

Attention is drawn to the order prohibiting publication of certain information referred to in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 93/09
5272393

BETWEEN DENIS OWEN
 Applicant

AND THE PUBLIC TRUST
 Respondent

Member of Authority: G J Wood

Representatives: Stuart Webster for the Applicant
 John Rooney for the Respondent

Investigation Meeting: 10 July 2009 at Napier

Determination: 14 July 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Denis Owen, seeks interim reinstatement to his position as an Estate Manager with the Public Trust. He claims his summary dismissal after more than 40 years of service was unjustified because he did not commit serious misconduct, and even if he had the appropriate sanction should have been a warning rather than dismissal.

[2] Public Trust claims that Mr Owen was dismissed for multiple breaches of various aspects of its Code of Conduct over a long period of time, in relation to a member of the public who later complained about him. In particular it considered that Mr Owen had provided investment advice contrary to the terms of his employment agreement.

[3] I have made an interim order prohibiting the publication of any material identifying the person who complained about Mr Owen and steps taken by Public Trust to resolve the complainant's complaint, including the settlement reached, for reasons of personal privacy and commercial confidentiality.

[4] At this juncture the Authority is dealing only with the application for interim reinstatement. The Authority received affidavits from Mr Owen and two of Public Trust's managers involved in his dismissal. I set out below tentative findings only, noting that Mr Owen is entitled to the benefit of an assumption that the factual allegations he made will be upheld in a substantive hearing.

Background

[5] Mr Owen was an Estate Manager with Public Trust at Hastings Branch when he was dismissed summarily on 29 June 2009 for serious misconduct. The dismissal came as a result of a complaint from a member of the public who claimed that he invested his life savings over the period 2000 to 2008 in finance companies which are now in receivership, relying on Mr Owen's advice. Between July 2008 and May 2009 Public Trust investigated the complaint and reached a settlement with the complainant. At that point it turned its attention to Mr Owen's role of allegedly giving investment advice to the complainant.

[6] On 15 June Mr Owen was given a copy of the relevant documentation, including the complaint and Public Trust's deliberations on how to resolve it and how settlement was achieved. At the same time Public Trust chose to investigate an allegation that Mr Owen had also recently breached its policy about only the Chief Executive being able to make public comments on its behalf. This allegation was subsequently found not to be substantiated. I do not address it any further accordingly.

[7] Mr Owen attended a disciplinary meeting on 29 June where he and Mr Webster gave a full and vigorous defence to the allegations, claiming that he had never given investment advice and that the Public Trust should be very wary of a complainant who was simply trying to blame someone else for a potential loss of the money that he had invested. Mr Webster also submitted that he should not pay the penalty for Public Trust considering it had to settle with the complainant, and that if Mr Owen had done anything wrong it would only justify a warning. Mr Webster also

later made submissions by email about Mr Owen's impeccable record, this being a first offence and that dismissal was not warranted.

[8] Public Trust then re-interviewed the investment adviser who provided the investment products that the complainant invested in, but Mr Owen was not made aware of the contents of that interview as Public Trust considered it did not need to do so, because it did not raise any new material.

[9] At a subsequent meeting on 29 June Mr Owen was dismissed by Mr David Muir, Regional Manager Eastern for Public Trust. Mr Muir told Mr Owen that after consulting with the General Manager Sales and Services (Mr Alex Polaschek), the Chief Executive and the Human Resources Department of Public Trust *it was the organisation's decision to proceed with the termination*. Mr Polaschek stated that this was the fifth issue in 18 months dealing with Mr Owen's behaviour, perhaps in response to the earlier submission that Mr Owen had an impeccable service record.

[10] Mr Owen was then offered the option of resigning on one month's notice, which was declined. There was discussion of Mr Owen remaining in limbo or on suspension until interim reinstatement could be claimed, but that was declined by Public Trust. No agreed statement about Mr Owen's departure was able to be negotiated and Mr Owen left his employment that day. Mr Owen has subsequently promptly filed for interim reinstatement, which must now be determined as the parties were unable to resolve their differences in mediation.

[11] Public Trust has subsequently undertaken not to fill Mr Owen's position until the Authority makes its substantive decision.

