

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 33/09  
File Number 5139396

BETWEEN                      Emily Gray  
   Applicant

AND                              Land Transport New Zealand  
   Respondent

Member of Authority:        Denis Asher

Representatives:             Tony Wilton for Ms Gray  
   Susan Hornsby-Geluk for Land Transport

Investigation Meeting        Palmerston North, 17 March 2009

Submissions Received        17 March 2009

Determination:                23 March 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Gray says a final warning on 18 April 2008 for serious misconduct was unjustified as a fair and reasonable employer would not have preferred the complainants' allegations over her consistent denials. Ms Gray seeks an appropriate determination, compensation for hurt of \$5,000 and costs.

[2] Land Transport says it fairly and reasonably issued Ms Gray with a final warning after it found she had "*referenced Land Transport NZ in some way in (a)*

*conversation*” with a member of the public and implied she had accessed information about that person’s husband other than for official business purposes (doc 11).

- [3] Note: all references to document numbers are to those set out in the respondent’s bundle.

## **Background**

- [4] Ms Gray is employed as a senior business support officer at the Land Transport Registry Centre in Palmerston North. Her terms and conditions of employment are set out in a collective agreement. She has been employed for 7 years,

- [5] The Registry Centre holds personal information about licensed drivers including name, date of birth and address and driving related offences. Access to the database is strictly controlled as privacy obligations apply.

- [6] Staff obligations to maintain confidentiality of information held by the respondent are made clear in Land Transport’s code of conduct. Employees are specifically prohibited from accessing the respondent’s database other than in the ordinary performance of their duties.

- [7] On 29 February 2008 Land Transport received a telephoned and then written complaint from a member of the public. Amongst other things, he said he had been informed the applicant *“broadcast around (a) restaurant”* (doc 4) that Ms Gray worked for the Land Transport and that she knew he had a record with it.

- [8] The complainant and his wife were interviewed by Land Transport on 14 March. He said he had not heard the comments himself but his wife had. The complainant’s wife said Ms Gray had told her in a threatening and intimidating manner, *“I know your husband, I know him very well. I have done some investigating, I work for Land Transport and I know your husband very well”* (par 2.3, statement in reply).

- [9] Along with relevant material, Land Transport set out its concerns in a letter to Ms Gray dated 17 March. She was asked to provide a written response.

- [10] In her reply of 20 March Ms Gray explained that she had known the complainant's wife for a number of years, that there was "*unknown animosity between us*" (doc 7) but only knew her partner by sight. She denied viewing information about the complainant or saying what had been alleged.
- [11] In a meeting on 31 March Ms Gray initially advised she was unable to recall whether she had been at the restaurant and that it was a big night. Ms Gray subsequently confirmed she had been at the restaurant after midnight and did speak to the complainant's wife. She said she had had quite a bit to drink.
- [12] Following further meetings with the complainants and the applicant and by letter dated 9 April, Land Transport advised of its preliminary conclusion, that the applicant had referenced Land Transport in some way in her conversation with the complainant's wife, that she had implied she had accessed information in respect of him other than for legitimate reasons and that Ms Gray's actions amounted to serious misconduct and Land Transport was considering terminating her employment.
- [13] Further communication between the parties followed. Ms Gray continued to deny the allegations and produced further evidence that, in her opinion, cast doubt on the complainants' version of events.
- [14] In a letter dated 18 April Land Transport advised it was issuing the applicant with a final warning for a period of 12 months from that date.

### **Applicant's Position**

- [15] Ms Gray says she was "*surprised and shocked at the allegation made against me. I could recall quite clearly having spoken to (the complainant's wife in the restaurant) but was unsure exactly what date that was because it was three or four weeks earlier. However, I knew that I had not said anything like I was accused of saying.*" (par 5 of her first witness statement).
- [16] Ms Gray knows the complainant's wife as, "*She was my ex-husband's ex-girlfriend. We weren't what I would call the best of friends.*" (par 6).

- [17] The complainant's wife has for years known a lot about Ms Gray including where she works, and there is no reason why the applicant would say to her, 'I work for Land Transport'.
- [18] There is no record of Ms Gray ever investigating the applicant: accessing his file could have been tracked.
- [19] Ms Gray agrees it was hard to be precise about her conversation with the complainant's wife as the conversation was brief and casual and there was no reason to remember it.
- [20] Ms Gray denies another allegation from the complainant's wife, that on an earlier occasion she pulled the other woman's hair while they were on a dance floor.
- [21] Ms Gray says she does not deserve a warning as she has done nothing wrong. She is dedicated to her job, values it highly and found it very stressful knowing that if she put a foot out of line it could be the end of her job. She feels hurt her employer does not accept her version but prefers a malicious complaint.

### **The Respondent's Position**

- [22] Amongst other things the respondent says Ms Gray was provided with no less than five opportunities to respond to the allegations and provide Land Transport with her explanation. The opportunities given to the applicant to rebut the claims were real and her replies were taken into account by the decision-maker.
- [23] The key question was Land Transport's assessment of the credibility of the complainants and the applicant. The respondent was faced with two contrasting accounts of what had occurred. Despite Ms Gray's denial, and consistent with clear case law, the respondent was entitled to find that the conversation had likely occurred. That conclusion was supported by the fact that Ms Gray's explanation was not constant and compelling, but rather inconsistent, vague and unconvincing: Ms Gray initially could not recall being at the restaurant on the night in question and she admitted to having quite a lot to drink (para 4, doc 9).

- [24] The comments, by their nature and content, brought Land Transport into disrepute by leading members of the public to believe that its employee, the applicant, had used confidential and private information that she was entrusted to protect for improper means. Ms Gray's actions and the application of the respondent's code of conduct (signed for by the applicant) and clear case law mean that the respondent was entitled to reach a finding of serious misconduct and issue a final warning.
- [25] In the alternative, there is no evidence to support an award of the \$5,000 sought as compensation for hurt and Ms Gray's contributory conduct was such that no award should be made.

### **Discussion**

- [26] I take the opportunity here to express my appreciation that Land Transport must be zealous in protecting the information that it retains.
- [27] At issue is a balance of probabilities finding by Land Transport that Ms Gray *"referenced Land Transport NZ in some way in the conversation with (the complainant's wife) which has implied that you have accessed information in respect of (the complainant) which was not for official/business purposes"* (doc 11, respondent's bundle).
- [28] Ms Gray properly accepts she is bound by the respondent's code of conduct and that the allegation – if true, which she denies – amounts to serious misconduct that could result in a final warning or dismissal.
- [29] In coming to its decision Land Transport properly took into account Ms Gray's initial uncertainty as to whether she was at the restaurant on the night in question, that it had been a big night and that Ms Gray did not deny she had been drinking.
- [30] Land Transport's enquiry unearthed no evidence of Ms Gray accessing the complainant's record.
- [31] The applicable test is set out in s. 103A of the Employment Relations Act 2000: the question of whether an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions were

what a fair and reasonable employer would have done in all the circumstances at the time.

- [32] As set out in *Arthur D Riley v Wood*, unreported, WRC 25/07, Shaw J, 8 October 2008:

*[52] Section 103 A obliges the Court to take an objective approach to determining justification ... . The process is essentially a review of the employer's decision ... . The question is whether the employer was justified in his decision.*

*[55] The test is not that the (decision) is judged according to the standards of an impartial observer. Section 103A recognises that the circumstances of an employment environment are a factor to be considered. This means that the standards of what is fair and reasonable may be variable according to the circumstances and a fair and reasonable employer may not necessarily be totally impartial or neutral. ...*

*[55] This does not give employers unbridled license to impose their personal prejudices or value on employees. The concept of fairness implies an open-minded approach and reasonableness implies rationality.*

## Findings

- [33] Because of the seriousness of the original allegation the respondent was required to find evidence as convincing as the charge was grave: *NZ (with exceptions) Shipwrights etc Union v Honda NZ Ltd* [1989] 3 NZILR 82.

- [34] By way of reviewing Land Transport's decision per *Wood* (above) and not be way of the standards of an impartial observer, I do not accept that Land Transport's finding that Ms Gray referenced the respondent was justified. I am satisfied, ultimately, that finding was not rational for the following reasons.

- [35] The basis of the respondent's decision to find there was serious misconduct is set out in its letter of 9 April 2008 (doc 11). In it Land Transport's decision-maker understandably records:

*The dilemma that I am faced with is this; I have two accounts of the conversation between (the applicant and the complaint's wife). The one from (the complaint's wife) is very specific and claims that you made reference to the fact that you had*

*undertaken some form of investigation into her husband. ... (the complainant's wife) had not been drinking at all.*

*On the other hand, you first of all were not even sure that you were at the (restaurant) ... on the evening in question as you had had a 'big night' which implies that you had a considerable amount to drink ... . Your recollection of the conversation with (the complainant's wife) is general and vague, yet you are adamant that you did not mention Land Transport NZ in this conversation.*

*As I suggested to you ... something happened that has triggered (the complainants) to make a complaint. I did not detect any malice from them towards you in the meeting that we have had. They did however mention that this was not the first time that you had pestered them when you have been apparently drunk at the (restaurant) and sited (sic) an incident in which the (complainant's wife) claimed that you had pulled her hair ... . You have denied this happened. While this incident is no business of mine, it signals to me that something was different with the incident in question as it would appear that if they had wanted to they could have complained or taken action previously. The only difference that I can see is that reference was made to Land Transport NZ i(n) some way. This triggered the complaint being lodged.*

- [36] With respect to the decision-maker, and despite the short-comings in Ms Gray's position, a fair and reasonable employer would not – if only barely – have concluded from the evidence to hand that the complainants' version of events was to be preferred. That is because, amongst other reasons set out below, such an employer would have concluded that the complainant's first written allegation (doc 4) masked the parties longstanding, and strained relationship. It only indirectly identified Ms Gray whereas the parties plainly knew each other well. Land Transport did not inquire into what if any motive was there in obscuring this relationship from the outset. Nor did it include this omission in evaluating the credibility of the complainants or their complaint. The failure of the complainant – arguably deliberate – to acknowledge the fact of the relationship between himself and his wife, and the applicant, was – I am satisfied – not taken into account by the respondent when it would have been proper, rational, fair and reasonable to have done so.
- [37] That the parties were well know to each other and their relationship was strained was evidenced by Ms Gray's response of 20 March:

*I have known (the complainant's wife) for a number of years ... (and) it disappoints me that after all these years of (the complainant's wife) knowing me, exaggeration can prevail. (She) has been aware of how different our lives have become and where I live ... (and) even after all these years there is still this unknown animosity between us."*

(doc 7)

- [38] The strained relationship was also referenced by the complainants when they were interviewed on 14 March 2008 (doc 5): the complaint's wife's account clearly implies a relationship of some standing, and not a chance encounter. She talks of the applicant's "*derogatory comments*" and behaving civilly towards her as "*I thought she might hit me*".
- [39] By the time of its letter of 9 April (doc 11) Land Transport knew that the applicant was well known to at least the complaint's wife as their relationship went back at least to their teenage years: that relationship was or should have been apparent from Land Transport from very early on into its inquiry and – because of the evident and longstanding tensions – warranted close scrutiny in evaluating the credibility of the complaint.
- [40] It follows therefore that I accept the submission on Ms Gray's behalf that, because of the longstanding relationship between the applicant and the complainant's wife and the high likelihood therefore the latter knew the identity of Ms Gray's employer, it was inherently unlikely the applicant would use the words attributed to her by the complainant's wife, i.e. "*... I work for Land Transport ...*" (doc 5).
- [41] As a result of one part of the complaint being unlikely, it also follows that a fair and reasonable employer even when not totally impartial or neutral would have approached the remainder of the complaint with heightened vigilance.
- [42] The initial written complaint (doc 4) includes the strong allegation that Ms Gray had "*broadcast around the restaurant*" her knowledge of the complainant and "*assaulted the person that informed me ... and made threatening accusations against that person*". During the Authority's investigation, the Land Transport confirmed its investigation established that the "*broadcast*" extended only to Ms Gray making the alleged comment to the complainant's wife, and the 'assault' involved alleged hand on hand contact with no force. While

technically a 'broadcast' and an 'assault', the reality was clearly otherwise: a fair and reasonable, and again not totally impartial or neutral, employer would have derived from its initial inquiry significant objective evidence of a *prima facie* exaggerated – and therefore inherently less plausible – substantive allegation.

- [43] Despite the disclaimer that it is “*no business of mine*”, the decision-maker’s letter of 9 April clearly relies on a finding (“*On the basis of the above information and as a result of interviewing you and the (the complainants) ...*”) in favour of the complainants allegations of previous unpleasant behaviour by Ms Gray, that she pestered them, was drunk in the restaurant and assaulted the complainant’s wife. In the absence of any investigation or independent evidence, there is no basis for that finding or to conclude – as the decision-maker did – that the substantive complainant was more plausible as occasion existed in the past for a similar complaint but one had not been made.
- [44] The record of the respondent’s first interview with the complainants (doc 5) reflects demonstrably contradictory claims and exaggeration: the applicant was alleged to have said to the complainant’s wife that she, Ms Gray, lived in a \$750,000 home. In her first response to Land Transport Ms Gray denied living in a home of that value (doc 7). Land Transport did not investigate the matter further and failed to evaluate the likelihood and credibility of the claim thus depriving itself of a further means of measuring the credibility of the substantive allegation.
- [45] Document 5 also records the complainant’s wife placing her husband in the conversation during which Ms Gray was alleged to have referenced Land Transport: in the same record the complainant denied hearing Ms Gray “*say anything*”. The outcome is a conflicted account by the complainants as to relevant events on the night which acts to diminish the credibility of their central complaint.
- [46] I note here that doc 5 refers to the presence of a third person during the conversation in which Ms Gray was alleged to have referenced Land Transport: the respondent declined to seek to interview that person on the ground of the complainant’s advice he – the third person – was “*in a state of intoxication ... and may not recall events*” (handwritten records of an interview attached to respondent’s letter to the Authority dated 13 March 2009). It was

open to the respondent not to seek to interview this person (or anybody else who was in the restaurant that night), however the evidential basis for a serious finding against the applicant was further narrowed by this omission.

- [47] Having regard to the above, I do not accept that a fair and reasonable but not necessarily totally impartial or neutral employer would conclude that “*something happened*”, i.e. Ms Gray “*referenced Land Transport NZ in some way ...*” (doc 11) in her conversation with the complainants and implied she had improperly accessed information for non-official/business purposes.
- [48] Whereas Land Transport concluded Ms Gray’s account was “*general and vague*” (doc 11) in reality the applicant consistently denied making the comments attributed to her. The only evidence to support the respondent’s allegation is that Ms Gray was initially unsure she had been at the restaurant on the night in question.
- [49] Having regard to all of the circumstances in this case, I find a fair and reasonable employer would not have relied on Ms Gray’s initial uncertainty to determine the credibility of the substantive complaint, separate as it was from that allegation. It went too far in relying on that matter to conclude that the applicant’s consistent overall position was unreliable. That is because it is not unreasonable to be uncertain about an event that the applicant in this case had no reason to recall, which had occurred almost four weeks earlier.
- [50] In reality, Land Transport’s decision maker was no better placed to prefer the complainants as “*honest people*” (par 20, Brett Dooley’s witness statement) than, by implication, to conclude that Ms Gray’s version of events was less so.
- [51] I accept the applicant’s submission that her 7-years’ experience as a good worker, some of which has been at a senior level, should have enjoyed greater consideration by the respondent before preferring the complainants’ allegations to Ms Gray’s consistent denial. It reinforces the finding there was no basis to find Ms Gray’s version of events less honest than the complainants’.
- [52] In conclusion, in respect of the circumstances at the time and by way of reviewing Land Transport’s decision, I find that a fair and reasonable

employer would not have strained the limited information available to it to conclude Ms Gray's conduct amounted to serious misconduct. I am satisfied a fair and reasonable employer, objectively assessed, would have concluded there was insufficient convincing evidence proportionate to the serious allegation.

### **Remedies**

[53] Ms Gray has succeeded in her claim for a determination that her warning was unjustified.

[54] She also claims compensation of \$5,000 for hurt. The applicant's evidence in support of this claim is set out in particular at paragraphs 15, 18 & 19 of her witness statement.

[55] Ms Gray describes herself as "hurt" and "shocked" by her employer's findings, and that it *"has been very stressful having a warning hanging over my head, knowing that if I put a foot out of line it could be the end of my job. I am dedicated to my job and value it very highly. ... I still feel deeply hurt that my employer has disbelieved my honest assurance ... and instead choose to believe a complaint which I feel was malicious"*.

[56] Ms Gray's feelings were not challenged and, while modestly put, justify – I find – the remedy sought.

### **Contributory Fault**

[57] I do not accept the respondent's submission that Ms Gray's actions in any way contributed toward the situation that gave rise to the personal grievance. That is because at issue here is not the applicant's conduct on the night that allegedly gave rise to the complaint, but the unfair and unreasonable decision of the respondent that Ms Gray was guilty of serious misconduct. It was incumbent on the respondent to ensure an adequate investigation was conducted such that evidence emerged sufficient to support a rational finding, not for the applicant to prove that she was innocent.

**Determination**

[58] Land Transport is to pay to Ms Gray as compensation for hurt the sum of \$5,000 (five thousand dollars).

[59] As requested by the parties, costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**