

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Lana MacKay (Applicant)  
**AND** Chief Executive, Land Transport Safety Authority (Respondent)  
**REPRESENTATIVES** D McLeod for Applicant  
S Turner for Respondent  
**MEMBER OF AUTHORITY** G J Wood  
**INVESTIGATION  
MEETING** 7 December 2004  
**FURTHER SUBMISSIONS  
RECEIVED BY** 24 December 2004  
**DATE OF  
DETERMINATION** 21 January 2005

**DETERMINATION OF THE AUTHORITY**

1. Ms MacKay claims that her summary dismissal by the respondent (the LTSA) was unjustified. By contrast, the LTSA claim that Ms MacKay was justifiably dismissed, following a full and fair investigation, for attempting to coerce a subordinate into misleading her employer. The parties have attended mediation but despite this and further discussions held during the course of the investigation meeting, were unable to resolve their employment relationship problem.

**The Facts**

2. Ms MacKay had nine years experience with the LTSA in its Napier office. At the time of her dismissal she was the Regional Administration Officer. She reported to the Regional Manager, Mr Pat Aldridge. The last year of Ms MacKay's employment with the LTSA was particularly difficult for her, both for personal and work related reasons. No doubt significant events in Ms MacKay's personal life impacted on her work

relationships, but that is not a matter that forms any significant part of this determination.

3. In November 2003 Ms MacKay was issued with a final written warning following a disciplinary meeting at which she was represented. The issue related to Ms MacKay's failure to pay for personal calls made on her LTSA supplied mobile phone, refusing to provide a detailed reconciliation and acting in a misleading and deceptive manner over the whole incident.
4. She was told that any further acts of misconduct may result in the termination of her employment. The warning issued by Mr David Wright, the Director of Land Transport Safety (who is also the Chief Executive of the Land Transport Safety Authority) also stated:

*“Furthermore, if you engage in any other behaviour which is considered serious enough to warrant disciplinary action, this too could result in the termination of your employment. Such behaviour includes, but is not limited to:*

- *Improper/false declarations;*
- *Unauthorised/improper use of LTSA work resources (including LTSA phones and credit cards);*
- *Unco-operative, misleading and/or deceptive conduct towards your manager; and*
- *Unco-operative or disruptive behaviour in the office.”*

5. Ms MacKay chose to not formally challenge the warning because she wanted to demonstrate to the LTSA that her behaviour did not always involve challenging any decision of LTSA management (which was management's perception) and because she believed she could meet the requirements placed on her under the final warning.
6. From Mr Aldridge's perspective, however, Ms MacKay's behaviour continued to be uncooperative. There are three particular incidents which Mr Aldridge raised with Ms MacKay, both at the time they occurred and later. One involved her allegedly ignoring a request not to put calls through to his office; another involved her declining to assist a member of the public during a general staff meeting, despite a request from Mr Aldridge to do so; and the other involved a complaint by a fellow staff member that Ms MacKay would not follow his requirements in relation to a work issue. The first matter was witnessed by Ms MacKay's subordinate, who told Mr Aldridge of her

observations when he requested her to do so. In a file note of a meeting between Mr Aldridge and Ms MacKay held on 9 December, Mr Aldridge noted that Ms MacKay's subordinate supported his recall of events.

7. Mr Aldridge raised his concerns with Mr Wright after the third incident had been discussed with Ms MacKay and the complainant. Accordingly, they determined to meet with Ms MacKay and sent a letter outlining their concerns. The letter stated as follows:

*"I am writing to advise that Pat Aldridge and I want to meet with you in relation to some recent incidents involving your behaviour at work, which have been brought to my attention and appear to be the type of behaviours that were addressed in the final written warning you were issued on 26 November 2003.*

*I would like to discuss with you what appears to have been a pattern of uncooperative/provocative behaviour by you at work that your manager has had to address with you, for example:*

- *A written complaint from [name deleted] about you (attached);*
- *Your apparent refusal to follow an instruction from your manager at a meeting I was running; and*
- *Your apparent uncooperative actions in relation to your manager.*

*I need to hear your explanation regarding these matters, following which I will consider whether any further steps are appropriate, which may include dismissal in light of the final warning..."*

8. These incidents occurred in December 2003 and January 2004. Because of various commitments of the parties and their representatives, the meeting was unable to take place until 20 February 2004. The meeting appeared to go well for all concerned. Mr Wright made it clear that it was not a disciplinary meeting. However, he also made it clear that if Ms MacKay's explanations were not satisfactory to him, then disciplinary proceedings could follow.
9. The meeting took over an hour. Ms MacKay's explanation in respect of the staff meeting, i.e. that she had not refused Mr Aldridge's request to attend to a member of the public, was disputed by Mr Wright, who stated that he was at that meeting and had heard her refusal.

10. Part of the meeting was also spent discussing the phone incident. I am satisfied that the matter of other employees having witnessed Ms MacKay's actions on that day (such as Ms MacKay's subordinate) was raised and thus Ms MacKay knew that management knew of that person's indirect involvement in the situation. Mr Wright noted that there were some points (mainly hearing for himself what Ms MacKay's subordinate had witnessed) that needed clarification and that that could be done after the meeting, but that he was more concerned about how the parties could move forward so that the office could function in a positive manner. In particular, he told Ms MacKay that she needed to understand that a number of staff had problems dealing with her.
11. Mr Aldridge suggested that the performance management process could be used to clarify Ms MacKay's key areas of responsibility and determine how her performance would be measured.
12. As noted above, Mr Aldridge was already aware that Ms MacKay's subordinate believed that Ms MacKay had ignored his request in relation to the phone incident. Immediately following the meeting Mr Wright called that person into Mr Aldridge's office to get her version of events first hand. That worker confirmed to Mr Wright that in her view, Ms MacKay had deliberately put the call through to Mr Aldridge in breach of his instruction.
13. Immediately afterwards Mr Aldridge took Mr Wright to the airport. During that period Ms MacKay approached her subordinate. Ms MacKay was unaware of the fact that Mr Wright had called her subordinate into the office, because she had left to have further discussions with her own representative. During that debriefing session her representative recommended that Ms MacKay discuss with her subordinate her perception of the phone incident so as she might understand how her actions could have appeared to be uncooperative. This of course was an issue for Ms Mackay as it had been raised at the earlier meeting.
14. What transpired at the meeting is disputed by Ms MacKay and her subordinate, in part at least, but it is worthy of note that the subordinate went to talk to two other staff about what had happened. They advised her to write down her recollection of events

and discuss it with Mr Aldridge when he returned. She did so. Mr Aldridge asked her to type up a full account of the incident.

15. The subordinate was concerned that Ms MacKay would see her account and thus that it could lead to a deterioration in her relationship with Ms MacKay, which had improved after a rocky start some years earlier. From her perspective she was concerned about what she saw as Ms MacKay's bullying and did not want to be blamed if Ms MacKay were dismissed. She therefore declined to make a full written response. Furthermore, she was so concerned about her situation that she sought legal advice and did not attend work the next week, but was allowed by the LTSA to take leave.
16. As a result of the concerns raised, Mr Aldridge contacted Mr Wright and determined to hold a disciplinary investigation in relation to the latest incident.
17. Ms MacKay was accordingly summonsed by letter to another meeting with Mr Aldridge and Mr Wright. The letter states as follows:

*"I am writing to request a time to meet with you, as soon as possible, in relation to an incident involving you and [name deleted] following my meeting with you on Friday, 20 February 2004, which appears to raise serious issues in relation to the LTSA's ability to have continued trust and confidence in you as an employee.*

*I am of the understanding that after the meeting we had on Friday, you approached [name deleted] and sought her view in relation to a matter that had been raised with you at our meeting. Specifically, I understand that you asked [name deleted] how she would answer my question in relation to the issue of whether or not your refusal to comply with Pat Aldridge's request during a meeting last year was intentional. When [name deleted] advised that she would answer honestly that she thought your actions were intentional, and when she advised you, you told her that you would be sacked and implied that she should change her response.*

*I urgently need to hear your explanation regarding this matter as it appears to me that you have responded untruthfully to my question at our meeting, and that you have tried to coerce a fellow employee into not answering my questions truthfully.*

*I advise that disciplinary action may be an outcome of this meeting, including, but not limited to, dismissal, especially in light of the final warning you recently received. As such you are invited to bring a support person/representative to the meeting..."*

