

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 76A/08
5099048

BETWEEN

JONATHAN JOSEPH
Applicant

AND

MAATAA WAKA KI TE TAU
IHU TRUST
Respondent

Member of Authority: Helen Doyle

Representatives: Kay Stringleman, Counsel for Applicant
Brian Fletcher, Counsel for Respondent

Investigation Meeting: 18 and 21 April 2008 at Blenheim

Determination: 30 June 2008

DETERMINATION OF THE AUTHORITY

Identity of the respondent

[1] The respondent named in the statement of problem lodged with the Authority is Maataa Waka Ki Wairau Incorporated. During a telephone conference on 10 March 2008 with the Authority and Ms Stringleman, Mr Fletcher advised that the incorporated society, Maataa Waka Ki Wairau Incorporated, no longer existed. Mr Fletcher said that its successor, Maataa Waka Ki Te Tau Ihu Trust, a charitable trust, should be the employer. Mr Fletcher confirmed that the Maataa Waka Ki Te Tau Ihu Trust assumed the responsibilities of Mr Joseph's employer.

[2] By consent, therefore, the name of the respondent is Maataa Waka Ki Te Tau Ihu Trust. I shall refer to the respondent from here on as Maataa Waka.

Prohibition from publication

[3] On 28 May 2008, I made an interim order prohibiting from publication all of the internet material and any information from the internet material that was downloaded about X, an employee who worked at Maataa Waka during the material time, and any information that may identify X.

[4] I make the interim order prohibiting from publication the identity of X and the internet material and information that was downloaded about X permanent.

The employment relationship problem

[5] The applicant, Jonathan Joseph, says that the problem he wishes the Authority to resolve is that he was unjustifiably dismissed from his employment with Maataa Waka on 24 July 2007.

[6] Mr Joseph commenced working for Maataa Waka as an animal control officer in or about September 2002. He was the senior animal control officer at Maataa Waka and was appointed as team leader of animal control for a brief period in May 2007.

[7] Maataa Waka is a Maori health organisation based in Blenheim. It manages a number of contracts including animal control and registration under contract to the Marlborough District Council. Mr Joseph carried out functions as an animal control officer under that contract with the Marlborough District Council.

[8] X commenced working with Maataa Waka on 23 April 2007. She was quickly appointed to a project leader role and then, on 1 June 2007, to the team leader role. The last day X spent in the office working was 28 June 2007 after which date X was on sick leave.

[9] Mr Joseph seeks a finding that he was unjustifiably dismissed from his employment with Maataa Waka, an order reinstating him into his previous position, an award of lost wages, an award of compensation for humiliation and loss of dignity and costs.

[10] The general manager at material times at Maataa Waka was Faye Ripeka Houkamau. Ms Houkamau was appointed to the general manager position on 29 October 2005. She has since resigned. Prior to Ms Houkamau's appointment, the

animal control department had been managed, following the death of the previous manager at Maataa Waka in June 2005, by interim managers.

[11] Maataa Waka says that Mr Joseph was justifiably dismissed for actions that amount to serious misconduct and that the trust and confidence that Ms Houkamau and the Board of Maataa Waka needed to have in Mr Joseph was completely destroyed.

[12] Mr Fletcher advised that if the Authority got to a position of considering remedies with respect to Mr Joseph, then a matter had been brought to the attention of Maataa Waka four days before the Authority investigation meeting which was considered to be of an extremely serious nature and as such, he submits, is directly relevant to remedies.

[13] Maataa Waka accepts that the matter did not, and could not, form part of the reason for the dismissal at the time the dismissal occurred because there was no knowledge of it at that time. It was held in the recent Court of Appeal judgment in *Salt v. Fell* [2008] NZCA 128 that subsequently discovered misconduct of a truly significant nature can be taken into account when determining remedies under s.123 of the Employment Relations Act 2000.

The test for justification

[14] Section 103A of the Employment Relations Act 2000 sets out the new test for justification. The Authority, under s.103A, must consider justification objectively. Objective may be likened to dispassionate or disinterested as opposed to how the affected employee or employer may have considered justification. It is the employer's conduct that is the focus of the objective inquiry. It is necessary to consider the actions of the employer in terms of the substantive dismissal and how the employer acted in the process leading to that outcome – *X v. Auckland District Health Board* [2007] 1 ERNZ 66.

[15] The Authority must be satisfied that what the employer did and how the employer acted was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

Employment agreement

[16] The Authority was provided with a signed individual employment agreement between Maataa Waka and Mr Joseph dated 8 March 2002 which was expressed to come into force on 1 April 2004. Appendix 5 to that agreement required Mr Joseph to sign and acknowledge that he had read the Maataa Waka rules and codes of ethics, conduct, confidentiality and behaviour. The offences that constituted serious and less than serious misconduct were set out although they were expressed not to be exhaustive.

[17] For serious misconduct, there were four options set out for Maataa Waka including instant dismissal and for less serious misconduct there was a procedure for an oral warning, a final warning and then, on the third offence, termination.

[18] There was also a collective employment agreement between Maataa Waka Ki Te Tau Ihu Trust and the Central Amalgamated Workers' Union Inc (the Union) for the period 1 April 2007 to 31 March 2009. Mr Joseph was a member of the Union and his work was covered by the coverage provisions of the collective agreement. The collective agreement had not been signed by both parties, but was generally agreed that the provisions of the document had been applied since 1 April 2007. Mr Joseph was a Union delegate.

[19] A collective agreement has no effect under s.54 of the Employment Relations Act 2000 unless it is both in writing and signed by the Union and employer parties to the agreement. There was nothing specific in the submissions from Ms Stringleman and Mr Fletcher about the terms and conditions of the employment agreement or any submission as to which one was applicable. In those circumstances, I have primarily had regard to the individual employment agreement.

The disciplinary process

[20] Mr Joseph was given a letter dated 18 July 2007 which contained a number of allegations. He was told to take paid leave to consider the allegations and his responses. The letter provided that there was to be a meeting on Friday, 20 July 2007. Mr Joseph was advised in the letter that an outcome of the meeting may be termination of his employment and that he should bring a support person.

[21] I have attached a copy of that letter to this determination as Appendix 1 replacing where required the employee's name with an X.

[22] Steve McManus, the Union organiser, became aware that three Union members at Maataa Waka had all received letters containing allegations that they were required to answer. The other two members were Glenarr Huntley and Colin Thompson. The Authority has investigated their personal grievances that they have been unjustifiably dismissed from Maataa Waka. I investigated all three grievances separately but all three determinations have been issued at the same time.

[23] Mr McManus was unable to attend the meeting on 20 July 2007 and suggested other dates. Eventually a date was set for 23 July 2007.

[24] Before the meeting and arrangement for a new date, Ms Houkamau sent Mr McManus a letter that Maataa Waka had proceeded to determine the matters on the information the organisation had at present and that if there were any other matters to be put forward then they were required by 2pm on 23 July 2007.

[25] There could have been unfairness if Ms Houkamau had not changed the date to accommodate Mr McManus and allow Mr Joseph a hearing in person Ms Houkamau did agree, however, that a meeting would proceed on 23 July 2007 and any unfairness in that respect was therefore able to be averted.

[26] Between 18 and 23 July 2007, Mr Joseph and Mr Thompson, who was also on paid leave to answer allegations, distributed some material that had been found by them on the internet and downloaded about X. The material was initially given to Ms Houkamau and then the members of the Board of Maataa Waka and then to Mr Congdon at the Marlborough District Council.

[27] Attached to the copies of the internet material about X was a distribution list which had the names of all the Board members and Ms Houkamau, the local Member of Parliament, the district health board, the Mayor and Garth Congdon from the Marlborough District Council.

[28] The meeting on 23 July 2007 was attended by John Drummond, advocate for Maataa Waka, Ms Houkamau, Mr Joseph, Mr Thompson, Ms Huntley, Mr McManus and Kore Tombs who was there to support Mr Joseph. Mike Porter attended to take

the minutes. The notes of the meeting are quite brief because only the procedure is set out and not specifically what was said about the allegations.

[29] Mr Drummond gave Mr Joseph, Ms Huntley, and Mr Thompson the options of discussing the matters individually or collectively. Maataa Waka had certainly anticipated hearing from each employee individually. Mr McManus advised that all three employees were happy with a collective response.

