

**YOUR ATTENTION IS DRAWN TO
THE NON PUBLICATION ORDER
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DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 362/08
5123751

BETWEEN GRAEME CASSE
 Applicant

AND CHIEF EXECUTIVE,
 DEPARTMENT OF LABOUR
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in person
 Tony O'Rourke for Respondent

Investigation Meeting: 11 August 2008 at Auckland

Submissions Received: 21 August 2008 from Applicant
 22 August 2008 from Respondent

Determination: 21 October 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Graeme Casse has been a Health and Safety Inspector employed by the Department of Labour (the Department) for the last six years. In 2006 the Department underwent a significant restructuring program which resulted in all its separate business units being combined into a new cohesive Regional business structure. The expectation is that the new structure will facilitate a more focused delivery of services and enable greater opportunities for the services to work together.

[2] Ms Annabel Newman was appointed as Acting Service Manager for the South Auckland area in November 2006. Mr Casse was based in South Auckland. It was common ground that until the restructuring the South Auckland office was a robust environment in which to work. One witness who gave evidence on behalf of

Mr Casse told me that she swears a lot around the office but not outside that environment.

[3] Mr Casse swore at Ms Newman in a meeting on 4 May and received a letter setting out the expected standards of behaviour for future interactions with all staff. Then, on 28 June 2007 Mr Casse walked out of a facilitated workshop meeting after challenging Ms Newman and the need for the workshop. He received a final written warning for his actions. Mr Casse claims both actions amount to claims for unjustified disadvantage, which the Department denies.

[4] The issues for this determination are whether the letter of 14 May 2007 and the final written warning on 11 July 2007 have led to one or more conditions of Mr Casse's employment being affected to his disadvantage by an unjustifiable action on the part of the Department.

[5] Section 103A of the Employment Relations Act 2000 requires the Authority to scrutinise the Department's actions and ascertain whether its actions, and how it acted, were what a fair and reasonable employer would have done in all the circumstances.

Letter dated 14 May 2007

[6] The new emphasis by the Department on Regional work groups, meant that new employees and more experienced employees from the different business units were being brought together to work in one office.

[7] To facilitate the amalgamation and to smooth the transition, Ms Newman arranged for workshops with all employees from each site to be held, in an endeavour to assist the groups to establish good working relationships within the new Regional Structure.

[8] The workshop in South Auckland was held on 14 March 2007 and was facilitated by an experienced mediator and facilitator, Ms Alison Cotter. Ms Cotter is a Mediator employed by the Department of Labour and is based in Hamilton. During

the workshop a brainstorming session was held to identify the current culture in the Manukau workplace.

[9] Notes from the workshop indicate that some participants felt that while the employees in the office were friendly and helpful, there was a feeling of distrust, lack of understanding, purposeful antagonistic behaviours, cliques and feelings of isolation. Mr Casse wasn't present for the entire workshop but was there for a significant part of it and received the notes produced from the workshop.

[10] On 24 April 2007 Ms Newman attended a meeting in the South Auckland office where participants raised issues of discomfort experienced with regard to communications within the office.

[11] Given the negative feedback relating to the working relationships identified in the 14 March workshop, combined with the further issues relating to communication arising out of the 24 April meeting, Ms Newman invited Ms Cotter to facilitate a second, half day workshop, to help the South Auckland employees develop guidelines on working together.

[12] On 4 May at a staff meeting in the South Auckland office Ms Newman advised those present that a second facilitated meeting would be held to develop a set of behavioural guidelines for the South Auckland office. Mr Casse believed it wasn't necessary and voiced his opinion, telling Ms Newman "...that's fucking crap, we are all mature adults here, not school children, this is not a crèche, this is bullshit!"

[13] Ms Newman advised Mr Casse that she might have an issue with his language or others may. Mr Casse took that to mean that one particular employee may have been offended by his language and proceeded to apologise to that individual. Mr Casse made no apology to Ms Newman, nor did he apologise to anyone else in the meeting that he may have offended.

[14] On 7 May Mr Casse was invited to attend a meeting on 10 May 2007. The purpose of the meeting was to discuss his conduct at the 4 May meeting, to discuss and set acceptable standards of behaviour, and to discuss the allocation of cases to Mr Casse.

[15] In answer to a question from Mr Casse, prior to the 10 May meeting, his manager, Mr Wray Mealings, advised him that the intention of the meeting was to commit expectations with regard to acceptable standards of behaviour, to writing. It was made clear to Mr Casse that the meeting was not disciplinary in nature, however, he was entitled to bring a support person with him if he so desired.

[16] During the meeting on 10 May 2007 Ms Newman advised Mr Casse that she found the language he used in the meeting on 4 May to be offensive and inappropriate. Throughout the meeting Ms Newman attempted to explain to Mr Casse that while it was acceptable for people to verbalise their opinions with passion, the language he used in the staff meeting was not acceptable.

[17] On 14 May 2007 Ms Newman wrote to Mr Casse and confirmed the discussion from 10 May and requested Mr Casse to monitor and manage his behaviour in the future so that he was respectful to all staff and to ensure he was not in breach of the Department's code of conduct. Mr Casse was warned that any breaches of the code of conduct may result in disciplinary action.

[18] In her letter Ms Newman reiterated her advice during the 4 May meeting that she intended to have the staff establish some ground rules for communication within the office and Mr Casse was told he was expected to attend that session.

[19] Mr Casse submits that in writing the letter of 14 May Ms Newman failed to take into account the existing workplace culture and behaviours at the South Auckland office. That submission is misguided. The only reason Ms Newman was embarking on the workshop process allowing employees working in the South Auckland office to set some behavioural and communications guidelines, was precisely because of the existing workplace culture and behaviour. That culture was more that adequately demonstrated by Mr Casse at the 4 May staff meeting.

[20] I am satisfied the letter dated 14 May 2007 is not an unjustified action leading to a disadvantage. The letter does not constitute a warning and the meeting on 10 May was not a disciplinary meeting. The setting out of expected standards of behaviour, particularly in the context of this matter, where Ms Newman had received

feedback from employees that the communications used within the office environment were making employees uncomfortable is what a fair and reasonable employer would have done in all the circumstances.

Final Written Warning

[21] In accordance with Ms Newman's advice to employees at the staff meeting on 4 May, and reiterated in her letter to Mr Casse on 14 May, on 29 May Mr Mealings advised all employees that they were required to attend a staff meeting on 28 June 2007. Ms Newman had arranged for Ms Cotter to attend the South Auckland office to facilitate a workshop during which the employees working in that office would set behavioural guidelines or ground rules.

[22] Mr Casse requested a copy of the Agenda for the meeting from Mr Mealings. As there was no Agenda Mr Mealings simply reminded Mr Casse that it was a follow up meeting to the 14 March workshop.

[23] On the morning of the workshop, about 20 employees attended the conference room in accordance with the instruction from Mr Mealings. At the outset of the meeting Mr Casse, both in his own personal capacity as an employee and acting on behalf of the PSA members present, challenged Ms Newman on the legitimacy of the meeting. Mr Casse wanted an assurance that all of the people present consented to the meeting taking place. Mr Casse presented his arguments from the point of view that those in the meeting did not know what the meeting was about. Mr Casse also expressed his view that if there were people feeling unsafe in the workplace, that having a workshop was not the way to deal with it and that any allegations needed to be substantiated.

[24] Mr Casse quoted from the Department's Code of Conduct which he had taken into the meeting with him. It was his view that Ms Newman was asking those present to breach the Code of Conduct by requiring personal philosophies or values to influence decisions that they made about other people. Mr Casse felt that by participating in the workshop he was being required to sit in judgement of his colleagues and impose behavioural boundaries in an undemocratic process. Mr Casse asked for permission to leave the meeting.

[25] Ms Newman denied that there was any breach of the code of conduct and advised Mr Casse that the meeting had been called by management, exercising management's prerogative to do so. Ms Newman refused to take a vote of those present as to whether the meeting continued and denied Mr Casse permission to leave the meeting, requesting that he stay.

[26] Despite Ms Newman's request to remain in the meeting Mr Casse left and returned to his work. Ms Newman viewed Mr Casse's behaviour in leaving the meeting as inappropriate. Following the conclusion of the workshop, Ms Newman asked Mr Mealings for his views and in response Mr Mealings confirmed that leaving the meeting when he did not get his own way, was the very type of behaviour the Managers were working to circumvent.

[27] On 2 July 2007 Mr Casse was invited, in writing, to attend a disciplinary meeting with regard to his behaviour on 28 June. Ms Newman advised Mr Casse in the letter that she deemed his behaviour at the beginning of the meeting as disruptive, a challenge to her prerogative to hold a meeting and was in breach of the Department's code of conduct. Ms Newman advised Mr Casse that disciplinary action was possible up to and including a warning.

[28] Intending to seek support for his stance on 28 June, on 4 July Mr Casse sent an email to all staff located in the South Auckland office asking for their views on his conduct at the 28 June meeting. In his email Mr Casse confirms his understanding that he even though he was not given permission to be excused from the meeting he left anyway. He also advised all staff that he had been summonsed to a disciplinary and he would "... vigorously defend these vindictive and dangerous allegations." Mr Casse expresses his concern that by requiring all staff collectively to attend such a meeting the department had acted with "...deceptive coercion..." which may constitute unlawful detention.

[29] Four employees responded. For the most part these employees expressed their understanding that they were required to attend the meeting and that if they left there would be consequences. The responses also indicate that group processes were used to allow the participants to come up with a list of behaviours which were acceptable to the group as a whole. Two responses outlined the benefits of the

workshop as allowing employees the opportunity to express their concerns in an open forum. It seems to me that these emails confirm the Department's intention that the workshop be used as a valuable tool to assist those participating to develop standards of behaviours to be followed by the South Auckland employees so that all employees feel able to contribute to workplace issues.

[30] The disciplinary meeting was held on 5 July 2007. The notes produced to the Authority show that Mr Casse was determined to focus the meeting on his opinion that the workshop on 28 June was in fact mediation in disguise. This was consistently denied by Ms Newman.

[31] Mr Casse also raised issues with regard to the letter setting out expected standards of behaviour which he considered constituted a warning (and which I have found was not a warning and was a justified action on the part of the Department).

[32] At some point in the meeting, the issues changed from those set out in the letter dated 2 July, to include the fact that Mr Casse had left the meeting in breach of an instruction to stay. Ms Newman determined that Mr Casse's conduct was now serious misconduct and a final written warning was issued.

[33] The final written warning sets out a number of things Mr Casse failed to do in contravention of the code of conduct:

- To maintain open communication;
- To comply with a lawful and reasonable instruction relation to ... employment;
- To carry out ... duties efficiently ... and be present at work as required;
- To maintain standards of behaviour ... appropriate to the workplace;
- To avoid any behaviour in the workplace which may cause unnecessary distress to colleagues or interfere with their ability to carry out their duties.

[34] Ms Newman contends Mr Casse was not clear about his concerns prior to the workshop so that they could be addressed in a considered manner. Further: that Mr Casse left the workshop after being specifically requested to stay; he was not present at work as required as he had walked out of the workshop; he deliberately challenged his manager in front of other employees and attempted to hold a vote for the

continuance of the workshop; and that the challenge to his manager, the disruption of the meeting and his attempt to force a vote, distressed some members of staff.

[35] There is no dispute that Mr Casse was aware a warning may result from the disciplinary process with regard to his conduct at the 28 June meeting. However, the Department's Policy on warnings states:

Dismissal on notice

Where dismissal results from misconduct for which warnings have already been given, the notice requirements in the employee's employment agreement will apply.

Final warning

Given when misconduct, if continued or repeated, may result in dismissal, or where previous warning/s have been issued.

Written warning

Where the misconduct is sufficiently serious to warrant a more substantive approach than an oral warning, or where the employee has already had an oral warning and the misconduct has continued/been repeated.

[36] The Department has defined misconduct as behaviour which is found to breach the Departments standards of conduct and/or performance. Serious misconduct must be sufficient to destroy the basic trust and confidence and may justify summary dismissal without prior warnings.

[37] Following its own policy, the Department was only able to issue Mr Casse with a final written warning if it could demonstrate that his conduct may result in dismissal. Dismissal is only available where previous warnings had been issued or where the conduct is serious misconduct.

[38] The final written warning states that it has been issued for serious misconduct. It seems to me the conduct complained of by the Department escalated from less serious misconduct (which may result in a warning) to serious misconduct during the course of the disciplinary process. This fact does not appear to have been put to Mr Casse or his representative.

[39] In its submissions the Department argues that it was sufficient that Mr Casse be advised that an outcome of the disciplinary meeting may be a warning. However, that submission does not take into account that in escalating the concerns to serious

misconduct, dismissal was also a possible outcome. That was not indicated in the letter of 4 July.

[40] Mr Casse says the final written warning is tainted because Ms Newman was the complainant, investigator and decision maker and has therefore not acted fairly. The Department says Ms Newman was assisted in the decision making by an HR Manager, and Mr Mealings and that this means any potential bias was avoided as she was not the sole decision maker.

[41] Ms Newman has an authoritative disposition. She has previously been employed in the Department as a mediator assisting parties to employment relationships to resolve their differences and is considered by those around her as being very experienced in employment relations issues.

[42] Ms Newman felt very strongly about Mr Casse's actions in what she viewed as a direct challenge to her in the meeting on 4 May 2007. Mr Casse then challenged Ms Newman again, directly, by confronting her with questions as to her right to require staff to attend and participate in the workshop on 28 June 2007.

[43] I find it is more likely than not, that even though Mr Smith and Mr Mealings were involved in the decision making process, Ms Newman was seen as the more experienced of the three and would have been significantly influential in the decision-making process. I have no doubt that her views were received and given weight. I am supported in my conclusion by Mr Mealing's oral evidence at the investigation meeting when he told me it was more appropriate for Ms Newman to handle the disciplinary process even though he had the delegated authority, because Ms Newman was his manager and had more experience than he did. He had never been involved in this type of thing previously.

[44] I am satisfied that Ms Newman was unable give this matter the objective consideration it deserved. Ms Newman felt her authority had been undermined by Mr Casse's very public challenge to the workshop. This came close on the heels of the 4 May meeting where she had felt offended by Mr Casse use of language which she concluded had been directed at her, again in a very public setting.

[45] Given Ms Newman's role as the complainant in this matter as well as the 4 May matter, it seems to me it was incumbent on her to stand aside and allow another senior manager from the Department take the role of decision-maker.

[46] An employer acting fairly and reasonably in all the circumstances of this case, would not have escalated matters during the disciplinary process from misconduct to serious misconduct without putting Mr Casse clearly on notice that the matter was now viewed as serious. Further, an employer the size of the Department acting fairly and reasonably would have ensured Ms Newman did not act as decision-maker.

[47] However, having said that, I am satisfied that an employer acting fairly and reasonably in the circumstances of this case would have issued Mr Casse with an oral or first written warning about his conduct.

[48] For the foregoing reasons I find the issuing of the final written warning to be unjustified. A final written warning made Mr Casse's employment more tenuous than an oral or written warning. He was essentially only one step away from dismissal. He has therefore suffered a disadvantage in his employment by an unjustifiable act of the Department and consequently has a personal grievance.

Remedies

[49] Mr Casse seeks payment of compensation of \$6,000 for hurt and humiliation. He maintains he never knew what the workshop on 28 June was to be about and that it was a mediation in disguise. I do not accept that. Mr Casse was aware that things were changing within the Department and that the Department was working towards integrating previously separate business units into a Regional structure. He was also aware that staff had raised issues with regard communications within the office, as these were issues that had been raised and discussed in the 14 March workshop.

[50] I find Mr Casse knew that the workshop on 28 June 2007 was to identify preferred behaviours in the office so that all employees did not feel isolated or uncomfortable in the office. He had been told as much at the meeting on 4 May and it was reiterated to him in the letter of 14 May 2007. Further, Mr Casse reacted to the

initial news on 4 May by clearly expressing his opinion about the need for such a workshop.

[51] Mr Casse's conduct in both the 4 May meeting and at the commencement of the 28 June meeting are two clear examples of the type of conduct Ms Newman and her managers were attempting to alter. His conduct had no regard to the prerogative of the Department's managers to call meetings and require its employees to attend. He was also clearly in breach of the code of conduct which sets out that ignoring or refusing to carry out reasonable instructions constitutes personal behaviour which is not acceptable.

[52] In considering the remedies, I am bound by s.124 of the Act to consider the extent to which Mr Casse contributed to the situation that gave rise to his personal grievance. Taking the above factors into account I find Mr Casse contributed to the situation giving rise to his personal grievance, and in all the circumstances of this case I consider a 50% reduction of remedies is required.

[53] Mr Casse gave compelling evidence of the effect of having the final written on his file for the last 12 months. He says he was apprehensive that even an honest mistake or failure could lead to the loss of his job. He says he lost enthusiasm for his work with a corresponding loss of enjoyment for it.

[54] In setting the level of compensation I have taken into account that Mr Casse could legitimately have been issued with an oral or written warning for his conduct. His employment in those circumstances would still have been in jeopardy. On that basis a suitable award would in normal circumstances be \$3,000.

The Chief Executive of the Department of Labour is ordered to pay to Mr Casse \$1,500 pursuant to s.123(1)(c)(ii) within 28 days of the date of this determination.

Costs

[55] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to

costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Prohibition on Publication

[56] In his written statement of evidence Mr Casse sets out sensitive information relating to his family. During the course of the investigation meeting I ordered that this evidence not be published. I confirm that order pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000.

Vicki Campbell
Member of Employment Relations Authority