18. The meeting between Mr Aldridge, Mr Wright and Ms MacKay and their respective representatives (Ms Turner and Mr McLeod) was accordingly held on 26 February. Mr Wright commenced the meeting by setting out his concerns and noting that Ms

MacKay's conversation with the subordinate caused her distress and considerable discomfort and that she felt that she was being coerced and being put in a difficult position. Mr McLeod indicated that he had advised Ms MacKay to approach her subordinate. Mr Wright emphasised that he considered it unwise for Ms MacKay to say that she would get the sack if her subordinate answered LTSA's questions honestly. Mr McLeod made the point that Ms MacKay's intention was important and that she only held the conversation in order to understand how she was perceived at work.

19. Ms MacKay had made a file note of the incident. Of particular importance was her reaction to her subordinate's response that she believed that Ms MacKay had deliberately refused an instruction from Mr Aldridge. Ms MacKay stated at the meeting that she had responded to that statement by her subordinate by saying that she thought she was "f\*\*\*\*d". At the meeting she told the LTSA that she regretted making the comment, which really was only meant to say that she herself had, in her words, "screwed up".
20. Mr Aldridge made the point that the subordinate was very distressed and felt bullied by Ms MacKay. Ms MacKay denied being a bully and could not understand why her subordinate would be so distressed as she was a nice person and Ms MacKay believed that she had a good rapport with her. Mr Wright also noted that it had been that very day that he had discussed with her the problem of the perception of her in the office and that she was to avoid further conflict.
21. Ms MacKay denied saying that she would have to speak to her lawyer and that she would be sacked. Mr McLeod indicated that she had said something unwise, but that there was no intention to coerce the subordinate.
22. Mr Wright then called an adjournment in order to speak to the subordinate directly by phone. The subordinate confirmed that she had been approached to have a confidential discussion by Ms MacKay, a discussion which included the phone call incident. The subordinate was asked by Ms MacKay what her version of events was and that she told Ms MacKay that she had seemed to ignore Mr Aldridge's request. Ms MacKay disputed that. Ms MacKay told her that she had not deliberately let the

phone ring. Ms MacKay asked her if it appeared that she was intentionally ignoring Mr Aldridge's request. When Ms MacKay responded that she wanted the subordinate to tell the truth, she told Ms MacKay that it did look intentional. Ms MacKay's response, according to the subordinate, was "*if you say it was intentional I will be sacked*". The subordinate then said that she did not think that Ms MacKay would be sacked just because of this incident and that Ms MacKay replied that they were looking for any reason, even one so trivial. Ms MacKay then told the subordinate that she would have to contact her lawyer regarding the conversation.

23. Mr Wright also asked her whether Ms MacKay had told her "*oh dear, I'm f\*\*\*\*d then*" after she had given her her view of Ms MacKay's actions. The subordinate denied that that had ever been part of the conversation but confirmed her version of events, including that Ms MacKay told her that she would have to speak to her lawyer.
24. The meeting then continued and Mr Wright told Ms MacKay that her subordinate's recollection of the meeting was different to hers and read that recollection out. Ms MacKay said that the only negative thing in the conversation was that one comment. Mr Wright then gave Ms MacKay another opportunity to say anything she wanted to. It was submitted on her behalf that the relationship was salvageable, that Ms MacKay had the best interests of the LTSA at heart and that she was honest, as was shown by her accurate use of bad language in the memo. Ms MacKay added that she wrote the note soon after the meeting she held with her subordinate.
25. Mr Wright then re-read the subordinate's statement. Ms MacKay stood by her statement. She also again denied referring to a lawyer.
26. After that Mr Wright and Mr Aldridge adjourned the meeting to consider the LTSA's decision. Mr Wright did not accept Ms MacKay's explanation. He took into account the fact that Ms MacKay was on a final warning, that she had previously had difficulty with other staff, including Mr Aldridge, and that there was no reason why Ms MacKay's subordinate should give anything other than a true account of the incident. LTSA management was aware that the subordinate considered that Ms MacKay made her feel that if she was honest she would be responsible for Ms MacKay being dismissed and that she also felt that Ms Mackay was putting her under pressure not to

be honest and not to say that the phone incident looked deliberate. Mr Wright considered that Ms MacKay had told her subordinate that she would be sacked if the subordinate repeated her views to the LTSA. Mr Wright concluded, and Mr Aldridge concurred, that Ms MacKay's behaviour amounted to intimidation of her subordinate and was designed to coerce her into acting dishonestly or, at best, uncooperatively. He considered that conduct to be serious misconduct and also a breach of the terms of her final warning in that it was uncooperative behaviour in the office. On that basis he determined to dismiss Ms MacKay summarily, although one month's salary was paid as an ex-gratia payment.