[30] Mr Drummond advised Mr Joseph and the other employees that the Board took very seriously the issue of distributing information regarding X. The notes record that Mr Thompson advised that *this was done to make the others aware of the person (X) that they had been dealing with*. Mr Drummond questioned *why the information was being sent to outside parties such as the Mayor, the local MP etc*. Mr Thompson advised that *whilst the letter had stated that copies were being sent, they had not been sent at the time of the meeting*. Mr McManus advised that legal counsel had *okayed this action*.

[31] Each employee then had an opportunity to make their individual responses to the allegations in the letters they had received.

[32] Mr Joseph read from prepared notes which he provided as part of his evidence at the Authority meeting. He did not make any further comments to those made by Mr Thompson about the internet material. In Mr Joseph's explanation he did not accept the substance of most of the allegations. He asked for further information about some of the allegations and/or sought clarification.

[33] Mr McManus asked that all three employees be allowed to address the Board directly. It was explained that Ms Houkamau had the authority to make a decision. When Mr McManus returned to his office from the disciplinary meeting, he found a letter from the Board which confirmed that the request to meet with the Board of Trustees had been declined. The letter further provided that the Board had been kept well informed of the issues relating to the matter and fully supported the processes actioned by the manager to date.

[34] Mr Joseph provided some written questions for Ms Houkamau to take to the Board after the disciplinary meeting ended. He said that he expected the questions would be presented to the Board and discussed and that answers would be provided to him.

[35] Mr Thompson and Mr Joseph, having not heard that they were required to work, went on a fishing trip on 24 July 2007. Mr Joseph took a call from Ms Houkamau to attend a meeting that day and advised that he and Mr Thompson would not be able to make the meeting because of the distance they were from Blenheim. I am not satisfied from the evidence that there was any agreed time reached for another meeting although there may well have been discussions that there should be a meeting at another time.

[36] On 26 July 2007, Mr Joseph received a letter advising him that his employment had been terminated together with a letter from Maataa Waka chairman, Lewis Boyles, advising that the letter of termination was posted because Mr Joseph did not attend a meeting as arranged.

[37] The basis for the termination was set out as below as below:

1. ***Actions that may Seriously Damage the Employers Reputation***

Given your current employee status and your part in the collection and distribution of sensitive information about a fellow employee of Maataa Waka, Management and Board must now have and does have serious concerns about your work ethic, professionalism and motives. This conduct will most certainly cause harm to the reputation of your employer and lays open the organisation to personal grievance claims.

2. ***Inappropriate Correspondence***

Concerns or information about a fellow employee or your employer should not be disclosed to outside agencies. Concerns must always be channelled through the manager in the first instance and the board if required. Your actions with regard to the distribution (or threatened distribution) of sensitive information about a fellow employee to the Marlborough District Council, the Nelson Marlborough District Health Board, and a local Member of Parliament is inappropriate and gratuitous and in conflict with your responsibilities as an employee.

Your part in attempting to discredit and cause embarrassment to the Team Leader by distributing sensitive information has been viewed as harassment and intimidating behaviour that lays open the organisation to personal grievance claims.

3. ***Breach of Trust and Confidence***

The trust and confidence that the employer must have in you together with the working relationship that must exist within the office particularly with X has been destroyed. The details are set out above.

4. ***Failure to Follow Reasonable Instructions***

Open defiance and refusal to carry out instructions given by Manager and Team Leader is a deliberate attempt to undermine management authority and leads to an irrevocable breakdown of employment relationships.

5. ***Performance Concerns***

Failure to perform a number of animal control officer functions in accordance with the Marlborough District Council contract. These are clearly outlined in a letter received by Maataa Waka on 12 July 2007, a copy of which you have received. Ongoing complaints about your challenging non-cooperative manner with the Team Leader whilst she was trying to implement improved procedures and practices in Animal Control and recent concerns about your ability to follow clear instructions causes management to question your ability to work effectively as part of a team.

These failings have also put the contract into jeopardy.

[38] Ms Houkamau said that she consulted with the Board at the meeting that had been arranged later in the day on 23 July 2007. She said that the questions from the three employees were considered. Ms Houkamau said in her evidence that the decision to dismiss was an overall decision taking into account all of the factors. Ms Houkamau said that the determining matter was the distribution of the internet material to the Council and the threat to send it to other outside agencies.

The issues

- Was Maataa Waka justified in concluding that Mr Joseph's actions in the collection and distribution or threatened distribution of sensitive internet material about X amounted to serious misconduct?
- Was Maataa Waka justified in concluding that Mr Joseph failed to follow reasonable instructions from X and Ms Houkamau?
- Was Maataa Waka justified in concluding that Mr Joseph had not performed in terms of his duties?
- Did Maataa Waka follow a fair process?
- Would a fair and reasonable employer have made the decision to dismiss Mr Joseph in all the circumstances that existed at the time of dismissal?

- If the dismissal is found to be unjustified, then what remedies is Mr Joseph entitled to and are there issues of contribution?

Was Maataa Waka justified in concluding that Mr Joseph's actions in the downloading and distribution or threatened distribution of sensitive internet material about X to outside agencies amount to serious misconduct?

[39] The primary or determining reasons for dismissal are the first three in the letter of 24 July 2007 and they concern the internet material.

[40] Mr Joseph did not give an explanation about the internet material at the disciplinary meeting on 23 July 2007.

[41] Ms Houkamau said that she considered the actions of Mr Joseph, Mr Thompson and Ms Huntley were joint in terms of the material and took Mr Thompson's explanation into account that he was making people aware of the type of person they had been dealing with at Maataa Waka. It was known at the time of the meeting that the material had been distributed to Mr Congdon at the Marlborough District Council.

[42] Ms Houkamau said that she considered the explanation about the internet material, the context and the distribution list. Ms Houkamau said that she concluded that it was not done in good faith, but in an attempt to undermine her, X and Maataa Waka. Ms Houkamau said that bringing the information to her was one thing, and that even taking it to the Board may be acceptable, but that it was totally unacceptable to deliver the material to an outside agency on whom Maataa Waka relied for funding. The only outcome Ms Houkamau said from that would be to cause further concern to the Council at a time when it already had considerable concerns about the performance by Maataa Waka of the animal control contract. Ms Houkamau said that she concluded that threatening to deliver it to others outside of Maataa Waka could have no benefit to Maataa Waka and was intimidating to X.

[43] Ms Stringleman submits that Mr Joseph's actions were entirely appropriate in terms of his evidence that:

- He had been struggling to understand X's attitude towards him and looked up X's name on the internet in June 2007.

- He found unexpected information and wanted to show his employer because it seemed that Ms Houkamau was taking X's word against him.
- It was not confidential information.
- There was no intention to undermine Maataa Waka in bringing this information to his employer's attention.
- Mr Joseph acted in good faith and was reassured that the legal advice received by Mr Thompson meant it was acceptable for him to do so.
- He saw Mr Congdon as part of the employment relationship.

[44] Mr Joseph's actions have to be considered against the circumstances that existed at the time. Maataa Waka had serious concerns about workplace relationships in the animal control department at the time it gave Mr Joseph the letter of 18 July 2007. The Council had serious complaints about breaches of the animal control contract it had with Maataa Waka. A letter setting those out was attached to the disciplinary letter.

[45] It was reasonable for Maataa Waka to put the concerns it had about Mr Joseph's conduct to him as it did in the letter dated 18 July 2007. Mr Joseph was entitled, as part of his explanation to those allegations, to provide the internet material downloaded about X to Ms Houkamau. There could be no misconduct in doing that.

[46] An objective assessment has to be made whether the action of distributing or threatening to distribute sensitive internet material about another employee to those outside the employer organisation is capable of destroying the trust and confidence that Maataa Waka must have in Mr Joseph and/or any working relationship with X. This not only involves considering whether the material was confidential but the motive or reason for the distribution or threatened distribution to others outside Maataa Waka.

[47] Mr Joseph said in his evidence that he and Mr Thompson were scheduled to attend hearings of the Council Dog Control Committee whilst they were on leave to answer the allegations. He said that they thought they should tell Mr Congdon that they would not be attending. Mr Joseph said that they told Mr Congdon what was happening in terms of the disciplinary process and then thought they should give him

a copy of the information about X. Mr Joseph said he did not think that was wrong because it was public information in accordance with advice from Mr Thompson's lawyer.

[48] I find Mr Joseph's evidence less likely that it was a spur of the moment decision to give the material to Mr Congdon. Mr Congdon is referred to by name on the typed distribution list that Mr Joseph said in his written evidence was delivered to Board members with the internet material before the material was given to Mr Congdon.

[49] Mr Joseph said in his evidence that X had caused all sorts of problems for animal control staff and had been devious and untruthful. He said that people were entitled to know what X's background was and that, because the relationship with Council staff was so close, they were also entitled to know.

[50] I accept that there was a close day-to-day relationship between the animal control officers and the Council. Mr Joseph knew, however, that he was not employed by the Council. The material was unrelated to Mr Joseph's work as an animal control officer. It was sensitive material about another employee which was, on its face, not relevant to the role that X was performing at Maataa Waka.

[51] Mr Joseph had obligations to deal with his employer in good faith and be active and constructive in maintaining a productive employment relationship with his employer at the time of the disciplinary meeting.

[52] The allegations that he was being asked to answer included ones that related to workplace relationships, an allegation that Ms Houkamau had been undermined and a concern that Mr Joseph may have deliberately adopted a policy of non-cooperation with X. If Mr Joseph had information about X that he believed was important, then he should have provided it to Ms Houkamau.

[53] A fair and reasonable employer would conclude that the distribution or threatened distribution of the internet material to the Council would cause harm to the reputation of Maataa Waka. The Council provided the funding for the animal control department at Maataa Waka and there were already concerns about breaches of the contract. The distribution or threatened distribution of the material was undermining to Ms Houkamau. It was for Ms Houkamau to decide what should be done with the

material. The distribution to Council was not beneficial to Maataa Waka and a fair and reasonable employer would conclude that it was not done in good faith.

[54] The distribution to the Council would cause embarrassment for X and undermine her relationship with the Council. The distribution and threatened distribution effectively rendered any future working relationship between Mr Joseph and X very difficult if not impossible.

[55] Maataa Waka must be able to put employees' concerns to Mr Joseph without the risk that he would then discredit that employee outside of Maataa Waka. That is so even if Mr Joseph believed that the issues raised by X were without foundation.

[56] A fair and reasonable employer would conclude, if the material was not intended to be distributed to the others named on the list then those names were put there to intimidate, harass and worry X and Maataa Waka about wider distribution in the community. The definition of harassment in Maataa Waka's policy included any form of behaviour whereby the person harassed would be intimidated or humiliated.

[57] Considered objectively, I find that a fair and reasonable employer would conclude that the action of distribution or threatened distribution of sensitive internet material outside of the employer and the Board about another employee, in all the circumstances was conduct that was capable of amounting to serious misconduct.

[58] I now turn to the other matters that formed part of the reasons for the termination of Mr Joseph's employment.

[59] Mr Joseph denied at the disciplinary meeting that he failed to follow instructions from X and he asked for some further information and sought clarification about other matters. Mr Joseph said that he did ask why change was necessary on occasions but did not openly defy X or Ms Houkamau.

[60] Ms Houkamau provided examples of issues of concern in her letter with respect to Mr Joseph failing to account for his whereabouts, arriving late at meetings, talking across X and failing to provide information.

[61] When these matters were complained about by X, Ms Houkamau did not take any formal steps. Mr Joseph also complained about X from time to time. A fair and reasonable employer would conclude that there were serious issues in respect to the

working relationship between Mr Joseph and X and it was fair that these issues be formally raised with Mr Joseph.

[62] Ms Houkamau also had concerns about of Mr Joseph telling Mr Thompson that he need not bring receipts back from Auckland. Ms Houkamau felt that she had been undermined by Mr Joseph's actions in her role as manager. She also considered the atmosphere in the office to be cold and unfriendly since there had been pay discussions.

[63] I think a fair and reasonable employer would conclude that Mr Joseph's behaviours were more fairly described as covert than openly defiant. A fair and reasonable employer was entitled to bring any matters of concern to Mr Joseph's attention, including, if necessary, with formal warnings as part of the disciplinary procedure, in accordance with the employment agreement. The behaviours were not such that they would constitute serious misconduct in the absence of earlier formal warnings.

