

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 184
5359998

BETWEEN NIKKI MOORE
 Applicant

A N D ELECTRIX LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Paul Pa'u, Counsel for Applicant
 Philip Skelton, Counsel for Respondent

Investigation Meeting: 02 April 2012 at Auckland

Submissions Received: 16 April 2012 from Respondent
 24 April 2012 from Applicant
 26 April 2012 from Respondent

Date of Determination: 31 May 2012

DETERMINATION OF THE AUTHORITY

- A. The final written warning issued to Ms Nikki Moore by Electrix Limited (Electrix) affected her employment to her disadvantage and was unjustified.**
- B. Electrix is ordered to pay Ms Moore distress compensation of \$5,400.**

Employment relationship problem

[1] Electrix issued Ms Moore with a final written warning on 05 October 2011 for *deliberately misleading a manger; refusal to comply with a lawful and reasonable instruction from [manager] to provide NoK [Next of Kin] register*

information; and unacceptable behaviour in relation to four altercations with Karen.

[2] In this determination I refer to the:

- a. References made in the outcome letter to deliberately misleading a manager as the *misleading a manager concern*;
- b. Refusal to comply with a lawful and reasonable instruction allegation as the *NoK allegation*;
- c. Unacceptable behaviour in relation to four altercations with Karen as the *Karen allegations*.

[3] Ms Moore claims the final written warning unjustifiably disadvantaged in her employment. She alleges that the warning was substantively and procedurally unjustified.

[4] Ms Moore claims Electrix breached its s.4 duty of good faith under the Employment Relations Act 2000 (the Act). She seeks a penalty for the alleged breach of good faith, which she asks be paid to her personally, together with \$10,000 distress compensation.

[5] Subsequent to the Authority's investigation meeting, Mr Pa'u asked the Authority to issue recommendations to Electrix under s.123(1)(ca) of the Act to prevent similar employment relationship problems to those associated with Ms Moore's alleged disadvantage grievance occurring in future.

[6] Mr Ranjit Manak, Electrix Divisional Manager – Distribution Services Division, was responsible for the disciplinary process and he decided to impose the final written warning on Ms Moore. After concluding his evidence to the Authority, Mr Manak quite rightly acknowledged there had been significant errors in the way he had handled the Karen allegations. He also conceded that he should not have commenced a disciplinary process in relation to the Karen allegations.

[7] Electrix denies there were any procedural deficiencies in the way it dealt with the NoK allegation and says Ms Moore's conduct in relation to the NoK justified its final written warning.

Issues

[8] Given Electrix accepts it cannot justify a final written warning regarding the Karen allegation, the Authority must determine whether a final written warning can nevertheless still be justified in respect of the NoK allegation only. If not, then the affect of the final written warning on Ms Moore in relation to both the Karen allegations and the NoK allegations may be considered when non monetary compensation is assessed.

[9] In determining this matter the following questions must be addressed:

- a. Did Electrix breach its duty of good faith?
- b. If so, should a penalty be awarded to Ms Moore?
- c. Did the final written warning disadvantage Ms Moore?
- d. If so, did Electrix comply with the s.103A(3) tests?
- e. Did Electrix have a good reason for imposing the final written warning?
- f. Was the final written warning justified?
- g. If not, what remedies should be awarded?
- h. Should remedies be reduced to reflect contribution?
- i. If Ms Moore has a disadvantage grievance, were workplace conduct or practices a significant factor in the grievance?
- j. If so, should the Authority issue recommendations?

Did Electrix breach its duty of good faith?

[10] Section 4 of the Act imposes a number of good faith obligations on Electrix. It did not dispute it had breached its s.4 good faith obligations.

[11] I find Electrix's actions during the disciplinary process breached the following sections in the Act:

- a. S.4(1) - because it did not deal with Ms Moore in good faith and it misled her;
- b. S.4(1A)(b) - because it was not active or constructive towards, or responsive and communicative with, Ms Moore;
- c. S.4(1A)(c) - because it withheld relevant information from Ms Moore and did not give her an opportunity to comment on information relevant to its decision.

Should a penalty be imposed?

[12] The Authority may impose a penalty under s.4A(a) of the Act on a party if its failure to comply with the duty of good faith was *deliberate, serious, and sustained*.

[13] Whilst Electrix's failure to comply with the duty of good faith was serious and sustained, I find it was not deliberate. I accept Mr Skelton's submission that the use of word *deliberate* in s.4A means there must be an element of wilful or intentional wrongdoing.

[14] I accept the breach of good faith was not deliberate. Mr Manak was not motivated by bad faith and did not set out to mislead or deceive Ms Moore or to undermine the employment relationship. The requirements of s.4A(a) are not met, so a penalty cannot be imposed.

Did the final written warning disadvantage Ms Moore?

[15] The imposition of a final written warning on Ms Moore disadvantaged her in her employment because it made her employment less secure in the event of a future transgression. It also made her more vulnerable to further complaints from Karen¹ whom Ms Moore had been experiencing ongoing interpersonal and communication problems with.

Did Electrix comply with the s.103A(3) tests?

[16] This question deals with procedural fairness.

¹ Her complaint gave rise to the *Karen allegations*.

[17] Section 103A(3) of the Act sets out four tests which must be considered when assessing justification. The tests consist of well established and non contentious minimum natural justice and procedural fairness requirements. Electrix failed to comply with all four of the s.103A(3) tests.

[18] I find that Mr Manak did not conduct any investigation. He commenced and concluded the disciplinary process without even obtaining copies of the email exchanges and associated attachments which had given rise to the NoK allegations. This failure to obtain and consider relevant information meant Electrix failed to sufficiently investigate the NoK allegations, contrary to s.103A(3)(a) of the Act.

[19] The disciplinary letter alleged Ms Moore had *refused to perform usual duties or comply with a lawful and reasonable instruction* which apparently related to an email Ms Moore received from a manger which had asked her to provide a colleague with NoK details for specified employees, within a set period of time.

[20] However, what Electrix was really concerned about, and what it actually disciplined Ms Moore for, was an allegation that she had deliberately misled a manager. I find that Electrix did not comply with s.103A(3)(b) of the Act because it did not raise its specific concerns regarding the NoK allegation with Ms Moore.

[21] Because Electrix did not fairly or properly raise its specific concerns with Ms Moore, she was not given a reasonable opportunity to respond to them, contrary to the requirements of s.103A(3)(c) of the Act.

[22] I find that Electrix also breached s.103A(3)(d) of the Act. It cannot have genuinely considered Ms Moore's explanation to the specific allegation it had raised in its disciplinary letter because it was clear she had actually provided the information she had been asked to provide, to the correct person, within the specified timeframe.

Did Electrix have a good reason for imposing the final written warning?

[23] This question deals with substantive justification.

[24] Electrix says it had a good reason for imposing a final written warning because Ms Moore admitted she had misled a manager in an email to him which stated she did not have information when she did in fact have that information referred to.

[25] I find the misleading a manager concern was not fairly or properly raised with Ms Moore as a disciplinary allegation. There was no good reason for Electrix to impose a disciplinary sanction on Ms Moore as a response to a concern which had not been the subject of a disciplinary process.

[26] Whilst it was open to Electrix to decide to raise the misleading a manager concern as a specific disciplinary allegation, it did not actually ever do so. Its disciplinary letter alleged Ms Moore had *refused to perform her usual duties or refused to comply with a lawful and reasonable instruction*. This was the only specific disciplinary allegation² put to Ms Moore to respond to.

[27] Mr Manak accepted Ms Moore had done what she had been asked to do. There was no good reason for Electrix to issue her with a final written warning for either refusing to perform her duties or refusing to obey a lawful and reasonable instruction when it acknowledged she had provided the information the manager had asked her to.

Was the final written warning justified?

[28] Justification must be assessed in light of the s.103A justification test in the Act which came into effect on 01 April 2011. The full Court of the Employment Court in *Angus and McKean v. Ports of Auckland Ltd* explains how the test is to be applied in practice. The Court in *Angus* commented a *failure to meet any of the s.103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified*.³

[29] Electrix failed to follow a fair process before it imposed the final written warning and it did not have a good reason to impose it as a response to the NoK allegations. Electrix failed to comply with its s.4 good faith obligations and with all of the s.103A(3) tests in the Act.

