

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 388
5331245

BETWEEN JOHN CHESNEY ESDAILE
Applicant

AND ROYAL NEW ZEALAND
SOCIETY FOR THE
PREVENTION OF CRUELTY
TO ANIMALS INC –
TAURANGA BRANCH
Respondent

Member of Authority: K J Anderson

Representatives: L Stewart, Counsel for Applicant
 K Stretton, Counsel for Respondent

Investigation Meeting: 28 April 2011 at Tauranga

Submissions Received: 13 May 2011 and 16 June 2011 for the Applicant
 3 June 2011 for the Respondent

Determination: 8 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Esdaile, claims that he was unjustifiably constructively dismissed, effective from 16th March 2010. He asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of lost wages for six months and compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Conversely, the respondent, the Royal New Zealand Society for the Prevention of Cruelty to Animals – Tauranga Branch (the SPCA) says that Mr Esdaile was not dismissed, constructively or otherwise, and his claims are denied. For completeness, I record that via his *Statement of Problem*, Mr Esdaile was pursuing other claims relating to annual leave, time in lieu and payment of notice,

along with seeking a penalty for an alleged breach of the Wages Protection Act 1983, but these claims were withdrawn at the investigation meeting.

[2] In addition to the evidence of Mr Esdaile, the Authority has received evidence for him from Mrs Madeleine Esdaile, Mr Terry Edwards, Mrs Lolita Edwards, Ms Helen Fabling, along with a medical assessment from Dr David O’Conner. For the SPCA there is evidence from Ms Anita Timms, Mr Peter Hart, Mr Edward Goodwin, Ms Jane Watchorn and Ms Maree Brooks. Both parties have submitted detailed closing submissions. All the evidence and submissions from the parties has been closely considered, albeit it may not be specifically referred to in this determination.

Background facts and evidence

[3] Mr Esdaile was employed as the General Manager of the Tauranga Branch of the SPCA. He commenced his employment on or about 28th September 2008. The SPCA is governed by a Committee (the Committee) of several people, most of whom have given evidence to the Authority (either for Mr Esdaile or the SPCA) and will be referred to in due course. The members of the Committee are unpaid volunteers and are generally employed in other full time employment. In addition to Mr Esdaile, the SPCA employed a number of other permanent staff, that Mr Esdaile had responsibility for. It appears that Mr Esdaile had a more or less day-to-day working relationship with Mr Edward Goodwin, the Chairman of the SPCA at the time.

[4] The evidence of Mr Esdaile is that when he commenced his role in September 2008 he was made aware by the Committee that “historically” the staff did not want or think they needed him. Mr Esdaile says that the other staff were “wary” of him initially but over time he gained the impression that they liked him and respected what he was doing for the SPCA. It appears that Mr Esdaile improved the overall performance and public profile of the SPCA and that his work was generally appreciated by all concerned. From the commencement of his employment until early 2010, there is no evidence to suggest that the relationship between Mr Esdaile, the other permanent staff and the Committee, was other than mutually agreeable.

[5] However, the evidence of Mr Esdaile is that when he returned to work in the first week in January 2010, after the seasonal break, he sensed that something was

“*very different*” and that “*something was wrong*” in regard to the attitude towards him by Ms Margaret Rawiri, the Office Manager. When asked to expand on this, Mr Esdaile attested that he noticed that Ms Rawiri would not “*look him in the eye*” and there was an absence of the usual jokes that used to be exchanged. Mr Esdaile says that he subsequently asked Ms Rawiri if something was wrong but she assured him that all was well.

[6] From 29th January 2010 until 24th February 2010, Mr Esdaile was absent from work on sick leave as he required an operation to his arms due to an injury he incurred in August 2009, whilst lifting a desk at work. On 8th February 2010, Mr Esdaile was driven to the workplace by his wife. The evidence of Mr Esdaile is that it was his intention to “*say Hi*” to the staff. But upon his arrival, he noticed that two of the staff didn’t want to talk to him and there was a lack of eye contact from Ms Rawiri.

[7] On 9th February 2010, Mr Esdaile received a phone call from Mr Goodwin enquiring as to his welfare. Mr Esdaile expressed some concern about the “*reception*” he had received upon his visit to the workplace (the shelter) the day before. He enquired from Mr Goodwin if there was anything wrong and was assured that everything was fine. But it appears that Mr Goodwin was less than honest with Mr Esdaile. This is because the evidence of Mr Goodwin is that he received a phone call from Ms Rawiri on 28th January 2010, whereby she conveyed that the staff wished to meet with him to discuss some matters regarding “*things happening*” at the shelter of which the Committee was not aware. While Mr Goodwin expressed to Ms Rawiri that staffing matters should be dealt with by Mr Esdaile, he agreed to meet the staff, providing another Committee member was also present.

The meeting with SPCA staff

[8] Mr Goodwin, along with Ms Maree Brooks, another SPCA Committee member, arranged to meet with the staff at an “*offsite*” location, outside working hours, on 2nd February 2010.¹ The evidence of Mr Goodwin is that upon his arrival, Ms Rawiri indicated to him that she wished to talk to him about “*a couple of administrative concerns*” namely; Mr Esdaile submitting time sheets for time in lieu that had not been authorised, and that she was having difficulty obtaining “*supporting information*” in regard to credit card usage and that this was leading to delays in the

¹ The staff required the meeting to be confidential and away from the shelter.

reconciliation of accounts. The meeting with six other staff, in addition to Ms Rawiri, duly took place. Also present were two other Committee members, Ms Jane Watchorn and Mr Peter Hart. The evidence of Ms Brookes is that the staff wanted to talk “*off the record*” and Mr Goodwin conveyed that there would be “*an informal discussion*” and that the Committee members were just there to listen and would not be in a position to resolve any issues that night.

[9] The evidence of Mr Goodwin is that each of the staff members spoke and discussed their respective “*concerns*” relating to Mr Esdaile. Mr Goodwin says that the matters raised were:

- (a) An employee being brought to tears in front of other staff.
- (b) Having to sign a new performance agreement even though the employee disagreed with it.
- (c) An employee arriving at work but waiting for other staff to arrive before “going inside” because she was afraid to be on her own with Mr Esdaile.
- (d) Employment contracts being issued without consultation.
- (e) Staff not being permitted to wear shorts.
- (f) An issue about a complaint from the public about a newspaper article.
- (g) Management (Mr Esdaile) not following procedures regarding animal food.
- (h) Not entering animals into the register and/or changing details later.
- (i) Changing procedures at the shelter.
- (j) Staff files being taken off the premises.
- (k) A complaint from the public that the SPCA had removed property from their premises.
- (l) Team meetings not being held resulting in communication problems.

[10] The further evidence of Mr Goodwin is that one of the staff stated that they had considered leaving “*because of the working environment and because they felt bullied*” and staff said that they could not go directly to Mr Esdaile because “*communications had broken down.*” The common evidence of the four Committee members who attended the meeting is that they were “shocked” at what they had heard from the staff members. They agreed to meet again on 8th February to decide what should be done. It was decided that professional advice should be sought. As a consequence, a Committee meeting took place on 16th February 2010 with a legal advisor (Ms Kim Stretton) present. There was some considerable discussion including

the point being made that not everything that the staff had said should be taken as factual. The evidence of Ms Watchorn is that:

We realised that the information given by the staff may be exaggerated and we were also mindful that there was little evidence to substantiate their claims other than what they had told us. However we recognised there was a problem when all the staff came forward with similar concerns. We felt as employers we couldn't sit back and do nothing even though it was likely that John would blow his stack because his ego is such that he can't handle any type of criticism. We realised we needed to minimise any potential distress to John to avoid an adverse reaction from him.

The outcome of the meeting was that it was agreed that Ms Stretton would draft a suitable letter setting out the matters that should be discussed with Mr Esdaile.

[11] This draft letter was discussed (and some minor changes were made) at a further Committee meeting on 23rd February 2010. It was the wish of the Committee that Mr Esdaile should not get the impression that a disciplinary approach was being taken, as they did not want to upset the good relationship that existed between him and the Committee. Rather, it was felt that a more informal approach should be taken. Hence, a Committee member, Ms Anita Timms, volunteered to talk to Mr Esdaile and give him the letter. The evidence of Mr Goodwin is that it was decided that “*a one-on-one meeting over coffee in a review type meeting was the best way to go.*” The evidence of Ms Timms is that she wanted to deal with Mr Esdaile in a “*fair and conciliatory way*” and that she did not want to “*insult or offend*” him.

[12] The evidence of Mr Esdaile is that he had a brief discussion with Mr Goodwin on 24th February 2010. Mr Goodwin conveyed that he would be on holiday for two weeks and that Ms Timms would call Mr Esdaile to discuss his performance review. Given the meeting that subsequently transpired between Mr Esdaile and Ms Timms, it seems that Mr Goodwin was again less than candid about the role that Ms Timms was to play. In the event, Mr Esdaile subsequently phoned Ms Timms and offered to assist her with his key performance indicators. Ms Timms confirmed that she wished to meet with Mr Esdaile and discuss “*a couple of staff issues*”.

The meeting on 25th February 2010

[13] Ms Timms and Mr Esdaile met at a local café on 25th February 2010 where Ms Timms gave Mr Esdaile the letter that had been approved by the Committee, albeit Ms Timms says that she had “*revised*” the introduction “*slightly to more accurately*

reflect the mood of the Committee and to get dialogue going.” Given that the content of letter is largely germane to these proceedings it is reproduced in full:

Dear John

Further to brief conversations with some committee members, please find outlined below some areas for further discussion and clarification. As the committee have expressed to you, on many occasions, we are very happy with what you have achieved since taking over the management duties. We would like to take this opportunity to offer some feedback in regard to the management of the shelter and have tried to link those issues raised with your job description to keep it relevant. The discussions fall into the following categories.

Team Performance and Leadership

The committee recognise and appreciate your dedication to the shelter, demonstrating a great deal of enthusiasm and energy towards animal welfare issues and the growth of the SPCA. Being responsible for the Shelter requires dedication and we are pleased you recognise the uniqueness of your role.

As you will appreciate it is important in your leadership role to maintain a positive work environment. The state of workplace relationships is of critical importance to the SPCA's success and the wellbeing of the people at work. With your appointment it has been necessary for the staff to adjust to your management style and approach to workplace relationships. There are significant benefits in a partnership approach (which requires commitment from both parties). It is important staff feel valued and supported as this contributes to the success of the SPCA as a whole. All staff have responsibilities towards each other and positive working relationships emerge when everyone comes together as partners with a common goal.

When relationships aren't working this can impact on the overall performance of the workplace. This can result in communication break down, low morale, and poor job satisfaction. In this regard it is necessary for:

- Open and constructive communication between staff
- A willingness to be open and honest in staffing relationships
- The ability to contribute suggestions in [sic] constructive and positive way

Business / Administration

One of [sic] most important steps in a good business management is a plan to follow specific goals and objectives for the SPCA and you are fulfilling this function well. Another important business management trait is communication, both with Shelter staff as well as the Committee. As a working Committee it is important relevant information (particularly from Auckland Office) is shared and that the opportunity is given for the Committee to participate in the decision making process. It is also prudent to include the Committee in decisions which could contractually and legally bind the SPCA (eg issuing new employment agreements etc). These are relatively minor issues none the less.

