

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 174
3030514

BETWEEN RICHARD DEAN PALMER
Applicant

AND DUNCAN COTTERILL
Respondent

Member of Authority: James Crichton

Representatives: Adam Gallagher, advocate for the Applicant
Karen Radich, counsel for the Respondent

Investigation Meeting: 10 December 2018 at Christchurch

Submissions Received: 19 December 2018 from the Applicant
24 January 2019 from the Respondent

Date of Determination: 22 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Mr Palmer) alleges that he has suffered a personal grievance because the respondent employer (Duncan Cotterill) gave him a final written warning dated 31 August 2017 which was unjustified and which caused him disadvantage.

[2] Duncan Cotterill admits it did administer the warning to Mr Palmer, it accepts that that affected his employment to his disadvantage, but it maintains that its actions were entirely justifiable. Moreover, Duncan Cotterill says that it took the subject action after

following a fair process and the decision to issue the warning was a decision that a fair and reasonable employer could have made in the particular circumstances of the case.

Name suppression

[3] Mr Palmer is alleged to have inappropriately contacted a staff member of Duncan Cotterill over an extended period and it was this conduct which gave rise to the disciplinary warning. By agreement with the representatives, the name and any identifying features of that staff member will not be mentioned in this determination and I will refer to that staff member as Ms Z.

[4] That decision of mine is made pursuant to clause 10(1) of Schedule 2 to the Employment Relations Act 2000 (the Act).

Relevant facts

[5] Mr Palmer was engaged by Duncan Cotterill as a consultant in 2015. Previously, Mr Palmer had been a partner of Duncan Cotterill for around 20 years until he left in 2009 to pursue other professional opportunities.

[6] It appears to be common ground that when he was recruited back to the firm as a consultant in 2015, the intention of both parties was that he would conclude his legal practice at Duncan Cotterill before retiring altogether.

[7] It follows from the foregoing very brief summary of Mr Palmer's distinguished legal career that even in his role as a consultant from 2015 onwards, he was a very senior and experienced member of the Duncan Cotterill team.

[8] On 18 May 2017, there was an informal discussion between Mr Palmer on the one hand and both the Chief Executive and Chair of Duncan Cotterill. The evidence from both Mr Smith, Duncan Cotterill's Board Chair, and Mr McLaughlin, the Chief Executive of Duncan Cotterill, is that they held this 18 May 2017 meeting with Mr Palmer to address two separate groups of issues.

[9] The ostensible purpose of the meeting was a discussion about the bonus that Mr Palmer was due and that discussion appears, on the evidence before me, to have been the first subject of the meeting.

[10] Once that aspect had been dealt with, the evidence suggests that Mr Smith and Mr McLaughlin raised “some concerns about Dean’s (Mr Palmer) behaviour which had arisen from observations made by various partners”.

[11] The behavioural issues that were raised according to both Mr Smith and Mr McLaughlin were allegations about long lunches, some implication that Mr Palmer was guilty of drink-driving, a suggestion of him touching female staff and an allegation that he had a habit of taking out staff for coffee and lunches and that typically involved young female staff.

[12] It is common ground that no warning or direction was given to Mr Palmer in the 18 May 2017 meeting. It was simply that Duncan Cotterill had used the opportunity to raise some potential concerns with a very senior colleague and the expectation of Mr Smith and Mr McLaughlin was that by raising these concerns with Mr Palmer, they would ensure that Mr Palmer would modify his behaviour appropriately.

[13] However, over a two month period beginning on 10 May 2017 and concluding on 12 July 2017, Mr Palmer sent to a junior member of staff a series of emails suggesting dates for coffee and subsequently, dinner.

[14] One of the firm’s decision makers, Mr Lang, who was a signatory to the final written warning letter, gave evidence that he thought some of the language used by Mr Palmer was suggestive or contained sexual innuendo.

[15] The sheer repetitive nature of the email requests was regarded as an exacerbating factor as was the power imbalance between Mr Palmer and the complainant, Ms Z.

[16] Moreover, the apparent inability of Mr Palmer to grasp the seriousness of the situation appears to have been a further motivating factor for Duncan Cotterill; Mr Palmer did not

accept the suggestion of a power imbalance and labelled that as “political correctness” and the firm’s position was that Mr Palmer’s response to the allegations was “aggressive”.

[17] At the end of the sequence of emails, Ms Z forwarded the subject emails to two colleagues saying they made her feel “uncomfortable”, then provided the email trail to an HR Advisor for Duncan Cotterill in advance of her exit interview and then at the exit interview, Ms Z outlined her concerns in more detail, including asking the firm to respond to the matter in a serious way.

[18] A letter was written by Duncan Cotterill to Mr Palmer on 1 August 2017 raising concerns about the emails, there was an investigative process followed by the firm, including meeting with Mr Palmer to seek his explanations and then a final warning letter was issued by letter dated 31 August 2017.

Issues

[19] There is only one question for the Authority to answer, and that is whether it was available to a fair and reasonable employer in Duncan Cotterill’s position, having conducted a proper inquiry, to reach the decision that Duncan Cotterill did.

Is the final written warning justifiable under the law?

[20] I have concluded that a fair and reasonable employer in Duncan Cotterill’s position, after conducting a proper inquiry, could have decided that a final written warning was the appropriate response to the matters complained of.

[21] Of course, following *Angus v Ports of Auckland (No. 2)* [2011] NZEmpC 160, the decision to issue a final written warning need only be one of the decisions that a fair and reasonable employer in Duncan Cotterill’s position could arrive at. It is not necessary for me to decide that the outcome Duncan Cotterill chose was the only proper outcome; only that it was one of the proper outcomes.

[22] The appropriate place to start my review of Duncan Cotterill’s actions is the letter of 1 August 2017 first raising the concern about the email exchange with Ms Z. As well as clearly identifying the nature of the complaint, the letter also refers to the firm’s bullying and

harassment policy. Unless there be any confusion about what that policy said, a copy of the policy was attached for Mr Palmer's information.

[23] What seems to me to be significant about the firm's bullying and harassment policy is not that Duncan Cotterill relied on the policy in order to make its decision to issue a final written warning, but rather that the policy, or more accurately a breach of it, stood as an alternative ground for reaching the same conclusion that Duncan Cotterill did. To put that point another way, if the firm had relied on the bullying and harassment policy, then I accept the submission of the firm's able counsel that it could have relied on that policy to ground its decision to issue a final written warning.

[24] I am satisfied that the gravamen of the decision to issue a final written warning is, in fact, contained in the following paragraph of the letter issuing the warning dated 31 August 2017:

... We consider the content of the emails, and the repetitive nature of the invitation, to be entirely inappropriate and unacceptable. We consider your actions are all the more serious given that the email exchange inviting (Ms Z) for dinner was instigated by you only four days after the informal discussion you had with (Mr Smith and Mr McLaughlin) on 18 May 2017, where you were asked to refrain from taking female colleagues out for drinks and lunch due the perceptions this could create.

[25] However, I derive one precept from the bullying and harassment policy and it relates exclusively to the definition of harassment behaviour. Put shortly, the definition is a subjective one focusing on the perception the subject behaviour has on the victim, rather than any intention of the perpetrator.

[26] This point is relevant because one of Mr Palmer's defences, which appears to have been accepted by the employer, was that he meant no harm. The point here is that intention is irrelevant in circumstances such as this; what matters is how the behaviour is received by the other party. Ms Z said she found the behaviour "uncomfortable" and conveyed the impression that she could not simply decline Mr Palmer's numerous proposals because of the power imbalance, which the firm says Mr Palmer made light of.

[27] Duncan Cotterill say that it was necessary for them to issue a final written warning in order to seek to promote a change in Mr Palmer's behaviour, but also to meet its obligations to other staff because like every workplace, Duncan Cotterill has an obligation to provide a safe workplace for its staff.

[28] There is ample case law to support the view advanced by Duncan Cotterill where courts or tribunals have concluded that an employer may properly mandate a particular standard of behaviour as between one employee and other: see for instance *Chen v New Zealand Sugar Company Limited* [2010] NZEmpC 54 and *Rhodes v Chief Executive, Department of Work and Income* [2001] NZERA 50.

[29] Mr Palmer says that the investigation conducted by the employer was insubstantial and unsatisfactory. I do not agree. I accept the submission for Duncan Cotterill that the email trail speaks for itself. There is little investigation which the firm could conceivably undertake that would impact appropriately on the factual matrix it would need to decide the matter.

[30] Nor am I much attracted by Mr Palmer's contention that there was something wrong with the nature of the complaint the firm had received. It is a fact that there is no written statement from Ms Z before the employer (or indeed before me) indicating her wish to complain, or indeed asking Duncan Cotterill to take any particular steps. But I do not accept that that is somehow fatal to Duncan Cotterill's process.

[31] Duncan Cotterill were told by Ms Shaw, one of their own HR Advisors, that Ms Z had complained about the email exchange in her exit interview, (although without ever using the word 'complaint'), had previously provided Ms Shaw with copies of the offending material, and had shared with two colleagues the fact that Mr Palmer's emails made her feel uncomfortable.

[32] I do not accept the contention made for Mr Palmer that the complainant ought to have been available for Mr Palmer and his lawyer to question. That, as counsel for Duncan Cotterill correctly points out, is not the law. The issue at law is whether the subject employer has conducted a full and proper inquiry and satisfied itself of the existence of the complaint

and the factual nature of it. It is neither necessary nor required that the complainant be available to be examined by the other party.

[33] Nor do I think there is any force in Mr Palmer's claim that the firm's decision makers ought to have gone back to Ms Z to seek further information from her, including around whether she accepted Mr Palmer's contention (made I have to say at the eleventh hour) that she and Mr Palmer had agreed to meet and the email exchange was only about organising the detail of such a meeting.

[34] If Mr Palmer had made that suggestion (that he and Ms Z had agreed to meet) to the employer, then certainly he is right to say that the employer should have consulted Ms Z again because if there was an admission that the two protagonists had agreed to meet and were simply trying to get the details of a meeting date, it changes the whole flavour of the email exchange.

[35] The difficulty with Mr Palmer's thesis on this particular point is that he never made that statement to the employer and indeed it does not appear in his evidence before me until the statement of evidence in reply. That suggests to me that this explanation is either an ex-post facto rationalisation or that he was extraordinarily confused at the time that he spoke to the employer. There is nothing in his demeanour before me, or indeed in the evidence of his engagement with the employer, which would suggest that Mr Palmer would have missed making to Duncan Cotterill such a fundamental point if that were in fact the actual position.

[36] The process the employer followed in progressing this matter seems to me absolutely standard. I have already noted that the initial letter spelt out the complaint clearly and unequivocally. Mr Palmer was given a proper opportunity to respond and the matters raised by Mr Palmer were carefully considered by the employer. This latter point is I think, demonstrated by the extensive analysis in the 31 August 2017 final written warning letter.

[37] Nor do I think the email trail suggests two parties trying to get their diaries together, as Mr Palmer contends. I agree with the submissions made by Duncan Cotterill that a careful analysis of the emails does not suggest anything of the kind. For instance, nowhere in the email trail from Ms Z's side is there any suggestion of an agreement; nor does Mr Palmer

take up Ms Z's two offers to have coffee with him; nor does the continuation of the email trail post 18 May 2017 (the informal meeting date) suggest any modification of behaviour from Mr Palmer.

[38] Put shortly then, I am satisfied that it was available to Duncan Cotterill to conclude that a final written warning needed to be issued to seek to modify the behaviour of Mr Palmer and to protect other staff. That decision was informed to some extent by the 18 May 2017 discussion which had no effect on Mr Palmer's behaviour, What investigation was needed took place, and so a fair and reasonable employer in Duncan Cotterill's position could have concluded that a final written warning was an appropriate response to Mr Palmer's identified behaviour.

Conclusion

[39] I have not been persuaded that Mr Palmer has any personal grievance.

Costs

[40] Costs are reserved.

James Crichton
Member of the Employment Relations Authority