

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 29/09
5113396

BETWEEN X
 Applicant

AND Y
 Respondent

Member of Authority: Helen Doyle

Representatives: Andrew McKenzie, Counsel for Applicant
 Amy Shakespeare, Counsel for Respondent

Investigation Meeting: 13 November 2008 at Christchurch

Submissions received: 24 November 2008 from Applicant
 1 December 2008 from Respondent

Determination: 16 March 2009

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] I prohibit from publication under clause 10(1) of the Second Schedule to the Employment Relations Act 2000 the names of the applicant and respondent. I have made this order to ensure the name of a client referred to the Trust remains confidential.

Employment relationship problem

[2] X commenced work with Y in February 2007 to undertake a programme with Y's clients. Y is a trust, employing ten employees, and is funded by a District Health

Board. The trust is contracted to provide services to people who have experienced the effects of mental health disorders. Individuals or families are referred to the Trust from mainstream multi-disciplinary teams, general practitioners and other organisations. The Trust is a Kaupapa Maori organisation operating with Maori principles and models of practice.

[3] X says that he was unjustifiably dismissed from his employment with Y on 27 November 2007. He seeks compensation from Y in the sum of \$10,000.

[4] Y says that X was not dismissed from his employment but that if it is found that he was dismissed his dismissal was justified for serious misconduct.

The issues

[5] The issues for the Authority to determine are:

- Was X dismissed from his employment?
- If X was dismissed from his employment, then what actions did Y rely on for the dismissal, and did those actions amount to serious misconduct?
- Was the decision of Y to dismiss X justifiable in all the circumstances?
- If the decision was not justifiable, then what remedies is X entitled to and are there issues of contribution?

Was X dismissed from his employment on 27 November 2007?

[6] A letter was provided to X and his representative, Joe Davies, from Unite Union at a meeting held as part of a disciplinary process on 27 November 2007. The contents of the letter were discussed. The final sentence of the letter provided:

It is with our sincere regret that we have decided to terminate your employment with this organisation. We believe the reputation of this organisation has been brought into disrepute by your actions regarding the Breach of Confidentiality and secondly the Harassing behaviour shown toward a colleague was considered to be abusive and intimidating.

[7] Mr Davies asked the managers of Y to put the decision to dismiss on hold while he consulted with X. Mr Davies then met with the managers of the Trust.

Negotiations were undertaken but an agreement was not reached between X and Y. A personal grievance was raised by letter dated 31 December 2007 that X had been unjustifiably dismissed. Y says it was not until a mediation held in mid-February 2008 that it concluded that X's employment was over and he was paid holiday pay.

[8] I find that, notwithstanding the decision to dismiss did not take effect immediately on 27 November 2007, there was nevertheless a clear intention on that day that X's employment would be terminated. I accept Ms Scott's submission that if the point is reached where the Authority considers remedies, then the actions of Y after 27 November 2007 may have a bearing on remedies.

[9] There is an issue about the actual date of dismissal. It is sensible to regard it in this way. X did not return to work after 27 November 2007. He had, prior to the disciplinary process, suffered an injury for which he was on ACC. X was still on ACC at the time of the Authority investigation meeting. X knew there was a decision to dismiss him on 27 November 2007, but the dismissal was effectively suspended whilst negotiations took place. The earliest the dismissal can be said to have taken effect was the raising of the personal grievance of unjustified dismissal on 31 December 2007. A request was also made at that time for Y to stop topping up X's ACC payments. Y did not receive the 31 December 2007 letter until early January and therefore continued to top up X's ACC payments until the letter was received.

[10] In conclusion, I find that X was dismissed from his employment with Y.

If X was dismissed from his employment, then what actions did Y rely on for the dismissal and did they amount to serious misconduct?

[11] The allegations that the management of the Trust believed to be serious acts of misconduct were set out in a letter dated 1 November 2007 which invited X to attend a disciplinary meeting. The letter was delivered to X by one of the managers at his home.

[12] The first alleged action set out in the letter was that X deliberately breached client confidentiality when, on 17 September 2007, a referral was received by the Trust from Psychiatric Emergency for a person known to X. It was alleged that X, having agreed to a protocol for dealing with the file with the managers of the Trust, deliberately breached client confidentiality by contacting a family member. This

action resulted in a complaint to Psychiatric Emergency from the referred person that her information had been divulged to sources without her consent.

[13] The second alleged act of misconduct was that on 28 September 2007 X was verbally abusive toward another colleague and that this conduct was not considered to be respectful or professional.

[14] There was a delay in the holding of the disciplinary meeting. I find that the reason for this was that X injured himself on or about 30 September 2007 in an out-of-work accident. He was required to spend some time in hospital. X did attend work after his release from hospital for a very short time, mainly for financial reasons. A discussion then took place with one of the managers and it was agreed that X would be better off at home. An agreement was reached that Y top up X's ACC payments to deal with his financial concerns. I am satisfied that X was aware that the two matters of concern set out in the letter of 1 November 2007 would be the subject of a disciplinary process soon after they took place. I do not find any unfairness in the circumstances because of the delay. Given that X was, apart from a very short period, away because of his injury I do not, as submitted by Mr McKenzie, consider it relevant that there was no suspension for the period leading up to the disciplinary meeting.

22 November 2007

[15] X was represented at the disciplinary meeting on 22 November by Mr Davies and he had another support person present. The two managers of the Trust were present at the meeting but there is a dispute as to whether the chairperson of the Trust was present at the first meeting or the second meeting on 27 November at which the decision to dismiss was delivered.

[16] It is necessary to resolve the dispute because X's main criticism of the process undertaken by Y in investigating the allegations is that other unspecified matters were relied on by Y in reaching a decision to dismiss. The criticism is that X did not get an opportunity to respond to these unspecified matters. X says that it was the chairperson of the Board who referred to these matters in delivering the decision to dismiss him on 27 November 2007.

[17] X did not have a particularly clear recollection of the two meetings, although he did agree that the chairperson was only at one of the meetings. Mr Davies was quite firm in his evidence that the chairperson was at the second of the two meetings.

[18] The chairperson of the Board had relevant diary entries that she gave evidence about. She was quite clear that she only attended one meeting as part of the disciplinary process and that she did not attend any meeting at which a decision was given to X. She believed the duration of the meeting that she attended was about one hour, which evidence was consistent with Mr Davies' for the meeting on 22 November 2007. The chairperson's evidence is consistent with written notes taken by one of the managers following the meeting and the evidence of the two managers.

[19] Having heard from the chairperson, X and Mr Davies, I find that it is more likely that the chairperson attended the first meeting on 22 November 2007. Whilst Mr Davies was quite firm in his evidence that the chairperson of the Board attended the second meeting, he was in all likelihood mistaken about that.

[20] The first action discussed at the meeting concerned the altercation between X and another colleague. X explained, either directly or through Mr Davies, that he did have an altercation with a colleague in late September 2008 and swore at her. The explanation given in terms of that action was that after the altercation the colleague wrote a letter to X and that they had both moved on from the incident and considered it to be at an end. X said that the action of writing a letter by the colleague was one that was suggested by one of the managers. There was some discussion about the difference between management's right to follow up the matter and the colleague's action in writing the letter. The managers of Y said that they were concerned that X was not taking any responsibility for his actions and it is likely there was mention of some other times when X had been spoken to about his behaviour, although there had been no disciplinary implications in terms of those matters.

[21] The second action discussed at the disciplinary meeting concerned a referral to the Trust of a file about X's daughter. By way of background, before a weekly triage meeting, X saw his daughter's file and removed it from the pile of files to be allocated. After the triage meeting, X spoke to the two managers to discuss an appropriate protocol for dealing with his daughter's file. X accepted that he had advised the managers that he had had little contact with his daughter who did not live with him. He did not accept that he used the words *not close*. His daughter was

18 years of age at the time. It was agreed with the managers that one of them would deal with the file. X had input into which manager that would be. X was also advised that there would be a discussion with his daughter about the fact that X worked at the Trust and she would be asked whether she still wanted her referral dealt with by the organisation. X accepted that the managers discussed with him that his daughter was of an age where he had to be careful with confidentiality and that he should not assume that her mother, from whom X was estranged, knew about her attempted suicide because his daughter had presented at emergency services with other people.

[22] The evidence supported that it was the evening of that same day when X telephoned his daughter's mother. It is from this call that the allegation of misconduct arose.

[23] Following the call, X advised the manager dealing with his daughter's file that the Trust should close the file that it had on his daughter. The manager did not accept that he should do this and became concerned. X then visited his daughter although he did not accept that he did this using the address on the file which was not that of her mother. Mr McKenzie correctly submits that the later actions, although not in dispute, were not referred to in the letter of 1 November 2007.

[24] The Trust then received a call from Psychiatric Services that there had been a call from a very distressed client who wanted to lay a complaint against the emergency service for a breach of her privacy. The client was the daughter of X. She was upset because her mother had received a call about the referral and the circumstances surrounding it. The client was upset because her mother was not aware of her attempted suicide prior to the telephone call. The client was not at the time living with her mother and she was also upset that her father had described her mother as an incompetent parent.

[25] X's explanation at the disciplinary meeting was that he was very upset by the news of his daughter's attempted suicide and that he contacted her mother, his estranged ex-partner, because he wanted to know if she knew and then discuss a response. X said that anyone in his position would have done the same and that he did not accept that his conversation was other than caring and that he was ringing out of parental concern. He described himself in his written evidence as acting in *auto pilot*.