The Law

[12] The tests for determining claims for interim reinstatement are three, as is set out in *Cliff v. Air New Zealand* [2005] ERNZ 1 at 9, namely:

- *First, whether the plaintiffs have an arguable case of unjustified dismissal.*
- *Second, whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the plaintiffs; and*
- *Third, the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage).*

Arguable case

[13] I conclude that Mr Owen clearly has an arguable case for unjustified dismissal. Looking at the procedural aspects of the matter there is a question about who actually made the decision to dismiss Mr Owen. Mr Owen is entitled to direct access to the actual decision-maker if that was not Mr Muir.

[14] Second, Public Trust met with the investment adviser and did not relay any of the information to Mr Owen for his comment before the decision was made to dismiss him. While it is Public Trust's case that no new information was provided, it is possible on full investigation that Public Trust should have at least disclosed information that was favourable to Mr Owen, such as him not being involved in any kick-backs or other unlawful behaviour.

[15] Third, Mr Owen's dismissal in effect took place through a one step process. It was not a two step process whereby Public Trust declared its conclusion on serious misconduct and gave Mr Owen a clear separate opportunity to argue over the sanction to apply. This may have been fairer to Mr Owen.

[16] In terms of substance it is arguable that Mr Owen is right in his claim that he is being made a scapegoat for Public Trust having to settle with the complainant and/or that Public Trust should not, in a disciplinary context, simply have preferred the complainant's recall of events over eight years compared to Mr Owen. Furthermore, he may be right that any failures of his were not sufficiently serious, judged objectively, as to justify dismissal. These issues can only be dealt with properly in a full evidential hearing and therefore it follows that Mr Owen has an arguable case that his dismissal was unjustified.

[17] It is likely, however, that only the points over substance are ones that would lead to a conclusion that Mr Owen's dismissal was not only unjustified, but that he also ought to be reinstated.

Balance of Convenience

[18] The application on Mr Owen's behalf for interim reinstatement relies on the financial consequences and reputational damage to him if it is not awarded. Because

of Mr Owen's entitlement to significant service leave, however, there will be no financial costs to him in the interim, even although the Authority will not be able to deal with his case until October.

[19] I accept that Mr Owen's reputation will be better able to be restored if he continues to work for Public Trust in his role as an Estate Manager in the interim. On the other hand Public Trust is concerned about its reputation if Mr Owen returns, given what it considers to be serious breaches of its core operational policies by him, particularly as he operates almost entirely autonomously. I discount Public Trust's claims of loss of trust and confidence in Mr Owen because he did not show remorse or accept responsibility for his actions. In a disciplinary setting he was entitled to argue his corner. Furthermore, had a clear two step disciplinary process taken place, Mr Owen may well have been able to positively address these issues, had he known Public Trust had already concluded he was guilty of serious misconduct.

[20] The key issues are the relative hardship to the parties and moral justice (*Melville v. Chatham Islands Council* [1999] 2 ERNZ 76, at 100). Because of Public Trust's undertaking, the financial position of Mr Owen and the fact that it would be difficult for Public Trust to supervise Mr Owen in the intervening period given his role, I conclude that the balance of convenience marginally favours Public Trust, despite the fact that Mr Owen's reputation would be better restored if he were able to continue working for Public Trust in the interim.

Overall Justice

[21] The key factor here is relative strength of the parties' cases. It appears from the documents that Mr Owen may well have breached the Public Trust Code of Conduct in that he spoke with the complainant over many years regarding investment products not offered by Public Trust, and that he had passed on and supplied information to the complainant without doing what he should have, namely make the complainant a customer of Public Trust or put him directly in contact with the investment adviser.

[22] Whether those issues constitute serious misconduct warranting summary dismissal is a matter for the substantive investigation, but the fact that Mr Owen should have known not to have become involved in the way that he did, despite the best of motives on his part, lessens his prospects of securing reinstatement following

the substantive investigation, given the role and conservative method of operation of Public Trust. When this is coupled with the inability of Public Trust to easily supervise Mr Owen in his autonomous role I conclude that the overall justice of the case similarly favours Public Trust.

[23] I therefore dismiss Mr Owen's claim for interim reinstatement.

G J Wood
Member of the Employment Relations Authority