² Regarding the NoK allegation

³ [2011] NZEmpC 160, para [26].

[30] The process defects were not minor, they were fundamental and pervasive. They were not corrected as a result of Mr Pa'u's involvement later in the disciplinary process. They also resulted in substantial unfairness to Ms Moore, so s103A(5) does not prevent the Authority from determining that Ms Moore's final written warning was unjustified.

[31] Electrix's actions and how it acted in relation to the NoK allegations was not what a fair and reasonable employer could have done in all the circumstances at the time the final written warning was issued. Accordingly, Electrix is unable to discharge its burden of justifying the final written warning issued on 05 October 2011.

[32] Ms Moore has a personal grievance under s.103(1)(b) of the Act because her employment was disadvantaged by Electrix's unjustified actions in relation to the final written warning. She is entitled to remedies.

What remedies should be awarded?

[33] Ms Moore seeks \$10,000 distress compensation.

[34] Distress compensation for unjustified warnings is usually modest. However, there are a number of factors which make this case fall outside the usual level of awards because they significantly increased Ms Moore's actual distress.

[35] Ms Moore was blindsided when she unexpectedly found the disciplinary letter on her desk. The lack of detail regarding the allegations left her to speculate about what she may have done wrong. She became extremely anxious and distressed when both managers refused to give her any information prior to disciplinary meeting.

[36] The disciplinary meeting was scheduled on a day when she had been approved annual leave, which she cancelled at the last minute so she could attend the meeting. She had no real opportunity to adequately prepare for the disciplinary meeting because she did not know what the allegations were about and she had not been given any information which explained Electrix's concerns.

[37] During the meeting anonymous complaints were read aloud but she was not permitted to see them. The disciplinary meetings were conducted in a glass

fishbowl meeting room so she was visible to other staff. Ms Moore was expected to respond to non specific statements from unidentified individuals about undated events. That left her in the helpless and hopeless position of not being able to properly address the matters which had been referred to.

[38] Mr Manak told Ms Moore she would be given information about the allegations at the disciplinary meeting, but he did not do so. Instead the meeting involved discussions which ranged over a number of topics, which left Ms Moore to guess at how the matters discussed related to the allegations in the disciplinary letter, if they did at all.

[39] Electrix also continued to raise a number of new matters with Ms Moore during her disciplinary meetings despite such matters having no relevance to the disciplinary allegations which had been put to her. Notwithstanding that, Ms Moore was required to respond to the new matters within a disciplinary context.

[40] Not only was that very unfair but it also caused Ms Moore ongoing anxiety and distress over many weeks. The two disciplinary allegations could have and should have been dealt with over a short period of time. Instead the disciplinary process was unnecessarily prolonged because Electrix insisted on addressing irrelevant matters, which consequently increased Ms Moore's stress.

[41] Ms Moore was told she had been disciplined over the Karen allegations because she should have raised concerns about Karen's behaviour with Electrix, and not with Karen directly. However, when Ms Moore did raise her concerns about Karen with Electrix it failed to address them.

[42] That failure caused Ms Moore very high levels of unnecessary stress and distress because she sat beside Karen at work. That seating arrangement was never changed so Ms Moore remained in extremely close proximity to Karen, whose complaint had resulted in the disciplinary allegations and whose behaviour towards Ms Moore had not been addressed.

[43] This was extremely unfair because Electrix had evidence from Ms Moore, other employees, and two managers that the way Karen had been engaging with Ms Moore had been causing ongoing problems. Two managers had planned to address Karen's behaviour, but Mr Manak was senior to both of them and his disciplinary process prevented that occurring. Karen's behaviour towards Ms

Moore was therefore effectively ignored and it had still not been properly addressed by the time of the Authority's investigation meeting.

[44] Ms Moore had to bear the ongoing burden of Karen's inappropriate behaviour not only throughout the entire disciplinary process, but also once she had a final written warning hanging over her head, whilst continuing to sit beside her. I accept this caused Ms Moore serious stress, humiliation, and distress.

[45] Ms Moore was told by some colleagues who had been interviewed by Electrix that they had given information which corroborated her explanation to the Karen allegations. Requests from her lawyer for disclosure of that material were ignored and that information was never given to her.

[46] After Electrix was directed to provide the Authority with copies of its handwritten notes, it was evident that comments which supported Ms Moore's explanation to the Karen allegations had been removed from the information disclosed to Ms Moore during the disciplinary process. That caused her hurt and humiliation.

[47] Because of the way Electrix drafted the warning, Ms Moore was subjected to the stress of believing that her final written warning was a *permanent warning* which had been imposed in lieu of dismissal.

[48] It was not until Ms Melony Lowe, Human Resources Manager, filed her statement shortly before the Authority's investigation meeting that Electrix advised Ms Moore that the warning was effective for six months only and therefore expired on 6 April 2012. Ms Lowe accepted the outcome letter was misleading regarding the duration of the warning but she had not taken steps to correct Ms Moore's incorrect belief about that.

[49] Ms Moore has been physically sick with stress. She has been found by colleagues crying at work. She has required medical treatment and time off work. She has been prescribed medication and was referred by her doctor to a psychologist, whom she saw for three months. She has utilised EAP services.

[50] Ms Moore has also sought out health treatments with alternative health practitioners to assist her to deal with the adverse effects the disciplinary process and final written warning have had on her. She has struggled with sleep and

concentration. It has also caused her financial stress and pressure because she had to borrow from her mother's retirement savings to pay her legal fees.

[51] The way Electrix dealt with its disciplinary concerns was extremely unfair, unreasonable, and caused Ms Moore significant distress. I accept Ms Moore's evidence that she has been *gutted*, anxious, stressed, and distressed. Her evidence of hurt, humiliation, and injury to feeling was compelling and credible. It was also supported by an affidavit from her mother.

[52] I award Ms Moore \$6,000 under s.123(1)(c)(i) of the Act to compensation her for her hurt, distress and injury to feelings.

Should remedies be reduced to reflect contribution?

[53] Section 124 of the Act requires the Authority to consider the extent to which Ms Moore's actions contributed to the situation which gave rise to her grievance and, if appropriate, reduce remedies accordingly. This requires an assessment about whether Ms Moore engaged in blameworthy conduct which would require remedies to be reduced.

[54] I do not view Ms Moore's actions in relation to the Karen allegation as blameworthy. Ms Moore's comments were understandable in the circumstances and I consider they were blown out of proportion by Mr Manak.

[55] Ms Moore's actions involved no more than legitimate expressions of frustration about Karen's behaviour. That was reasonable because the Karen problems had been continuing for some time, they had been having an adverse impact on Ms Moore, and they had not been addressed by Electrix.

[56] In terms of the NoK allegation, Ms Moore did mislead a manager because she emailed him that she did not have the NoK information when she did in fact have it. That was blameworthy conduct which contributed to the situation which gave rise to her grievance because it was the catalyst for the disciplinary process.

[57] I consider it appropriate to reduce Ms Moore's distress compensation by 10% to reflect her contribution, which means her award is reduced from \$6,000 to \$5,400.

Were workplace conduct or practices a significant factor in the grievance?

[58] I do not consider workplace conduct or practices were a significant factor in Ms Moore's grievance.

Should the Authority issue recommendations?

[59] The Authority only has power to make recommendations under s.123(1)(ca) of the Act to an employer where workplace conduct or practices have been a *significant factor* in the grievance. This threshold has not been met.

Summary

[60] Ms Moore has an unjustified disadvantage grievance under s.103(1)(b) of the Act.

[61] Electrix is ordered to pay Ms Moore \$5,400 under s.123(1)(c)(i) of the Act.

Costs

[62] Ms Moore as the successful party is entitled to costs.

[63] The parties are encouraged to resolve costs by agreement. If that is not possible, Ms Moore has 14 days within which to file a costs memorandum, Electrix has 14 days to file its costs memorandum, and Ms Moore has 7 days within which to file her reply.

[64] This timetable may only be departed from with the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority

