

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 75B/08
5095129

BETWEEN COLIN THOMPSON
Applicant
AND MAATAA WAKA KI TE TAU
IHU TRUST
Respondent

Member of Authority: Helen Doyle
Representatives: Kay Stringleman, Advocate for Applicant
Brian Fletcher, Counsel for Respondent
Submissions: Applicant submissions and affidavit evidence –
23 October 2008
Respondent submissions and affidavit evidence - 4 August
and 28 October 2008
Determination: 3 November 2008

**DETERMINATION OF THE AUTHORITY
AS TO REMEDIES**

[1] In my determination dated 30 June 2008 I found that Colin Thompson had been unjustifiably dismissed from his employment with Maataa Waka Ki Te Tau Ihu Trust (Maataa Waka) on 24 July 2007. I reserved the issue of remedies because Mr Fletcher said information had been received about Mr Thompson following his dismissal which he considered impacted on remedies and therefore wanted an opportunity to put before the Authority. The Authority has received affidavits with respect to the information on behalf of Mr Thompson and Maataa Waka and submissions from Ms Stringleman and Mr Fletcher.

[2] The remedies Mr Thompson seeks are an order that he be reinstated to his position at Maataa Waka as an animal control officer, that he be reimbursed lost

wages in the amount of \$12,250 and that he receive an award of compensation for hurt and humiliation in the sum of \$20,000.

[3] The issues to be dealt with in this determination are –

- Should the new information provided by Mr Fletcher form part of the consideration with respect to remedies?
- Are there issues of contribution?
- What remedies should be awarded?

Should the new information form part of the consideration with respect to remedies?

[4] In early August 2008 the Authority was provided with two affidavits about the new information. One affidavit was from Gail MacDonald who is the current manager of Maataa Waka. Ms MacDonald deposed in her affidavit to the organisation receiving a telephone call from a person I shall hereafter refer to as “Robert” about an infringement. Ms MacDonald deposed to an entry being made in the phone log to the effect that Robert was informed by Mr Thompson that the infringement could be written off if Robert gave Mr Thompson some wild pig. Attached to Ms MacDonald’s affidavit was a statement from Robert that he dictated and signed at the offices of Maataa Waka on 14 April 2008 about his interactions with Mr Thompson. The other affidavit provided to the Authority was Robert’s in which he deposed to the truth of his annexed statement dated 14 April 2008.

[5] Initially a response from Mr Thompson by way of affidavit was expected. It was then indicated by Ms Stringleman that Mr Thompson wished the Authority to reconvene its investigation and hear evidence about the allegation. Mr Fletcher was not opposed to that suggestion and the Authority indicated some dates to suit the representatives.

[6] A matter then brought to the Authority’s attention was that there was a strong possibility that Robert may be imprisoned before the date that the resumed investigation meeting was to be held. The Authority asked as a first step for some indication as to the nature of Mr Thompson’s response to the allegation by Robert. This was provided by letter dated 29 September 2008 and was that Mr Thompson would deny the conversations alleged, about writing off infringements in turn for

being given pork, ever took place and that Mr Thompson never had the ability to make infringements go away. It was accepted that in his role as animal control officer Mr Thompson did have some dealings with Robert because he had unregistered dogs. An attack on Robert's credibility was made in the letter.

[7] The Authority indicated to the representatives that given Mr Thompson's denial of the allegation and the difficulties with Robert's availability it was of the view it should proceed to determine the issue of remedies on the basis of the documents already before it. Mr Thompson subsequently provided an affidavit in which he denied the allegation and stated in several places that he considered Robert had lied. Mr Thompson deposed in his affidavit to reasons why Robert should not be believed. There were other affidavits provided on behalf of Mr Thompson from people in the community with respect to Robert's credibility and an affidavit from another animal control officer who was also dismissed from Maataa Waka and whose dismissal was also held to be unjustified, Jonathan Joseph.

[8] Mr Fletcher provided some further submissions. I indicated to Mr Fletcher and Ms Stringleman that I would not consider part of the submissions.

[9] The Court of Appeal in *Salt v Fell* [2008] NZCA 128 held that subsequently discovered misconduct of a truly significant nature can be taken into account when determining remedies under section 123 of the Employment Relations Act 2000.

[10] The allegation made by Robert is of a significant nature. A law enforcement officer accepting or attempting to obtain a bribe is a serious allegation and such conduct can amount to a criminal offence punishable by imprisonment.

[11] The allegation is completely denied by Mr Thompson and credibility issues are raised about Robert whose credibility is central to any findings that can be made in terms of the allegation. It was proper for Maataa Waka to put the allegation to Mr Thompson for his explanation. For some reason an earlier written denial of the allegation on Mr Thompson's behalf from Ms Stringleman in June 2008 was not received by Mr Fletcher. He did not therefore have knowledge of Mr Thompson's view of the allegation until late September 2008 when the indication was that Mr Thompson would deny the conduct alleged in its entirety. Nothing in particular can be read into that. It may simply have been that for some reason the letter was not transmitted by email in June 2008, or was overlooked.

[12] I must be satisfied in order to take subsequently discovered conduct into account in assessing remedies that there has in fact been conduct of the serious nature alleged. Given the seriousness of the allegation, proof on the balance of probabilities that there was such conduct would have to be convincing if it was to be taken into account by the Authority in reducing remedies. I am not satisfied from considering all the material before me that there has been conduct of the nature alleged by Robert by Mr Thompson.

[13] I decline to take the allegation made by Robert after Mr Thompson's dismissal into account in determining remedies. For completeness, Ms Stringleman submitted that it would be appropriate for the Authority to make a clear finding with respect to credibility given the seriousness of the allegation. That would be inappropriate in the circumstances.

Are there issues of contribution?

[14] I found in my determination that a fair and reasonable employer would have concluded that the action of Mr Thompson in distributing and/or threatening to distribute, internet material about another employee, whilst on paid leave to prepare and answer allegations for a disciplinary meeting including issues about interactions with the employee concerned, amounted to serious misconduct.

[15] The substantive ground for dismissal on that basis was established, but the dismissal was unjustified for reasons of a lack of procedural fairness. The Court of Appeal judgment in *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 is authority for the proposition that where there is a probability that a fair process would have resulted in a justifiable dismissal that probability must be considered with respect to the assessment of compensation.

[16] In this case I have stood back and considered the situation objectively and from the perspective of a fair and reasonable employer as to whether with a fair process there was a possibility or probability of a justifiable dismissal. I find a strong probability and a real likelihood that with a fair process Mr Thompson's dismissal would have been justified.

[17] Ms Stringleman submits that Maataa Waka cannot show any blameworthy or culpable conduct on the part of Mr Thompson and there should be no reduction of remedy.

[18] Maataa Waka was entitled to have trust and confidence in Mr Thompson that he would approach the organisation first about any matters of concern about another employee before distributing internet material to the organisation. Maataa Waka relied on for funding and before threatening to distribute it wider into the community. Those actions breached the trust and confidence that Maataa Waka was entitled to have in Mr Thompson. They were actions that were not undertaken in good faith, were destructive to the continued working relationship between the employee in question and Mr Thompson and undermining of Maataa Waka. Mr Thompson's actions did contribute to the situation that gave rise to the personal grievance.

Reinstatement

[19] I find reinstatement would not be practicable because of Mr Thompson's actions which caused a significant loss of confidence in him as an employee.

Lost wages

[20] I understand from submissions on Mr Thompson's behalf that he was paid a sum in lieu of notice on dismissal, although the dismissal was clearly summary in nature and it was not argued otherwise. I understand that the amount paid to Mr Thompson was equivalent to a four week payment. Taking into account the probability I have found that Mr Thompson would have been justifiably dismissed with a fair process I make no further order for reimbursement of lost wages beyond that already paid in lieu of notice of four week's wages. If I am incorrect in my understanding that that payment was made, then there should be a payment for that four week period made by Maataa Waka to Mr Thompson.

Compensation for hurt and humiliation

[21] This matter was somewhat unusual because had there not been the action by Mr Thompson in terms of the internet material whilst he was preparing to answer other allegations at a disciplinary meeting then it is unlikely that the other matters would have justified dismissal. I found in my substantive determination that the action in terms of the internet material did impact on the failure by the decision maker to retain an open mind and on the decision not to have a further meeting to answer Mr Thompson's questions.

[22] Mr Thompson had worked at Maataa Waka for almost a year and a half at the time of his dismissal. I find that he was entitled to a fair disciplinary process and a more dignified exit than he was afforded in all the circumstances. He is, I find, entitled to a small award for the way his employment ended taking into account his contribution and the probability of a justified dismissal had there been a fair process. I find that a fair and reasonable award of compensation for the way in which the dismissal was undertaken but not the loss of job itself would be \$2,000.

[23] I order Maataa Waka Ki Te Tau Ihu Trust to pay to Colin Thompson the sum of \$2,000 without deduction under section 123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[24] I reserve the issue of costs. Ms Stringleman has until 19 November 2008 to lodge and serve submissions as to costs and Mr Fletcher has until 17 December 2008 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority