IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 188
5294901

	BETWEEN	RICHARD THOMAS McALEVEY Applicant
	A N D	MOLYNEUX PARK CHARITABLE TRUST Respondent

Member of Authority:	M B Loftus
Representatives:	Kieran Tohill and Mary Flannery, Counsel for Applicant Justine Baird, Counsel for Respondent
Investigation Meeting:	6 and 7 September 2011 at Alexandra
Submissions Received:	23 September and 25 October 2011 from the Applicant 14 October 2011 from the Respondent
Date of Determination:	30 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Richard McAlevey, claims he was unjustifiably dismissed from his employment with the respondent, Molyneux Park Charitable Trust, on 16 November 2009.

[2] The Trust accepts it dismissed Mr McAlevey but contends it was reasonable to do so, given Mr McAlevey's unsatisfactory performance.

Background

[3] At the heart of this dispute is the preparation and maintenance of the cricket wicket and practice facility at the Park. For some years Molyneux Park has hosted first class cricket but to do so it must maintain what is known as a warrant of fitness issued by New Zealand Cricket. The warrant was withdrawn as a result of poor pitch reports for the 2008/2009 season and that led to Mr McAlevey's dismissal.

[4] Mr McAlevey was employed by the Trust as a groundsman on 20 August 2005. He says there were concerns about the warrant even then. One of the things that therefore attracted him to the job was the fact the warrants retention was not a requirement specified in the job description.

[5] The Trust has a different view. It relies on funding from the local authority and that income is dependent on the maintenance of a first class warrant for the pitch. Failure to retain the warrant would mean there would no longer be a need for a fulltime qualified grounds person.

[6] Mr McAlevey had a written employment agreement. Contained therein, and pertinent to this dispute, is a clause entitled disciplinary procedures. It opens by stating:

> *Before entering into a formal disciplinary process, the Employee will be given a reasonable opportunity to improve.*

[7] It continues:

> *Before considering any form of disciplinary action an investigation into the alleged misconduct must be carried out promptly.*
>
> *Prior to any disciplinary meeting, the Employee will be advised of the specific allegation and of the likely consequences should the allegation be found to be true. The Employee will also be advised that they are entitled to have a support person at the formal disciplinary meeting. During the meeting the Employee will be given an opportunity to explain or deny the allegation. The Employee's explanation and any mitigating circumstances will be considered before a decision is made on the appropriate course of action.*

[8] The clause goes on to advise there will generally be four steps in the disciplinary procedure. They are (1) a verbal warning; (2) a written warning; (3) a final written warning; and (4) dismissal.

[9] That said, the clause contains the rider:

> *Where misconduct or substandard work performance is considered serious enough, a written warning, final written warning, or dismissal, may be issued without a verbal or written warning preceding it.*

[10] On 21 September 2007 Mr McAlevey attended a meeting called by the Trust to various issues stemming from a season of poor pitch reports and concerns about the

playing surface. The meeting led to an arrangement under which Mr McAlevey would receive support and guidance from Mr Jared Carter, New Zealand Cricket's Turf Manager, in the preparation of the field and playing surface. Mr Carter prepared a detailed work plan and forwarded it to Mr McAlevey on 2 November 2007.

[11] Pitch reports following a game on 29 December 2007 suggest a great improvement but Mr Carter felt there was room for further improvement and provided further advice to Mr McAlevey. Similar reports of improvement followed on 3 January 2008.

[12] There was then a meeting on 31 January at which the Trust claims it was made clear to Mr McAlevey, and others attending, that maintenance of the warrant was crucial to the viability of the ground and the continued receipt of funding.

[13] As the year progressed there was further correspondence and advice from Mr Carter.

[14] In October 2008 Mr McAlevey was the subject of a formal performance review. A summary was forwarded to Mr McAlevey on 23 December 2008. It states:

> *… in general the Trust is very happy with the state of the grounds and wishes to thank you for your efforts over the past year. The feedback from New Zealand Cricket is also encouraging and we hope this will continue. As a result of your performance we are offering a 4% pay increase which will be effective from 1 November 2008.*

[15] That was the only formal performance appraisal to which Mr McAlevey was subject. It is also one the Trust now wishes to distance itself from and its position is the positive comments were a result of its having given Mr McAlevey the benefit of the doubt.

[16] The 2008/2009 season saw further poor pitch results and this resulted in Molyneux Park's loosing its first class warrant. That led to a *Formal Employment Meeting* on 22 June 2009. The letter asking Mr McAlevey to attend states:

> *As you will be aware the Molyneux Park facility has lost its ground WOF in respect of 1st class cricket. The Trustees feel that this is partially due to the consequences of your actions with regards to the preparation of the pitch. As such it is a matter that needs to be discussed in respect of your employment contact and employment conditions.*

[17] That was followed by a second letter dated 16 June 2009. It advised the trustees wished to *progress* related issues including:

a. A plan for regaining the ground warrant of fitness. This was described as the major aim of the Trust; and

b. A discussion over the Trust's view Mr McAlevey was tardy in respect of the provision of timesheets.

[18] According to Mr McAlevey the meeting concentrated on discussing methods to regain the warrant and no performance issues were discussed.

[19] The Trust, in its closing submissions, says:

> *The outcome of the meeting … was to support the applicant in his role with clear guidelines on what was expected of him, including seeking ongoing assistance from Jared Carter.*
>
> *… it was made clear if the warrant was not regained there was a real likelihood of the council contract being terminated and the loss of the applicant's position.*

[20] In making this last assertion the Trust relies on the notes of the meeting and the summary entitled *conclusion*. It reads:

> *Should the Board not regain our WOF then there may be a likelihood of the council rescinding the contract resulting in the loss of funding for a highly qualified or fulltime groundsman.*

[21] A trial game was then arranged through New Zealand Cricket for Labour weekend in October 2009. The purpose was to ascertain whether the Molyneux Park wicket was of sufficient standard to regain the warrant. As events transpired it attained a *satisfactory* grade. That would be sufficient for retention of an extant warrant but fell short of the *above satisfactory* necessary for the issuing of a new warrant (which this was deemed to be).

[22] On 31 October Mr Carter sent an email to representatives of the Trust commenting on the trial and expanding on a comment in the pitch report *about the groundsman being under par for the match*. That expansion takes the form of a series of observations critical of Mr McAlevey.

[23] That was followed by a letter dated 17 November in which Mr Carter expands on those comments and amplifies others he had made in various correspondence and conversations. He says *In my opinion a good deal of the issues that have arisen are due to poor turf management* before penning a damning summation:

> *I am now in a position where it is difficult to have any confidence with the current Turf Manager can prepare the venue to the required First Class standard. The dedication and motivation (as shown by the other parties involved) is lacking and there is little pro activeness to speak to those within the industry who can help him through this tough period. All support given to the Turf Manager seems to be accepted at the time, then discarded as soon as they leave the venue.*

[24] In the interim other events had occurred. On 2 November Mr McAlevey was sent an email. It refers to Mr Carter's email of 28 October (of which Mr McAlevey had been given a copy) and advises the Trustees required Mr McAlevey's attendance at a *formal employment meeting*. It advises Mr McAlevey he is entitled to bring a support person and that *the possible consequences of the meeting could be a warning (either verbal or written), a final written warning, or dismissal*.

[25] The meeting occurred on 6 November. It was attended by four members of the Trust, Mr McAlevey and his representative.

[26] Notes of the meeting show discussion centred on events over the trial weekend and the preparations therefore. There is no specific mention of possible disciplinary action, nor is there any indication of a specific allegation relating to performance issues. The specifics discussed were those raised by Mr Carter. He was not present.

[27] The four trustees present at the meeting then consulted with others. The outcome was Mr McAlevey's dismissal. The decision was conveyed in a letter dated 16 November. It reads:

> *The trustees have had a chance to confer regarding the employment meeting held on November 6, 2009.*
>
> *The trustees have now considered all the responses and information you supplied, and your performance over the past three years, including the review of the trial game held recently.*
>
> *The trustees have concluded the only option open to them is for your employment to be terminated, on notice. However, you will not be required to work during your notice period.*
>
> *…*

Please contact me if you have any questions regarding the above.

Position of the parties

[28] Mr McAlevey contends there are a number of reasons why his dismissal must be unjustified.

[29] First, the job description did not specify maintenance of the warrant as a requirement of the job.

[30] Second, Mr McAlevey was never formally advised he was required to improve his performance or of the consequences should he fail. While he accepts he was aware of the Trust's concerns over the warrant they were never expressed in the form of an adequately explained performance management process. He claims the closest the parties came was the meeting in June 2009 but states that concentrated on what was required to regain the warrant and not issues of his performance.

[31] Thirdly, it is submitted that it was unreasonable to hold the trial as early in the season as occurred. In essence Mr McAlevey and his witnesses claim it was an enterprise doomed to fail. Indeed it is noted that Mr Carter's email of 28 October and says:

The pitch was in reasonable condition for this time of year.

[32] Fourth, it is submitted that Mr McAlevey was cognisant of the training and assistance he received and that was evidenced by the fact that Mr Carter observed that the pitch was an improvement on previous seasons.

[33] Fifth, it is submitted that the failure to warn Mr McAlevey of the consequences of failing to regain the warrant is a fundamental failure as is the sixth point; namely a failure to fully appraise Mr McAlevey that he had lost the confidence of New Zealand Cricket thus depriving him of the ability to respond to a significant accusation.

[34] For the respondent, it is submitted it is not necessary for the job description to refer to maintenance of the warrant as Mr McAlevey was not dismissed for its loss. The Trust acknowledges there was no written follow-up to the meeting of 22 June but believes Mr McAlevey was fully appraised of the need for his performance to

improve and told that if it did not, his employment was in jeopardy. As confirmation of that the Trust relies on the evidence of two of Mr McAlevey's witnesses who both gave evidence that Mr McAlevey had told them that his employment was under review and his job on the line in the August/September 2009 period.

[35] The Trust denies it was unreasonable to hold the trials over Labour Weekend as Mr McAlevey was given an opportunity to postpone or cancel the fixture. They also point out that the reasonableness of the task was confirmed the following year when Molyneux Park did regain its warrant following games held over Labour weekend 2010.

[36] In respect of a meeting of 6 November, the Trust submits:

> *The applicant was advised of the specific allegation, he was advised of the potential sanctions, he was afforded a real opportunity to explain and the outcomes were considered in an unbiased manner by a Board of seven members (with no personal agenda or benefit to be gained from the decision).*

[37] From a substantive perspective it is submitted that the dismissal was justified given Mr McAlevey's ongoing and persistent failure to perform which impaired and then destroyed any trust and confidence the employer may have had in him. The dismissal was a permissible response as, in the Trust's view, is confirmed by the content of the employment agreement which allows steps in the disciplinary process to be bypassed if the alleged deficiencies are serious enough.

Determination

[38] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is justifiable

> *... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.*

[39] That test is used as Mr McAlevey was dismissed before the current test came into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. There

is no suggestion in the Act the revised s.103A has retrospective effect so the earlier test applies.

[40] I need not go into a number of the issues raised by Mr McAlevey as reasons why his dismissal is unjustified. A determination can be made by considering a few key issues.

[41] Traditionally the objective review has been performed by considering the employers actions from both a substantive and a procedural perspective. Whilst it is clear that issues of substance and process overlap and there is no firm delineation, separation still provides a useful means of analysis.

[42] Here there must be doubts about the substantive justification, or at least doubts Mr McAlevey's failures were serious enough to warrant dismissal at the time it occurred.

[43] Mr McAleveys employment agreement requires the giving of assistance and coaching prior to the commencement of a stepped warning process which will make both the required standards, and consequences for failing to meet them, clear. The agreement says the process can be truncated when the performance deficiencies are serious enough. The question therefore becomes whether or not Mr McAleveys alleged deficiencies were serious enough to warrant truncating of the process. The answer, I conclude, is no, as the wicket was rated *satisfactory*. While not enough to regain the warrant, it would have been a pass mark in normal circumstances with the warrant still in place. That is not performance so poor it justifies the truncation of the process and a reasonable employer would not think so.

[44] Turning to procedure. A basic summary of what is considerably more detailed law is that an employer is required to put issues in its mind, allow an explanation and consider them. Furthermore the employer must allow the employee to address decision makers directly (refer, for example, *Ioane v Waitakere City Council* [2003] 1 ERNZ 104 (NZEmpC).

[45] I now refer to two points which illustrate significant deficiencies in this process. First members of the Trust who gave evidence are divided on why Mr McAlevey was dismissed. When asked why dismiss, Mr Soper, the Trust's chairman, states that while the loss of the warrant was, from his perspective, the final straw he chose to dismiss because of the possible loss of council funding and the fact NZ

Cricket had *ceased to trust* Mr McAlevey. Mr Tait, the Trusts administrator, says it was due to Mr McAlevey's history of poor performance while another Trust member, Ms Whiting says the timesheet issue (see 17 above) and NZ Crickets loss of confidence swayed her. A fourth trust member, Mr Hughes, emphasises the loss of the warrant. He says the potential loss of funding could not be a consideration as the issue had not been tested with the Council.

[46] The dismissal letter cites *performance over the past three years, including the review of the trial game held recently* as justifying the dismissal, yet it appears many other factors contributed to the decision. Indeed, only one witness, Mr Tait, cites the letters rationale as guiding his decision, yet there is no evidence historic concerns were discussed at the meeting of 6 November. The evidence indicates discussion was limited to preparation for, and the outcome of, the trial game. Similarly, and importantly, there is no evidence New Zealand Cricket's loss of trust was discussed and it is not mentioned in Mr Carters e-mail of 28 October. It appears to have come up in later conversation and was confirmed in the letter of 17 November. There is no evidence some of the concerns others took into account such as the possible loss of funding or the timesheets were put to Mr McAlevey at the meeting of 6 November. Mr McAlevey could not, and did not, have an opportunity to respond to many of the consideration that led to his dismissal and a non-existent response could not have been considered. The dismissal must, for this reason alone, be unjustified.

[47] The second point is the decision to dismiss was made by seven members of the Trust. Only four were present at the meeting and the other responded to briefings and information passed to them second hand. Mr McAlevey did not have a chance to address nearly half the decision makers.

[48] There is also an issue about the veracity of the claim Mr McAlevey was clearly advised of the consequences of not retaining the warrant. Despite the assertion consequences were made clear Mr Soper conceded that may not have been the case when answering questions.

[49] These deficiencies are serious and must, I conclude, render the dismissal unjustified.

[50] The conclusion the dismissal is unjustified raises the question of remedies. Mr McAlevey seeks lost wages and $15,000 as compensation for hurt and humiliation.

[51] Mr McAlevey seeks recompense for wages lost from the date of dismissal till he obtained full time employment in May 2011. Once earnings from casual engagements are deducted the claim totals $62,500.

[52] Section 128(2) of the Employment Relations Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Here, the period of loss was considerably greater than three months and Mr McAlevey seeks reimbursements accordingly. Such claims are often considered by the Authority but to be eligible for such an award a claimant must have tried to mitigate the loss.

[53] Mr McAlevey chose to return to polytechnic and add another qualification so as to make himself more attractive to prospective employers. The course took 15 months though Mr McAlevey claims he could still have worked as the course was extramural. That said, his evidence in respect to a job search was limited. He said he read the situations vacant looking for opportunities. He did not say he applied for many so I am left unconvinced there was a serious attempt at mitigation. In such circumstances I limit the award to three months lost wages as specified in the Act, especially as that takes payment to around the point at which he commenced the course.

[54] Mr McAlevey provided evidential support for his compensatory claim. He talks of the financial pressures that resulted and the humiliation that resulted from the public nature of his dismissal. It was reported in local newspapers and that has led to further issues such as reputational damage that has caused further hurt. Having considered the evidence, I conclude an award of $10,000 to be appropriate.

[55] Finally I am required by s.124 of the Act to address whether not Mr McAlevey contributed to his demise in a way which justifies a reduction in remedies. The trust contends that to be the case and Mr McAlevey has not helped himself by making, in writing, comments such as *pitch reports are not worth the paper they are written on.* The attitude he evidenced was, at times, poor but does that does not in itself warrant a reduction of remedies.

[56] Here I am left incapable of concluding Mr McAlevey's conduct contributed as so many of the issues members of the Trust used to justify the decision to dismiss

were never put. The Trust's failures mean there is insufficient contemporaneous evidence upon which a conclusion of contributory conduct can be safely based.

Conclusion and Orders

[57] For the above reasons I conclude Mr McAlevey has a personal grievance in that he was unjustifiably dismissed.

[58] As a result the respondent, Molyneux Park Charitable Trust, is ordered to pay the applicant, Mr Richard McAlevey, the following:

i. Three months wages as recompense for wages lost as a result of the dismissal. I leave it to the parties to calculate but if there are any difficulties they may return to the Authority for a computation. PAYE then deducted before payment; and

ii. A further $10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[59] Costs are reserved.

Mike Loftus
Member of the Employment Relations Authority