

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 164  
5582818

BETWEEN                      TRACEY SPENCER  
   Applicant  
  
A N D                              TE ANUA NUA TRUST  
   Respondent

Member of Authority:      T G Tetitaha  
  
Representatives:              D Vinnicombe, Advocate for Applicant  
   L Budge, Counsel for Respondents  
  
Submissions received:      25 May 2016 from both parties  
  
Investigation meeting:      25 May 2016 at Auckland  
  
Oral Determination:        25 May 2016  
  
Written Determination:      26 May 2016

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**ORAL DETERMINATION OF THE AUTHORITY**

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- A. Tracey Spencer was unjustifiably dismissed by the Te Anua Nua Trust.**
- B. There is an order the Te Anua Nua Trust pay Ms Spencer lost remuneration equivalent to 50% of one month's wages less PAYE pursuant to ss.123B, 128 and 124 of the Employment Relations Act 2000.**
- C. There is an order the Te Anua Nua Trust pay Ms Spencer compensation of \$3,000 pursuant to ss.123C(i) and 124 of the Employment Relations Act 2000.**
- D. The Te Anua Nua Trust is also ordered to pay a contribution towards Ms Spencer's costs of \$1,750 and disbursements of \$71.56 filing fee.**

**Employment relationship problem**

[1] Tracey Spencer was instantly dismissed following an altercation with two managers on 3 August 2015. The application before me is whether that dismissal was justified.

**Respondent**

[2] Originally when this matter was filed the named respondent were the “Trustees of the Te Anua Nua Trust”. The named employer in Ms Spencer’s employment agreement is Te Anua Nua Trust. The Companies Office record shows there is an incorporated entity known as Te Anua Nua Trust and it is a charitable trust registered under the Charitable Trusts Act. After hearing from both parties, the name of the respondent is amended to Te Anua Nua Trust.

**Issues**

[3] At a previous teleconference<sup>1</sup> it was agreed that the issues I need to determine for hearing are:

- (a) Whether Ms Spencer’s behaviour on 3 August 2015 justified her immediate dismissal; and
- (b) Whether the respondent’s actions leading to dismissal were fair and reasonable in all the circumstances.

**Relevant Facts**

[4] Te Anua Nua Trust (Trust) is a trust providing residential services for intellectually disabled persons, and also persons with multiple disabilities. Ms Spencer was a support worker responsible for the day to day care of residents. She was employed from 2 July to 3 August 2015, although I understand she had been previously employed in a similar role with this respondent for eight months.

[5] On 2 August 2015 Ms Spencer was undertaking various duties at a residential home. She became upset by what she perceived as a lack of support for her handling

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<sup>1</sup> Minute dated 27 April 2016.

of the residents that day. One of her managers, Tania Teinakore told her to go home. She was asked by another manager, Erin Hema, to attend a meeting the next day.

[6] At the meeting on 3 August there was a dispute about Ms Spencer's behaviour. Ms Spencer arrived at the meeting with a support person and friend. Mr Hema and Ms Teinakore were also in attendance. At the end of that meeting Mr Hema terminated Ms Spencer's employment.

***What are the statutory requirements for justified dismissals?***

[7] The fact that Ms Spencer's employment was terminated is accepted by both parties. The onus falls upon the Trust to justify whether its actions *were what a reasonable and fair employer could have done in all the circumstances at the time the dismissal occurred.*<sup>2</sup>

[8] In applying this test, I must consider the matters set out in s.103A(3) of the Employment Relations Act 2000 (the Act). Those matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[9] I must not determine that a dismissal is unjustifiable if the procedural defects were minor or did not result in an employee being treated unfairly.<sup>3</sup> A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.<sup>4</sup>

***What were the employment arrangements between the parties?***

[10] Ms Spencer signed an individual employment agreement on 2 July 2015. The employment agreement at clause 12.2 stated:

***Disciplinary Policy***

*12.2 The Trust's objective is to resolve any disciplinary matters according to the principles of fairness to every individual employee and to ensure the effective management of the Trust. All disciplines involving any employee(s) shall be conducted according to the Trust's policies and procedures.*

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<sup>2</sup> Section 103A Employment Relations Act 2000.

<sup>3</sup> Section 103(5) of the Act.

<sup>4</sup> *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26].

[11] The Trust had a conduct and disciplinary policy and procedure (policy). The policy included a definition of serious misconduct as behaviour “which undermines the contractual relationship between employee and employer and/or seriously threatens the wellbeing of the organisation, the staff or clients and may warrant dismissal”.<sup>5</sup>

[12] The policy gave specific examples of what serious misconduct may be. This included, amongst others, “verbal or physical abuse/violence, or threatening behaviour and/or language used in the workplace”.

[13] The policy also set out how disciplinary action should occur. This included counselling, verbal warnings and written warnings. It particularly included two points of note regarding action the Trust must take prior to dismissal:

- no person shall be dismissed without warning and explanation;
- The manager must advise the Board of Trustees prior to dismissal of staff. The Trust Board must agree to the dismissal of the employee.

[14] The policy provided for “summary dismissal” in the case of serious misconduct that warrants “instant dismissal”. I take the view that “instant dismissal” could not occur under the policy without there being prior warning and explanation and the agreement of the Board of Trustees.

### ***What happened on 3 August 2015?***

[15] The evidence of Ms Spencer, which is uncontested, was that on 2 August she was upset and unwell following an incident and on 3 August when she was asked to attend a meeting she was still somewhat upset and had a headache. She accepted Tania Teinakore’s evidence about what Ms Spencer said at the meeting. She also stated that she was upset and crying at one point during the meeting.

[16] There is a dispute about what Mr Hema told her at the beginning of the meeting. Ms Spencer said she was told by Mr Hema she was terminated or had to resign. Ms Spencer also disputed that she was aggressive and threatening at that meeting.

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<sup>5</sup> Te Anua Nua Trust Conduct and Disciplinary Policies and Procedures as at February 2015.

[17] The two managers Ms Spencer who met with on that day, Erin Hema and Tania Teinakore, deny Mr Hema told Ms Spencer at the beginning of the meeting she was terminated or had to resign.

[18] I accept their evidence. It would be somewhat unusual for a manger to start a meeting with an indication of termination. It does not appear to me that this meeting was intended to be disciplinary. However, it ended with disciplinary action, and I will go back and address this at a later stage.

[19] From my view, there was some heightened sensitivity on the part of Ms Spencer regarding the 3 August meeting. It is not unsurprising given her evidence about what happened the day before. She was feeling unsupported by her management and she may have, in my view, conveyed those issues in a way others would have thought to be aggressive. There would have been sufficient for an employer to start a disciplinary process.

[20] Mr Hema, to his credit, accepted that he had no prior approval from the Board of Trustees for dismissal of Ms Spencer. It would have been preferable if he had sought their approval. Cool heads were needed in this situation. From the evidence of both parties it was clear to me that this was a fraught situation. Ms Spencer was upset and expressing in a direct way her unhappiness with the management style of the two persons she was in the meeting with. It made it a difficult situation for the managers hearing, for what appeared to be the first time, some grievances about them from an employee. I accept their evidence they were attempting to finish the meeting to prevent any further disagreement between the parties. However, that did not warrant instant dismissal.

[21] This Trust has very clear policies. They have agreed to follow those policies with Ms Spencer in terms of the way her employment is to be managed. They could not have dispensed with those policies lightly and certainly not in a way which disadvantaged Ms Spencer. In my view, that was not a minor flaw and it did create unfairness for Ms Spencer.

[22] A reasonable employer would have followed its own disciplinary processes and policies prior to dismissal. This Trust did not. Therefore, in my view, Tracey Spencer was unjustifiably dismissed on 3 August 2015.

## **Remedies**

### ***Lost remuneration***

[23] I turn to the issue of remedies. Where I have determined that there is a personal grievance of unjustified dismissal, Ms Spencer is entitled to seek lost remuneration equivalent to a maximum of three months wages pursuant to s.128 of the Act. In considering an order for remuneration, an employee has an obligation to mitigate or prevent losses by seeking alternative paid employment. Employees who do not reasonably mitigate lost wages, have not lost remuneration and I am not required to order reimbursement as a consequence.<sup>6</sup> In practice, this requires evidence of a detailed account of efforts made to obtain employment. That includes dates, places, names, copies of correspondence and the like.<sup>7</sup>

[24] I have little evidence of mitigation in front of me. At best, I understand Ms Spencer signed up to WINZ for a benefit then sought to revise her CV, but otherwise took no steps to make any job applications. The job she obtained in September 2015 was arranged by a family friend. There has been minimal mitigation. I am only prepared to award one month's lost wages less PAYE and that will be subject to any contributing conduct.

### ***Hurt and humiliation***

[25] Ms Spencer seeks hurt and humiliation of \$6,000. She has given me some compelling evidence of her mental health following the termination of her employment. She refers to depression and anxiety and is currently on medication. \$6,000 would be an appropriate award subject to contributory behaviour.

### ***Contributory Behaviour***

[26] An employee's conduct may be relevant to remedies. I am required by s.124 of the Act to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance in deciding whether to reduce the remedies to be provided.

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<sup>6</sup> *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

<sup>7</sup> *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

[27] For contributing behaviour to be taken into account in reducing remedies, the actions of the employee must be both causative of the outcome and blameworthy.

[28] In my view, Ms Spencer's behaviour on 3 August would have sufficed for an employer to have started a disciplinary process. Unfortunately that was circumvented by the termination which was not her fault. There is causative and blameworthy behaviour and it is sufficient to reduce the remedies by 50%.

[29] Both parties accept costs can be awarded at the Authority's daily notional daily tariff of \$3,500 per day. This was a half day hearing. Accordingly, the starting point for costs shall be \$1,750. It is appropriate in this matter for Ms Spencer to recover her filing fee of \$71.56.

### **Orders**

[30] Accordingly the following orders are now made:

- (a) Tracey Spencer was unjustifiably dismissed by the Te Anua Nua Trust.
- (b) There is an order the Te Anua Nua Trust pay Ms Spencer lost remuneration equivalent to 50% of one month's wages less PAYE pursuant to ss.123B, 128 and 124 of the Employment Relations Act 2000.
- (c) There is an order the Te Anua Nua Trust pay Ms Spencer compensation of \$3,000 pursuant to ss.123C(i) and 124 of the Employment Relations Act 2000.
- (d) The Te Anua Nua Trust is also ordered to pay a contribution towards Ms Spencer's costs of \$1,750 and disbursements of \$71.56 filing fee.



**T G Tetitaha**  
**Member of the Employment Relations Authority**