

A prohibition on the publication of certain information applies see paragraph [1]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 62
5366186

BETWEEN

SYLVIA BEACHAM
Applicant

A N D

CHIEF EXECUTIVE OF THE
MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: P R Stapp

Representatives: Susan Hornsby-Geluk and Megan Vant, Counsel for Applicant
Robert Foitzik and Andrew Berry, Solicitors for Respondent

Investigation Meeting: 21 and 22 February 2012 at Wellington

Submissions: 1 March 2012

Date of Determination: 5 June 2012

DETERMINATION OF THE AUTHORITY

Order prohibiting publication of names

[1] By consent I order that names of the clients of the Ministry of Social Development (MSD) referred to in the evidence and documents in this matter are prohibited from publication, and this includes any references likely to lead to the identification of any of the named clients.

Employment relationship problem

[2] This employment relationship problem is about Ms Beacham's dismissal from her employment for allegedly bringing the MSD into disrepute and breaching the Ministry's code of conduct. Mrs Beacham claims that her dismissal was unjustified because MSD wrongly based its decision on a final warning, the disciplinary investigation was unduly delayed and because the decision should have been treated

as a performance matter instead of a disciplinary matter. Ms Beacham claims reinstatement amongst the usual remedies for a personal grievance.

[3] MSD denies all Ms Beacham's claims.

The issues

[4] The issues are:

- a. Could MSD as a fair and reasonable employer rely on the reasons given at the time for the dismissal?
- b. Was MSD able to rely on the final warning dated 22 September 2010?
- c. Is reinstatement reasonable and practicable?
- d. What other remedies are available?
- e. Who gets costs and how much?

The reasons for the dismissal

[5] Sylvia Beacham was a Social Worker employed by MSD in Child Youth Family (CYF). She had been employed in the role since May 2006. She was a member of the Public Service Association (PSA). Her terms and conditions of employment applied under the collective employment agreement between the Chief Executive of the Ministry of Social Development and the PSA.

[6] Ms Beacham had a number of warnings during her employment. The first warning was a verbal warning given to her by the Site Manager, David Bane, in June 2007. Ms Beacham acknowledged that warning and that it would remain on her file for six months. The warning was given to her in regard to actions in breach of the principles of the Department's Code of Conduct – *namely complying with all lawful and reasonable instructions and work as directed by your Manager.*

[7] On 9 April 2010 Anne Gardener, supervisor, made a written complaint to Mr Bane about Ms Beacham's behaviour toward her during a meeting over a social work incident. During the meeting the two of them allegedly became involved in an altercation, but they each had different opinions about each other's behaviour. It was not clear until the Authority's investigation meeting that Mr Bane later put that matter

to one side, because he could not decide on whom to believe. However, the investigation report and outcome still included the complaint. That Mr Bane had put it to one side was not included in his report.

[8] Ms Beacham was issued a warning on 22 September 2010 by Mr Bane relating to six complaints. The complaints were outlined in a letter dated 26 May 2010 and an investigation report. MSD's finding was that Ms Beacham's action constituted a serious breach of CYF's Code of Conduct to fulfil her lawful obligations with professionalism and integrity and to perform her duties honestly, faithfully and efficiently having regard to the rights of the public and her colleagues.

[9] It was decided that the warning would remain in effect for 36 months from the date of the letter, but apparently in agreement with the PSA, this was reduced to two years (24 months), although this was not recorded anywhere, but seemed to be accepted by the parties.

[10] The next disciplinary action related to Ms Beacham's performance, and she was given a verbal warning dated 18 April 2011 for performance from Anne Gardener.

[11] On 9 May 2011 a written complaint was made about Ms Beacham from an Occupational Therapist and a Registered Psychologist employed by Child and Adolescent Mental Health Services (CAMHS) about Ms Beacham and her conduct at a meeting on the same date.

[12] In the mean time on 17 May 2011 Ms Beacham attended another disciplinary/review meeting on her performance, where there were various matters still causing concern in regard to written work, case ownership, problem solving and judgement, and communication. The outcome was a written warning for performance dated 10 June 2011, from Anne Gardener.

[13] Ms Beacham's performance review concluded that she had not reached the standards of performance in accordance with a performance improvement plan, and thus was in breach of the Code of Conduct, specifically relating to carrying out her duties and performance. She was informed that any unacceptable behaviour could include termination of employment.

[14] It was decided that this warning would remain in effect for 12 months from the date of the letter and that another performance review meeting would occur in the future.

[15] In regard to the complaint of 9 May 2011 Mr Bane and Kiley Stevenson-Wright, Human Resources Consultant for the Central Region, pulled together the information in regard to the complaint from the CAMHS people, and interviews they held with other people. On 31 May Ms Beacham was advised of a disciplinary investigation by Mr Bane. This line of action was taken independently of the performance matters that involved Ms Gardener. Mr Bane's disciplinary investigation related to a breach of the MSD code of conduct for serious misconduct. Ms Beacham was advised that the allegations that had been made against her were serious and invited her to a preliminary disciplinary meeting.

[16] On 10 June Ms Beacham and her PSA delegate at the time met in the preliminary disciplinary meeting. It was then discovered that Ms Beacham had not received a copy of the written complaint with the letter inviting her to the meeting. So she was given a copy of that complaint and subsequent information from the Occupational Therapist and Psychologist. She was given time to read the information before responding. Ms Beacham and her representative decided to continue with the meeting, but reserved the right after receiving the meeting notes to make a further response before the investigation continued. This was agreed. The preliminary meeting notes were emailed to Ms Beacham and the PSA on 19 June 2011.

[17] The investigation continued in the meantime. Two MSD social workers who were involved on 9 May were both interviewed on 14 July 2011.

[18] Mr Bane and Ms Stevenson Wright produced an investigation report (the August 2011 report). They escalated the matter to the General Manager Operations, Marama Edwards. Ms Edwards wrote to Ms Beacham and gave her the report.

[19] Ms Beacham was given the opportunity to respond and she did so at a meeting and in writing. Ms Beacham was provided with all the relevant documents.

[20] On 19 October 2011 Ms Edwards sent to Ms Beacham a letter outlining the disciplinary allegations and her preliminary view in regard to the matter. She considered the information that she had been provided with from the preliminary investigation and the previous 22 September 2010 warning. Ms Edwards reached a

preliminary view that Ms Beacham's actions brought MSD into disrepute. Ms Edwards' concluded that the action amounted to "misconduct" that would warrant a warning, but because she was already on a final warning the impact meant that she would terminate Ms Beacham's employment (letter dated 22 September 2011) even although it related to misconduct as opposed to serious misconduct.

[21] Ms Beacham was given an opportunity to comment on this preliminary view.

[22] In the meantime Ms Beacham changed her representative twice (first to involve an advocate, and second to involve her current legal Counsel).

[23] On 7 December 2011 Ms Beacham's new lawyer raised a personal grievance based on an unjustified disadvantage action on the basis of Ms Edwards's preliminary decision, and stated that a personal grievance for unjustified dismissal would follow if she was dismissed. The unjustified disadvantage claim related to the *long and drawn out process*.

[24] In the meantime, Ms Beacham's lawyer and another Human Resources Consultant, Mr Waddel, from MSD, started discussions on the basis of earlier communications that had occurred between Ms Beacham's PSA representative and Mr Waddel. There is an argument as to whether or not their consultation was without prejudice.

[25] I am satisfied that the without prejudice nature of the discussion did include some options involving an alternative to dismissal, but those have not been disclosed or discussed in this Authority's investigation meeting. The PSA representative "believed" that the full discussion was without prejudice. There was no formal arrangement in place for this.

[26] What is at issue, and remains in contention, is whether Mr Waddel's information that Ms Edwards had made the decision to terminate Ms Beacham's employment on 21 November 2011 was formal advice of the dismissal. This was subsequently contained in a letter dated 21 November 2011, which was hand-delivered and passed over to Ms Beacham by Mr Bane on 9 December 2011. I accept Mr Bane did not know what the letter said, although he inferred that it was about Ms Beacham's employment. This clearly upset Ms Beacham, who for the first time was provided with the decision in writing that her employment had been terminated.

[27] This matter is complicated by two lines of disciplinary action. The first related to Ms Beacham's performance in her work (oral warning and first written warning from Anne Gardener); and second, a disciplinary action for a breach of the MSD Code of Conduct for serious misconduct (based on a "final" warning dated 22 September 2010 from Mr Bane that would apply for 24 months). The significance of Ms Beacham's claim that MSD should have treated the 9 May 2011 matter as a performance matter is because if it had done so, then she could have anticipated a final warning, given that she was already on a first warning for her performance, instead of dismissal.

[28] Ms Edwards upheld the CAMHS complainants' versions of events they say occurred on 9 May 2011. Ms Edwards based her decision on:

- a. The CAMHS workers' complaint and the subsequent investigation report. It was the first time that one of them had ever complained about a social worker's conduct.
- b. Kylie Anderson's version differed from Ms Beacham's recollection of what happened at the 9 May meeting. Ms Anderson's version was consistent with the allegations from the CAMHS workers.
- c. The statement provided by one of the social workers interviewed.
- d. The meeting she held with Ms Beacham.

[29] Ms Edwards concluded that Ms Beacham's conduct on 9 May was unprofessional. She decided that Ms Beacham:

- a. Did not introduce herself to the client.
- b. Asked questions in an insensitive manner that seemed to attribute blame on the client.
- c. Demonstrated a lack of compassion and empathy.
- d. Failed to provide the client with any reassurances.
- e. Created a situation where the client potentially suffered more harm than good.

[30] Ms Edwards' conclusion was that; "...*your practice on the day has effectively "brought your employer into disrepute"*". This related to misconduct, but because of the final warning, Ms Edwards decided to escalate the outcome to a dismissal. This was the reasoning at the time. However, in her evidence Ms Edwards has referred to a loss of trust and confidence, for the first time. The matter was not put to Ms Beacham in the investigation report or the preliminary dismissal letter. There was no evidence that the complaint had gone any further than the two CAMHS workers and their team leader. One of the CAMHS workers did not suggest that he had lost trust and confidence or respect for MSD when he was questioned in the Authority's investigation meeting. A fair and reasonable employer could not have come to the conclusion that Ms Beacham's conduct brought her employer into disrepute because the matter did not go beyond the two CAMHS workers and their team leader. I am satisfied that MSD could not have reached such a conclusion because the elements Ms Edwards decided on related to Ms Beacham's performance, which was already being managed. In other respects of course there was a difficulty relating to Ms Beacham's performance based on the details about the meeting involving the CAMSHS workers. In regard to the details of the meeting of 9 May 2011 that were available to Ms Edwards a fair and reasonable employer could have concluded that the code of conduct had been breached in regard to Ms Beacham's conduct to perform her duties involving some disciplinary action, I hold. In this regard there are other relevant circumstances that influence the outcome.

Was MSD entitled to rely on the final disciplinary warning dated 22 September 2010?

[31] This is a key matter. The final warning relied upon was dated 22 September 2010 in respect of six complaints that occurred from January-June 2010 in breach of the code of conduct.

[32] The applicant has challenged the MSD's reliance on the final disciplinary warning dated 22 September 2010 because it was not justified and was stale (out of time). This challenge is based on the grounds that the incident that the warning related to occurred a considerable period of time prior to the dismissal and that the warning was too old at the point that the notice of termination was issued (21 November 2011). MSD relied on the date of incident on 9 May 2011 and the warning being 8 months old at that time. However, the warning applies from the time

it was given on 22 September 2010 and when it was considered in regard to Ms Edward's decision. The first date would have been 21 November 2011.

[33] Ms Edwards decided to dismiss Ms Beacham on the basis of the warning dated 22 September 2010. This was confirmed in the dismissal letter dated 21 November 2011. The 9 May 2011 incident occurred within the time of the warning. It was a final warning relating to disciplinary action that Ms Beacham did not challenge at the time. I accept that the incident occurred within 8 months of the time the final warning was issued. It was therefore reasonable for the employer to take it in to account in regard to determining the reasonableness of a response to the new matter, I hold. It is part of all the circumstances under s 103A of the Act. As such the 9 May 2011 incident could be viewed as a separate instance of poor performance because of the matters involved relating to the meeting on that day, and indeed MSD put in place procedures, such as monitoring and supervision to minimise any work related risks afterwards. These all point to a fair and reasonable employer categorising the conduct as performance and not serious misconduct, I hold.

[34] I hold that the warning could not be relied on because the matters concerned performance. Also, Ms Edwards escalated the matter further during the Authority's investigation meeting to make the allegations more serious as a breach of trust and confidence.

Was the procedure fair?

[35] Second, Ms Beacham claims that the process undertaken by MSD in regard to the complaint laid on 9 May 2011 was unfair, including the delay until 21 November 2011 in reaching a conclusion.

[36] Ms Edwards was entitled to rely on an investigation as reported to her, and in respect of the investigation report, she met with Ms Beacham about that, and made her tentative decision. She enabled Ms Beacham to have the opportunity for her input and comment on the preliminary decision. These were the actions of a fair employer.

[37] Ms Beacham was not disadvantaged and/or prejudiced by the length of MSD's investigation I hold. The overall process conducted by MSD was not unfair, I hold. In addition Ms Beacham was permitted to stay at work on full pay until there was an outcome.

[38] Ms Edwards confirmed that she reached her decision to dismiss Ms Beacham on 21 November. Ms Beacham's representative was informed by Mr Waddel of the decision at that time. It has been accepted by MSD that the communication of the decision did not constitute an effective dismissal and therefore it was communicated on 9 December 2011 when Mr Bane handed over the envelope with the dismissal letter. Any monetary loss has been subsequently fixed in regard to that issue, but for completeness if there remains any issue about that I grant leave for the parties to return to the Authority for a sum to be fixed.

[39] Criticisms of the manner in which MSD pursued the disciplinary process and criticisms of delays have no foundation, I hold. First MSD was entitled to follow up the complaint because it had been made in writing and there were genuine concerns about Ms Beacham's performance raised in regard to the meeting of 9 May. Second, there were differences between the people involved about what had happened on 9 May. Indeed an issue emerged during the Authority's investigation as to who was responsible for what was said at one point during the meeting involving one of the CAMHS complainants and Ms Beacham. Third MSD decided not to suspend Ms Beacham because Ms Edwards believed that there were safeguards in place to minimise any risk as Ms Beacham was able to be supervised and her work load managed. Fourth Ms Beacham's issue that this was a matter that did not involve a suspension, and thus, should have been a performance matter, I hold was a matter for the employer, and it was entitled to treat it as a disciplinary matter. However, a fair and reasonable employer would not have separated it from the performance management process already underway. The point that there was no suspension and Ms Beacham was allowed to continue working was a decision made by the employer that supports my conclusion I hold.

Determination

[40] Ms Beacham has a personal grievance because MSD's action of dismissal could not be justified when the matter was more a performance matter, especially where there was performance management in place, a first written warning for performance had been issued and the issues about the meeting on 9 May 2011 related to Ms Beacham's performance. I have also had regard to the resources of the employer in this setting as MSD is a large government department with resources it can call on involving on site management, human resources capability and legal

services. The evidence was not sufficient to support Ms Beacham bringing her employer into disrepute, and certainly at the time, did not involve an issue of trust and confidence.

Remedies

[41] The applicant is seeking reinstatement. Reinstatement is no longer a primary remedy under the Act, but is one of a number of remedies to consider. I conclude that it is not practicable and reasonable to reinstate Ms Beacham. I am aware that in coming to this decision that it seems to be contrary to any other chance Ms Beacham may have expected given an alternative remedy of a final warning.

[42] It is my decision not to reinstate Ms Beacham for the following reasons:

- a) That I am satisfied that there are on-going performance related matters causing significant issues between MSD and Ms Beacham that are not likely to be resolved.
- b) That the witnesses who would need to manage her do not want her back.
- c) That MSD will be required to put in place mechanisms to closely scrutinise Ms Beacham's work and I accept this will be too onerous because of resources and staffing levels.
- d) That there will be difficulties in managing Ms Beacham's work and a real prospect of more risk to MSD. This is supported by the difficulties that occurred on 9 May.
- e) That MSD is entitled to expect a level of performance from Ms Beacham that is unlikely to be achieved for the amount of pay that Ms Beacham is currently entitled to. Ms Beacham accepted that her level of performance had not been up to the level that she is paid at.

[43] Ms Beacham is entitled to lost wages from 22 February 2012 to the date of the Authority's determination. During the Authority's investigation meeting the parties acknowledged that Ms Beacham remained on *garden leave* until the Authority's investigation meeting (22 February 2012). Ms Beacham has made attempts to mitigate her losses. As reinstatement is not a practicable and reasonable remedy she should be compensated for the loss of wages since 22 February 2012 until the date of

the determination. Her loss of wages is attributable to her dismissal. Any earnings since the Authority's investigation meeting are to be deducted. Therefore the award for Ms Beacham is approximately 14 weeks wages, to be calculated by the parties, and leave is granted to return to the Authority if necessary to determine an amount.

[44] MSD initially denied all Ms Beacham's claims. However, during the Authority's investigation meeting MSD made the concession that it was wrong to backdate the termination letter to 21 November 2011. MSD accepted that the termination should have applied from 9 December 2011 (although the decision was made on 21 November 2011, and the consequence of its decision impacted on the length of notice).

[45] Ms Beacham is entitled to compensation that I fix in the amount of \$12,000 for humiliation, loss of dignity and injury to feelings. The manner in which the last part of the process was carried out I accept greatly impacted on Ms Beacham's feelings and that she was hurt and distressed. I also accept that the loss of her job has impacted on her feelings and caused her humiliation and loss of dignity.

[46] On both amounts there is no deduction to be made for contribution. I have assessed that Ms Beacham did not contribute to her grievance, considering MSD's actions and that there is not a causal connection between Ms Beacham's actions associated with her performance and MSD's actions.

Summary of orders of the Authority

[47] The Ministry of Social Development is to pay Ms Beacham:

- a. Fourteen weeks (14 weeks) lost wages (less any earnings) to be calculated by the parties with leave to return to the Authority for a sum if it needs fixing.
- b. \$12,000 compensation under s 123 (1) (c) (i) of the Employment Relations Act for hurt humiliation loss of dignity and injury to feelings.

[48] Any outstanding issue on holiday pay is reserved.

[49] Costs are reserved

P R Stapp
Member of the Employment Relations Authority