Determination Number: AA 126/06
File Number: AEA 778/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Christine Rogers (Applicant)
AND	Otamatea Veterinary Club Inc. trading as The Vet Centre (Respondent)
REPRESENTATIVES	Dr Christopher Perry, Counsel for Applicant Mr Murray Broadbelt, Advocate for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	24 February 2006
SUBMISSIONS RECEIVED	17 March 2006
DATE OF DETERMINATION	19 April 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] While employed by The Vet Centre, under which name the respondent in this case trades, the applicant Ms Christine Rogers was questioned by her employer about some of her conduct. She was subsequently dismissed, summarily, for one particular matter the employer had been concerned to investigate. She raised personal grievances, first challenging the justification for the way the employer had been carrying out its enquiries, and then later challenging the justification for the dismissal itself. As her employment relationship problem remained unresolved, even after mediation, a determination has now been sought from the Authority.

[2] Ms Rogers seeks a finding from the Authority that her former employer acted unjustifiably to her disadvantage and that it also dismissed her unjustifiably. She seeks orders requiring The Vet Centre to reimburse her for lost wages including holiday pay, and to pay her a bonus she claims was an expected benefit of her employment. Orders are also sought to compensate her for stress and humiliation. Ms Rogers has not pursued reinstatement, a remedy she had initially sought.

[3] Ms Rogers first became employed by The Vet Centre in 1997. This was on a casual basis until late 2002, when her status changed to permanent-part time.

[4] Ms Rogers worked as a Vet Nurse/Cleaner at the respondent's Waipu clinic. She also ran her own kennels business from her home. In February 2004 ms Roger's dog breeding produced a litter of bullmastiffs which she arranged to have vaccinated in preparation for sale of the puppies. There is no dispute that the vaccinations were carried out in April 2004 at the Waipu clinic by a veterinarian who was then employed by The Vet Centre. There is also no dispute that the usual

practice was for employees to be billed, at staff rates, for work such as this they had had done by their employer.

Payment of fees

[5] The question of payment for the puppy vaccinations became a matter of dispute, one which lead ultimately to the dismissal of Ms Rogers. In relation to this question, she said in a signed note dated 16 March 2005 given to her employer;

> *On the 16th of April 2004 I had 6 puppies vaccinated and this was paid for in cash the following week.*

[6] Clearly from her note, Ms Rogers did not in March 2005 dispute her obligation to pay for the work carried out 11 months earlier. Her note was an acknowledgement that the usual charging practice had applied to the vaccination work. The note was also a declaration that she had in fact promptly paid for the work.

[7] However the employer believed that at times during the months prior to writing her note, Ms Rogers had made inconsistent and contradictory statements about the payment which, contrary to her later statement, The Vet Centre believed she had not made at all. Her earlier statements included one, so the employer believed, that she should not have to pay because the staff veterinarian had not invoiced her for the work at the time it was carried out. Implicit in such a statement (if it was made) was an acknowledgement that the fees had not been paid.

[8] It seems the veterinarian who had administered the vaccinations had not straight afterwards given instructions to the accounts staff for Ms Rogers to be charged for the work, and later on the veterinarian had not attended to this by the time she left the practice two or three months after the work had been done. Nevertheless the accounts staff knew of the vaccinations, and also knew they had not been charged for. They believed the vaccinations had not been paid for by Ms Rogers.

[9] Mr Graeme Goodall the CEO of The Vet Centre, became aware of the matter in mid 2004 and gave instructions for the fees to be charged to Ms Rogers account. They were eventually posted in February 2005. Over a period of months Ms Rogers made a number of statements to Mr Goodall and other staff about the fees and whether she had paid them or intended to pay them. Mr Goodall's concerns about this and also other matters to do with Ms Roger's general performance, grew to a point where he requested that she attend a meeting, which he advised was to discuss, "*…..issues regarding trust and also issues regarding staff interaction and co-operation."*

Mr Goodall's letter

[10] Before the requested meeting took place Ms Rogers wrote back to Mr Goodall asking for better advice about the "*issues*" he had notified the existence of. Mr Goodall replied in writing on 31 March 2005. He referred in some detail to the issues under the following headings in his letter;

> ***Usurping Veterinarians Authority***
>
> ***Attitude problems (ongoing during 2004 and 2005)***
>
> ***Time misrepresentation (stolen time)***
>
> ***Product & service pilfering***

[11] Under the heading referring to *"stolen time"* Mr Goodall wrote, *"…… there has been plenty of evidence of time theft."* Under the heading *"Product & service pilfering,"* with reference to the payment of the vaccination fees, Mr Goodall wrote, *"…… We have to conclude that you are deliberately telling untruths, or that you have paid the money to some unknown person who has taken the money."*

[12] Mr Goodall finished his letter with the following;

> *In conclusion, we summarise as follows;*
>
> > *We have completely lost confidence in your ability to be truthful*
> >
> > *As a practice we feel that we have been poorly treated by you*
> >
> > *We believe that ingrained bad attitudes are very unlikely to be able to be corrected.*

Presence of bias

[13] Mr Goodall's choice of words for the headings alone indicates a degree of disposition on his part against Ms Rogers in respect of the issues, but the details he gave under each heading in my view put the presence of bias and predetermination beyond doubt. This advice was given to Ms Rogers by Mr Goodall on 31 March 2005, which was before the requested meeting *"of a disciplinary nature"* had even been held. It was not set to take place until 18 April 2005.

[14] I find that in his correspondence to Ms Rogers, Mr Goodall clearly displayed a real danger or real likelihood of bias against her and of predetermination of the issues he had not yet adequately investigated with her but was planning to do so.

[15] The meeting on 18 April duly took place. Although no outcome of it was announced by Mr Goodall to Ms Rogers or her then solicitor Ms Lynda Emmerson, a grievance was raised in writing the day after the meeting. In relation to the above letter from the employer Ms Emmerson complained;

> *……to a large degree the issues have already been predetermined. The tone of the letter is very clear – that you have made your decision in terms of the allegations prior to even hearing from her.*

[16] At the Authority's investigation meeting Mr Goodall frankly acknowledged that his letter and the words he had chosen when writing it reflected the way he was feeling about Ms Rogers and the issues he had with her. He acknowledged that the letter could be read as indicating that he had closed his mind about those matters. The Authority was also told that employment law advocates Mr Goodall consulted after writing and sending his letter had advised him that it displayed bias and predetermination. The advocates also advised him that the 18 April 2005 disciplinary meeting had been conducted by him with questionable fairness to Ms Rogers. Evidence points to this as a correct assessment.

[17] In an attempt to overcome these difficulties if still possible, Mr Goodall's advisors then proposed mediation to Ms Rogers. Her solicitor responded to this overture by advising;

> *Our client does not agree to mediation until such time as the disciplinary action has been resolved.*

[18] Mr Goodall decided to continue the disciplinary process and on 24 June 2005 another meeting took place. Although it was attended by an advocate Ms Sally Leftley, who was present to inject some objectivity and impartiality into the employer's deliberations, Mr Goodall retained the role of ultimate decision maker. He could and should have stepped aside from that role, as the presence of bias on his part was not something that could be fixed by Mr Goodall himself unless he took no further part in the process. While it may have been inconvenient and caused some delay, the employer was capable of appointing someone else to be the decision maker, such as the chairman of The Vet Centre or another official of the incorporated society. Given the contents of his letter of 31 March 2005, Mr Goodall was the last person who should have remained involved.

[19] After the two meetings with Ms Rogers had been held Mr Goodall duly decided that she had not been truthful in claiming to have paid the vaccination fees and in giving conflicting explanations about her conduct in that regard. He decided that she had seriously misconducted herself to a point where The Vet Centre had lost trust and confidence in her. Consequently he decided to dismiss her. Mr Goodall described Ms Roger's conduct as, *"……a serious breach of trust"* in a letter he wrote to her on 28 June 2005 in which he advised that non-payment of the fees was the reason for dismissal.

Justification for dismissal

[20] Applying s.103A of the Employment Relations Act 2000, the statutory test of justification, I find that a fair and reasonable employer would not have continued the disciplinary enquiry with Mr Goodall as the ultimate decision maker. Inevitably given his obvious bias, by continuing to be involved to the point of deciding to dismiss Ms Rogers, Mr Goodall acted unfairly and unreasonably and therefore without justification. Ms Rogers was disadvantaged in her employment and was ultimately dismissed. A fair and reasonable employer would not have dismissed in those circumstances. At the time the decision was made dismissal was unjustified, I find.

[21] I also find that Mr Goodall's letter of 31 March 2005 showed not only the appearance of bias on his part but the actual existence of bias as well. The letter was written by an articulate and intelligent professional man. As a qualified veterinarian who had also been a CEO of the employer for some 12 years, he may be taken to have expressed himself clearly and carefully, saying precisely what he meant to say. I cannot accept his view that despite the appearance to be taken from his words he nevertheless retained an open mind towards Ms Rogers as he embarked on the disciplinary exercise. Bias and predetermination were real as well as apparent I find on the part of the employer, making that exercise an unfair and unreasonable one. There was little point having the meeting of 18 April 2005 in those circumstances.

Remedies

[22] Having found that The Vet Centre acted without justification and to the disadvantage of Ms Rogers when conducting the disciplinary exercise, and having found that her subsequent dismissal was unjustified, the Authority must assess her entitlement to the remedies or relief that she has sought.

[23] In relation to this exercise I have considered the following observations made by the Court of Appeal in *Telecom NZ v Nutter* [2004] 1ERNZ 315, at page 331 paragraph [81];

> *The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment. For instance, where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance*

must be made for the likelihood that had a proper procedure been followed the employee would have been dismissed.

[24] Whether in this case the presence of bias went merely to procedure or whether it went to substance, I consider that an assessment of remedies on the basis of likelihood of Ms Roger's dismissal cannot realistically be made in the circumstances of this case, because it cannot be determined now what an unbiased and objective Mr Goodall might have decided on the strength of the evidence or information he had obtained about her actions with regard to the payment of the vaccination fees.

[25] A similar objective in the course of assessing remedies may be achieved by a different path, one that the Authority must take in all cases. As required by s.124 of the Act, what must be determined from the evidence collected is whether the actions of Ms Rogers to any degree contributed towards the situation that gave rise to her personal grievance. Any blameworthy conduct on the part of the employee that is causally connected to the employer's decision to dismiss will qualify as a contributory action to be taken into account under s.124.

[26] If I find that there was such contribution then I must also consider whether and by how much a reduction in remedies is required. The reduction scale runs from nil at one extreme to 100% at the other. Contribution at the very top end of the scale will usually translate to a determination that no remedies be ordered in favour of a grievant. Conversely, a complete absence of contribution or presence of only minimal contribution, will usually not lead to a reduction in remedies.

Further mediation

[27] During the investigation meeting the Authority was critical of Ms Rogers and Ms Emmerson for not going to mediation when that was proposed by advisors acting for The Vet Centre on 6 May 2005. As at that date the disciplinary process had not been concluded. Ms Rogers had been disadvantaged by bias but had not been dismissed. I consider that declining the valuable opportunity of mediation was unreasonable. The insistence that the employer needed to complete the disciplinary process before mediation could take place, reflects an unduly narrow and pessimistic view taken of the purpose of mediation. That process is an ideal means of looking at the entire state of the employment relationship rather than focussing on compartments and phases of it.

[28] When mediation was proposed Ms Rogers through her advisors had already raised a grievance about the obvious failures in the way Mr Goodall was conducting the disciplinary procedure "in house". In relation to mediation Ms Rogers was bound by the express term of her employment agreement at clause 9 b.iii., which provided;

- *mediation will be the primary method whereby disputes will be brought for resolution where "in house" procedures have failed.*

Ms Rogers and her advisor seemed content to do nothing but observe the employer "digging a hole for itself," as Ms Rogers put it in her evidence. Although it may have begun to act wrongly in some way, any party to an employment relationship is entitled to have an opportunity to correct a breach of duty on its part before harm is caused to the other; see *Rankin v A-G (No 2)* [2001] ERNZ 476 at 527. The innocent party should actively encourage and assist it to do so, through mediation if necessary.

[29] As well as having obligations under the employment agreement to enter into mediation, the parties were bound by the Act itself, the expressed object of which is to promote mediation as the primary employment relationship problem solving mechanism; see s.3(a)(v).

[30] There is also the duty of good faith imposed by s.4(1A) of the Act which required Ms Rogers and The Vet Centre as parties to an employment relationship, to be *"active and constructive"* in maintaining that relationship, it being one in which they were to be *"responsive and communicative."* Ms Rogers was none of those things in declining the mediation proposed by her employer.

[31] It is regrettable that despite having the assistance of a legal advisor Ms Rogers retained a view of the proposed mediation as *"another session of humiliation."* I consider that Ms Rogers and her advisor were also mistaken in viewing the employer's proposal for mediation as being nothing more than a disciplinary process conducted by a mediator instead of the employer. Those views do not do justice to the process itself or to the skill and professionalism of the Department of Labour mediators with whom the meeting had been sought by the employer. The very least that is likely to have come out of mediation was the withdrawal by Mr Goodall from any further involvement in decision making, if not from the entire disciplinary process. I have no doubt that a mediator would have urged Mr Goodall to voluntarily take that step. Beyond that it was possible for agreement to be reached that no disciplinary action at all would be continued and that mediation would result in the rebuilding of the employment relationship, an outcome expressly contemplated by The Vet Centre when it proposed mediation on 6 May 2005. Alternatively, termination on agreed terms may have been a product of mediation.

[32] Although I have finally determined that the dismissal and employers actions preceding it were unjustified, the quantum of remedies recoverable by Ms Rogers remains to be assessed. This is a matter that is most suitable for mediation, particularly given the requirement to factor in any contributory conduct on the part of Ms Rogers.

[33] The parties and their advisors have heard and helped test the evidence of Ms Rogers and other witnesses who attended the investigation meeting. As the parties have had the same opportunity as the Authority to observe the various witnesses giving that evidence, they have some basis from which to predict the findings the Authority is likely to make from that evidence in relation to contribution. Therefore they may wish to retain some control over the ultimate disposal of that matter by reaching their own agreement rather than having a decision imposed on them.

[34] For these reasons I will reserve the question of remedies until the parties have returned to mediation and have tried to resolve that question by agreement. Accordingly they are directed to mediation under s.159 of the Act. The investigation will be suspended until that has been completed.

<u>Further observations and findings</u>

[35] For the assistance of the parties in mediation, I add the following comments and make the following findings from the evidence.

[36] The assessment of contribution will depend on the Authority's ultimate findings of evidence as to the following in particular;

- whether Ms Rogers did pay the fees, as she claimed in March 2005 to have done,

- if not, whether she had any reasonable excuse for not paying, such as an honest but mistaken belief that she had paid them, or had not been required to pay them,

- whether in offering her explanations to the employer she was honest, but perhaps did not have an accurate recollection because of lapse of time, or whether she had deliberately tried to deceive her employer.

[37] Before finding that there was any dishonesty or deceitful behaviour, the Authority must be satisfied that the evidence meets a high standard corresponding to the serious nature of that kind of blameworthy conduct.

[38] In assessing contribution, the Authority must bear it in mind that Ms Rogers did not cause Mr Goodall to close his mind against her before he had completed an adequate investigation into her conduct in relation to the payment of the vaccination fees.

[39] As to other issues that were raised against Ms Rogers including the serious matters of *"stolen time"* in respect of which Mr Goodall had declared there to be *"plenty of evidence of time theft,"* and the *"pilfering"* of office supplies (paper bags), it seems these evaporated or at least were not relied on as giving grounds for disciplinary action. Ms Rogers has not been told otherwise and Mr Goodall has called the non-payment of fees issue the *"primary issue"* in the dismissal letter. These other issues cannot therefore be taken into account as matters of contribution if they had no disciplinary consequences.

[40] A matter of complaint during the disciplinary meetings and a matter of submission during the Authority's investigation, was the length of time it had taken for the fees payment issue to be investigated by the employer. The payments were due after the vaccinations were carried out in April 2004, but the first disciplinary meeting about the matter was not held until a year later. I do not however consider that this delay was unfair to Ms Rogers in any substantial way. There is no prejudice obvious from her ability to confidently declare on 16 March 2005 that she had paid the fees a week after they were incurred in April 2004.

[41] I find that Ms Rogers told Mr Goodall that she had made the payment of the vaccination fees in cash paid directly across the counter to one or other of the clinic's receptionists, Ms Heather Logue or Ms Judith Fraser who shared the same job. In this regard I note that the minutes of the meeting held on 24 June 2005 record the following exchange between Mr Murray Broadbelt (MB), advocate for the employer, and Ms Rogers (CR);

> *MB - Moving onto March* [2005] *now. Graham* [Goodall] *asked you again when you would be paying the money for the vaccinations. You then said to him that you had paid it at the time in cash.*
>
> *CR - I remember that. They were vaccinated on the Friday. I sold them that Sunday and so I had the cash which I paid to the clinic the following week.*
>
> ……
>
> *MB - So who did you pay the cash to Christine?*
>
> *CR - I remember telling Graham that it wasn't Paddy the vet. I paid it over the counter.*
>
> *MB - So I can assume that it had to be a member of the support team then, either Heather or Judy at that time?*

CR - Yes that's correct. It was definitely the following week after the 16th April (date of vaccinations).

[42] I observed both Ms Logue and Ms Fraser to be honest and reliable witnesses and I accept their evidence and find as a fact that neither woman at any time received any payment of cash from Ms Rogers for the vaccination work. As well as the favourable way these witnesses presented there is the evidence of the business system that they were responsible for operating on behalf of The Vet Centre at the Waipu clinic. I accept that both women were careful, thorough and professional in the accounting work they did. I find it quite improbable that they received cash from Ms Rogers but did not put it through the till and generate a receipt, or that they simply misplaced the money somewhere in or around the office. It is also unlikely that Ms Rogers would not have asked for a receipt. I am satisfied that to account for discrepancies in cash handling, the usual business practice was faithfully followed by Ms Logue and Ms Fraser of ensuring that the till balanced each day before finishing work. An "unders and overs" banking check carried out later, also failed to reveal any departure from the usual internal checks on accounting for cash received.

[43] Further, I accept the evidence of Ms Logue that in late 2004 she had a conversation with Ms Rogers in which Ms Logue mentioned the vaccination payments. I find that in that conversation Ms Rogers said "they'll have to prove that I had the pups vaccinated," or similar words, and also said, a short time later, "it's not my responsibility if the vet forgets to charge me," or similar words. I accept that the discussion was not about whether Ms Rogers had paid the fees but about why she had not paid and why she ought to pay. I find from her evidence that Ms Logue reported these conversations to Mr Goodall at the time.

[44] I find that on 15 March 2005 Ms Logue saw Ms Rogers leave a meeting she had been having with Mr Goodall. On her way out through the office, I also find, Ms Rogers was heard by Ms Logue to make the comment, "I've told him that I paid cash for the vaccinations, so I hope that I haven't shot myself in the foot." This was the first time over many months that Ms Logue had heard Ms Rogers claim that she had paid the fees. Before the dismissal Mr Goodall was aware that Ms Logue had said she had heard this comment. He was present at the second disciplinary meeting on 24 June when the comment Ms Logue said she had heard was put to Ms Rogers. Ms Rogers response was that she could not recall making it. Telling the truth is not usually regarded as a situation of shooting oneself in the foot, whereas the making of an inconsistent statement can be seen in that way.

[45] I find therefore that Ms Rogers did make inconsistent and contradictory statements about the payment of the vaccination fees. On 15 and 16 March 2005 she stated to Mr Goodall that she had paid the fees and had done so a week after they were incurred. Earlier she had made statements to Ms Logue in particular to the effect, expressly or by implication, that she should not have to pay the fees and that she was intent on avoiding paying them. In her evidence to the Authority she did not deny making those statements, although she put a different construction on their meaning.

[46] I found Ms Rogers unconvincing in giving her evidence that she had paid the fees. It was not difficult for her to recall that she had paid them, yet she could remember few details of making payment. She could say that she had given the cash to Ms Logue or Ms Fraser but could not say how much or in what denominations she paid the cash. She could not say in evidence how she even knew what amount to pay. Since she was not invoiced or charged until several months later, it is difficult to see how she would have known what to pay at the time she said she did.

[47] Without expressing my final conclusions on these findings and others I am able to make from the evidence, I leave it to the parties and their advisors to consider the findings given to this point. The parties may wish to consider the likely impact these findings will have in relation to the

question of contribution, if that question must finally be determined by the Authority. Additional findings will need to me given if and when the Authority is required to assess remedies.

Bias on the part of the Authority

[48] I finish with the submission made by Dr Perry that bias, predetermination and prejudice was shown by the Authority during the investigation meeting. Merely because a court or tribunal has earlier in a hearing commented adversely on a party or a witness (as I did) does not by itself found a sustainable objection to the court continuing to hear and decide the matter. The law in this regard has been clearly expressed from time to time; see for example *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004 at paragraph 25, a decision of the England and Wales Court of Appeal.

Costs

[49] Costs are reserved.

A Dumbleton
Member of Employment Relations Authority