

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination: WA 21/08

File Number: 5095596

BETWEEN James Morgan
Applicant

AND The Chief Executive of the
Department of Corrections
Respondent

Member of Authority: Denis Asher

Representatives: Barbara Buckett for Mr Morgan
Emma Warden for the Department

Investigation Meeting Wellington, 5 February 2008

Submissions Received By 14 February 2008

Determination: 18 February 2008

**DETERMINATION OF THE AUTHORITY: Application for Referral to the
Employment Court and Alleged Unjustified Suspension**

Employment Relationship Problem

- [1] In his statement of problem filed on 1 August 2007 Mr Morgan said he had been unjustifiably disadvantaged by being unjustifiably suspended. He seeks a declaration to that effect, reinstatement, compensation for humiliation, etc of \$25,000, penalties for breach of his employment agreement and costs.

- [2] In its statement in reply dated 16 August the Department said Mr Morgan was justifiably suspended as a result of serious allegations which, if one or more is substantiated, was likely to constitute serious misconduct which could result in the applicant being dismissed.
- [3] The parties underwent mediation but their employment relationship problem remains unresolved.
- [4] Following a telephone conference on 8 October the parties agreed to a one day investigation in Wellington on Tuesday 5 February 2008. The parties usefully provided witness statements and relevant documents in advance.
- [5] During the investigation on 5 February the parties agreed there was little prospect of this problem being settled by them on their own terms.
- [6] During the investigation counsel for Mr Morgan, Ms Barbara Buckett, advised that her client was now seeking an urgent removal of this employment relationship problem to the Employment Court on the ground that central to it was an important question of law. An application to that effect was subsequent filed in the Authority on 7 February.
- [7] At the investigation on 5 February counsel for the respondent, Ms Emma Warden, reserved her client's position in respect of the application for removal. In a notice of opposition filed on 12 February the respondent gave notice of its opposition to the application for removal to the Employment Court.
- [8] At the investigation on 5 February the parties agreed the Authority would proceed to determine both matters.

Background

- [9] The applicant has been an employee of the Department since 9 May 1988. He has been a unit manager at Rimutaka Prison since 1 July 1998.
- [10] At a meeting on 25 May 2007 Mr Morgan was given a letter setting out the Department's concerns about his alleged involvement in respect of three serious allegations. Mr Morgan was advised that a formal investigation into the allegations would follow, and that, if substantiated, they were likely to constitute serious misconduct and could result in his

dismissal. The applicant was then placed on special leave with pay while the Department considered whether he should be suspended on pay for the duration of the investigation.

- [11] Another meeting followed on 1 June following which the Department confirmed Mr Morgan would be suspended while the allegations against him were investigated.
- [12] On subsequent occasions the Department amended the allegations – see its letters of 5 June, 16 July, 9 August, 25 October and 29 November 2007. The allegations now relate to the possible misappropriation of gym funds and misuse of a departmental vehicle – see the respondent's letter of 29 November.
- [13] Mr Morgan has consistently denied the allegations – see the applicant's letter of 4 October. He says they are unfounded, lacking in sufficient particularity for him to respond to and that the Department has taken too long to investigate them. He has also consistently argued they do not justify his suspension. Mr Morgan is of the view that some of the Department's conclusions are "*pre-determined (and its) management and investigators have an agenda afoot and are fishing, to get me for something or anything*" (par 31 of his witness statement) and, because of the changing nature of the allegations, that the respondent was "*making up allegations as (it) went along*" (par 36 of his statement).
- [14] The Department does not accept the applicant's claim there is no evidence to support the allegations or that they are unclear. It says its decision to suspend the applicant on pay while the investigation is conducted was made in accordance with its relevant policy, that it has good reason for suspending Mr Morgan, that the applicant was given an opportunity to make submissions as to whether suspension should occur and that it took those submissions into account before making a decision.
- [15] The Department also says that it has reconsidered its decision to suspend Mr Morgan five times (including in light of its decision to withdraw some allegations), i.e. on 11 June, 9 August, 9 October, 29 November and 6 December, and has determined it remains appropriate for his suspension to be continued.
- [16] The Department says the responsibility for the length of its investigation rests with the applicant as it repeatedly wrote to Mr Morgan seeking a meeting so that his full response to the allegations could be received; his replies could potentially lead to its concerns being satisfied. It says Mr Morgan's responses did not provide enough information to properly assess what response he has, if any, to the allegations or provide the means to withdraw the allegations and lift the suspension.

- [17] The parties last meeting was on 11 December 2007, following an ultimatum from the Department (see its letter of 6 December) that if Mr Morgan did not meet with it then it would proceed to make a decision without his input.
- [18] Mr Morgan says that, until his suspension, he has never been subjected to a disciplinary hearing and his performance review results have always been superior to others in like positions.
- [19] During his suspension Mr Morgan has undertaken the Department's EAP programme.

Important Question of Law and Reinstatement

Applicant's Position

- [20] The applicant says that, in the event of not finding in favour of Mr Morgan's substantive claim, that he has been unjustifiably disadvantaged by being unjustifiably suspended, then an important question of law arises as to the right to suspend in light of recent decisions of the Employment Court in *B & D Doors Ltd v Hamilton*, unreported, CC 28/07, Couch J, 18 December 2007 and *Singh v Sherildee Holdings Ltd (t/a New World Opotiki)*, unreported, ARC 111/04, Couch J, 22 September 2005. In the latter, at par 91, Couch J determined that:

In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct, or even serious misconduct, does not of itself justify suspension while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue.

- [21] The judgement also concluded that a decision to suspend an employee will usually only be justifiable if it is the result of a fair process.
- [22] Ms Buckett says these decisions are at odds with previous decisions of the courts which have proceeded on the basis "that there is no right to suspend where there is no express provision in the employment agreement and the employee remains ready and willing to work" (par 2 of the statement of problem received on 7 February 2008).

- [23] An order to suspend an employee is reliant on an express provision to that end in the relevant contract. There is no such provision in Mr Morgan's employment agreement (document 1 in the agreed bundle). Reference at page 8 of Mr Morgan's agreement to the discipline and dismissal procedure in the respondent's human resources manual is not of contractual significance: see *Jensen v Attorney-General in respect of the Chief Executive of the Department of Corrections* [2003] 2 ERNZ 36, at par 29.
- [24] The courts have taken the view that where a suspension has occurred in the absence of an express right to suspend and the employee remains ready and willing to work the employer is in breach of the employment agreement: *Elston v State Services Commission* (No 3) [1979] 1 NZLR 218.
- [25] The original decision to suspend Mr Morgan was unreasonable as there was no evidence or complaints in support of the allegations. There was evidence Mr Morgan was authorised to use the prison vehicle at the relevant time but, in any event, he had ceased using the vehicle by July 2005 (when he is alleged to have used it without authorisation in the following month). The Department had already reached a finding in respect of the misappropriation issue that it was impossible to make any findings and the allegations were over two-years old. All of the gym monies were contributed by fellow employees none of who had any complaints about the management of their funds. Mr Morgan was not the only staff member who had access to the funds. Mr Morgan has replied to the Department and, if it is unable to come to a decision by now, it should not be allowed to capitalise on its own dilatory behaviour.
- [26] None of the allegations, even if proven, could constitute serious misconduct.
- [27] Because of the applicant's unblemished 19-year employment history there is no basis to the second reason given for suspension, which raised the issue of his honesty and integrity.
- [28] There is similarly no basis to the third reason given for the suspension that Mr Morgan would otherwise hamper a full and fair investigation.
- [29] The process applied to Mr Morgan has been unfair because he was not provided with the information relevant to the allegations. In particular, he has been denied information contained in the respondent's current report into Rimutaka Prison, the Pattern Report, even though the decision to suspend referred to that inquiry.

- [30] The process was unfair because at the time the Patten inquiry was still proceeding and had not reached any conclusions about its subject matters.
- [31] Section 4(1A) of the Employment Relations Act 2000 requires the respondent to deal with the applicant in good faith, including being responsive, communicative and not misleading or deceiving. The Department is in breach of those requirements by failing to provide the relevant sections of its human resources manual on which it specifically relied to impose the suspension: that material was not provided until after the suspension was imposed. It also has not provided the terms of reference for the Pattern inquiry.
- [32] The Department has failed to properly inquire of the applicant's managers in respect of facts concerning the allegations which would have resolved them.
- [33] The passage of time has rendered an otherwise justifiable suspension unfair and unjustifiable.
- [34] The raising of new allegations raises the issue of bad faith as they lack sufficient foundation or substance and amount to a moving feast.
- [35] The Employment Court's approach to suspension is that it is:

... a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by suspension can never be assuaged even if he is ultimately vindicated at the disciplinary hearing and is then restored to office and paid his arrears of salary.

Birss v Secretary for Justice [1984] 1 NZLR 513, 522

- [36] I note here that is clear from the argument and evidence advanced on Mr Morgan's behalf that his employment relationship problem, as he sees it, is as much about the substance of the allegations (he says they are without any substance) as it is about the fairness of the Department's decision to suspend him because of the allegations. He says the allegations are not clear and that he has not been supplied with relevant information (or the supply has been unnecessarily delayed), including details as to the source of the allegations. Mr Morgan says the allegations do not justify the respondent's decision to suspend him and to maintain that suspension for over 6-months.

- [37] The applicant says the process has caused him to incur significant legal costs (over \$30,000) and that he is receiving medical treatment (including personal counselling support through the respondent's EAP programme) for workplace engendered stress.

Respondent's Position

- [38] Because of my findings set out below it is not necessary for me to summarise the Department's position.

Discussion and Findings

Important Legal Question?

- [39] I accept the Department's submission that, whatever the case may have been prior to the enactment of the Employment Relations Act 2000, it is now settled law that an express contractual provision is *not* required in order to suspend an employee on pay while an employment investigation is conducted.

- [40] That is because the Act made wide ranging changes to the employment law landscape, in particular going beyond the strictly contractual view that had previously applied and that, consistent with those changes, and as set out first in *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587, the Employment Court has found that,

Each case about the justification for suspension must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise.

- [41] Although Ms Graham's employment agreement expressly provided for suspension, the Court recently addressed and further discounted the suggestion that an employee may only be justifiably suspended where there is an express provision in their employment agreement (see par 17 above). In *B & D Doors* (above), the Employment Court said,

*On the issue of suspension, the Authority adopted the proposition that an employer may only justifiably suspend an employee pursuant to an express right to do so contained in an employment agreement. **This was an error of law.** As discussed above, suspension may be justifiable in the absence of contractual authority and even, in exceptional cases, in the absence of consultation. In each case, the fairness of the decision must be assessed on the facts.*

(emphasis added – par 89)

- [42] The Court went on to find that the employer's failure to consult with the employee prior to imposing the suspension rendered it procedurally unjustifiable.
- [43] The Court had earlier considered the same suspension issue in *Singh* (above): again, there was no provision in the employment agreement allowing the employee to be suspended. The Court found that notwithstanding the lack of any such provision and the lack of pay, suspension could be justified where the employer has "*good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue*".
- [44] I accept the respondent's submission that the legal position, as determined by the Employment Court, is very clear: an employer is not precluded from suspending an employee due to the absence of an express contractual provision allowing for this. As there is no important question of law to be answered, and as the remaining criteria for removal in s. 178 are not met, I find against the application for removal to the Employment Court.

Unjustifiable Disadvantage/Suspension?

- [45] Was Mr Morgan unjustifiably disadvantaged in his employment as a result of being unjustifiably suspended while an investigation into allegations of serious misconduct is undertaken? I am satisfied the Department's decision, objectively measured, was what a fair and reasonable employer would have done in all the circumstances. That is because of the following.
- [46] As is made clear above, an express contractual provision is not required in order to suspend an employee on pay while an employment investigation is conducted.
- [47] The Department's human resources policy allows for suspension where an investigation into serious misconduct is to be conducted: being familiar with that policy and aware of other, similar suspensions, Mr Morgan would therefore be unable to claim he was surprised by his employer's action or that he was being treated differently from others.
- [48] Mr Morgan's suspension is consistent with the reasons for its application as set out in the Department's policy (document 2).

- [49] Mr Morgan was given full opportunity to comment on the Department's detailed allegations and its proposal to suspend him: a fair process was followed.
- [50] The Department has properly regularly reviewed its decision to suspend Mr Morgan, taking into account his views and submissions: the Department has continued to follow a fair process.
- [51] The allegations are serious, involve important questions of trust and confidence and clearly necessitate investigation: *Airline Stewards and Hostesses of NZ IUOW v Air NZ Limited* [1990] 3 NZLR 549.
- [52] Mr Morgan operates in a managerial capacity in an inherently dangerous environment, one that requires his full concentration. He is facing serious allegations. Those allegations, and his suspension, have understandably impacted on the applicant, to the extent he has properly sought EAP assistance. These factors provide sound reasons for suspending – and continuing the suspension of – the applicant while the investigation is undertaken, as much for his protection as for that of other staff, inmates and members of the public who are in Rimutaka Prison from time to time.
- [53] Because of the applicant's managerial role this is an unusual case resulting in good reason to accept that Mr Morgan's continued presence in the workplace could give rise to some other significant issue, in particular to the hampering of the respondent's ability to complete a fair and reasonable investigation.
- [54] The allegation of misappropriation relates to the use of gymnasium funds: the gymnasium is on the respondent's property, in facilities provided by it, and the respondent funded the purchase of a number of pieces of equipment at the time of its establishment. Gymnasium members are exclusively employees of the Department and Mr Morgan's involvement with the facility was because of his employment with the Department. An employer's entitlement to inquire into the conduct of employee clubs is well established: see *Goodall v L'Oréal New Zealand Limited* [2002] 2 ERNZ 224, etc.
- [55] The Department's investigation has been lengthy. However I do not accept that its prolonged nature results in Mr Morgan's suspension becoming unjustified. That is because of the following:
- a. The Department is undertaking a complex investigation requiring a significant amount of correspondence, numerous interviews and the reviewing of a large amount of

documentation including extensive banking records and vehicle logs, particularly as a result of Mr Morgan's replies;

- b. Mr Morgan's replies caused the Department to vary and reduce its allegations;
- c. The applicant declined to uplift numerous requests by the Department to meet with him;
- d. Mr Morgan elected to travel overseas from 27 August to 11 September 2007;
- e. The applicant has been slow in replying to the respondent's correspondence, in particular in providing a detailed response, whereas the Department has swiftly, and thoroughly, responded to his requests for greater specificity. The speed and thoroughness of the Department's correspondence can be measured by reference to the extensive details and attachments of its letters of 25 May, 16 & 23 July, 9 August, 28 September, 9 October 2007, etc (respectively documents 4, 13, 14, 16, 21, & 23);
- f. The applicant's first substantial written response is dated 4 October 2007 (document 22). That reply raised further questions;
- g. Because of Mr Morgan's stance, the parties did not meet in respect of the substance of the allegations until 11 December 2007.

[56] The parties reached agreement on 26 September 2007 that, notwithstanding the Department's suspension policy, not to refer any of the allegations to the Police.

[57] There is no evidence to support Mr Morgan's claim he is being singled out and that the respondent is pursuing an agenda against him. As set out above, there is evidence to support the view that the prolongation of this investigation has been contributed to by Mr Morgan's unrealistic and legalistic stance and his reluctance to be responsive and communicative as required by s. 4 (1A) of the Act.

[58] In these circumstances the applicant's suspension was and remains justified.

Determination

[59] I find against Mr Morgan's applications that there is an important question of law for removal to the Employment Court and that he has been unjustifiably disadvantaged in his employment by being unjustifiably suspended.

[60] As requested by the parties, costs are reserved.

Denis Asher
Member of the Employment Relations Authority