[64] The matters of performance had not formally been brought to Mr Joseph's attention although I accept they were discussed in a general way in meetings. Mr Joseph was not aware that his performance was not to the standard required or that there were any particular failings in terms of the work that he undertook.

[65] I do not conclude that the two other reasons in the letter of termination would constitute serious misconduct in the circumstances or lead to a conclusion that Mr Joseph was not capable of performing his role.

[66] Had there not been the distribution or threatened distribution of internet material, then a fair and reasonable employer would have wanted to take immediate steps to improve workplace relationships. Matters had not progressed to that stage, when the letter of 18 July 2007 was given to Mr Joseph, that it could be concluded the relationship between him and X was irreparable.

Conclusion

[67] A fair and reasonable employer in all the circumstances would have concluded the distribution or threatened distribution of the internet material outside of Maataa Waka was capable of amounting to serious misconduct. The other reasons for

dismissal would not justify a conclusion of serious misconduct. The concerns about performance had not previously been brought to Mr Joseph's attention.

Did Maataa Waka follow a fair and reasonable process?

[68] Ms Stringleman, in her submissions, criticised the fairness of most aspects of the dismissal process. She accepted that Maataa Waka's actions should not be subjected to minute and pedantic scrutiny but said that there was procedural unfairness on the part of Maataa Waka that was not simply a deviation from procedural perfection.

[69] Mr Fletcher submits that the conduct about the internet material was admitted and that procedural fairness does not require a further investigation once there is an admission: *Murphy and Routhan v. van Beek* [1998] 2 ERNZ 607. Mr Fletcher poses the question, *what more was required of Maataa Waka?*

[70] In *Chief Executive of Unitech Institute of Technology v. Henderson* [2007] 4 NZELR 418, Chief Judge Colgan stated that:

... even in some instances over a long process, the employer might be found to have failed to meet all ideal standards of a fair and reasonable employer, this will not necessarily mean that the resultant dismissal that may itself have been justified, will thereby be declared to have been unjustified and that remedies should be awarded accordingly.

[71] The Chief Judge said in *Unitech* that the standards of a notional fair and reasonable employer and the particular circumstances of the parties are to be assessed on an objective basis and at the time of relevant events.

[72] The particular circumstances in this case were that the primary reason for concluding there had been serious misconduct on the part of Mr Joseph was the actions that he took after he received the letter of 18 July 2007. Mr Drummond made it clear that the actions that were taken after Mr Joseph received the letter of 18 July were viewed seriously but on the day of the disciplinary meeting on 23 July 2007 Mr Joseph's focus was clearly on answering the allegations in the 18 July letter.

[73] It was held in *X v. Auckland District Health Board* that there are special statutory requirements for responsiveness and communicativeness in s.4(1)(1A) of the Employment Relations Act 2000 and longstanding requirements of fair dealing which require significant conclusions, including tentative ones, to be articulated to the

employee. Objectively assessed in all the circumstances, procedural fairness required a further meeting after 23 July 2007. Mr Joseph should have been advised that there had been a conclusion reached that there had been serious misconduct in terms of the distribution and threatened distribution of the internet material outside of Maataa Waka. Mr Joseph, who had not previously made a statement himself about that action would have then had a fair opportunity to make any statement in that regard before a decision was made in terms of any disciplinary action.

[74] Mr Joseph provided questions that he wanted to be considered and answered as part of the disciplinary process. There were matters that he had not answered properly because he was still awaiting clarification in terms of those questions. The answers were therefore important to Mr Joseph and a fair and reasonable employer would have met with him after 23 July 2007 and advised him of any response to those questions.

[75] Instead, a decision was made to dismiss Mr Joseph after the 23 July meeting and he was subsequently advised of that by letter. I have not found that a definite time was arranged for a meeting to give Mr Joseph his letter. I do not find there can be criticism of him for failing to attend such a meeting.

