brooksmith had carried out her job – particularly in respect of disclosing potential problems with payments made – but the Society's investigation was inadequate in how it went about putting the allegations to her and reaching its conclusions.

How the allegations arose

[24] In July 2009 Ms Hodge and Ms Jones became aware for the first time of an arrangement that Ms Denton had made when she was operations manager for herself and Ms Brooksmith to receive an extra week's pay as a bonus at the end of each year. This came to light shortly after Ms Denton's resignation in June because she sent Ms Brooksmith an email asking for payment of what she described as "*one week at 40 hours that I have not taken*" and said that Ms Brooksmith "*drew both of your weeks*".

[25] Ms Brooksmith explained to Ms Hodge and Ms Jones that Ms Denton's request related to a verbal arrangement for payment of a 40 hour bonus at the end of each year. Both had received the payment in December 2008. When Ms Brooksmith

took some leave in February 2009, Ms Denton approved advance payment to her of the bonus she otherwise would have anticipated receiving in December 2009.

[26] Ms Jones and Ms Hodge took the view that Ms Denton was not entitled to such a bonus payment as it was not due until December 2009 and Ms Denton had left the job in June 2009. In a letter to Ms Denton Ms Jones also said the "*early payment*" to Ms Brooksmith was made under Ms Denton's discretion as a manager at the time.

[27] The Society's committee subsequently introduced a new procedure requiring its approval before any such payments to staff were made.

[28] Ms Hodge's evidence was that at the time of dealing with Ms Denton's request in July she asked Ms Brooksmith whether there was "*anything else we need to know*" about arrangements for payments to staff. She recalled Ms Brooksmith replied "*no*".

[29] In October 2009 Ms Brooksmith was asked to calculate holiday pay due to a former employee, Jo Barnes. Ms Barnes was the daughter of Ms Denton. She had worked for the Society in 2008 but was on parental leave and resigned before returning to the job.

[30] Ms Brooksmith was asked to explain why the pay slip she prepared for Ms Barnes showed some minus amounts. She said this was because Ms Barnes was overpaid at Christmas 2008. Further enquiries revealed a payment of $2500 holiday pay to Ms Barnes, which was considerably in excess of her entitlement. Ms Brooksmith said she made the payment because Ms Denton "*told me to do it*".

[31] Ms Hodge's evidence was that she again asked whether there was anything else she should know but Ms Brooksmith replied "*no*".

[32] In November 2009 Ms Hodge reviewed the 2008 holiday pay costs and cash flow forecast as similar payments would be due in December. In the course of inquiries to Ms Brooksmith about this, Ms Hodge discovered that in December 2008 Ms Brooksmith and Ms Denton received cash payments for holiday pay as well as

their usual pay by direct credit. The total amounts received appeared to be in excess of entitlements. Ms Brooksmith said she was told by Ms Denton to make those payments.

[33] Ms Hodge then took advice and began the steps which resulted in Ms Brooksmith's suspension on pay and a disciplinary inquiry.

The Society's inquiry

[34] In the 3 December committee meeting Ms Brooksmith was, I find, at a disadvantage when asked to respond to the content of a report from Ms Jones and Ms Hodge that she had not heard. While the committee members – who were subsequently to become decision-makers in the disciplinary inquiry – were entitled to be briefed about the issues of concern, there was no real reason Ms Brooksmith could not have heard what was being said about her. There was a real risk that unfairly negative impressions were created by what was said in that private conversation which she could not subsequently address.

[35] She did have a fair opportunity in the 11 December disciplinary meeting to offer an explanation for what had been identified as "*discrepancies*" in the four-page report.

[36] There was at the time – and, I consider, throughout the process, up to and including the Authority investigation – some ambiguity in the Society's position about whether its concerns were (a) the payments made (with the suggestion they were in excess of or outside entitlement), or (b) the process of approval (by Ms Denton and without committee scrutiny or a proper procedure in place for managing the apparent conflict of interest in employees approving and making payments to themselves) or (c) Ms Brooksmith's apparent failure to report the full extent of her own involvement when problems were discovered earlier in 2009 over payments made to Ms Denton and Ms Barnes. It is the later point on which the subsequent finding regarding trust and confidence was based. The Society's concern on that point was, I find, sufficiently identified in the report to which Ms Brooksmith was asked to respond in the 11 December disciplinary meeting.

[37] I am satisfied that a fair and reasonable employer would have expected its financial administrator to have done more about disclosing to it how she had also benefited from the approvals given and payments made when they proved to be controversial in the case of Ms Denton and Ms Barnes. Ultimately the Society's conclusion was not about the legitimacy of the payments made to her but that Ms Brooksmith had not been as frank as could be expected in a situation where there was some doubt. Its subsequent doubt in her was, on the objective standard, justified for that reason. She was involved in the committee's activities in applying for grants from charitable trusts and government agencies and knew, or should have known, about the care needed to avoid conflicts of interest in spending what were largely charitable or public funds.

[38] However the matter does not end there because Ms Brooksmith did not get, I find, a full and fair opportunity to put her explanation – about what she had done and why – to all the people who subsequently made the decisions for the Society about her employment.

[39] Ms Jones did let Ms Brooksmith comment on the documents that subsequently went to the Society's committee about the investigation into the concerns over her conduct. But Ms Jones then refused to allow Ms Brooksmith to attend the committee meeting on 14 December at which that material would be considered. She said she did so on the advice of the Department of Labour, the Privacy Commission and the Society's employment advisor. If that is so, the advice was either wrong or misunderstood.

[40] The Society had warned Ms Brooksmith in its 8 December letter to her that disciplinary action could result in termination of her employment and the committee's decision on 14 December made that prospect reality.

[41] Case law firmly establishes the right of an employee facing the prospect of dismissal to be heard by the decision-maker. In *Irvine Freightlines Limited v Cross*

Judge Palmer stated:[2]

> *It is, I consider, of the essence of that fundamental principle of natural justice, namely the right to be heard, that this right in a disciplinary setting affecting a particular employee should be exercisable by that employee in a real and purposeful hearing before the person or persons who are to decide how the disciplinary infraction, if proved or admitted, shall be dealt with.*

[42] In *Quinn v BNZ* the Court emphasised that written reports of the employee's position or explanation are not sufficient:[3]

> *The decision to dismiss was not made by any of the senior officers who had interviewed Mrs Quinn but by the Chief Personnel Manager who had never seen her but was relying entirely on reports. We do not think that this is a satisfactory way to proceed. The right to be heard is a right to be heard by the decision-maker.*

[43] Ms Brooksmith did not get such a real and purposeful hearing by all the people who would make the decision. Most of the decision-makers relied solely on written and oral reports from Ms Jones and Ms Hodge about whatever explanations Ms Brooksmith had about what had happened and why. That was unfair, particularly in respect of the decision to dismiss.

The decision to dismiss

[44] The Society's 14 December committee meeting minutes recorded the following resolution:

> *Committee instruct Karyn Hodge to write to Carol Brooksmith advising her that her employment with [the Society] is to be terminated. Committee instructed Karyn to consult with Employment Consultant as required.*
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> |---|---|
> | *Moved:* | *Daphne* |
> | *Seconded:* | *Claire, Janet, Sandy (by phone during committee meeting), Adrienne and El (by email)* |
> | *Abstained:* | *Karyn, Jane* |

[2] [1993] 1 ERNZ 424 at 442.
[3] [1991] 1 ERNZ 1060, 1070.

[45] Ms Hodge's evidence confirmed that she and another employee, Jane Pope, attended the meeting but abstained from voting on the dismissal resolution.

[46] Ms Jones' evidence confirmed that the votes of two committee members – Adrienne Powderley and Elsie Mann – were recorded on the basis of emails each had sent before the meeting. In voting in advance in that manner they had relied on reports given to them by Ms Jones and had not heard from Ms Brooksmith in person before doing so. Neither did they have the opportunity to benefit from any discussion or analysis of her explanations that may have occurred in the committee meeting before casting their votes. That latter criticism could not be made of Sandy Snep who joined the meeting by telephone conference when this issue was being discussed – however she too did not hear in person from Ms Brooksmith. Neither had Ms McKerras and Janet Pope who, along with Ms Jones, were the three members who physically attended the committee meeting and voted on the dismissal resolution.

[47] I do not accept Ms McKerras' evidence – given in the Authority investigation – that hearing directly from Ms Brooksmith was not necessary as "*the points were raised and the paperwork was there*". The failure to hear from her in person is important – and fatal to the Society's justification of its subsequent decision – because there was not one but two decisions made that evening.

[48] On the first decision – whether her conduct in reporting on the bonus and holiday pay transactions was satisfactory – Ms Brooksmith was heard in person only by Ms Jones and Ms Hodge in the disciplinary meeting. The other voting members relied on the written material and oral reports from Ms Jones.

[49] Even if that were sufficient in respect of the first decision, it was not so for the second decision – that (because of the committee members' conclusions about her conduct) Ms Brooksmith should be dismissed. Although the committee minutes record that Ms Jones outlined "*some options to think about in regards to various pathways*", Ms Brooksmith did not have the opportunity to make any submission on the appropriate level of disciplinary sanction. The written reports to the committee (a letter and an email) set out some of her explanations but had not included any comment from her about the possible disciplinary outcome.