[26] It was agreed that the meeting on 22 November 2007 would be adjourned and that there would be a further meeting on 27 November to deliver a decision.

Meeting of 27 November 2007

[27] X says that his dismissal on 27 November 2007 was for matters other than those he had been given an opportunity to explain during the meeting on 22 November.

[28] The basis for this belief was an alleged comment or comments the chairperson made at the decision meeting on 27 November 2007. I have found that the chairperson only attended the meeting on 22 November 2007. The only discussion about other matters at the meeting on 22 November 2007 that I could ascertain from the evidence was in relation to incidents where a manager had had to intervene because of X's behaviour. The relationship between X and Y otherwise seemed to be a good and successful one and there was no evidence to satisfy me that there were other issues. Y thought X's programme which he had developed was very good. Y also treated X well when he was sick and following his injury.

[29] Mr Davies, in his evidence, said that he could recall at the meeting on 27 November the discussion starting with the breach of confidentiality and then something being said to the effect that the decision was *not to terminate for that reason*. Mr Davies said it was a discussion along the lines that the behaviour would normally have delivered a final warning but not termination. He said that then other matters came into it about which he was unclear and then it was decided that there was no option but to dismiss.

[30] The wording in the letter of dismissal does give me cause to pause and reflect whether there were other reasons for the dismissal. That is because the letter which was distributed and read at the meeting on 27 November 2007 provides about the breach of confidentiality that it was serious misconduct and states *therefore issuing a written warning is our policy for your conduct*. That sentence, however, is completely out of place with the balance of the letter and the lengthy reference in the letter to the provisions in X's employment agreement about confidential information and that a breach with respect to confidentiality constitutes serious misconduct. It is also inconsistent with the final paragraph in the letter which refers to termination.

The main emphasis in the letter is on the breach of confidentiality with the interaction between X and his colleague only being referred to at the end of the letter.

[31] Both managers say, after considering the disciplinary outcome, they concluded that dismissal was the only option. One of the managers said in her evidence that as part of the decision-making process a warning was never considered with respect to the breach of confidentiality because management had set up a clear safety plan with X to deal with confidentiality issues and that his daughter was entitled to confidentiality. The notes that one of the managers took to read at the meeting made it clear that the decision was based on the two actions about which X had an opportunity to give an explanation on 22 November 2007. Both managers said that the reason for the dismissal was the breach of confidentiality and the altercation with X's colleague equally.

[32] When X was asked at the Authority investigation meeting what he thought the reason was for his dismissal, he said that it was for breach of confidentiality and the altercation with another staff member. I am not satisfied that there were other reasons for X's dismissal. I think that some of the confusion may well have arisen because of the sentence in the letter of dismissal and perhaps how the decision was delivered at the time of the meeting. When the letter is read as a whole I am not satisfied that the sentence about a warning makes any sense. There are no other matters referred to in the letter as being relied on by Y in making the decision to dismiss.

[33] In conclusion, I am satisfied that the decision to terminate X's employment was for the two reasons for which X thought he was being dismissed. They were for the breach of confidentiality and the altercation with a colleague.

[34] I now have to consider whether these two grounds would constitute serious misconduct which would be required for dismissal.

[35] The issue has to be considered under s.103A of the Employment Relations Act 2000 on an objective basis, by asking the question whether, having carried out a full and fair investigation, conduct was disclosed which a fair and reasonable employer would regard as serious misconduct.

[36] Mr McKenzie submits that Y was estopped from, or waived any rights to, pursue with X the manner in which he interacted with a colleague because she had written a letter and the matter had been resolved between them.

[37] Objectively assessed, I find that a fair and reasonable employer would have raised concerns about X's interaction with his colleague. There were particular factors in terms of the interaction that concerned Y. The discussion with the colleague took place away from the group and X's reaction was upsetting for the colleague. There was a concern by management that X had not appeared to appreciate the effect of his behaviour on others. In this context, some other issues with X's behaviour were also discussed.

[38] In a workplace that deals with mental health issues behaviour is important because of the need for a supportive environment between colleagues and for balanced behaviours in working with those with mental illness. Whilst I have found that the matter would justifiably have been pursued by a fair and reasonable employer, I do not conclude that the incident itself was one that a fair and reasonable employer would conclude constituted serious misconduct.

[39] I now turn to the breach of confidentiality. Within the first few months of X's employment he was provided with a draft employment agreement. He did not sign it and did not negotiate it further. The employment agreement provided that disclosure of confidential information was regarded as serious misconduct that may give rise to summary dismissal. X knew the policies of the Trust included confidentiality and he understood the need for confidentiality in the area that the Trust operated. He agreed that there was emphasis placed on confidentiality within the Trust and in its work.