[76] Ms Stringleman submitted that Ms Houkamau did not retain an open mind during the disciplinary meeting. Ms Houkamau said in her evidence that she was quite prepared to listen to Mr Joseph's explanations and give them due consideration. Objectively assessed, I conclude that in all likelihood the actions taken by Mr Joseph in terms of the distribution or threatening to distribute the internet material impacted on Ms Houkamau continuing to maintain an open mind during the disciplinary process. The failure to go back to Mr Joseph with conclusions and responses to his questions does support that after these actions came to light the matter was not approached with an open mind.

[77] I find that applying the standards of a notional fair and reasonable employer in the circumstances, the disciplinary process into the allegations of serious misconduct was not one that a fair and reasonable employer would have undertaken in all the circumstances.

The decision to dismiss

[78] Maataa Waka was facing significant workplace relationship problems at the time and had been advised of a large number of breaches of the animal contract it had with the Marlborough District Council. Maataa Waka were required to address both of these issues urgently. The letter of 18 July 2007 was the start of the formal process to bring these matters to Mr Joseph's attention. He then took an action that I have found, objectively assessed, amounted to serious misconduct.

[79] A finding of serious misconduct was justified by Maataa Waka in terms of the distribution and threatened distribution of the internet material outside of his employer and Board in all the circumstances. A fair and reasonable employer would not have dismissed Mr Joseph in all the circumstances that existed at the time of dismissal without having held a further meeting with him, and provided him with responses to his questions and the conclusions that the employer had reached with respect to the internet material. That failure was unfair and therefore the decision to dismiss Mr Joseph was not one that a fair and reasonable employer would have reached in all the circumstances.

Determination

[80] I find that Mr Joseph was unjustifiably dismissed from his employment with Maataa Waka on 24 July 2007.

Remedies

[81] I have reached the point of considering remedies. Mr Fletcher shall provide as part of that consideration the information that he considers will impact on remedies. Ms Stringleman has a right of reply to that. If necessary a telephone conference can be held with the Authority. I reserve the issue of remedies until that information is provided.

Costs

[82] I reserve the issue of costs until after there has been a determination with respect to remedies.

Helen Doyle
Member of the Employment Relations Authority



Maataa Waka Ki Wairau Inc.

OFFICE: 22 Alfred Street, Blenheim.
 POSTAL: P.O. Box 1016, Blenheim, NZ.
 Phone: 03 577 9256
 Fax: 03 577 9259
 Email: mataa@xtra.co.nz

18 July 2007

Mr J Joseph
 Maataa Waka Ki Te Tau Ihu Trust
 P.O. Box 1016
BLLENHEIM

Kia Ora Johnny,

EMPLOYMENT

I wish to meet with you to discuss issues of performance and conduct. The purpose of the meeting is to receive your comments in regard to matters of concern and then to decide whether or not any disciplinary action should be taken if, as your employer, it is considered that these concerns are upheld.

I wish to meet with you at Poumanawa Oranga on 20 July 2007 at 3.30pm. I will have with me at the meeting Industrial Consultant John Drummond. A minute taker will also be present at this meeting.

As your employer this matter is being treated very seriously. An outcome of the meeting may be termination of your employment or other disciplinary action e.g. written warnings.

You should therefore bring a representative and/or support persons with you. As I understand you are a member of the Amalgamated Workers Union I will notify the Union as to this meeting to provide them with an opportunity to attend. You should also contact them directly if you wish.

Misconduct issues

1. On 30 January 2007 in discussions regarding your demands for increased pay, you were clearly unhappy with my decision you raised your voice to me in an irate and threatening manner. I felt intimidated and disrespected. Thereafter you became unfriendly towards me and as a result of this behaviour the atmosphere in the office became extremely cold and at times hostile
2. I spoke to you in regard to the need to produce receipts for reimbursement of expenses while away. You confirmed to me that you had told Colin Thompson that he did not need to produce receipts. This is clearly not so in terms of the employment agreements with staff. The receipts must be produced to obtain or to verify reimbursement expenses. It is not for you to make these management decisions and such actions undermine the management function.
3. On three occasions it is reported that you became irate with X. The occasions were:

- When your desk was moved on my instruction and X's work station was moved into the back office.
 - When attempts were made to move the email address for animal control to X's work station. On this occasion (in my absence) you left the office with no explanation to X and later returned with a sick leave note that you handed to X in an abrupt manner the left the work place for the rest of the day. X reports that she had no idea of your work obligations for the remainder of the day.
 - On or about the 26th June 2007 it is reported that you raised your voice at X and called her "stupid" when she sought an explanation for your failure to let her know your whereabouts despite repeated requests that you should do so.
4. Further it is alleged that you failed to follow the Team Leaders instructions without explanation, for example you did not provide X with your infringement book when requested to do so nor respond to emails from X for information about the way file notes and letters are stored.
5. It is also alleged that you showed continual disrespect for the Team Leader and myself on occasions, displayed by:
- Failure to follow the sickness leave provisions in your contract and as outlined by the Manager.
 - On occasions, failure to account for your whereabouts.
 - Your late arrival without explanation at prearranged staff and animal control meetings with management and the Team Leader.
 - Absenting yourself from the office and sending messages via junior member of staff
 - That you talked across X as if she were not in the room about matters that X as Team Leader should have been made aware.
 - That you talked across X as if she were not in the room about matters that X as Team Leader should have been made aware.

These matters have lead management to the view that you may have deliberately adopted a policy of non co-operation with X. This view is further enforced by comments to this effect that have been reported to me by a work peer in Animal Control which leads me to believe that this may be the case. Your comments are sought in this respect

If proven to be -factually correct this would be considered a serious disciplinary matter warranting a penalty which could include dismissal.

6. I have received correspondence from the Marlborough District Council advising me that they have serious concerns about the performance by officers in Animal Control and contending that certain failings amount to performance related breaches of contract. This correspondence is attached. I remind you of your duties to retain this information as confidential. It is commercially sensitive and must not be disclosed outside the office. I must advise that if you are found responsible for all or any in total or in part of these breaches, this would be viewed as a serious matter and any disciplinary action that followed could include the termination of your contract of employment. The allegation of breaches of contract that Council have brought to my attention and that relate to your work are as follows:-

- A) All dog bites, animal attacks and challenging rushing incidents are to be reported to Council as soon as possible. This has not routinely happened.
- B) Any impounded dog is to be kept for a minimum of seven days before destruction or re-homing. Late last year 2 dogs were destroyed within seven days of

impoundment giving rise to serious complaints. The CRM program was to be fully utilised to prevent a re-occurrence. Lost and found notices are not being produced and the standard letters to owners of lost dogs are not being sent out.

C) You are not producing the required schedule for Council of dog owners whose dogs are to be seized because of non-payment of registration fees or other non-compliance. Furthermore every case on the schedule should be considered with Council in advance of seizure and this process is only happening in an ad hoc manner.

D) You do not appear to have undertaken the requisite review of property licence holders for the year to 28th February 2007.

E) You failed throughout the registration period 2006/07 to undertake the required patrol program.

F) You failed to implement a system to monitor and follow up of all classified dogs and to ensure compliance. It is very important to ensure that classified dog owners are fully aware of their obligations and to provide education and support and any monitoring programme should have taken these factors into account.

G) There is a contractual requirement to re-home dogs where ever appropriate. You have not taken any active steps to re-home dogs brought into the pound.

H) Visits associated with non registration are to commence in 1st September and be completed by 31st October. For the registration year 2006/07 the process did not start until 14th May 2007 and was finished within a 2 week period causing concern about the quality of work. Only 6 infringement notices were then issued for 14 unregistered dogs and the reason for this anomaly has not been explained.


I seek your explanation about all the above matters.

Summary

In isolation and in combination if the above concerns are factually correct then I, as your employer, consider that serious misconduct may have occurred to the extent that you have been unable to effectively carry out your duties and I would have no confidence that you would carry out these to the required standard. I would therefore be entitled to come to the conclusion that the trust and confidence that I must have in you to carry out your duties and to deal appropriately with other staff has diminished so significantly that continuing with your employment would not be reasonably possible and that termination of your employment would have to be considered.

Even if I did not decide to dismiss you for serious misconduct I would need to consider whether lesser disciplinary action is taken in which case some standards of behaviour and performance would need to be made clear and review and monitoring of those would take place. If you did not achieve those requirements then dismissal from employment might take place after that time.

Yours faithfully,



Ripeka Houkamau
General Manager