[50] There are many decisions of the Employment Court which cite the following passage from Justice Megarry in *John v Rees* to explain the relevant principle:[4]

> *It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not, I think, do themselves justice. As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.*

[51] It is not an academic or abstract point. Ms Brooksmith had worked for the Society for six years and was an office-holder. There was a real prospect that, if given the opportunity to make a 'plea in mitigation' to the decision makers on the committee, she may have persuaded them to impose a less severe sanction than dismissal or to arrange some alternative end to her employment and role. There were plausible arguments regarding the extent to which she had acted under instructions and the collective responsibility for inadequate procedures – since rectified – that might have persuaded committee members that a warning along with the safeguard of more robust monitoring procedures was all that was needed to resolve the matter. Instead five decision makers – Ms McKerras, Ms Powderley, Ms Haworth, Ms Mann and Ms Snep – each cast a vote to dismiss her without hearing from her directly at all while Ms Jones also voted for that outcome after having heard from Ms Brooksmith only in the disciplinary meeting but not on the question of the suitable sanction should her conduct be found wanting.

[52] Having failed to give Ms Brooksmith that opportunity, and to consider with an open mind whatever she might then have had to say, the Society's committee members did not do what a fair and reasonable employer would have done. Because

[4] [1970] Ch 345 at 402 cited in, for example, *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 at 435.

there was some reasonable prospect that their decision may have been different if they had, their action was unjustified. Ms Brooksmith has a personal grievance for unjustified dismissal.

The wage claim

[53] Ms Brooksmith's evidence did not establish her claim for payment of outstanding holiday pay and notice. She accepted, in answer to a question from the Society's representative during the Authority's investigation, that there was an overpayment of her holiday pay that she had not recognised earlier. She was paid additional wages in February 2009 as an anticipated bonus for December 2009. Taken in the round I consider it more likely than not that she has received amounts equivalent to entitlements due.

Remedies

Lost wages

[54] Ms Brooksmith sought an award reimbursing wages lost due to her dismissal. She provided no evidence of making any job applications but said she had some "*on the computer at home*" and may have attended some job interviews but could not recall any "*off the top of my head*". In light of that evidence I was not satisfied that she had made the necessary reasonable endeavours to mitigate her loss of wages following her dismissal by the Society. I decline to make an order for lost wages.

[55] I note too that her ten-hour-a-week paid job at the Society was not her main source of income. Throughout her employment with the Society and until the end of 2010 Ms Brooksmith got earnings related compensation from ACC for an injury which had occurred in a previous job.

Compensation for hurt and humiliation

[56] I accept Ms Brooksmith's evidence that she felt humiliated by the manner of her dismissal and that was aggravated by the Society's subsequent complaint about

her to the Police and a report to the Charities Commission. Those actions may have been legitimate steps or reporting obligations for the Society – although I make no finding on that point. However the effect was to increase the number of people in the wider community of social agencies who knew about Ms Brooksmith's dismissal (but not the unjustified way it was decided) and that increased her loss of dignity and the injury to her feelings arising from it. While the Police eventually decided there was no criminal liability or serious wrongdoing by her, Ms Brooksmith was prevented from being involved in victim support voluntary work while inquiries were made and that increased her loss of dignity.

[57] The sum of $6000 (subject to reduction for contribution) is awarded to Ms Brooksmith under s123(1)(c)(i) of the Act as compensation for her loss of dignity and injured feelings.

Reduction for contribution

[58] The Authority must consider whether blameworthy conduct by an employee contributed to the situation giving rise to the grievance and may reduce the nature or extent of remedies as a result. In this case I agree Ms Brooksmith did contribute to the situation by not being franker with Ms Hodge when the problems about payments to Ms Denton and Ms Barnes arose. She did not, however contribute to the Society's failure to fairly hear her explanations and decide on her dismissal. On balance I consider her contribution should be recognised by a one-third reduction of the compensation remedy provided – that is from $6000 to $4000.

Costs

[59] Costs are reserved. The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and an Authority determination of costs is sought, Ms Brooksmith's representative may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Society would then have 14 days from the date of service to lodge any reply memorandum. No application for costs will be considered outside this timetable without prior leave.

[60] If a determination on costs is sought, the Authority is likely to make an award on its usual tariff basis, subject to the parties' submissions about any factors requiring an upward or downward adjustment of the notional daily rate in the particular circumstances of the case.[5] On what is presently known I would be likely to award costs of $2500 to Ms Brooksmith, a reduction of the usual rate due to postponement of one notified investigation meeting because she did not lodge witness statements by the required and agreed time to do so.

Robin Arthur
Member of the Employment Relations Authority

[5] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.