

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 75A/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

Investigation Meeting: 17 and 18 April 2008 at Blenheim

Determination: 30 June 2008

DETERMINATION OF THE AUTHORITY

The 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 Thompson'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 hereon 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. I make the interim order prohibiting from publication the identity of X and the internet material that was downloaded about X permanent.

The employment relationship problem

[4] The applicant, Colin Thompson, 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.

[5] Mr Thompson commenced working for Maataa Waka as an animal control officer in February 2006. Mr Thompson's job description at Maataa Waka provided that he was directly accountable to the animal control team leader for day-to-day responsibilities of the position and overall accountability for the animal control contract was the responsibility of the general manager.

[6] 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 Thompson was employed as an animal control officer to carry out functions under that contract to the Marlborough District Council.

[7] X was appointed to a role at Maataa Waka on 23 April 2007. She was employed initially as an administrator and then on or about 15 May 2007 as project manager. By 1 June 2007 X became team leader of animal control. By 28 June 2007 X had resigned and was working out a notice period at home. She had provided Ms Houkamau with a medical certificate to support that she was unwell and could not work in the office.

[8] Mr Thompson 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.

[9] The general manager at the 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 from her position at Maataa Waka. The previous manager at Maataa Waka died in June 2005 and the animal control department had been managed until Ms Houkamau's appointment by interim managers.

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

[11] Mr Fletcher advised that if the Authority got to the position of considering remedies in respect of Mr Thompson, then a matter had been brought to the attention of Maataa Waka four days before the Authority's investigation meeting which was considered to be of an extremely serious nature and was directly relevant to remedies.

[12] Maataa Waka accepted the matter was 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

[13] 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.

[14] 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

[15] The Authority was provided with an unsigned individual employment agreement between Maataa Waka and Mr Thompson. 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 Thompson was a member of the Union and his work was covered by the coverage provisions of the collective agreement. Whilst the collective agreement had not been signed by both parties, it was generally agreed that the provisions of the document had been applied since 1 April 2007.

[16] There was no specific procedure in the event of any disciplinary matter set out in either the individual or collective agreement.

The disciplinary process

[17] Mr Thompson 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 and Mr Thompson 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.

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

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

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

[21] Before the meeting and arrangements 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 then they were required by 2pm on 23 July 2007.

[22] There could have been unfairness if Ms Houkamau had not changed the date to accommodate Mr McManus. There was, however, agreement that a meeting would proceed on 23 July 2007 and any unfairness in that respect was therefore averted.

[23] Between 18 and 23 July 2007, Mr Thompson and Mr Joseph distributed some material that they had downloaded from the internet about X to Ms Houkamau, the members of the Board of Maataa Waka and the Marlborough District Council. 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. Mr Congdon was the liaison person for the animal control contract with Maataa Waka.

[24] The meeting on 23 July 2007 was attended by John Drummond, advocate for Maataa Waka, Ms Houkamau, Mr Thompson, Mr Joseph, Ms Huntley, Mr McManus and Kore Tombs who was there as a supporter. 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.

[25] Mr Drummond gave Mr Thompson, Mr Joseph and Ms Huntley the option of discussing the matters individually. The documents support that it was Maataa Waka's original intention to have three separate meetings. Mr McManus advised that all three members were happy with a collective response.

[26] Mr Drummond advised Mr Thompson 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 that they had been dealing with. Mr Thompson advised that the downloaded internet material had not been distributed to the other names on the list aside from Mr Congdon, Ms Houkamau and the Board members at the time of the meeting. Mr McManus advised that their legal counsel had *okayed this action*.

[27] There was an understanding reached that each employee would make their individual response to the allegations contained in the letter they had received.

[28] Mr Thompson read his responses to the allegations from prepared notes which he provided as part of his evidence at the Authority meeting.

[29] Mr Thompson did not accept the criticism made of his behaviour towards Ms Houkamau and X. He said he had no idea where the allegation of sexual harassment had come from and that the letter of 18 July 2007 was the first he had heard of it. He believed that the concerns set out in para.4 of the 18 July letter reported to Ms Houkamau by X were fabricated and expressed the view that he believed *she was a control freak to the extreme*.

[30] Mr Thompson accepted that he did not have receipts to give to Ms Houkamau in terms of para.5 of Appendix 1 on advice given to him by Mr Joseph and Mr McManus and in the belief that he did not have to. Mr Thompson denied any misappropriation and advised that he would give the money back if required.

[31] In terms of the performance issues, Mr Thompson said that he had not been shown the contractual obligations with the Council and was unaware of the breaches until he received the letter of 18 July 2007 which had relevant Council letters attached to it. Mr Thompson said that he knew nothing about some of the procedures. There was no dispute that Mr Thompson had not previously been warned about any performance shortcomings.

[32] Mr McManus asked that Mr Thompson and the other employees be allowed to address the Board directly. It was explained that Ms Houkamau had the authority to make a decision in terms of the disciplinary process.

[33] A letter was sent that same day to Mr McManus' office which he found when he returned from the disciplinary meeting. The letter was from the Board chairperson of Maataa Waka, Lewis Boyles and 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 process of action by the manager to date.

[34] At the end of the disciplinary meeting, Mr Thompson provided some written questions for Ms Houkamau to take to the Board and to be considered. Mr Thompson said that he expected the questions would be presented to the Board and that answers would be provided.

[35] Mr Thompson and Mr Joseph, having not heard that they were required to work after the disciplinary meeting went on a fishing trip on 24 July 2007. Mr Thompson understood from Mr Joseph that he had taken a call from Ms Houkamau to attend a meeting on 24 July 2007 but that Mr Joseph had confirmed that they would not be able to make the meeting given where they were fishing. From the evidence, I conclude that there was some expectation that another date for a meeting was to be arranged but I am not satisfied that there was any firm agreement as to the time for that meeting.

[36] Mr Thompson went to see Mr McManus on 25 July 2007 but he was not available for a meeting until the Friday. On 26 July, Mr Thompson received two letters at home including a letter advising him that his employment had been terminated. The letter was dated 24 July 2007 and set out the basis for the dismissal for six reasons that formed the basis on which a decision to terminate his employment had been made 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 at 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 serious 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 for 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. ***Inappropriate Behaviour in the Workplace***
Aggressive intimidating behaviour has been reported by the Manager and the Team Leader. This behaviour is not acceptable and will no longer be tolerated.
5. ***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.
6. ***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 co-operative 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 in jeopardy.

Ms Houkamau said that the first three reasons concerning the distribution and/or threatened distribution of the internet material about X were the primary reasons for dismissal but that the reasons set out in paras.4, 5 and 6 were matters that she took into account in reaching a decision to terminate Mr Thompsons's employment.

The issues

- Was Maataa Waka justified in concluding that Mr Thompson's actions in the collection and distribution or threatened distribution of internet material about X amounted to serious misconduct?
- Was Maataa Waka justified in concluding that Mr Thompson exhibited aggressive and intimidating behaviour in the workplace?
- Was Maataa Waka justified in concluding that Mr Thompson failed to follow reasonable instructions from X and Ms Houkamau?
- Was Maataa Waka justified in concluding that Mr Thompson had not performed his duties satisfactorily?

- Did Maataa Waka follow a fair process?
- Would a fair and reasonable employer have made the decision to dismiss Mr Thompson in all the circumstances that existed at the time of dismissal?
- If the dismissal is found to be unjustified, then what remedies is Mr Thompson entitled to and are there issues of contribution?

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

[37] The first three reasons in the letter of termination dated 24 July 2007 concerned the internet material.

[38] The material itself was not confidential as it was on the internet but it could fairly be concluded from considering the material which Ms Houkamau had been provided with at the time of the disciplinary meeting that it was sensitive to X. I accept Mr Fletcher's submission that there was nothing to support that at that time it was public in the sense that the general population in Blenheim/Marlborough knew of it.

[39] The contract Maataa Waka had with the Marlborough District Council required liaison between the two organisations and their staff. There was a clause in the contract that provided, amongst other matters, that the contractor (Maataa Waka) shall not remove key personnel, vary the duties of key personnel or replace key personnel without the prior approval of the Council.

[40] Ms Stringleman submits that Mr Thompson's explanation at the time of the disciplinary meeting was reasonable. He confirmed that he had had legal advice that the material was not confidential and that there was no intention to undermine Maataa Waka.

[41] Ms Stringleman submits that it was not inappropriate to bring the material to the attention of the Council given the relationship between them and the unreasonable and rushed disciplinary process. She submits that there was no improper motive and that it was totally unreasonable to categorise Mr Thompson's conduct regarding the internet material as serious misconduct and that there was no attempt to properly investigate the matter.

[42] Ms Stringleman submits that the action of Mr Thompson in terms of the internet material was, at worst, an error of judgement.

[43] Ms Houkamau said that when she heard the explanation from Mr Thompson, read one of his questions to the Board provided after the disciplinary meeting had closed and considered the distribution list she concluded the material was not distributed or threatened to be distributed in good faith and was done in an attempt to undermine her, X and Maataa Waka. Ms Houkamau said that giving the material to the Council which already had significant concerns about the performance of the animal control contract with Maataa Waka would cause harm to Maataa Waka's reputation. She concluded that it was not done for any reason beneficial to Maataa Waka and made it impossible for X and Mr Thompson to continue working together.

[44] The circumstances against which the actions have to be considered are that Maataa Waka had received a formal written complaint from X about Mr Thompson dated 2 July 2006 (document 16, respondent's bundle). The essence of the complaint was that X considered Mr Thompson's behaviour to be bullying and intimidating. X set out a specific situation where she felt that Mr Thompson made her feel frightened and further she said in her letter that Mr Thompson was persistently insubordinate, non-communicative and took steps to isolate and undermine her. X was at home on sick leave at the time the disciplinary meeting was held.

[45] Maataa Waka was obliged to investigate X's complaint which fairly and reasonably involved the matters being put to Mr Thompson. Ms Houkamau put X's concerns to Mr Thompson in the letter of 18 July 2007.

[46] After receiving the letter Mr Thompson together with Mr Joseph distributed some internet material downloaded about X that he felt showed her in a bad light and therefore made her less believable. Mr Thompson took part in the preparation of a list which included agencies and individuals outside his employer. The list was attached to all of the Board members' copies of the material but not to the material Ms Houkamau was given. It was also, in all likelihood, attached to the copies of material given to Mr Congdon at the Council.

[47] Assessing whether this behaviour was capable of destroying the trust and confidence that Maataa Waka must have in Mr Thompson and/or any working relationship with X in the future not only involves considering whether the material is

confidential. The motive or reason for the distribution and threatened distribution to others outside of Maataa Waka is relevant.

[48] Mr Thompson was on paid leave at the time of distribution to answer disciplinary allegations and he still had obligations as an employee to deal with Maataa Waka in good faith and be active and constructive in maintaining a productive employment relationship. Amongst other allegations in the letter of 18 July 2007 there was an allegation that X had said Mr Thompson's conduct toward her was making her ill.

[49] Objectively assessed, Ms Houkamau was entitled, following the disciplinary meeting on 23 July 2007, to conclude that the motive behind the distribution of the material to Mr Congdon at the Council was to show X in a bad light.

[50] Whilst accepting that there was a close day-to-day relationship between the animal control officers and the Council, Mr Thompson knew the Council did not employ him. Mr Thompson was not giving material to Mr Congdon that was related to his work as an animal control officer but was giving him sensitive material about another employee which was on its face not relevant to the role that X was performing at Maataa Waka.

[51] Mr Thompson was not the contractor in terms of the animal control services contract between Maataa Waka and the Council. It was for Maataa Waka as contractor and employer to decide what the Council was told or shown.

[52] Objectively assessed, a fair and reasonable employer would not conclude that it was reasonable that Mr Thompson gave the material to Mr Congdon to bring *some reason* to what Mr Thompson saw as a rushed and unreasonable disciplinary process. That is the role of an advisor and Mr Thompson had legal advice and support from his Union at that time.

[53] Maataa Waka was entitled to have trust and confidence in Mr Thompson that if he had some information about X then he should provide his employer with that and not provide the material or threaten to provide the material to others outside the organisation.

[54] A fair and reasonable employer would conclude that the 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 had concerns about breaches of the contract. Mr Thompson distributing sensitive material about the team leader of animal control in those circumstances was undermining to Ms Houkamau as general manager of Maataa Waka and was not beneficial to Maataa Waka or done in good faith.

[55] The distribution to the Council would cause embarrassment and stress for X and undermine her in the eyes of the Marlborough District Council. The distribution effectively rendered any future working relationship between X and Mr Thompson impossible.

[56] Maataa Waka must be able to put to Mr Thompson concerns another employee has about his conduct without the risk that he will take matters into his own hands and discredit that employee outside of Maataa Waka. That is so even if he feels that the concerns are without foundation. Otherwise there is a real risk that no one would ever feel safe to complain about Mr Thompson because of the fear of reprisal. In those circumstances, Maataa Waka could not provide a healthy and safe working environment for its employees and investigate matters of concern.

[57] A fair and reasonable employer would conclude, if the material was not intended to be distributed to the other names on the list that they were put there to intimidate and worry X about wider distribution in the community. The behaviour fell within the definition of harassment in Maataa Waka's harassment policy as *any form of behaviour, which takes place in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the person harassed, would be offended, humiliated or intimidated.*

[58] A fair conclusion could be reached given the preparation of the list that it was a deliberate rather than a spontaneous distribution or threatened distribution of the material.

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

Was Maataa Waka justified in concluding that Mr Thompson exhibited aggressive and intimidating behaviour in the workplace?

[60] During the disciplinary meeting on 23 July 2007 Mr Thompson denied that his behaviour in the workplace was aggressive or threatening to either Ms Houkamau or X.

[61] There was no conclusion reached that there was misconduct in terms of the allegation in the letter of 18 July 2007 of sexual harassment and indeed there was no such conclusion available on the facts that related to the incident. It was unfortunate that the allegation, although made by X in that way, was described by Maataa Waka as sexual harassment in the 18 July 2007 letter. Maataa Waka had always viewed the incident complained of on the particular day by X on the basis of threatening and intimidating behaviour and not sexual harassment. I accept that Mr Thompson was confused and hurt by the description of his behaviour in the letter of 18 July 2007.

[62] X complained about Mr Thompson pointing with his finger in what she felt was an aggressive way during a meeting with the two other animal control officers. Mr Thompson complained about X at the time because he felt that X was abusive and aggressive.

[63] Mr Thompson denied that he had behaved in an inappropriate way to Ms Houkamau. He placed reliance at the disciplinary meeting on a statement that he says was made by Ms Houkamau that she did not think he was a threatening person. Ms Houkamau said in her evidence at the investigation meeting that she could not recall telling Mr Thompson that she did not find him threatening.

[64] In essence, Mr Thompson's explanations at the disciplinary meeting were that he did not accept that his behaviour was intimidating, threatening or oppressive. He said that X was the bully and a control freak.

[65] Ms Houkamau was entitled to conclude that she found some of Mr Thompson's behaviour intimidating and oppressive towards her. X had already raised concerns directly with Mr Thompson and Ms Houkamau about his conduct. A fair and reasonable employer would conclude that there were genuine concerns and there would have to be some change if the working relationship was to continue between Mr Thompson and X.

[66] The letter of 18 July 2007 was the first time the concerns from Ms Houkamau and X had been formally brought to Mr Thompson's attention. There had been a mediation to try to deal with the workplace conflict on 27 June 2007 but that involved all employees in the animal control department and did not resolve the matter.

[67] The formal process started by the letter of 18 July 2007 to bring these concerns to Mr Thompson's attention was overtaken by the internet matters that, objectively assessed, I have found rendered the working relationship untenable between X and Mr Thompson. Had the process not been overtaken in that way, then a fair and reasonable employer would have wanted to see if Mr Thompson was amenable to changing his behaviour if it was upsetting to others. A step in that direction, given that there had already been an unsuccessful mediation, would have been to have had some specialist assistance from a third party to work between Ms Houkamau, X and Mr Thompson. If there was a conclusion that Mr Thompson was not amenable to change then there would have to be consideration as to whether the employment relationship could continue or whether it was irreparably damaged.

Was Maataa Waka justified in concluding that Mr Thompson failed to follow reasonable instructions?

[68] Ms Houkamau accepted that, after a period of time with poor management in the animal control area, it was going to be difficult for Mr Thompson to accept directions from X. Mr Houkamau tried getting the employees on board by talking informally. There was a point at which she concluded that formal steps were required and set the concerns out formally in the letter of 18 July 2007.

[69] Ms Houkamau had many issues to deal with and leading up to 18 July 2007 almost continual complaints from staff and concerns from the Council. I accept that she probably felt overwhelmed. Ms Houkamau was also facing complaints from Mr Thompson about X's behaviour.

[70] Looking at the matter, as I must from an objective perspective a fair and reasonable employer would have had to reach a conclusion on each incident as it occurred. If information was not provided promptly when requested of Mr Thompson by X without good reason, or if Mr Thompson did not record his whereabouts then he should have been warned. There were no clear warnings as to specific incidents although issues had very clearly been raised by X.

[71] These behaviours, objectively assessed, when taking into account the explanations given at the disciplinary meeting, do not fall under the description of open defiance as set out in the termination letter. The behaviours were of a more covert nature and left unchecked for an extended period of time contributed to the breakdown of the relationships and needed to be carefully managed. They had not been.

[72] A fair and reasonable employer would not have concluded that there was serious misconduct in these circumstances.

[73] The other significant matter that was put to Mr Thompson in the 18 July 2007 letter concerned a situation where he had received prepaid expenses of \$250 for a work trip to Auckland in June 2007 together with \$100 cash for taxis.

[74] Ms Houkamau was directly involved in this matter and it was open for her to conclude after the disciplinary meeting on 23 July 2007 that she had asked Mr Thompson to provide all receipts because he had been prepaid his expenses. A fair and reasonable employer would conclude that Mr Thompson was not straightforward and honest about receipts on his return. Ms Houkamau had to ask Mr Thompson several times for the receipts when clearly he had no intention of providing them to Ms Houkamau and indeed on receiving a telephone call from Mr Joseph had, in all probability, thrown them away.

[75] Ms Houkamau was entitled to have confidence in Mr Thompson that he would respond to her in good faith about the receipts. A good faith approach on the part of Mr Thompson would have been to contact Ms Houkamau from Auckland and say that he had been advised by Mr Joseph that there was a dispute about whether or not he had to provide receipts. Ms Houkamau and Mr Thompson could then have agreed what was to happen on that particular occasion with the receipts whilst notification for a dispute was prepared and advised by the Union.

[76] A fair and reasonable employer would take into account that a failure to follow a reasonable instruction where there is a genuine dispute about the application or operation of an employment agreement provision will not usually constitute serious misconduct. The wording in the collective employment agreement as it stood certainly supported Ms Houkamau's view that receipts were required. Account would also have to be taken of the fact that Ms Houkamau, although concluding that failure

to provide receipts was yet another attempt to undermine her authority, did not take any formal disciplinary action at the time.

[77] Taking those matters into account, a fair and reasonable employer would conclude that there was misconduct and a lack of good faith by Mr Thompson in terms of the instruction to provide receipts to Ms Houkamau as requested but not serious misconduct.

Performance concerns

[78] The performance concerns set out in para.6 of the letter of 18 July 2007 had not been the subject of a formal process of warnings. Mr Thompson maintained that it had never been brought to his attention that there were any performance deficiencies in terms of the animal control contract. As these matters had not been the subject of a formal process of warnings, they would not justify a conclusion that the point had been reached, in terms of Mr Thompson's performance, where his employment could not continue.

Conclusion

[79] In conclusion, the first three matters in the letter of termination that concern the distribution or threatened distribution of the internet material outside of Maataa Waka are capable of amounting to serious misconduct. Had there not been that action by Mr Thompson the issues of inappropriate behaviour which were formally brought to Mr Thompson's attention for him to respond to on 18 July 2007 would not have justified a finding that the employment relationship was irreparable without a further step to see if Mr Thompson was amenable to changing his behaviour.

[80] A fair and reasonable employer would conclude that the failure to follow reasonable instructions from X was of a covert nature rather than openly deliberate. In the absence of warnings at the time these would not justify a conclusion of serious misconduct. A fair and reasonable employer would conclude that there was misconduct in the way Mr Thompson dealt with the receipt issue involving Ms Houkamau.

[81] Mr Thompson had never been specifically advised that his performance was in issue which was required as a matter of fairness. There was an overlap between the

second part of the reasons for termination of Mr Thompson's employment in paras.5 and 6.

Did Maataa Waka follow a fair and reasonable process?

[82] 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.

[83] 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?*

[84] 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.

[85] 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.

[86] The circumstances in this case were that the primary reason for concluding there had been serious misconduct on the part of Mr Thompson 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 Thompson received the letter of 18 July were viewed seriously but on the day of the disciplinary meeting on 23 July 2007 Mr Thompson's focus was clearly on answering the allegations in the 18 July letter.

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

employee. Objectively assessed in all the circumstances procedural fairness required a further meeting after 23 July 2007. Mr Thompson should have been advised of the 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 Thompson would then have had a fair opportunity to make any statement in that regard before a decision was made in terms of disciplinary action.

[88] Mr Thompson had provided questions that he wanted to be considered by the Board as part of the disciplinary process. He was expecting a response. Objectively assessed, the answers to the questions may well not, as Mr Fletcher submitted, have advanced the matter, particularly in terms of the disciplinary allegations, but the answers were important to Mr Thompson. A fair and reasonable employer would have met with Mr Thompson after 23 July 2007 and advised him of any response in terms of those questions.

[89] Instead a decision was made to dismiss Mr Thompson after the 23 July 2007 meeting and he was subsequently advised of that by letter. There was some dispute about whether Mr Thompson failed to attend a meeting and be handed that letter. I am not satisfied that there was a definite time arranged for a meeting after Mr Joseph advised Ms Houkamau that Mr Thompson would not be able to attend a meeting on 24 July 2007. I do not find that there can be criticism of Mr Thompson in that regard.

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

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

The decision to dismiss

[92] Maataa Waka was facing significant workplace relationship problems. At the same time there had been advice of a large number of breaches by Maataa Waka of the animal control contract it had with the Marlborough District Council. Steps were required to address both of these matters. The letter of 18 July 2007 was the start of a formal process to bring these matters to Mr Thompson's attention and he then took an action that I have found, objectively assessed, amounted to serious misconduct.

[93] A finding of serious misconduct was justified by Maataa Waka in terms of the internet material but a fair and reasonable employer would not have dismissed Mr Thompson in all the circumstances without having a further meeting with him. That failure was unfair and therefore the decision to dismiss was not one a fair and reasonable employer would have reached in all the circumstances.

Determination

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

Remedies

[95] I have reached the point of considering remedies. Mr Fletcher should provide as part of that consideration the information he has 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.

[96] I reserve the issue of costs until after remedies have been determined.

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

Colin Thompson
 Maataa Waka Ki Te Tau Ihu Trust
 P.O. Box 1016
BLLENHEIM

Kia Ora Colin,

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 Friday 20 July 2007 at 1pm. I will have with me at the meeting Industrial Consultant, John Drummond. A minute taker will also be present at the 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. Thereafter you snubbed me, you remained cold towards me, you rarely made eye contact, and your body language was non-engaging. As a result the atmosphere in the office became extremely unfriendly. I found this behaviour intimidating and distressing.
2. On another occasion after I had informed animal control staff that Kerrie Vale had resigned because she was unhappy working in the animal control environment you asked to meet with me to discuss the matter further. I met with you on 16 March 2007. At that meeting you informed me that I had made a lot of eye contact with you in the meeting and this had led you to believe that you may have been implicated in Kerrie's decision to leave: You insisted on knowing if you had played a part in this decision. I found your insistence oppressive. It was under some duress and with considerable reluctance, that I shared with you that Kerrie was concerned about the delight that you had expressed about me moving on. Thereafter the snubbing behaviour, lack of

eye contact, non-engaging body language continued.

3. On the 23rd May 2007 X made a formal complaint of sexual harassment, intimidation and bullying about you. After I spoke with you I arranged for you to meet with X in my office in an attempt to resolve the matter informally. X reported to me after that meeting, that you did not consider that you were at fault and that you were not prepared to offer an apology. I am told by X that you felt your conduct was appropriate. X does not feel able to work with an employee who displays what she considers to be aggressive and bullying behaviour and on further discussion seeks to justify that behaviour. I have discussed the initial incident with you in an informal setting. I am not satisfied with your response and have concerns about X's report of your subsequent conduct. I therefore wish to hear your comments about these matters, before determining whether formal disciplinary action should be taken against you.
4. Since taking on the role of team leader X has reported to me a number of incidents which she contends made her ability to work as your team leader impossible and further that your conduct towards her was making her ill. The matters of complaint were that you had shown her a lack of respect and had been persistently insubordinate, that your behaviour was intimidating and bullying. X reported to me in particular that you had:
 - Much of the time, even though X sits next to you in the office and is Team . Leader, you chose to ignore her presence and instead talked across her to Johnny and Shugar as if she were not in the room. X reports that this conduct made her feel very uneasy and stressed, undermined and isolated.
 - Much of the time provided no account to X of your reasons for being out of . the office and made no entries in the calendar. You ignored X's requests to enter your appointments in the calendar and when X persisted with her request that you should do so, you started to put your appointments in to her calendar.
 - You were repeatedly awkward and difficult over simple requests for information and assistance.
 - You failed to follow X's request that field work should not be undertaken in pairs unless there was a good reason and only after X or I had undertaken an assessment of the matter and given our authority to go out in pairs.
 - You failed to turn up for meetings that X arranged or turned up late offering no explanation.
 - You were awkward over changes indicating no understanding of why new systems were needed and ignoring many that were implemented.

If I find that your conduct amounts to intimidation, bullying or threatening behaviour, then this is extremely serious particularly as it would lay open the organisation to a personal grievance from X.

5. You attended Animal Control Officer training in Auckland during the week of the 11th June 2007. You were provided with an advance of funds for expenses and advised that you were required to provide receipts for all expenditure upon your return. On your return I asked you on several occasions for receipts. You promised these would be forthcoming. In the event, you produced a receipt for a taxi fare. You advised me that you had been told by

Johnny Joseph that you were not required to produce other receipts supposedly in accordance with the collective agreement. I pointed out the collective agreement had not been agreed and signed and that your requirement and my instruction was clearly that you were to produce receipts.

6. I further pointed out that your individual employment agreement in clauses 7.3 and 7.4 specifically states that reimbursement for expenses would be made "provided the employee completes a reimbursement form and produces appropriate receipts". I consider your refusal to provide the receipts are a deliberate refusal to carry out proper instructions by me as your manager and a breach of your employment agreement. As it involves funds and the reimbursement of expenses in the absence of proper proof this could be seen as misappropriation. In any case if the receipts cannot be produced then reimbursement of the advance will be required.

7. 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

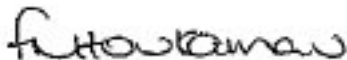
brought into the pound.

- 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.

Summary

8. 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.
9. 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