

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA160A/08
5131243

BETWEEN THE APPLICANT
 Applicant

AND THE RESPONDENT
 Respondent

Member of Authority: Philip Cheyne

Representatives: Z, Advocate for applicant
 Geoff Davenport, Counsel for respondent

Investigation Meeting: 23 October 2008 at Blenheim

Determination: 29 October 2008

DETERMINATION OF THE AUTHORITY

[1] The applicant was suspended from his employment some while ago pending the respondent's investigation into alleged trust and confidence issues. He seeks from the Authority orders revoking his suspension, declaring void the respondent's disciplinary investigation to date and prohibiting the respondent from continuing its investigation. The suspension is said to amount to an unjustified disadvantage personal grievance, to be unlawful and in breach of good faith. The respondent says that it gave the applicant an opportunity to comment on whether he should be suspended, that he raised no objection and that it then decided to suspend him pending the conclusion of a disciplinary investigation. The respondent wants to proceed with the investigation.

[2] There was an investigation meeting to canvass these matters on Thursday 23 October 2008 and I released a determination on Friday 24 October declining the orders sought by the applicant with reasons to be given later. Those reasons are set

out in this determination. I will follow the applicant's submissions dealing with points raised therein.

[3] I note that there is an order prohibiting the publication of the names of the applicant, his wife and the respondent.

Basis for and process of the suspension

[4] The applicant's position is covered by an applicable collective agreement so he was initially offered employment on those terms and conditions and given an opportunity to seek independent advice. The applicant joined the union after he commenced work so he is covered by the collective agreement. That agreement refers to the respondent's discipline and dismissal policy and procedures and requires matters to be dealt with *fairly, promptly, consistently and in conformity with the prescribed procedures*. The policy permits suspension on full pay in certain circumstances such as where health and safety issues are involved or where the alleged conduct if proven would mean that the employee should not have direct contact with clients.

[5] I am referred to *Singh v Sterile Holdings Ltd* unreported, Couch J, 22 September 2005, AC 53/05. The facts in that case are different from the present case. Here, the applicant was written to and given an opportunity to comment about whether he should be suspended for the reasons advanced. He did not oppose the idea saying *All I can really say is that I have never acted in any way wrongly with a client I hope that your investigation will prove that* The suspension is on full pay and the respondent has acted in conformity with the applicable procedure.

[6] To some extent the challenge to the suspension is based on the notion that the respondent has further undisclosed information regarding the allegations and that the suspension indicates that the respondent has accepted the veracity of the allegations. However there is no evidence or information to support this notion. To the contrary, the policy states that *Suspension is not, in itself, a disciplinary action...* and the material available supports that respondent's contention that no conclusions have been reached about the veracity of the allegations and any effect on the employment relationship.

[7] There is also a complaint that the applicant was sick at the time he was suspended. If that was a reason to defer dealing with the suspension proposal at the time it should have been advanced then.

The applicant's treatment during the suspension

[8] There are complaints about the applicant's treatment during the suspension.

[9] First, there is a complaint about the duration of the suspension which commenced on 8 July 2008. The respondent's investigations have extended beyond New Zealand. There is no reason to think that this has been done in anything other than a diligent fashion. This work resulted in affidavits containing details of most of the allegations being furnished to the applicant on or about 24 September 2008 with a request to meet on 3 October 2008. The applicant declined to meet then and a further date was set for 24 October 2008. Before this second date the applicant departed New Zealand without advice to or the approval of the respondent apparently intending to return in mid November 2008.

[10] The applicant first applied to the Authority on 24 July 2008 asking for orders revoking the suspension and requiring his return to work. That was served on the respondent and a statement in reply was received by email on 8 August 2008 and by post on 12 August 2008. The reply was served on the applicant by the Authority. Before receiving the reply (it appears) the applicant lodged an amended statement of problem on 13 August which was served on the respondent. The respondent then lodged an amended reply. There was a phone conference on 5 September 2008, the parties consented to mediation, a direction was made and there were attempts to arrange a mutually agreeable date and venue before a further amended statement of problem was lodged on or about 29 September 2008.

[11] All this is by way of demonstrating that this is not a case of an employer suspending an employee and doing nothing to progress the disciplinary investigation. Here, the respondent sought and provided details of the allegations, responded to the applicant's applications to the Authority, attempted to obtain an early date for mediation and tried to meet with the applicant. I find that the elapse of time does not entitle the applicant to any orders revoking the suspension.

[12] The applicant complains that the respondent has failed to give details about the complaint and complainants making it unfair to continue the suspension, consider

dismissal or even call on him to answer the complaints. However, there is no reason to think that the respondent has not disclosed all of the material available to it. The points about cogency raised by the applicant will no doubt be considered by the respondent when it assesses what (if any) aspects of the complaints are established and any resulting impact on the employment relationship.

[13] One of the objections raised by the applicant is that he is bound by a continuing obligation of confidentiality in respect on the complainants. I accept counsel's point that the objection could only arguably arise in respect of two of the complainants. Counsel has now obtained express waivers from those two people so that resolves the objection. I also accept counsel's submission that any obligation of confidentiality did not prevent the applicant answering the allegations about his own behaviour.

Restrictive terms of the suspension

[14] As part of the suspension the applicant was directed not to enter the respondent's premises or contact staff or clients about the issues for investigation which were to be kept confidential. Such instructions are not uncommon in the context of disciplinary investigations.

[15] The respondent provides services to the public and it cannot be doubted that the applicant remains entitled to access those services despite the broad wording of the respondent's instruction. The applicant is obliged to comply with lawful and reasonable instructions; an instruction not to access the respondent's public services if required would be neither. However, it is not possible to similarly categorise the instruction to keep confidential the matters referred to in the respondent's letter of 9 July 2008. A breach of this instruction may itself be a breach of a lawful and reasonable instruction but that depends on the circumstances.

Pay slips

[16] The applicant requested and then received pay slips. He then followed up with some questions about payments. The respondent has made reasonable endeavours to comply with the applicant's requests and provide responses to his questions. This matter does not cast any shadow over the legitimacy of the suspension even if the applicant's assertions about the pay issues are correct.

Personal possessions

[17] This is framed as an allegation that the respondent has not allowed the applicant to retrieve personal possessions from the workplace but that is not what happened. After about a month of the suspension the applicant wrote and asked for his personal items to be returned to him. When he did not receive a reply he wrote again threatening to report the matter to the police. In the meantime the respondent had consulted counsel but there was a delay in counsel attending to that instruction. The applicant's second letter prompted a further response and apology. The matter is now resolved. The issue does not reflect on the legitimacy of the suspension.

Appraisal and training

[18] There may be some issue about the respondent not adhering to its appraisal process. If so, it predates the suspension by some months and is not relevant to the present dispute.

[19] On 4 September 2008 the applicant sought a copy of his most recent appraisal and he subsequently asked that he be permitted to undergo training as per the appraisal during the suspension. The respondent replied on 6 October 2008 declining that request on the basis that he should spend his time while suspended preparing his response to the allegations. There is no reason to criticise the respondent's approach.

Involvement of the applicant's child

[20] The respondent's communications during the suspension have included phone calls and personal delivery of items to the applicant at home. The first response has sometimes been by the applicant's child. I do not accept that the respondent has thereby involved the applicant's child in this dispute.

[21] When an objection was raised the respondent endeavoured to comply with the applicant's preferred means of communication.

Confusion caused by the respondent

[22] A point is made that the respondent's communications about the disciplinary investigation and the intended meeting are confusing. I disagree. The applicant is entitled to know that he is at risk of dismissal or some other disciplinary outcome if the respondent reaches a conclusion from the disciplinary investigation that there was

some misconduct by him. Fairness requires an employer to communicate that risk to the employee prior to seeking any comment from the employee. That is all that happened here.

Breaches of good faith

[23] There is a complaint about a lack of detail in the complainants' affidavits, non-disclosure of relevant files and the lack of an opportunity to test the complainants' evidence. That is couched as a breach of good faith.

[24] As I understand it the respondent has disclosed all the material it holds in relation to its concerns. It has given the applicant an opportunity to comment on this material. The applicant is entitled to cast doubt over the truthfulness or accuracy of the affidavits by raising the very points mentioned to the Authority. There is no reason to think that the respondent would not properly consider the applicant's comments as part of its assessment of the available information.

[25] The standard expected of an employer is to act fairly in any disciplinary investigation but it is not the same as conducting a trial. Nothing said by the applicant persuades me that there has been any unfairness by the respondent in its conduct of the investigation to date.

Out of hours work

[26] This is unconnected with the issues arising from the disciplinary investigation and requires no further comment at present.

Continuation of the suspension

[27] Properly the suspension will end once the disciplinary investigation has been concluded. No grounds have been established for the Authority to interfere with that process.

Conclusion

[28] The Authority will not make any orders restricting or restraining the respondent from continuing with its disciplinary investigation, whether by injunction, declaration, compliance or otherwise. I am not deciding that the applicant does not have a personal grievance in connection with the suspension, nor am I determining

that there has been a breach by him in connection with the allegations so as to justify a dismissal.

[29] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority