

**Attention is drawn to the order
prohibiting publication of certain
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 297/08
5095143

BETWEEN MALCOLM CHAMBERLAIN
 Applicant

AND ASB BANK LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Mark Ryan for Applicant
 Simon Dench for Respondent

Investigation Meeting: 28 March 2008 at Auckland

Submissions received: 2 April 2008 and 14 April 2008 from Respondent
 10 April 2008 from Applicant

Determination: 18 August 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 4 May 2007 the Applicant (“Mr Chamberlain”) gave written notice, effective immediately, of resignation from his 36-year employment relationship with the Respondent (“the Bank”). He says he felt forced to resign and that the Bank has not honoured an offer to pay him a gratuity if he resigned.

[2] Mr Chamberlain had not attended work for the previous six weeks on the basis that he was distressed by comments his manager made during the investigation of a customer complaint.

[3] The Bank accepts that it offered Mr Chamberlain the opportunity to resign and take a gratuity payment rather than face a disciplinary inquiry but says he did not take up that offer. Rather, the Bank says, he refused to accept responsibility for a serious mistake in how he had dealt with a customer and he resigned rather than participate in a disciplinary meeting.

Issues

[4] The issues for determination are:

- a. Whether the Bank's actions in offering Mr Chamberlain an opportunity to resign and receive a gratuity payment rather than go through a disciplinary investigation were what a fair and reasonable employer would have done in the circumstances; and
- b. Whether the Bank was justified in seeking to continue with disciplinary action after that offer was not accepted; and
- c. Whether Mr Chamberlain's resignation on 4 May 2007 was a constructive dismissal – that is he was really forced to do so by the Bank's actions toward him – or was a 'true' resignation; and
- d. If some or all of the Bank's actions were unjustified, what remedies are due to Mr Chamberlain, after allowing for what he did to mitigate any loss and for anything he did to contribute to the situation giving rise to a personal grievance?

The investigation

[5] The parties had attended mediation prior to the Authority's investigation but had not resolved the issues between them.

[6] For the purposes of investigation the Authority was provided with written witness statements from the Applicant, his wife Susan Chamberlain, his manager Mark Walker, Mr Walker's manager Fred Revell, Mr Revell's manager Ian Park, and

Paul Newman who was another manager at the same level in the Bank as Mr Walker.

[7] All six witnesses attended the investigation meeting where, under oath, they confirmed their written evidence and answered questions from the Authority and the parties' representatives. The representatives later lodged written closing submissions.

How the employment relationship problem arose

[8] Mr Chamberlain worked in the Bank's investigations department. He investigated retail-related fraud, including counterfeiting. He had 20 years of experience in this area of the Bank. His work included, at times, directing the closure of accounts deemed to be a risk to the Bank and referring files to the Police to investigate and possibly lay charges.

[9] In February 2007 Mr Walker was called to the office of the Bank's managing director Hugh Burrett. Mr Burrett gave Mr Walker an email complaint he had been sent by a customer. Mr Burrett asked Mr Walker to deal with the complaint. It was Mr Walker's evidence, which I accept, that Mr Burrett did not give him any direction about what to do about the complaint.

[10] Mr Walker said Mr Burrett, during that conversation, referred to some previous customer complaints about Mr Chamberlain. However Mr Walker had previously inquired into those complaints and was satisfied with Mr Chamberlain's actions in those cases. In evidence he noted that the "*nature of the work*" of the Bank's fraud investigators would, inevitably, generate a certain level of complaints.

[11] Mr Walker began investigating the most recent complaint. It was from a Bank customer who I need identify only as Mr Z. Under clause 10 of Schedule 2 of the Employment Relations Act 2000 I make an order prohibiting publication of the real name of Mr Z and the identity of his business.

[12] Through his inquiry into Mr Z's complaint Mr Walker assembled a range of information. This included Mr Chamberlain's investigation file about Mr Z. It held copies of emails between the two men, diary notes from the Bank's internal record system, printouts of relevant transactions and customer information.

[13] The Bank records telephone calls of its investigators. Mr Walker had access to sound recordings of Mr Chamberlain's telephone conversations with Mr Z on 22 February 2007 and with Mr Z's accountant on the following day.

[14] Mr Walker also spoke to the Bank's Customer Care manager Roy Ball who was investigating a complaint from Mr Z. Mr Ball had spoken to Mr Z and to the local bank officer who had dealt with Mr Z at the relevant times. I need only refer to that bank officer as Ms Y.

[15] Later during the course of his inquiries Mr Walker also conducted telephone interviews with Mr Z and Ms Y.

[16] From Mr Walker's inquiry the following picture emerged.

[17] Mr Z was 76 years old at the time. He and his wife operated a small business. In September 2006 the business had been the victim of a credit card scam. A bank investigator contacted him at the time and, according to a diary note made by the investigator, Mr Z took some persuading to understand he had been dealing with fraudsters.

[18] By early 2007 Mr Z and his wife had put the business up for sale.

[19] On 17 February 2007 Mr Z visited his local bank branch and spoke with Ms Y to whom he was a well-known customer. Mr Z had received a US\$2000 bank draft ("the first draft") from a person said to be interested in buying his business.

[20] Mr Z asked Ms Y what to do with the draft. She was concerned that the draft did not look genuine and advised Mr Z to open a separate account, deposit the draft and send it through to "Foreign", a part of the bank that dealt with such documents. If the draft were not genuine, it would be dishonoured and returned.

[21] This proved to be the case. Shortly after Mr Z received another draft from the same person, this time for US\$70,000 ("the second draft"). On this occasion he sought advice from his accountant and his solicitor before again speaking with Ms Y.

The advice he received was to test the genuineness of the second draft by depositing it in another separate account that Ms Y arranged for him to open for that purpose.

[22] The second draft was deposited into the separate account on 19 February 2007 and was shortly after identified by the Bank as being counterfeit.

[23] On 22 February both counterfeit drafts were reported to the Bank's investigation department.

[24] At this point Mr Chamberlain became involved. He telephoned Mr Z on 22 February. A transcript of that call was available in evidence. The key points from it are that:

- a. Mr Z told Mr Chamberlain without prompting that he was waiting for news of the second draft and that the first draft had been dishonoured.
- b. Mr Chamberlain told Mr Z he was putting the Bank at risk and was "*party to a fraud*".
- c. Mr Z told Mr Chamberlain that he had banked the second draft "*in good faith after discussing it with my accountant, my solicitor and the [Bank] representative down here, and we felt that it was the best thing to do to test the validity of it That was our reasoning*".
- d. Mr Chamberlain told Mr Z that "*holds*" would go on each of his accounts because, otherwise, Mr Z could get another counterfeit bank draft and "*just decide to bank that as well*".

[25] Mr Chamberlain then sent Mr Z an email saying the Bank intended to sever its banking relationship with him as "*a result of past and current deposits of fraudulent nature*". Mr Z was told holds had been placed on his accounts and he would have to visit a Bank branch to make any withdrawals. He was not told about a stop placed on his credit card by Mr Chamberlain.

[26] Mr Z promptly protested that decision in an email reply that he copied to the Bank's managing director Hugh Burrett.

[27] On 23 February Mr Chamberlain had a telephone call from Mr Z's accountant. Again a recording of that call was available to Mr Walker and a transcript of it was in evidence in the Authority's investigation.

[28] During the call the accountant confirmed that Mr Z had sought her advice before depositing the second draft and that he had discussed his concerns about the genuineness of the draft with Ms Y before depositing it. Mr Chamberlain replied that he found that "*hard to believe*" and that the Bank's file would be sent to the local Police.

[29] Five days later Mr Chamberlain did refer the matter to the local Police in a letter written under the heading "*Using a Document*". The heading was plainly a reference to the offence under s228 of the Crimes Act 1961 of dishonestly using a document. Mr Chamberlain's letter to the Police stated that "*it is considered that Mr [Z] had intent to defraud*" and refers to Mr Z as being "*involved in a fraud scam*" in 2006.

[30] Mr Walker subsequently instructed Mr Chamberlain to withdraw the complaint to the Police. Mr Chamberlain did so on 6 March 2007.

[31] Meanwhile Mr Ball had investigated Mr Z's complaint about how Mr Chamberlain had dealt with the issue and sent a written apology on behalf of the Bank. Mr Ball wrote that the Bank's "*handling of this matter fell well short of the standards it aims to maintain*". Holds were removed from Mr Z's accounts.

[32] Mr Z was told by Mr Ball that Mr Chamberlain's manager, Mr Walker, would be conducting his own enquiries into how Mr Chamberlain had dealt with the matter.

[33] On 14 March Mr Walker met with Mr Chamberlain. His meeting notes show that Mr Walker expressed concerns that Mr Chamberlain had not listened to Mr Z during the telephone call on 22 February, particularly Mr Z's statements that he spoke to his solicitor, his accountant and Ms Y before banking the second draft. Further concerns were that Mr Chamberlain had failed to speak with Ms Y to verify Mr Z's story and had made a complaint to the Police. Mr Walker asked Mr Chamberlain to reconsider his position and Mr Chamberlain agreed to listen to the tape of his call to

Mr Z.

[34] They met again the following day. Mr Chamberlain confirmed that he had listened to the call and was “*happy*” with how he had handled the matter. Importantly he told Mr Walker that he “*would do the same again*” if presented with the same set of circumstances and that how he had conducted himself was “*no different to any other file I do*”.

[35] Mr Walker was upset by Mr Chamberlain’s response. He said to him that, as his manager, he had concerns that such an experienced investigator was not able to “*make a proper call*”. Mr Walker said that he would have to report Mr Chamberlain’s response to Mr Revell and Mr Burrett.

[36] According to Mr Walker’s notes he also told Mr Chamberlain:

[I] can’t make out whether you genuinely can (sic) see you’ve made a mistake, or you’re just being obstructive and don’t want to apologise.

[37] Mr Chamberlain responded by reiterating that he believed that he had dealt with the matter properly.

[38] Mr Walker then telephoned Ms Y because he “*wanted to be sure*” about what had happened at the branch in discussions with Mr Z.

[39] From that conversation Mr Walker was confident that Mr Z had been open with Ms Y about concerns over the bank drafts and had acted on her suggestions in depositing the drafts to test their genuineness. He was satisfied there had been no intention to mislead the Bank.

[40] In the light of this confirmation, and his most recent conversation with Mr Chamberlain, Mr Walker met with Mr Revell to discuss the situation. Mr Walker’s concerns now included Mr Chamberlain’s statement that he would do the same again in the same situation.

[41] Mr Walker and Mr Revell confirm that they discussed the need for a disciplinary process to consider Mr Chamberlain’s actions.

[42] Mr Walker was aware that Mr Chamberlain intended retiring at the end of 2007 and raised the prospect with Mr Revell of offering Mr Chamberlain the option of doing so earlier than planned if he were to be paid the gratuity for long service for which he was eligible to be considered on retirement.

[43] Mr Revell and Mr Walker then went to discuss the notion with Mr Park. Bank policy required the prior approval of the managing director, Mr Burrett, to pay such a gratuity. Mr Park agreed to discuss the proposal with Mr Burrett.

[44] By the next day a message had been passed back to Mr Walker advising that Mr Burrett approved the offer of a gratuity to Mr Chamberlain.

[45] On 16 March – a Friday – Mr Walker met with Mr Chamberlain. He made some notes of what he intended to say to him which I accept is largely what he subsequently said in the meeting.

[46] Mr Walker said he was going to initiate a disciplinary process about Mr Chamberlain's investigation of Mr Z. While it was too early to determine the outcome, one possibility was that Mr Chamberlain would be dismissed.

[47] Mr Walker acknowledged Mr Chamberlain's length of service meant that on retirement he would normally be entitled to a gratuity of up to a year's salary. Bank policy provided for staff with more than 34.5 years continuous service to receive this gratuity, subject to the managing director's discretion and approval.

[48] He said that if Mr Chamberlain resigned rather than "*going down the disciplinary route*", the Bank would pay him that gratuity. This would enable Mr Chamberlain to leave with his "*dignity and ... reputation intact*".

[49] Mr Chamberlain was asked to take time over the weekend to consider what he wanted to do. He was asked for a reply by Monday. Mr Chamberlain said that he wanted to get advice on the offer and would reply by Wednesday in the coming week.

[50] By Wednesday – 21 March – Mr Chamberlain had taken advice. His lawyer

wrote that day to the Bank raising an employment relationship problem and alleging Mr Chamberlain was unjustifiably disadvantaged by Mr Walker's investigation, the request for an apology from Mr Chamberlain, and the Bank's offer that he could resign with a gratuity rather than face disciplinary action.

[51] His lawyer's letter also said Mr Chamberlain had sought medical intervention because of significant distress caused by Mr Walker's comments and had been "*placed on sick leave*".

[52] The letter stated that if Mr Chamberlain resigned, Mr Walker's comments would be used to make a constructive dismissal claim against the Bank.

[53] On 11 April 2007 the parties met on a without prejudice basis but did not resolve the issues between them.

[54] Whether some subsequent correspondence between the parties could be admitted in evidence was the subject of Authority determination AA 44/08 (13 February 2008, Member Ulrich). As a result of that determination a letter from Mr Chamberlain's lawyer dated 12 April 2007 and a letter from the Bank's lawyer dated 23 April 2007 – both expressed at the time as being written on a without prejudice basis – formed part of the documentary evidence in this investigation.

[55] Through the 12 April letter Mr Chamberlain advised that he had lost trust and confidence in the Bank and a return to work was not realistic. He sought payment of a gratuity of \$62,000; a further \$46,500 in lost earnings to the end of 2007 and a further \$15,000 as compensation for hurt and humiliation.

[56] By letter on 23 April 2007 the Bank sought to convene a meeting on 30 April to start its disciplinary process. Mr Chamberlain's current sick leave certificate was due to expire by that date. By 2 May the meeting had not occurred and a further date was scheduled by the Bank for 4 May.

[57] Mr Chamberlain did not attend the meeting. Instead he submitted a written notice of resignation on 4 May and alleged that what Mr Walker had told him "*forced me to leave the bank eight months earlier than intended*".

Analysis and discussion

[58] The question of whether Mr Chamberlain had properly handled his investigation into Mr Z's actions lies at the centre of this matter.

[59] I have no hesitation in accepting the evidence of the Bank's witnesses – supported as it is by undisputed transcripts of the relevant telephone calls – that Mr Chamberlain overlooked an important basic step in his inquiry and appeared to rush to judgement of Mr Z's actions.

[60] Mr Chamberlain did not take any steps to talk with Ms Y, the local bank officer who Mr Z dealt with about both bank drafts.

[61] He was told in telephone calls with Mr Z on 22 February and with Mr Z's accountant on 23 February that Ms Y had suggested or approved the steps taken by Mr Z in depositing the drafts. Further Ms Y had opened separate accounts for Mr Z for that very purpose.

[62] It was Mr Walker's evidence, which I accept, that a bank investigator would, as normal procedure, contact a local bank officer to verify or negate assertions made by a customer about their dealings with the Bank. This was particularly so where the investigator doubted what a customer said they had been told by bank staff.

[63] Mr Chamberlain provided no real explanation – either at the time of Mr Walker's inquiry in March 2007 or to the Authority's investigation this year – about why he omitted to talk to Ms Y. Having failed to talk to her, his conclusions that Mr Z intended to mislead the Bank were faulty from the outset.

[64] During the Authority investigation meeting Mr Chamberlain expressed the view that it would have made no difference to his actions if he had spoken to Ms Y and if she had confirmed that the drafts were banked on her advice.

[65] He maintained his view that he acted correctly against the "*risk*" posed by Mr Z. Asked if the contrary views of several senior colleagues gave him any pause for

thought on that position, Mr Chamberlain's reply was: "*I am not moved by their solidarity*".

[66] There is however some evidence that suggests Mr Chamberlain was indeed aware that he had made a significant mistake. It comes from a conversation he had with a colleague.

[67] On 21 March 2007 Mr Newman, a manager in Bank Investigations who also reports to Mr Revell, learnt of the employment dispute between the Bank and Mr Chamberlain. He did so by inadvertently picking up a faxed letter from Mr Chamberlain's lawyer. Mr Walker was out of the office so Mr Newman phoned him and read out the letter.

[68] Mr Newman later remembered an earlier conversation he had with Mr Chamberlain which he now realised might be of interest to Mr Walker.

[69] Mr Newman recalled that around 9 March 2007 Mr Walker told him of having made a "*massive cock-up*" of a matter in a particular town – referring to the town in which Mr Z lived. He also referred to this being the third complaint about him in recent times and that Bank would soon be "*forced*" into giving him his "*cheque*".

[70] Mr Chamberlain accepts he talked with Mr Newman that day but insists he referred only to the circumstances of another complaint about which Mr Newman knew some details. I prefer Mr Newman's evidence on this point, while noting that it is not decisive to my finding that the Bank could fairly conclude that Mr Chamberlain's work was deficient in respect of the extent of his inquiries into Mr Z's actions. Rather it adds weight to the conclusion.

[71] I also accept that the Bank was justified in its concerns about Mr Chamberlain's reply when asked by Mr Walker to reconsider his position on how he had handled the inquiry into Mr Z.

[72] A fair and reasonable employer would have concerns about an employee, properly identified as having made a mistake, insisting that he would do the same thing again. It was a response Mr Chamberlain maintained throughout and reiterated

during the Authority's investigation.

[73] The Bank was entitled in those circumstances to press the issue with Mr Chamberlain. It was no longer a matter of his previous conduct but his future reliability and judgement, matters of considerable importance in the Bank's investigation department.

[74] Having investigated both the circumstances of how Mr Z was dealt with, and having heard Mr Chamberlain's intransigence in accepting any blame, Mr Walker cannot fairly be criticised for his concern about the effect that a disciplinary process – which by 15 March looked inevitable – would have on Mr Chamberlain's entitlement to a retirement gratuity.

[75] The offer of the gratuity does not confirm that Mr Walker had decided such a process could only result in the dismissal of Mr Chamberlain. I consider as more likely than not that Mr Walker was also aware that such a disciplinary process could result in a less severe sanction such as a warning. But the consequence of such a blot on Mr Chamberlain's copybook could nevertheless endanger his prospect of securing the discretionary approval by the Bank's managing director for a gratuity on his retirement at the end of the year.

[76] If Mr Walker had been set on denying Mr Chamberlain that prospect, he could have pressed ahead with a disciplinary process that may well have resulted in a summary dismissal and an undignified end to Mr Chamberlain's long career in banking. He did not. Instead he suggested a safer, compassionate solution.

[77] I accept this proposition, put in a letter by the Bank's counsel to Mr Chamberlain's lawyer on 23 April 2007:

The Bank should not be criticised for being considerate to a longstanding employee who is close to retirement and giving him the opportunity of retiring early with a full gratuity. He was put under no pressure to accept.

[78] Mr Chamberlain chose not to take that opportunity. Rather he opted to seek more, and took on the risk that the result would be considerably less than that, if anything.

[79] I do not accept Mr Chamberlain's submission that Mr Ball's inquiry and apology to Mr Z – complete by 6 March 2007 – indicates that the Bank's position regarding his actions was pre-determined. Mr Ball had established enough to confirm that the actions of an employee of the Bank – Mr Chamberlain – resulted in Mr Z being unfairly accused of intending to mislead the Bank about the validity of the bank drafts and having Mr Z's conduct, again unfairly, reported to the Police with a request for action by them. That was sufficient to require a prompt apology to Mr Z from the Bank. It is not sufficient to suggest that Mr Walker, in the inquiry he subsequently conducted, had closed his mind to any responses, further information or likely outcomes in respect of Mr Chamberlain and his employment. The fact that Mr Chamberlain refused to attend any disciplinary meetings meant the prospect of any predetermination was never able to put to the test in any event.

[80] Mr Chamberlain did not attend work in the period after his 16 March meeting with Mr Walker until his written resignation on 4 May. He was paid sick leave until 27 April. There were medical certificates provided for his absences up until 27 April but no information about the reasons for the leave apart from his lawyer's indication that the sick leave was for "*distress*".

[81] Mr Chamberlain suggests that having resigned on 4 May 2007, he is entitled to the gratuity offered to him by Mr Walker on 16 March 2007 if he agreed to resign.

[82] That suggestion takes little account of what transpired between the two dates. Mr Chamberlain did not accept the offer made on 16 March. Instead he raised a personal grievance on 21 March and, by his lawyer's letter of 12 April, made a counter-offer on terms for volunteering his resignation. I accept the Bank's submission that the counter-offer was a rejection of the 16 March offer. Having rejected it, Mr Chamberlain could not later opt to rely on it. He had already, with legal advice, set off on another path.

[83] Against that background, any entitlement to the gratuity – or rather the monetary value of it – would arise only as a loss of benefit if Mr Chamberlain were found to have been unjustifiably dismissed by the Bank and an assessment were made that he would, but for that unjustified dismissal, most likely have been awarded the

gratuity on retirement at the end of the year.

Determination

[84] Addressing the issues identified earlier, I resolve the problem raised by Mr Chamberlain on the following basis:

- a. A fair and reasonable employer considering the particular circumstances of Mr Chamberlain's length of service, proximity to retirement, and obvious mistake in handling the inquiry into Mr Z's affairs would have given him the opportunity to consider resigning and receiving a full gratuity, and consequently the Bank's actions in giving him the opportunity to consider such an option were not unjustified.
- b. The Bank was justified in seeking to initiate disciplinary action after that offer was not accepted and a personal grievance was raised.
- c. Mr Chamberlain's decision to resign in May rather than pursue the issues through the Bank's disciplinary process was not, in all the circumstances, a constructive dismissal.
- d. Mr Chamberlain does not have a personal grievance. No remedies can be awarded to him.

[85] It is sad that Mr Chamberlain's long career with the Bank ended badly for him. The responsibility for that ultimately rests with the quixotic approach he took in refusing to acknowledge an error in his handling of an investigation and taking the position that he would act in the same way again.

[86] While this determination brings this matter to an end in the Authority, I note that Mr Park, in his evidence, emphasised that the Bank had still, at the time of the Authority investigation meeting, made no final decision on whether Mr Chamberlain would be paid any gratuity in recognition of his retirement after continuous service for

some 36 years. The closing submissions of the Bank noted that “*the door [was] not yet completely closed*”. That is now a matter for the Bank’s managing director to consider, in exercising his discretion, and not this Authority.

Costs

[87] Costs are reserved. The parties are encouraged to resolve any issue as to costs between themselves. If they are unable to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination and the Applicant will have 14 days to lodge and serve any reply before the Authority determines costs.

Robin Arthur
Member of the Employment Relations Authority