

**Attention is drawn to the non-
publication order in paragraph 7**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 54/10
5162078

BETWEEN ROBERT PITMAN PAEA
 Applicant

AND CHIEF EXECUTIVE OF THE
 DEPARTMENT OF
 CORRECTIONS
 Respondent

Member of Authority: Marija Urlich

Representatives: James Parlane, Counsel for Applicant
 Steve Wragg, for Respondent

Investigation Meeting: 15 October 2009

Submissions Received: 29 January 2010

Determination: 9 February 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Paea was employed by the Department of Corrections as a community work supervisor from 30 April 2008 until his resignation on 12 March 2009. In this role he supervised offenders undertaking community service sentences.

[2] On 18 February 2009 Corrections received a complaint from an offender about Mr Paea's conduct. Mr Paea was advised on 20 February that the complaint had been received and, arising from the complaint, that Corrections would undertake a disciplinary investigation into allegations of serious misconduct which could result in Mr Paea's dismissal. During the course of the second investigation meeting Mr Paea tendered the following resignation letter:

To whom it may concern I resign as a community work supervisor as of effective 12.03.09

[signature Robert Paea]

[3] Mr Paea says this resignation resulted from a threat of dismissal and/or that he was bullied during his employment culminating in his resignation and that this amounts to an unjustified constructive dismissal. He seeks awards to remedy consequent losses. Mr Paea also says Corrections failed to maintain the statutory obligations of good faith by not investigating complaints he made during his employment and not giving him a favourable reference after his employment ended.

[4] Corrections say Mr Paea resigned of his own free will, that the resignation was proffered and accepted in good faith.

Timetables – non-compliance

[5] The Authority has set three timetables for the filing of closing submissions. The first two required sequential filing of submissions with Mr Paea's to be filed first and then those of Corrections. Without explanation Mr Paea has not complied with those timetables. The third timetable, set in the New Year, required simultaneous filing of closing submissions by the end of January 2010. The respondent has complied with this timetable. No submissions were received on behalf of Mr Paea. After the date for filing an Authority support officer left a message with Mr Parlane inquiring as to whether any submissions would be filed on behalf of Mr Paea. The message has not been returned.

[6] Mr Paea has had a fair opportunity to file closing submissions. It is time to move to determine this employment relationship problem.

Non-publication order

[7] I record the non-publication order made at the investigation meeting suppressing all evidence identifying offenders or locations involved in the community supervision at issue in these proceedings: Schedule 2, clause 10 Employment Relations Act 2000.

Issues

[8] To determine this employment relationship problem the Authority must decide:

- If Mr Paea resigned or was dismissed; or
- If Mr Paea's resignation amounts to an unjustified constructive dismissal; and
- If Corrections breached the statutory good faith obligations during and after Mr Paea's employment.

Choice between resigning or being dismissed

[9] Mr Paea says the day before the resignation meeting he received a telephone call from his union organiser, his representative in this disciplinary investigation. He says she told him Corrections had interviewed 13 offenders in relation to the allegations, that they all confirmed the allegations and that he should resign. Mr Paea says he told his organiser he would not resign because he had done nothing wrong.

[10] The following day, 12 March, Mr Paea attended a disciplinary meeting represented by his union organiser. Corrections were represented by Colin Waterton, the service manager and Angie Christini-Crawford, regional HR manager.

[11] Mr Paea says the Corrections representatives told him there was sufficient evidence to justify his dismissal but he could resign. He says an adjournment was taken and his union organiser told him he had no option but to resign, there was enough evidence to dismiss and if he was dismissed his name would be mud in Corrections. Mr Paea says this advice caused him to make an irrational decision about his future and resign. He says he then wrote the resignation letter which he presented to the Corrections representatives when the meeting was reconvened along with his keys.

[12] Corrections version of events is different. Ms Christini-Crawford's file note of the meeting records:

Meeting commenced at 8.40am.

Robert and Nita were thanked for attending the meeting. It was explained to Robert that as he has been made aware by his PSA Organiser (Nita), they had discussed the option of resignation. Therefore, we (The Department) would like to give Robert the opportunity prior to commencing the meeting, to resign.

Robert asked what would happen if he didn't. He was told that we would continue with the investigation process and that a preliminary view would come from Raema (Area Manager) as to any further disciplinary action etc.

Nita explained to Robert that, as they had discussed the day before, should he resign it would be in his favour in regards to finding further employment (rather than possible dismissal).

Robert then handed over his resignation, keys and Departmental property. Was asked if he had anything further to ask or add, to which he answered "no".

Meeting closed 8.50am

[13] In her evidence to the Authority Ms Christini-Crawford said she had been contacted by Mr Paea's union organiser on 27 February, shortly before the first scheduled investigation meeting, asking if Corrections would accept Mr Paea's resignation. Ms Christini-Crawford replied the investigation was not yet complete and after pressing from the organiser said that a resignation would be considered if it came to that. The meeting then proceeded as scheduled.

[14] A possible resignation for Mr Paea was next raised during an informal meeting with Mr Paea's organiser, Ms Christini-Crawford and the Corrections regional manager. I accept this meeting had been scheduled well before the 19 February complaint was received and that its purpose was not to discuss Mr Paea or the disciplinary investigation. Ms Christini-Crawford said that during the course of the meeting the organiser again raised whether Corrections would accept Mr Paea's resignation. Corrections response was as on 27 February.

[15] The next investigation meeting was scheduled for 12 March. The purpose was to present Mr Paea with new allegations which had arisen during the investigation. The evening before Mr Christini-Crawford received a telephone call from the organiser advising she had been on the telephone with Mr Paea for an hour and a half and he was more than likely to offer his resignation at the meeting the following day. Ms Christini-Crawford then telephoned her manager who agreed if Mr Paea offered his resignation Corrections would accept it.

[16] The key area in dispute about the 12 March meeting is – who initiated the resignation?

[17] In his witness statement Mr Paea says he was advised to resign by his organiser because there was no alternative and he signed the resignation letter under duress without proper legal advice. During the investigation meeting when questioned on his witness statement he said he had not written that document and that perhaps his lawyer had. The witness statement does not properly form part of the evidence – it is not Mr Paea's evidence.

[18] Mr Paea's evidence that Corrections' representatives told him there was sufficient evidence to dismiss him but he could resign is not consistent with the purpose of the meeting which was to present Mr Paea with a letter setting out fresh allegations. It is clear from that letter that Corrections' investigation was not complete. Other than Mr Paea's assertion, there is no evidence Corrections' investigation into the allegations against Mr Paea was complete or that it had formed a view there were grounds to dismiss Mr Paea. I prefer Ms Christini-Crawford's recollection of the meeting based, as it was, on contemporaneous notes.

[19] Having accepted Ms Christini-Crawford's version of events - was Mr Paea presented with an option of resigning or being dismissed?

[20] No. The evidence establishes the day before the 12 March meeting Mr Paea's organiser advised Corrections he was likely to tender his resignation at the meeting and made inquiry as to whether that resignation would be accepted, which was agreed. In such circumstances it was appropriate for Ms Christini-Crawford to give Mr Paea the opportunity to tender that resignation before the meeting commenced and to reference that opportunity to the conversation with the organiser the previous evening, of which she expressly said she understood him to be aware. This, properly, separated the resignation from the disciplinary context. It was also appropriate for Mr Christini-Crawford to tell Mr Paea, in answer to his question, that the disciplinary investigation would continue if he did not resign – that was a statement of fact not a threat.

[21] I find repeated representations were made on Mr Paea's behalf by his representative to elicit whether Corrections would accept his resignation, that these

representations were confirmed with him at the 12 March meeting, he then tendered a pre-prepared resignation and returned Corrections property which was formally acknowledged in writing two days later.

[22] For these reasons I find Mr Paea was not given an option of resignation or dismissal. His resignation was genuine. He was not dismissed.

Workplace bullying

[23] Mr Paea's alternative ground of unjustified constructive dismissal is that he was the subject of workplace bullying – he says he was picked on by Corrections and the investigation into the 18 February complaint was the culmination of that bullying.

[24] Workplace bullying is described as repeated, unreasonable behaviour directed towards an employee with the intention of causing harm¹.

[25] Mr Paea points to training and counselling sessions through 2008, Corrections issuing and then withdrawing a disciplinary warning in January 2009 and the March disciplinary investigation as examples of workplace bullying. He says minor issues were exaggerated and unnecessarily escalated to formal investigation.

[26] I have reviewed the examples upon which Mr Paea relies. Corrections' has carefully documented these events. These documents show the interventions Corrections undertook to manage Mr Paea's performance were all based on genuine grounds – the training gaps were genuine, the lapses in judgement or inexperience were identified and drawn to his attention, investigations were undertaken on receipt of written complaints and disciplinary action was appropriately withdrawn following submissions from Mr Paea's organiser.

[27] There is no evidence to support the claim Mr Paea was subject to workplace bullying. His claim that he was unjustifiably constructively dismissed for workplace bullying does not succeed.

¹ *Karen Evans v Gen-I Ltd* D King, AA 333/05, *Wendy Clear v Waikato DHB* J Scott, AA 33/07

After Mr Paea's employment ended

[28] Mr Paea says after his employment ended with Corrections his former manager unreasonably and unfairly gave a damaging reference to a prospective employer. He says this action amounts to a breach of the statutory duty of good faith.

[29] Putting aside whether Corrections has been fairly put on notice that Mr Paea wishes to pursue this claim, there is a fundamental question as to whether the Authority has jurisdiction to consider it – does the duty of good faith survive the termination of the employment relationship?

[30] It is well established that it does not: *Balfour v Chief Executive, Dept of Corrections* [2007] ERNZ 808. The statutory duty of good faith does not survive the termination of an employment relationship.

[31] Even if this was not the case, the claim could not succeed because I accept the manager's unchallenged evidence that she was asked for a personal reference by the prospective employer and had not received prior notice or warning from Mr Paea such a request would be made.

Costs

[32] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then application should be made to the Authority to set a timetable for the filing of costs memoranda.

Marija Urlich

Member of the Employment Relations Authority