## The Law

27. The standard test to be applied for dismissals was set out definitively in *W & H Newspapers Ltd* [2000] 2 ERNZ 448 by the Court of Appeal. As was stated at p.457:

*“The burden on the employer is not that of proving to the Court the employee's serious misconduct, but showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.”*

28. This approach was more recently clarified in *Peterson v. Board of Trustees of Buller High School* [2002] 1 ERNZ 139. The key issue for determination is, as summarised in para.101:

*“... whether, at the time of the dismissal when the employer claims to have believed that the plaintiff was guilty of serious misconduct, the employer had reasonable grounds to sustain such a belief and whether the employer had carried out as much investigation into the matter as was reasonable in the circumstances at the stage when it formed the belief on those grounds. However, there is a wide range of discretion left to employers in such situations and the Employment Tribunal ... may not substitute its own view of the facts for the view honestly and reasonably reached by the employer.”*

29. These principles were reinforced in *Chief Executive of the Ministry of Maori Development v. Travers-Jones* (unreported, Goddard CJ, 4 April 2003, WC11/03), where it was held:

*“A personal grievance is not an appeal to the Employment Relations Authority from the employer's findings of fact but is an inquiry into the question of whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal. In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where*

*there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.”*

30. It is thus not for me to determine whether or not Ms MacKay actually intended to coerce a fellow employee into not answering the LTSA's questions truthfully. However, the LTSA needed to proceed with caution, given that the seriousness of the accusation makes the probability of its occurrence more remote or unlikely and hence the more difficult to establish (*Honda NZ Ltd v. NZ Shipwrights Union* [1993] NZILR 23).

### **Determination**

31. It appears to me in this case that the LTSA had to draw inferences about Ms MacKay's intentions from surrounding or circumstantial facts, as well as by choosing between conflicting accounts. It is for the LTSA to satisfy me that their conclusions were genuine and ones open to a fair reasonable employer.
32. I do not accept that Mr Wright approached this matter with a closed mind. He had, after all, met with Ms MacKay the week before in a non-disciplinary setting when he could well have treated the matter as disciplinary first up, given the final warning. Furthermore, he was in a position to take into account the fact that he had been present when Ms MacKay had refused an instruction of Mr Aldridge and then denied it to him later. This is a matter that had been discussed with Ms MacKay, even if not at the 26 February meeting, and therefore Mr Wright was entitled to take into account his own knowledge in determining what Ms MacKay's intentions were when discussing matters with her subordinate.
33. Mr Wright faced a very difficult decision. Ms MacKay vehemently denied the very serious accusation of trying to coerce her subordinate and had legitimate reason for talking to her about the phone incident, given that she had been requested to do so by Mr McLeod. Furthermore, Ms MacKay's subordinate had already informed LTSA management of her views, so it would be very difficult to coerce a change in those views. On the other hand, this type of matter had been raised recently in the context of a formal meeting, Ms MacKay was on a final written warning and was not to engage in uncooperative or disruptive behaviour in the office and the subordinate's evidence

of feeling coerced was never in dispute. The issue is whether or not the evidence was sufficiently strong, given the nature of the allegations, that Mr Wright was able to conclude that Ms MacKay intended to coerce her subordinate over her version of events in relation to the phone incident.

34. Mr Wright believed he had to choose between the two different recollections on the basis of what was more likely, taking into account the fact that this was a serious allegation. This was a correct step to take, although it was possible that he could have accepted an amalgam of the two versions of events, which were not all that different in many respects. I thus accept that Mr Wright had to make a decision on which version of events he preferred and that once he did that, this had implications for his central conclusion as to whether Mrs MacKay intended to coerce her subordinate over the issue of what was said to management over the phone incident. In this regard he was entitled to take into account the fact that even Ms MacKay stated that her subordinate was honest the whole way through, particularly as the subordinate had nothing to gain over the matter, especially compared to Ms MacKay.
35. Mr Wright then went on to conclude that, as a result of the verbal and non-verbal behaviour as reported to him by Ms MacKay's subordinate, Ms MacKay had intended to try and prompt a more favourable reply from her subordinate in later discussions with management.
36. Having concluded that the words "*if you say that it was intentional I will be sacked*" were used and that there was reference to Ms MacKay's lawyer, was it then further open to Mr Wright to conclude that Ms MacKay's subordinate's assessment of how she was treated was an accurate one in terms of Ms MacKay's actual intentions? It was possible that Ms MacKay approached her subordinate with a genuine intention of receiving feedback, but on not liking the feedback, strongly implied by words and actions that she wanted it changed.
37. I accept that LTSA management had already made Ms MacKay aware that her subordinate had witnessed the matters in dispute over the phone call. I also accept that Ms MacKay's subordinate told her near the commencement of their discussion that she had already been spoken to by Mr Aldridge about her version of events. Ms MacKay

thus understood her subordinate had already revealed her recollection to LTSA and that thus no practical benefit would likely accrue to her if she were to change her story. Mr Wright said he could not recall Ms MacKay telling him at the final meeting that she already knew that her subordinate had spoken to management about the incident. He certainly did not ask any question along those lines and thus he failed to fully address one important aspect this matter.

38. On any reasonable assessment of this matter I can not accept that it was open to the LTSA, given the seriousness of the accusation of coercion, to conclude that Ms MacKay had the necessary intention. On the basis of the subordinate's recollection there was nothing directly stated that called for the subordinate to change her recollection of the phone incident. Furthermore, Ms MacKay already knew that her subordinate had told LTSA management of her recollection of the phone incident, so there was little or no incentive for her to try and change her subordinate's recollection. As the LTSA's conclusion was not one open to a fair and reasonable employer it therefore follows that Ms MacKay's dismissal was unjustified (*Honda* applied).

## **Remedies**

39. Ms MacKay seeks reinstatement. Unfortunately, I have had to conclude that her reinstatement would be impracticable on the basis that she is unlikely to be a harmonious and effective member of the Napier LTSA team if she were to return. She has had a number of serious staff-related problems and the evidence shows that even despite a final warning she was unable to ameliorate her behaviour even immediately afterward. For example, her subordinate remains intimidated by her and her relationship with Mr Aldridge appears unsalvageable. Her approach to her subordinate was made for good reason, but her behaviour was such as to intimidate her own staff member, which is unacceptable, even if not done deliberately. I have taken into account Ms MacKay's claims in evidence that she has since mellowed, but unfortunately I can only conclude that the damage has already be done.
40. Ms MacKay has claimed compensation under s.123(c)(i). I accept that she has suffered injury to her feelings as a result of her dismissal. She gave little direct evidence of humiliation, but spoke of being passionate about her work at the LTSA

and of the problems not having a job has caused her. Account must also be taken of the fact that she is not to be reinstated.

41. On the other hand, Ms MacKay has contributed to the situation she has faced. She did not ameliorate her behaviour even in the face of a final warning and her approach to her subordinate on the 26<sup>th</sup> of February was conducted in an unacceptable manner. Taking all these factors into account I assess compensation at \$6,000.
42. Ms MacKay also claimed lost remuneration. Taking into account her contributory actions and the fact that she probably would have given up work about a month before the birth of her child I conclude that three months remuneration, namely \$9,750 gross, is appropriate.

### **Conclusion**

43. Ms MacKay was unjustifiably dismissed because no fair and reasonable employer could have concluded that her behaviour on 26 February was intended to coerce her subordinate to mislead the LTSA about an earlier incident. I therefore order the respondent, the Chief Executive of the Land Transport Safety Authority, to pay to the applicant, Ms Lana MacKay, \$6,000 in compensation and \$9,750 in lost remuneration.

### **Costs**

44. Costs are reserved.

**G J Wood**  
**Member of Employment Relations Authority**