Public Education / Relations

Public Relations is a key strategy to reach our audience and to establish sustainable relationships. Thank you for your contribution and effort in [sic] date and moving forward our public relations strategies will continue to build the positive image of the SPCA. It is essential to appreciate the importance of building on alliances as we depend on effective PR to generate financial support for our activities. We appreciate this can be frustrating when it necessitates working in with other organisations and at times this will require restraint and a certain amount of self-control not to react in a manner which may jeopardise strategic relationships (eg emails).

The newspaper articles are a good way of creating awareness in our community and raising the profile of the SPCA. We have to be careful however not to make

statements which could possibly result in sectors of the community being offended and potentially developing a negative attitude towards the SPCA

Operational Procedures

It appears you understand the importance of policies and procedures in the workplace, as well as the importance of all staff following the correct processes. Policies set the parameters of the workplace and ensure staff know what is expected of them. This includes management who should set a good example and also shows transparency. We probably need to assess if it is necessary to introduce additional procedures to ensure a systemised [sic] and organised workplace. Consistency is also important because if staff believe not everyone is following the correct procedures this causes dissention [sic] and potential loss of respect. Training and educating staff on the correct procedures is important.

Further clarification may be needed in relation to:

- 1) Time in Lieu and Overtime
Staff must obtain authorisation to book time in lieu (in your case authorisation from the Committee). There is a cost component associated with time in lieu and in order to keep track this needs to be monitored carefully.
- 2) Donated food
The policy regarding donated food must be followed by everyone so that there is no misunderstanding or perception that food is being misappropriated for personal use. Everyone following the same rules is essential because accountability is important.
- 3) SPCA documentation/property
It is not really appropriate for any SPCA documentation (eg personnel files) or SPCA property to be removed from the premises. As an organisation which relies on the generosity and support of the community we must be accountable at all times.
- 4) Accounting/Finance
In order to keep the accounting and administrative system simple, accounts should be used for suppliers rather than booking through the credit card. Approval for expenditure should also be sought, again for transparency and accountability reasons.

John we appreciate the positive contribution you have made to the SPCA to date. Moving forward we would like to work at cementing positive and on-going staff relationships with a shared vision of meeting the SPCA objectives.

Kind Regards
SPCA Committee

[14] The evidence of Ms Timms is that she explained to Mr Esdaile that the staff had talked to Mr Goodwin while Mr Esdaile was away from work after his operation. Ms Timms explained that the staff had expressed some concerns about Mr Esdaile's management style, they felt he was sometimes difficult to approach and that one

person had considered leaving as a result.² Ms Timms says that Mr Esdaile considered the letter to be “*an affront*” and he demanded to know “*who had said what and to give times and dates.*” The further evidence of Ms Timms is that (among other things) Mr Esdaile “*was less than complimentary*” in his description of some of the staff and that Mr Esdaile thought that there was a “*witch-hunt*” on the part of Mr Goodwin, as well as being critical of some of the Committee members. The further evidence of Ms Timms is that she tried to explain that: “*...this was nothing personal and that Edward and the committee all believed he was a good Manager and supported him fully.*” Ms Timms attests that she was “*quite shocked and saddened*” that Mr Esdaile responded as he did.

[15] The evidence of Mr Esdaile, regarding the meeting with Ms Timms, is that he was under the impression that Ms Timms was acting as a mediator. But Ms Timms has explained that this was not the situation. Mr Esdaile says that he asked Ms Timms what it was that he “*had done wrong*” as it was his view that the letter was: “*full of thinly veiled innuendos and insinuations but nothing concrete.*” The further evidence of Mr Esdaile is that he left the meeting “*very upset*” and that he had a feeling of “*betrayal*” by “*these people*” – being, I take it, the Committee. Mr Esdaile is also critical of the Committee for putting the issues in writing rather than meeting with him personally. However, the evidence of Ms Timms is that she was meeting with Mr Esdaile “*personally*” on behalf of the Committee, rather than just sending him a letter or “*ambushing*” him at a Committee meeting. Also, the perception of Ms Timms is that Mr Esdaile “*seemed OK*” at the conclusion of their meeting, which she says lasted approximately 90 minutes, rather than the 15 minutes that she had anticipated. Ms Timms also says that Mr Esdaile indicated that he would like a few days to consider the content of the letter given to him and then meet again to discuss matters in more detail. Ms Timms says that she informed Mr Esdaile that he could ring her at any time and that she wanted to keep the “*lines of communication open.*” It is clear from her evidence (and that of Mr Esdaile too) that Ms Timms found it emotionally difficult and generally uncomfortable to have broach the various issues with Mr Esdaile, albeit it is clear that she did so in a very sensitive and sensible manner.

² Ms Timms produced to the Authority a summary of the matters for discussion that she had prepared prior to the meeting as an *aide memoir* to assist her.

[16] Mr Esdaile returned to work after meeting with Ms Timms. His evidence is that:

It simply didn't make sense to me and my trust in everyone had been completely destroyed but especially the chairman who would not deal with me personally and who had lied to me on so many occasions. I didn't know who to turn to. I was in total shock that these people, these friends had without a word of thought for me stabbed me in the back. You expect it from staff but not from the people that are supposed to support you. They have chosen to support the staff on blind faith and to hell with me.

The further evidence of Mr Esdaile is that he started to have “*heart palpitations*” and broke down in tears at his desk. He then walked out to the staff, who were at the reception area, and asked them why they had not come to him if they were unhappy. Mr Esdaile says that the staff just looked “*awkward*” and he left the workplace; “*but not before calling them a bunch of gutless bastards.*” Mr Esdaile regrets this but he believes that it was “*understandable in the circumstances because I was devastated and still am.*”

[17] Subsequent to meeting with Mr Esdaile, Ms Timms sent an email to the members of the Committee; Mr Esdaile was copied in. Ms Timms informed that she had met with Mr Esdaile and that he was “understandably upset” and that he would like to take a few days to consider some of the points and that:

I have expressed to John the committees support for the work he is doing at the shelter, and also our desire to make sure we keep good communication lines open between ourselves. It is our desire to raise any issues as they come up and the learning curve for us is to find the best way to do this. Having just gone through the process with him I'm not sure if this is the right way but we can review and agree on a better option for discussing things as they come up (as they inevitably do) (Committee will be the first to put their hands up and say we are a work in progress!)

John[,] thanks for your input and I apologise for it being at times clumsy / awkward.

[18] Early the following day (26th February 2010), Mr Esdaile sent an email to the members of the SPCA Committee, the germane content being:

The baseless allegations together with the very nature of those allegations and the fact that you have sought legal advice to write the notice handed to me makes it untenable to remain with the SPCA. This then brings into the frame constructive dismissal. I am still in a state of shock but I am going to take the weekend to reflect before making any decisions where I go from here and what actions I will take.

The next day (27th February), Mr Esdaile sent another email to those members of the Committee that he had the email addresses for. He informed that:

Before I make any decisions, I need to face my accusers, initially those on the committee and at a later time, staff. I have had no chance to defend my integrity. As you know I love my job, but I don't know what to do. You cannot expect me to come

back as if nothing has happened. I have given my all to my position and to be blindsided as I have been immediately after sick leave and without the right of reply in person has left me totally bewildered and very distraught. This meeting needs to be ASAP even though Edward is going away on Monday. I will be on Stress Leave until this matter is resolved.

[19] Also on 27th February, as a consequence of Mr Esdaile's email, Mr Goodwin sent an email to members of the Committee informing that:

The committee must remember we sought advice from Kim Stretton as to how to handle the concerns that had been brought to our attention to ensure that we looked after our manager[s] interests and to ensure that the Branch was seen to follow accepted processes. This resulted in a unanimous decision that a letter be given to John outlining those concerns which we felt needed to be addressed prior to a meeting with Anita who was appointed by the Committee to act as a go between. This was to allow John time to consider the points in the letter so that he could be prepared when he met with Anita.

A meeting was held between John and Anita at which stage the suggested letter was given to John. I understand Anita broached some of the topics however all of those areas of concern were not discussed. I believe that this process needs to be completed before the Committee (not John) decides on the next step which should be passed to Kim to ensure that we protect the SPCA from any possible claims.

One should remember that the committee totally supported John and the process we are following was based on this and to ensure that everything was done properly.

Further communication between Mr Esdaile and Ms Timms

[20] The evidence of Ms Timms is that she "*kept dialogue going*" with Mr Esdaile and she believed that she could work with him to "*get things back on track.*" Ms Timms was of the view that the relationship between her and Mr Esdaile remained good and she was hopeful that Mr Esdaile would "*cooperate*" in focusing on returning to work.³ Ms Timms attests to communicating with Mr Esdaile on 1st March 2010. She says that she reiterated that:

...we were only trying to generate a discussion and that we wanted to open the lines of communication. The relationship with John was good and I genuinely wanted to work with him to sort things out. John was open with me and I was pleased he wanted the same.

The evidence of Ms Timms is that Mr Esdaile indicated to her that he wanted to reply to the Committee's letter in writing and she offered to assist him with his response. Ms Timms says that Mr Esdaile forwarded his proposed written response to the Committee to her (via an email dated 2nd March 2010) and she was "*shocked*" by the content. Ms Timms responded by return email the same day. In essence she conveyed to Mr Esdaile that if the Committee were to receive his response as forwarded "*things will escalate to another level.*" Ms Timms suggested (as a friend) that Mr Esdaile

³ Mr Esdaile remained absent from work (with the approval of the SPCA) but did not return again after 25th February 2010.

should delay his response over the weekend and then decide if he wanted to forward it to the Committee. Mr Esdaile accepted this suggestion and revised his response but Ms Timms again had to suggest that it remained inflammatory and would “*blow the committee away.*” Ms Timms subsequently produced for Mr Esdaile an outline to assist him to prepare an appropriate response for the Committee.

[21] Mr Esdaile and Ms Timms met again on 8th March 2010 for approximately two hours. The various issues that had arisen were discussed further and Mr Esdaile indicated that he would produce a response for the consideration of the Committee. However, early on 10th March 2010, Mr Esdaile sent an email to Ms Timms indicating that he had sought further advice and the conclusion was that the SPCA “*have broken every rule in the book ... plus a few.*” Mr Esdaile also conveyed that he concluded that the Committee’s letter was “*disciplinary*” and that he needed to talk to the Committee before “*any decisions are made.*” Mr Esdaile also indicated that he did not want to “*go down the track of taking them [the SPCA] to Court*” but he would be looking after himself on “*this occasion.*” Ms Timms responded the same day and queried whether Mr Esdaile was going to respond to the Committee in writing, based on the draft outline she had provided for him.

[22] On 11th March 2010, Mr Esdaile forwarded a written response to Ms Timms for her to give to the Committee and it was arranged that he would meet with the Committee on 16th March. The written response is reproduced (in substance) as follows:

I have had to seek advice from a variety of sources including Legal, HR and the Labour Department. All are in accord that the letter I received **is a disciplinary**. There are many reasons for this that will no doubt come to light in time. Still no one has told me what the allegations are, who made them and when and where they were made. The innuendos and insinuations however are abundantly clear. I challenge anyone to read it and think otherwise. I have managed to gather pertinent facts that I will put to the committee on Tuesday should I be allowed to attend. It is much more in depth than this report. It is important that I get to face my accusers and once this is done my decision on what to do will be clear to me.

Team Performance and Leadership

There are and always will be underlying issues with staff. As you are aware and have commented on previously, there are a couple of stirrers always stirring things up in the background. I have discussed this with many of you and indeed the Chairman. I have also sent an email recently regarding this and I have always kept you in the loop regarding [B]. It is an area that demands constant attention which it gets. To date I am still unaware of the specific issues, except for what has been relayed by Anita and a couple of committee members that staff feel working relationships are often strained.

I have always been open to sitting down with staff and/or committee to discuss these matters.

Public Relations

My approach to outside organisations has always been professional but I call it the way I see it. The SPCA would not be where it is if I hadn't done so much networking with local agencies and if they thought I wasn't doing a decent job they would not have come on board would they?

[23] There then follows the mention of matters relating to an Expo and one particular individual, along with an outside organisation, that should remain between the parties to these proceedings. Mr Esdaile then addresses the matter of time in lieu thus:

Staff do get authorisation, I give them TOIL for things like attending the Volunteers Morning Tea and other functions. Not that many of them turn up anyway. I on the other hand have missed only the Expo in 18 months. I racked up 500 hours overtime in the first 12 months together with 10 days off (DDO's) due to working in the weekends, either at functions or at the shelter helping with the cats/kittens. My wife also worked 7 days at the shelter. I don't think I have had a lunch break in 18 months. I also got authorisation from Edward over the time that I had done my job and Tania's. A total of 7 weeks. I have gone above and beyond and you all know it. Yes I have taken some TOIL, most of it DDO's.

Donated Food

Anita thinks this is an area that requires further discussion. I don't. There are strict processes in place for uplifting food. I developed them. All inward food is accounted for except on occasions, out of date food or food that is not used in the shelter. This is often distributed to the poor/needy which my two bags were used for. Addresses will be supplied so you can check up.

Finances

The understanding was that I use the credit card for purchases and the logic behind that was discussed at the time. Using accounts is an easier system from an accounting perspective, but it is not practical to have accounts for every purchase as we don't have accounts everywhere and I always try to get the cheapest deal. But don't worry I have chopped the card up.

Contracts

I am aware of the legal obligations regarding contracts. Don't forget I wrote them. The staff have never been pressured into signing them and are encouraged to get independent advice. I am aware the Committee like to be kept informed about sensitive issues and you have been kept up to date with play on [Ms T], however operational matters it was agreed were my domain and I don't need to come running to the Committee every time things get tough.

Conclusion

The process that has been undertaken in this instance for what amounts to minor issues has caused much anguish. You have gone from A to Z without so much as informing me of when, where, who or why. I still don't know. This is reinforced by the fact that the information gained was sent to a Solicitor and in fact your very vague document was written by one, namely Kim Stretton. In that letter she has relied on insinuation, innuendo and hearsay and for a Lawyer to say that the process has been followed show to me that either she has not been given all the information or at the very least she hasn't even bothered to speak with the Labour Department.

Again, this is a very short precise of the situation and in no way covers the issues in the depth they need to be covered. Please inform me as to when and where I get to face you all.

Meeting on 16th March 2010

[24] Mr Esdaile attended a meeting with the Committee on the evening of 16th March 2010. He was accompanied by Mr Terry Edwards, a life member of the Tauranga Branch of the SPCA and the husband of one of the Committee members, Ms Lolita Edwards. The consistent evidence is that rather than the matters contained in the Committee's letter, and Mr Esdaile's subsequent response, being explored further, Mr Esdaile read to the Committee a further written statement that he had prepared. This clearly took some time as the document is more than twelve A4 pages in length. The evidence of Ms Timms is that this statement is the one that she had earlier persuaded Mr Esdaile not to send to the Committee as it was "*slating of many people.*" Ms Timms says that:

I sat there knowing that the Committee would have been blown away/dumbfounded by what he was saying. I was disappointed that he had taken this approach and that all my efforts had come to nothing. The way that he was responding was exactly the way others predicted he would, in term of aggression, overly emotive, and not willing to listen to others.

[25] While the statement (the second statement) that Mr Esdaile read to the Committee contained some of the content of the first response (the first statement), that Mr Esdaile had already provided to the Committee (via Ms Timms), there is an extra 9 pages. The first statement is a reasonably rationale response, most probably due to the input of Ms Timms. Unfortunately, the content of the second statement is a combination of conciliation and confrontation. It opens thus:

The actions of certain members of this committee have made it impossible for me to return to work. Whether by accident or design, the way in which you have undergone (and I use the word lightly) this investigation negates the ability for staff to be censured either by myself or the Committee. This is reinforced by the way in which three members of the committee have acted in blind faith that the comments were in fact true without (a) informing me that there was a problem or (b) undergoing an investigation without my knowledge and (c) issuing me with a disciplinary letter the day I get back from ACC leave. There was no opportunity for me to have a support person present and no written warning that the disciplinary was to be given. As the SPCA is a business it is bound by the rules of the Good Employer. You have breached every principle of Good faith, good reason and fair process plus a few others. After all this time I still don't know what the actual Allegations are, who made them and when and where they were made.

[26] Mr Esdaile then provides a summary of his contact with Mr Goodwin, who he perceives, with some justification, acted in a less than candid manner in regard to the

issues that have arisen. Mr Esdaile is reasonably complimentary towards Ms Timms but then informs that:

I will be requesting all documents, emails, statements etc pertaining to this investigation under the Official Information Act, providing of course that there were any made. If not I want to know why not because if it is important enough to go from A to Z and get the assistance of a Lawyer then I would expect things to have been done in a PC way. Because that's apparently how you operate. I also want copies of the conversations, complaints by staff, times, dates and the names of those involved, both staff and committee members.

No warning, no opportunity to face my accusers, no right of reply prior to my disciplinary, nor prior to a solicitor being involved, not informed prior to the disciplinary nor my right to have a support person involved. I doubt any more of my fundamental rights could have been breached if the committee tried. **I even had to request a meeting with the committee myself.**

[27] Mr Esdaile then sets out his views under the headings of:

1. *Team Performance and Leadership*

Mr Esdaile is highly critical of several of the SPCA staff. "There has always been an overwhelming source of negativity that pervades the Tauranga SPCA. I got rid of some of the major stirrers but a few remain." And; "They run with the hares and hunt with the hounds."

2. *The value of Staff*

In contrast to his criticism of staff under the previous (and following) headings, Mr Esdaile explains how he had assisted and supported the staff in various ways.

3. *Open and Constructive Communication*

Mr Esdaile is again critical of a number of the SPCA staff and among other things, informs that:

My door is always open. I am aware that people see me as intimidating. [Mr C] has the same problem. It is a perceived notion because of how I look. I cannot help that and if the staff are so insecure that they cannot even try and talk to me then that is their problem and not mine.

4. *Business/Administration*

Mr Esdaile explains that he has a largely autonomous role related to his "mandate to manage." He also explains in some detail the issues he has had to address in regard to the performance management of one employee and the associated connection with her job description and employment agreement.

5. *Public Relations/Education*

Mr Esdaile addresses what appears to have been a contentious issue for the SPCA connected with an external person (and an associated organisation) related to an Expo that ran into some difficulties. Mr Esdaile also alludes to an article he wrote about pit bull dogs.

6. *Operations Procedures*

Mr Esdaile was unable to address any issues that may have arisen under this heading as: “You are expecting me to comment on things that you know about but expect me to guess.”

7. *Time in Lieu*

Mr Esdaile largely repeats his perception of this issue as set out in his first statement and concludes: “Yes I have taken some TOIL. If you wanted me to work to rule, eg 8 hours a day then you should have said so and the SPCA would not be where it is now.”

8. *Donated Food*

Mr Esdaile gives a lengthy and logical explanation of the operation of the policy on out of date stock and how it operates.

9. *SPCA documentation/property*

Mr Esdaile explains why he found it necessary to take some personnel files home while he was on ACC leave – in order to update them for a forthcoming round of performance management meetings with staff. Mr Esdaile also explains how he has personally paid for some items, in particular, a commission sum of \$600 relating to two paintings that it appears were associated with an SPCA art auction.

10. *Accounting/Finance*

Mr Esdaile explains his use of the SPCA credit card and the development of a 5 year strategic plan as well as a “rave review” at audit because of the quality systems that it appears that he developed.

The statement ends with a conclusion thus:

This [the Committee’s letter] is all just padding to add to what is an unjustified attack on my honesty, character, credibility and integrity. It has been masked as a document purporting to try and assist in the management of the shelter when in fact those

investigating have blindly accepted the complaints as fact. This is reinforced by the fact that the information gained was sent to a Solicitor and in fact this vague document was written by one, namely Kim Stretton.

Every single one of you at one time or another has said to me what a strange and different bunch staff are and how difficult they must be to manage. You have questioned everything that I am. No one has had the decency to come out and tell me the actual allegations that have been made. You have simply insinuated things and relied on innuendo and hearsay.

I see this ending one of three ways:

1. I go back to work and carry on as usual with a full written apology. A clear message must be sent to the staff that half truths and underhand tactics will not be tolerated. This is going to be difficult because I have zero respect for them now and the trust factor has gone not only with them but with you. Again I draw your attention to the fact that the Chairman had amply [sic] opportunity to speak with me about this and he either lied to me when I asked him about what was happening or of his own volition, started this witch hunt in response to what I told him in a private conversation. Either is unacceptable and I am at a total loss as to what his agenda is. My trust here has also been irreparably damaged.
2. I resign from my position with a confidential exit strategy, together with my holiday pay and a letter of reference recognising my contribution to the SPCA. Should this be the way you or I go then I will sign a confidentiality agreement as shall the committee.
3. I resign and we all head for the Employment Tribunal with the knowledge that to date every employment procedural rule in the book, plus a couple have been breached. This will then enter the public domain and confidentially is unlikely.

I thank those of you on the committee who have given me words of support. I don't think any of you fully appreciate the affect this has had on both myself and Madeline.

[28] The evidence of Mr Esdaile is that after he finished reading the statement Mr Goodwin responded: "*Thank you John, we have heard it all before.*" Mr Goodwin says he cannot recall saying this but I conclude that it is probable that he did and that this was a reference to the first statement that Mr Esdaile had provided to the Committee via Ms Timms. Mr Esdaile says that Mr Goodwin still would not tell him what the "*actual problems*" were. Mr Esdaile further attests that he asked the Committee to tell him what the allegations were as:

I could not fix something if I did not know what is that is wrong. I was simply told we don't want to get into a he said she said. The committee continued to deny me the simplest of requests and failed to treat me with the respect that I feel I deserved or for that matter, any person would deserve. At the end of the meeting, and in the light of the response or more correctly put, the lack of, I felt that I had no alternative but to resign.

Mr Esdaile also told the Authority that Mr Edwards “... *tapped me on the shoulder and said there’s no way we’re going to get anywhere here.*” He then left the meeting and on the way out he placed his letter of resignation in front of Mr Goodwin.

[29] But the evidence of some of the Committee members is somewhat different. Ms Timms says that there was no attempt made by the Committee to discuss matters further as the atmosphere was “*highly charged*” and that everyone was “*quiet.*” Her further oral evidence is that they were “*shell shocked*” at the end of Mr Esdaile’s presentation. Ms Timms says that Mr Esdaile “*stood up and walked over to Edward [Mr Goodwin] who was seated, and then threw a letter⁴ at him before walking out.*” The evidence of Ms Brookes is that:

At the end John pushed an envelope towards Edward and walked out of the meeting. We were taken aback by what we had just heard. I was pretty shocked by the way he had written his statement in such harsh and accusatory tones. I could understand how threatened the staff at the shelter felt. This was the worst possible outcome because we hadn’t wanted John to go. The last thing we had expected was John to resign. Despite some of the difficulties I knew Anita was having, I thought things were okay and they were working things through.

The evidence of Mr Goodwin is that:

John read out a statement that he had written and became quite emotional at times. John made derogative [sic] statements about all of the staff and some of the Committee members including myself.

In response to cross examination by Mr Stewart at the investigation meeting, Mr Goodwin said that: “*It was a very emotional presentation.*” Mr Goodwin said that it was a “*shock to me and the other committee members.*”

[30] The letter that Mr Esdaile gave to Mr Goodwin was his resignation dated 16th March 2010; thus:

It is with the utmost regret that I have been put in a position, not of my making, that makes it impossible for me to continue as the Manager of the Tauranga SPCA. Please take this as my 4 weeks notice, the first two of which will be continued stress leave which I have a medical certificate for. I am assuming that I would not be wanted at the shelter for the remaining two weeks and would be released or I can simply gain another medical certificate.

The Committee resolved not to accept the resignation and via a letter dated 17th March 2010, from Mr Goodwin, informed Mr Esdaile that:

⁴ On the weight of the evidence, it seems more probable that the resignation was not thrown at Mr Goodwin but simply placed before him by Mr Esdaile.

Thank you for attending the meeting last night and presenting your verbal statement. As you left you handed me your letter of resignation which I later read to the Committee. It was unanimously agreed not to accept it.

The Committee as stated again last night has always fully supported you and the work that you have done in raising the profile of the SPCA and the more professional approach in the management of the Shelter.

We believe the current situation is retrievable and would like to continue dialogue between yourself and members of the Committee selected by you. If however you see any benefit in attending mediation as a way forward I will present this proposal to the Committee. We look forward to receiving your response to this offer.

[31] The evidence of Mr Goodwin is that a meeting was to take place with Mr Esdaile on 23rd March 2010. However, Mr Goodwin says that on that day, Mr Esdaile cancelled the meeting, apparently on the advice of his lawyer at that time. A personal grievance was raised via a letter dated 31st March 2010.

Constructive Dismissal

[32] Mr Esdaile claims that his resignation on 16th March 2010 was, in reality, a constructive dismissal. The general principles applying to constructive dismissal are well established and are derived from a number of leading cases going back to the Court of Appeal judgment; *Auckland Shop Employees Union v Woolworths (NZ) Ltd*⁵ where it is posited that there are three main circumstances (not exhaustive) where a constructive dismissal may arise:

- (a) Where an employer gives an employee an option of resigning or being dismissed.
- (b) Where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign
- (c) Where a breach of duty by the employer leads an employee to resign.

Mr Esdaile claims that it is the third of these categories that applies to his circumstances. The leading case pertaining to such remains *Auckland Electric Power Board v Auckland Local Authorities Officers IUOW*⁶ where the Court of Appeal held that:

In such a case as this we consider that the first relevant question is whether the resignation was caused by a breach of duty on the part of the employer. To determine that question, all of the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the

⁵ [1985] ACJ 963

⁶ [1994] 1 ERNZ 168 at 172

affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. As to the duties of the employer, there are a number potentially relevant in this field. How some should be defined precisely is a matter no doubt still open to debate: see the discussion in the *Auckland Shop Employees* case. But in our view it can now be safely said in New Zealand law that one relevant implied term is that stated in the judgment of the Employment Appeal Tribunal, delivered by Browne-Wilkinson J, in *Woods v W M Car Services (Peterborough) Ltd* quoted in the *Auckland Shop Employees* case. As the Judge put it:

“In our view it is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: *Courtaulds Northern Textiles Ltd v Andrew* [1970] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see *British Aircraft Corporation Ltd v Austin* [1978] IRLR 322 and *Post Office v Roberts* [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v Roberts*.

“We regard this implied term as one of great importance in good industrial relations ...”

Was the resignation of Mr Esdaile caused by a breach of duty on the part of the employer?

[33] It is submitted for Mr Esdaile that the SPCA committed three main breaches of duty that resulted in his resignation. Firstly, it is claimed that Mr Goodwin, in his role as the Chairman of the Committee, and also other Committee members, deliberately “lied” to Mr Esdaile in relation to not telling him that there had been a meeting with staff at which allegations against Mr Esdaile were made. Secondly, it is claimed that there was a failure by the SPCA to provide Mr Esdaile with “any specifics of the allegations amounting to a breach of good faith.” Finally, it is claimed that the Committee failed to engage in any attempt to resolve Mr Esdaile’s concerns at the meeting held on 16th March 2010.

[34] As set out in the *Auckland Electric Power Board* case, the determination of the question of whether the resignation of Mr Esdaile was caused by a breach (or breaches) of duty by his employer, requires an examination of all the circumstances pertaining to the resignation. It seems to me that the examination of “all the circumstances” must begin with looking at the management and governance structure of the SPCA. There was not a management structure in place as one would normally see in a commercially driven business. Rather, the SPCA was governed by a committee of well-meaning volunteers with little experience in employment relations.

As far as any tangible management structure is concerned, this was, in reality, provided by Mr Esdaile, with appropriate support from members of the Committee, in particular, Mr Goodwin, as the Chairman of the Committee.

[35] Another circumstance is that Mr Esdaile is particularly critical of Mr Goodwin in regard to his failure to respond honestly to him before, and after he came back to work after the medical absence and enquired if anything was wrong. I find that this criticism is justified to some extent in that Mr Goodwin failed to be open with Mr Esdaile in regard to the fact that the staff had expressed numerous concerns about the management style of Mr Esdaile, prior to his return to work. But I do not conclude that Mr Goodwin deliberately misled (or lied to) Mr Esdaile. Rather, as of 9th February 2010, when Mr Esdaile made his first enquiry to Mr Goodwin, Mr Esdaile was still absent from work and further, the full Committee was yet to meet to discuss the concerns expressed by the staff. At that point it is most probable that Mr Goodwin did not want to raise the staff concerns until matters had been discussed by the Committee. Upon Mr Esdaile's return to work on 23rd February 2010, Mr Goodwin was about to go on leave and he conveyed to Mr Esdaile that Ms Timms would be meeting with him. No doubt Mr Goodwin could have been more candid with Mr Esdaile, but given the obvious difference in the temperament of the two men, it is not difficult to understand why Mr Goodwin would want to avoid the possibility of any conflict with Mr Esdaile. Regrettably, this lack of candid engagement by Mr Goodwin appears to have had a significant influence on the subsequent behaviour exhibited by Mr Esdaile. But I conclude that this cannot be seen to be because of any deliberate action or inaction on the part of Mr Goodwin. Neither do I accept that any of the members of the Committee deliberately withheld any information from Mr Esdaile. Indeed, it is clear that the Committee was split in regard to the views of certain individuals regarding how the situation should be managed, as revealed by the fact that while there was a collective position arrived at by the Committee, some individuals subsequently expressed their particular views to Mr Esdaile in a private capacity; and again in the tenor of their evidence to the Authority.

[36] Another circumstance that falls for consideration is that the Committee chose to seek legal advice before conveying the concerns raised by the staff to Mr Esdaile, with the outcome being that a letter was drafted and subsequently delivered by Ms Timms. Mr Esdaile is critical of this process in that he believes that the involvement

of a lawyer by the SPCA indicates that matters were serious and disciplinary in nature. It is not difficult to understand how Mr Esdaile could initially arrive at that conclusion as the content of the letter, while conciliatory, without making any specific allegations, is also somewhat ambiguous and hence open to various interpretations, particularly given that there had been no prior discussion with Mr Esdaile about the matters that were expressed. It seems to me that a preferable option would have been for Mr Goodwin and Ms Timms to have initially met with Mr Esdaile and explained to him the concerns that had been expressed by the staff, with the intention of discussing with him the best manner in which to address those concerns, as well as their validity or otherwise. However, upon the continuing helpful and constructive involvement of Ms Timms, in a clearly non-disciplinary setting, Mr Esdaile received a constant assurance that the SPCA did not have any disciplinary issues with him and the Committee was seeking to enter into some constructive discussion with him about the matters that had been raised by the staff. But, despite the best efforts of Ms Timms, the overall reaction of Mr Esdaile must be seen as little short of astonishing, particularly his change of stance from his first written response to the second one. Therefore, I cannot help but conclude that regardless of how the SPCA Committee had approached matters with Mr Esdaile, more probably than not, his reaction would have been equally destructive of the employment relationship.

[37] In regard to the claim that the Committee failed to engage with Mr Esdaile at the meeting held on 16th March 2010, I note that Mr Esdaile went along to the meeting with his resignation already prepared. Given this and the largely confrontational nature of his lengthy presentation, its obvious effect on the Committee and the conclusions that Mr Esdaile put forward⁷, it is difficult to accept that Mr Esdaile ever intended that a rational discussion, leading to some form of satisfaction between him and the Committee, would be an outcome.

[38] Then following the refusal of the Committee to accept Mr Esdaile's resignation and effectively allowing for a "cooling off" period, an offer was made to engage in further discussion and/or mediation with Mr Esdaile. A meeting was set down for 23rd March 2010 to allow for further discussion with Mr Esdaile, but acting upon legal advice (apparently) he declined to attend. While an experienced employment relations practitioner or mediator may have been able to have reconciled

⁷ At para [27] above.

the situation, it is clear that there was insufficient experience in such matters within the makeup of the Committee to constructively manage the situation. But in any event, it seems clear that Mr Esdaile had set himself upon a different course of action.

[39] In summary, I find that while the overall circumstances could have been managed better by the Committee, I do not find that their overall actions, as a group or individually, amounted to any breach of duty by the SPCA of sufficient substance that could have foreseeably led to the resignation of Mr Esdaile and hence convert that resignation into a constructive dismissal.

An Alternative Argument?

[40] It is submitted for Mr Esdaile that in the event that the Authority should find that Mr Esdaile was not constructively dismissed, then pursuant to s.160(3) of the Act, the Authority should consider whether Mr Esdaile was disadvantaged in his employment by an unjustified action by his employer and/or whether there was a breach of good faith pursuant to s.4 of the Act.

[41] In regard to the unjustified disadvantage claim it is submitted that there was a failure by the SPCA to provide enough information in regard to the specifics of the unfounded allegations against Mr Esdaile, that had been made by the staff and hence he was not able to adequately respond and effectively, “clear his name.” It is argued that:

This inability to clear his name by putting forward responses to the unspecified allegations, left unresolved issues that would affect his employment, any disciplinary matters and salary reviews going forward.

But apart from the fact that the Committee decided that the allegations made by the staff were not necessarily valid or of such substance that any disciplinary action was required, any possible future disadvantage to the future employment of Mr Esdaile (being speculative at best) was effectively negated by his resignation.

[42] Finally, it is argued that there was possibly a breach of good faith pertaining to Mr Goodwin being less than candid with Mr Esdaile, as already canvassed earlier in this determination. Section 4(1A)(b) of the Act requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship and to be, among other things, responsive and

communicative. While I accept that Mr Goodwin was less than responsive and communicative in regard to some of his contact with Mr Esdaile, I do not find that any failure on the part Mr Goodwin was deliberate, serious and sustained to the extent that a penalty is appropriate.

Determination

[43] For the reasons set out above, I find that the resignation of Mr Esdaile was not brought about by a breach of duty by the SPCA. It follows that Mr Esdaile was not constructively dismissed. I further find that Mr Esdaile was not disadvantaged in his employment by some unjustifiable action by the employer pursuant to s.103(1)(b) of the Act. Nor was there a breach of s.4 of the Act that warrants a penalty being awarded. The claims of Mr Esdaile are dismissed.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority