

Attention is drawn to paragraph 23 prohibiting publication of certain information contained in this determination

Determination Number: CA 55/06
File Number: CEA 95/06

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Angela Ireland (Applicant)
AND The Child Cancer Foundation Incorporated (Respondent)
REPRESENTATIVES Len Andersen, Counsel for Applicant
Carl Blake, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 20 April 2006
DATE OF DETERMINATION 26 April 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Angela Ireland worked for the Child Cancer Foundation Incorporated from March 2003 until she was summarily dismissed on Thursday 16 March 2006 for serious misconduct. She says that her dismissal is unjustified and seeks reinstatement and compensation. She also seeks interim reinstatement and this determination resolves that part of the problem. As is usual in these applications, evidence is by way of affidavit and the following findings are for the purpose of resolving the application for interim reinstatement. Final findings of fact must await a full investigation.

[2] The task for the Authority is first to determine whether Ms Ireland has an arguable case of unjustified dismissal which might be remedied by reinstatement. If there is an arguable case, I must determine where lies the balance of convenience. That involves assessing the potential harm to Mrs Ireland if she is not reinstated before a full investigation meeting which might find in her favour against the potential harm to the Foundation of reinstating Mrs Ireland now when the full investigation meeting might uphold its dismissal decision. Consideration is also given to the overall justice of the case as is presently apparent.

[3] First, I will briefly outline the context of the dismissal.

The decision to dismiss

[4] CanTeen is a division of the Foundation and Mrs Ireland was CanTeen's Otago/Southland Member Support Manager. In that position, she worked with CanTeen members and potential members and their families. While doing that work on 17 February 2006, Mrs Ireland visited Karen Heslip. She is the Chairperson and Secretary of Southland Child Cancer Foundation, a branch of the Foundation. Mrs Heslip's son was interested in joining CanTeen.

[5] On 28 February 2006, Mrs Heslip rang CanTeen to complain about comments made by Mrs Ireland during their discussion. Mrs Heslip spoke to Mr Hill, CanTeen's national manager. Earlier that same day, Mr Hill had been told by Jim Barclay, the Foundation's chief executive officer, that Mrs Heslip was very upset as a result of her discussion with Mrs Ireland. Following the discussion with Mr Hill, Mrs Heslip put her complaint in writing.

[6] Mrs Heslip's complaint is that Mrs Ireland said various things about a man who Mrs Heslip had asked to assist at their branch meetings by taking minutes. This man has an earlier involvement with the Foundation and CanTeen. Mrs Ireland is alleged to have said that there is a court order preventing the man being involved with Child Cancer, that he has had affairs with women, that he had been charged with rape and could not be trusted with teenagers as he was too friendly with them, and that Mrs Ireland's husband had business problems with the man's business.

[7] On 7 March 2006, Mr Hill initiated arrangements to meet with Mrs Ireland to get a response to the complaint. The meeting was held on 10 March. By that time, Mrs Ireland through her solicitor had a copy of the written complaint. Mrs Ireland prepared a written response and presented that at the meeting. A further meeting was then arranged for 16 March 2006. At that further meeting, Mr Hill presented a letter advising Mrs Ireland of her summary dismissal for serious misconduct. The letter says *You admitted a number of the allegations, but denied others. In relation to the allegations that you denied, we have undertaken further investigations by seeking Ms Heslip's comments. ...it is our view ...that your behaviour is so serious as to constitute serious misconduct, Your behaviour is a serious breach of CanTeen's required standards of professional conduct....*

Arguable case?

[8] Mrs Ireland makes various criticisms of her employer's conduct leading up to the 10 March meeting, but I see little merit in those criticisms. By the time of the meeting, Mrs Ireland had a copy of the complaint and was able to attend with both her husband and her solicitor. There is also a complaint about the meeting venue but Mrs Ireland could have sought another venue if there was a significant problem with the arrangements so I see little merit in the point at this stage.

[9] There is a dispute in the evidence about whether Mr Hill had predetermined his decision. Mrs Ireland and her solicitor (Mr Hamel) say they were left with that impression but Mr Hill denies any pre-determination. There is no other evidence of predetermination so the best that can be said is that it is a weakly arguable point at this stage.

[10] At the investigation meeting, counsel for Mrs Ireland argued that Mrs Ireland's conduct, even if the allegations are completely accepted, does not amount to serious misconduct. Reference was made to the employment agreement which has an entire agreement clause. The argument is that serious misconduct requires a breach of one of the express terms of the agreement. Clause 17.1 deals with confidentiality and privacy about the employer's (CanTeen's) work. The argument is that no confidential information was disclosed. In particular, it is said that the man's involvement was with a branch of the Foundation and not with CanTeen, he not having any role with CanTeen. There was therefore no breach of clause 17.1 and no other express term is relevant.

[11] The point is arguable. The employment agreement appears to make much of CanTeen being a special division of the Foundation. Arguably, the intention is to limit the employee's duties and obligations such as confidentiality to the affairs of CanTeen's community which does not include those involved separately with the Foundation. Although arguable, there are several hurdles. For example, the agreement is signed by Mr Hill but expressly on behalf of the chief executive of the Foundation. CanTeen has no separate legal personality so the respondent in these proceedings is

the Foundation. It also requires a strict application of the entire agreement clause and a narrow reading of the clause 10 dealing with termination of employment.

[12] Clause 10.3 says: *In the case of theft, misappropriation, fraud, falsification of your health declaration or other information supplied pre-employment, or other serious misconduct or professional misconduct, you shall be subject to immediate dismissal.* The argument would be that there was no *theft, misappropriation, fraud* or similar misconduct. However, clause 10.4 reads *Nothing in the above clauses will prevent your dismissal without notice in the case of other cause justifying summary dismissal.* That appears to be a general power to dismiss summarily for serious misconduct including any breach of implied obligations of trust and confidence. If so, then it will then be for the Authority to assess whether the established conduct meets the test for serious misconduct established by cases such as *BP Oil NZ Ltd v NID Distribution etc Workers IUOW* [1989] 3 NZILR 276 and *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 read in light of the statutory test now provided by section 103A of the Employment Relations Act 2000.

[13] One issue for CanTeen is whether Mrs Ireland should have had an opportunity to respond to the results of the further investigation mentioned in the dismissal letter. In his affidavit, Mr Hill explained that he accepted Mrs Heslip's account over Mrs Ireland where there was a dispute. However, that was not explained to Mrs Ireland at the time. There are significant disputed points about the conversation, including the claim by Mrs Ireland that she and Mrs Heslip had agreed they were having an off the record discussion about the man and whether Mrs Ireland said that there was a court order preventing his involvement in the Foundation.

[14] If CanTeen should have given Mrs Ireland a further opportunity to comment on Mrs Heslip's response and a chance to comment on an appropriate penalty in light of the employer's expressed findings about what happened, it is arguable that the dismissal will be unjustified and that reinstatement might be an appropriate remedy. In addition, Mrs Ireland has learnt later that Mr Hill apparently told CanTeen board members during a phone conference to talk about her dismissal about another alleged breach of confidentiality by her, that allegation not having been referred to during the disciplinary process. Mr Hill says that this matter did not form the basis of his dismissal decision but his denial might not be upheld after a full investigation. The parties are also at odds about whether there was a refusal by Mrs Ireland to answer Mr Hill's questions during the meeting on 10 March although it is not clear what role any refusal might have played in Mr Hill's decision. These too are matters that might result in a finding of unjustified dismissal. Accordingly, I find that there is an arguable case of unjustified dismissal.

Balance of convenience

[15] For Mrs Ireland, this largely rests on the merits of her personal grievance and her claim for reinstatement. She accepts that her comments were injudicious but does not accept that CanTeen could dismiss her. She is passionate about and has worked hard for CanTeen since March 2003. Her dismissal may affect CanTeen members but I accept the point made by Mr Hill that Mrs Ireland could have attended a recent funeral service in her personal capacity.

[16] Mr Hill has given an undertaking not to replace Mrs Ireland before the Authority determines her substantive personal grievance claim. Arrangements are now agreed for an investigation meeting on 6 June 2006 and the ensuing determination will be given priority. In those circumstances, the prospects for re-establishing a successful employment relationship are not materially harmed by not ordering interim reinstatement.

[17] Mr Hill says and there is no reason to doubt that CanTeen will be able to meet any award of compensation.

[18] It may be that CanTeen can establish that the dismissal is justifiable or that Mrs Ireland's contribution to the situation disentitles her to reinstatement as a remedy. At this point, neither outcome appears substantially more likely than the other. However, I accept that if Mrs Ireland is reinstated for the time being but reinstatement does not follow the substantive investigation meeting, CanTeen may suffer reputational damage that could not be adequately remedied despite Mrs Ireland's undertaking as to damages.

[19] It follows that the balance of convenience favours CanTeen. There are no other factors about the respective cases as presently outlined that strongly favour an order for interim reinstatement. Accordingly, the application is declined.

Summary

[20] The application for interim reinstatement is declined.

[21] Costs are reserved.

[22] I note that there is agreement by Mrs Ireland and CanTeen to participate in mediation prior to the investigation meeting.

Non publication order

[23] It has not been necessary for the purposes of this determination to name the man who was the subject of the exchange between Mrs Ireland and Mrs Heslip. However, I see no reason why his interests should be adversely affected by open publication of his name. I make an order prohibiting the publication of his name pending further order of the Authority. The order is temporary since the point has not been discussed yet with the parties. Its continuation can be dealt with at the investigation meeting on 6 June 2006.

Philip Cheyne
Member of Employment Relations Authority