[40] I find that a fair and reasonable employer would consider that the action of X in relation to the breach of confidentiality was serious misconduct in circumstances where the need for the client's confidentiality had been discussed with X and there was an agreed protocol in place for a manager to deal with the file which provided some protection for X's daughter and her right to confidentiality.

Was the decision of Y to dismiss X justifiable in all the circumstances?

[41] I am required to consider, on an objective basis, the justifiability of the decision to dismiss X. That requires an evaluation of the decision against all the relevant circumstances. I have only found that the breach of confidentiality was serious misconduct and it is that breach I am required to consider.

[42] In terms of the breach of confidentiality, the managers said that they took into account not only the conduct with respect to the breach but also the lack of remorse or appreciation of the seriousness of the breach by X.

[43] One of the relevant circumstances is the nature of the organisation for which X worked. In organisations that assist people with mental health issues, confidentiality is a fundamental principle based on a client's right to decide whether information is shared with others. There are some exceptional circumstances where evidence can be disclosed without consent. In his written evidence, X said that he felt compelled to raise the matter with his daughter's mother and he saw it as a matter of life and death. In this case, Psychiatric Emergency retained an overview of his daughter's file and there was no evidence from anyone with a clinical overview of the file to support that a failure to advise the daughter's mother could/would be a life and death situation. Objectively assessed, I do not find that a fair and reasonable employer would find that an exception to the principle of confidentiality applied in this matter.

[44] As a consequence of the telephone call X made to his daughter's mother, his daughter became upset and made a complaint to Psychiatric Emergency. X's daughter did not want the Trust to deal with her file after that. Objectively assessed, the complaint of a breach of confidentiality did bring into question the Trust's ability to maintain, on behalf of referred clients, confidentiality. A fair and reasonable employer would have considered, as part of the circumstances, the very difficult and sad situation that X was in as a parent. In doing so it would have considered its own conduct and whether there was support for X.

[45] The managers in this case realised the very difficult situation facing X and the Trust. A protocol for dealing with the file in an appropriate way was discussed with X and agreed to by him as soon as he properly advised them that he knew the referred person. X had input into which manager would deal with the file. The managers were told by X that he and his daughter were distant. I find that it was reasonable in those circumstances for the managers to conclude that confidentiality could be maintained. This may not have always been the case. X was reminded again at the time of the discussion with the managers about the importance of confidentiality and advised not to assume that his daughter's mother knew of the attempted suicide.

[46] X then, without reference back to the manager who was to deal with the file, made a deliberate decision that evening to contact the mother of his daughter. The

fact that such conduct occurred following the discussion with the managers as to a protocol for dealing with the file which protected his daughter increases its seriousness. It was conduct destructive of the trust and confidence that the managers were entitled to have in X. The delay between the discussion and the conduct was such that a fair and reasonable employer would conclude it was less likely to be conduct undertaken without thought and consideration.

[47] X then asked the managers that his daughter's file be closed. He paid a visit to his daughter. Discussion took place with X after these matters came to the attention of the managers and there was concern expressed about his conduct and the need for confidentiality.

[48] The managers were concerned that X did not appreciate the seriousness of the conduct and did not show real remorse. Mr McKenzie submitted that one of the managers seemed troubled by the apology coming through Mr Davies and failed to appreciate the roles of a representative and X's right to have one.

[49] A fair and reasonable employer would have wanted to know, in these circumstances, that X did appreciate the seriousness of the breach so that the Trust could have confidence in X in the future that he would adhere to his professional obligations with respect to confidentiality. I do not find there was a failure to appreciate Mr Davies' role in delivering an apology but the managers were not satisfied that such reassurance had been provided by what was said.

[50] Mr McKenzie submits that a fair and reasonable employer would have taken into account that the situation was unlikely to recur. A fair and reasonable employer would not be satisfied about that without an appreciation by X of the seriousness of the breach. The managers concluded not unreasonably in my view that there was no appreciation of the seriousness of the breach of confidentiality.

[51] I find that the conduct, in terms of the breach of confidentiality, which followed a discussion and agreement with X about a protocol to protect the client was of such seriousness that a fair and reasonable employer would have dismissed X in all the circumstances.

[52] X does not have a personal grievance that he was unjustifiably dismissed. There is nothing further I can do to assist him.

[53] I apologise to the parties for the delay in this determination which was because of personal reasons outside of my control.

Costs

[54] I reserve the issue of costs. I would encourage the parties to reach an agreement, failing which Ms Shakespeare has until Friday, 3 April 2009 to lodge and serve submissions as to costs and Mr McKenzie has until Friday, 24 April 2009 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority