

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 508/10
5306483

BETWEEN TANIA DICKINSON
 Applicant

AND CHIEF EXECUTIVE
 MINISTRY OF SOCIAL
 DEVELOPMENT
 Respondent

Member of Authority: Dzintra King

Representatives: Bryce Quarrie, Counsel for Applicant
 Samantha Tuner, Counsel for Respondent

Investigation Meeting: 9 September 2010

Submissions received: 16 September from Applicant
 24 September 201 from Respondent

Determination: 13 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Tania Dickinson, says she has been unjustifiably disadvantaged and unjustifiably dismissed by the respondent, the Ministry of Social Development. She seeks reinstatement, compensation and lost wages.

[2] The Ministry denies that the suspension or dismissal were unjustified and resists the claim for reinstatement.

[3] Ms Dickinson commenced employment on 22 November 2004 at Work and Income, which is a service of the Ministry. From late 2007 she was employed in the Kaikohe Office as a Prisoner Reintegration Case Manager attached to Ngawa prison.

[4] On 4 October 2007 she was issued with a final warning for a serious breach of the Code of Conduct. The warning related to unauthorised access to records of clients known to Ms Dickinson.

[5] On 31 August 2009 Ms Dickinson was charged with arson. Prior to this police arrived at the Kaikohe Service Centre and took Ms Hikitia Tuoro, a colleague of Ms Dickinson's who had lent Ms Dickinson her car, away for questioning as her car had been seen at the arson site.

[6] On 1 September Ms Dickinson was placed on paid leave of absence by Mr Graham McPherson, the Regional Director, Work and Income for Northland.

[7] The Collective Employment Agreement provides for suspension as part of the disciplinary process. It permits suspension on pay while an investigation is undertaken and that prior to suspension the employer will advise the employee of the reason for the suspension and give the employee a reasonable opportunity to respond.

[8] Mr MacPherson's letter advised Ms Dickinson that she was placed on paid leave of absence with immediate effect and was not to return to the workplace until she was contacted and asked to explain her conduct.

[9] Ms Dickinson remained on paid leave from 1 September 2009 until 9 December 2009.

[10] On 4 December Ms Dickinson and her representative, Mr Quarrie, met with Mr MacPherson and Mr Clive Kilgour, the Human Resources Manager. The purpose of the meeting was to discuss the status of the criminal proceedings and the continued paid leave. It was agreed that Ms Dickinson could not continue her role or work at the Kaikohe Service Centre. The Ministry agreed that Ms Dickinson could work at the Kawakawa service Centre, where she started on 9 December 2009. She was not reinstated to full time duties and worked largely under supervision.

[11] In March 2010 the Ministry became aware of comments posted on Ms Dickinson's Face book page. It was made aware of this by way of an email complaint from a member of the public, who turned out to be the owner of the house Ms Dickinson was alleged to have set on fire.

[12] The comments on the page included references to her political views as *hard core left wing conservative*, her favourite quotations included *hey boss, can I go home sick????* and a description of herself as a government employee and *very expensive paperweight* who is *highly competent in the art of time wastage, blame shifting and stationary [sic] theft*.

[13] The Ministry viewed these comments seriously.

[14] On 26 March Ms Dickinson was placed on paid leave of absence. This was by means of a letter headed “Complaint and Proposed Suspension” which stated that the Ministry was considering suspending her on pay pending the outcome of the investigation. Before doing that Mr MacPherson said he wanted to give her an opportunity to comment on his intention to suspend her. She was placed on paid leave of absence until Tuesday 30 March 2010 to take advice about the proposal to suspend and provide comment about the proposal. She was told not to enter the Ministry premises until the meeting on 2pm on 30 March.

[15] Ms Dickinson did not respond to the letter and did not contest the decision to place her on paid leave or the suspension. On 30 March Mr McPherson extended the paid leave period so she could seek advice.

[16] On 9 April the parties met to discuss the allegations regarding the Face book entries and to get an update on the criminal proceedings. The meeting was attended by Ms Dickinson, Mr Quarrie, Mr Kilgour, Mr MacPherson and Ms Ellen Hadfield, a WINZ collective representative.

[17] Mr Quarrie asked that Ms Dickinson’s responses regarding the Face book entries be given at a meeting attended by the Regional Commissioner, Mr Manley, who was the delegated decision maker.

[18] On 12 April a meeting was held with Ms Manley. Ms Dickinson expressed regret for placing the Face book comments in the public domain.

[19] Mr Manley considered Ms Dickinson’s response and formed a preliminary view that her employment should be terminated. He conveyed this to Mr MacPherson who phoned Ms Dickinson on 28 April and asked if she had comments on the proposal. She did not and was then advised of her dismissal

[20] A letter dated 28 April was sent to Ms Dickinson and Mr Quarrie.

[21] Mr MacPherson indicated that the dismissal was not made solely on the contents of the Face book pages but on the basis that they and the arson charges had eroded the Ministry's trust and confidence in her to such a degree that dismissal was a reasonable outcome.

[22] Serious criminal charges can be taken into account and may justify dismissal where there is a risk of damage and discredit to the employer's reputation: *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd* [1986] ACJ 462.

[23] The Face book comments were unfortunate. I do not accept that the political references in any way undermined the need for neutrality in the public service. They are clearly contradictory and nonsensical. The comments endorsed a stereotyped view of slothful and exploitative public servants. They are derogatory of the public service and they are disparaging.

[24] In *Hohaia v NZ Post Ltd* (17 August 2010, AA 362/10) the Authority commented that the negative attitude towards the employer may well hinder a successful reinstatement.

[25] Given that Ms Dickinson was convicted of arson in November, reinstatement is clearly not possible.

[26] What remains to be considered is the justifiability of the suspension and the dismissal.

[27] Despite the employer's assertions that the placing of Ms Dickinson on paid leave was to give her an opportunity to seek advice about the proposed suspension it is clear that the "paid leave" is per se a suspension. Ms Dickinson was prevented from being in the workplace. This is a breach of the employment agreement which provides for an opportunity to respond before a suspension takes place.

[28] For an unjustifiable disadvantage to succeed there must be an unjustifiable action and the employee's employment must be affected to her disadvantage by that unjustifiable action. The respondent says Ms Dickinson has not produced any evidence that she was disadvantaged. Employment agreements impose contractual

obligations that are to be abided by by the parties to those agreements. While I accept that Ms Dickinson did not state that she was adversely affected by the failure to follow the procedure in the employment agreement and the fact that she was prohibited, illegally, from entering the premises and carrying out her work, in itself constitutes a disadvantage.

[29] The test for justification is set out in s103A. Whether a dismissal is justifiable must be determined on an objective basis considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would do in all the circumstances at the time the dismissal occurred.

[30] All the circumstances will include a consideration of the employment environment and also past conduct and past warnings. In *Butcher v OCS Ltd* [2008] ERNZ 367 the Court held that expired warnings could be considered as part of all the circumstances. In this case, the expired warning related to the Code of Conduct and it was reasonable for the employer to take it into account.

[31] The Face book entries would not, in themselves, have justified a dismissal but in the context of Ms Dickinson's history with the Ministry and her past behaviour the employer was entitled to consider that a point had been reached where trust and confidence no longer existed. The dismissal was justified.

[32] In terms of remedies for the unjustified disadvantage, it is difficult to arrive at a compensatory sum when there has been no actual evidence of any humiliation and distress. In these circumstances I am unable to make an award.

Costs

[33] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority