

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012]NZERA Auckland 143  
5341940

BETWEEN

JANE DRADER  
Applicant

A N D

CHIEF EXECUTIVE OF  
THE MINISTRY OF  
SOCIAL DEVELOPMENT  
Respondent

Member of Authority: James Crichton

Representatives: Bryce Quarrie, Counsel for Applicant  
Samantha Turner, Counsel for Respondent

Investigation meeting: 16 February 2012 at Whangarei

Date of Determination: 27 April 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Ms Drader) alleges that she was unjustifiably dismissed from her position and suffered a disadvantage because of the unjustified action of her employer in suspending her from duty pending further inquiries. The respondent employer (the Ministry) resist both contentions.

[2] The factual matrix involves clients of the Ministry and because they are entitled to privacy, the Authority now directs that the name of any client of the Ministry, together with any information which will lead to the identification of the name of such persons, shall be prohibited from publication. To that end, the Authority will, throughout this determination, refer to such persons by general identifying descriptors. However, because the pleadings and the evidence before the Authority ( or some of them ) contains the actual names of these clients, it is necessary for the

Authority to make the order that it does: Schedule 2 Employment Relations Act 2000, clause 10(1) applied.

[3] Ms Drader was employed as a service centre manager for the Ministry's Work and Income New Zealand Division at Kerikeri. Her employment was covered by a standard individual employment agreement.

[4] On 3 February 2011, Ms Drader was attending to clients at reception in the Kerikeri office. Two clients (one of whom had an appointment and one of whom did not) came to reception. The client who had no appointment had concerns about child care payments. Ms Drader told that client that she was unable to address that but would refer the matter to the appropriate officer in the Ministry.

[5] The following evening Ms Drader was out for dinner with her husband and another couple and she was involved in a fight with the client who had attended at the office the previous day without the appointment. Both parties (the client and Ms Drader) sustained injury.

[6] Ms Drader was persuaded to leave the scene of the fight, The Rock Salt Café, by her husband. By her own admission, Ms Drader was excitable at this point. On the way home, she and her husband were stopped by Police who wanted to know if she wished to lay a complaint. She replied in the affirmative.

[7] The fight took place on a Friday night at the end of a working week and Ms Drader returned to the office the following Monday as usual. On Thursday 10 February 2011, nearly a week after the fight, Ms Drader reported it for the first time to her immediate superior, Mr Graham MacPherson. During that meeting, she recited the events of the previous Friday night from her perspective but at the end of the meeting, Mr MacPherson was interrupted by his Executive Assistant, who provided him with a client complaint. This complaint was from the client who had met with Ms Drader in the office at reception on 3 February 2011 and had subsequently been involved in the altercation with Ms Drader at The Rock Salt Café the following night.

[8] The client had a different view of matters from Ms Drader, as to the events on 3 and 4 February 2011 but also alleged that Ms Drader had telephoned her home on 7 February 2011 (the Monday immediately after the fight) to threaten her. Ms Drader

is alleged to have said words to the effect *you better watch yourself, the dogs are after you*.

[9] When confronted with the details of the complaint from the client, Ms Drader admitted that she had accessed confidential client records without authorisation for her own personal use and admitted that she had telephoned the client and threatened her. Mr MacPherson encouraged Ms Drader to seek advice on the matter and gave her a copy of the complaint.

[10] A formal meeting between the parties took place on 14 February 2011. In that meeting, the Ministry identified four concerns:

- (a) the exchange between Ms Drader and the client at reception on 3 February 2011;
- (b) the fight on 4 February 2011;
- (c) the threatening telephone call on 7 February 2011; and
- (d) the issue of Ms Drader accessing the client's contact details without appropriate authorisation.

[11] A further issue which arose during the course of the meeting was why it had taken Ms Drader fully six days to notify the employer of the events in question.

[12] Contemporaneously with that meeting, Ms Jan Rata, the Regional Commissioner for the Ministry met with the client on 16 February 2011. That meeting established to the Ministry's satisfaction that the effect on the complainant of the threat made by Ms Drader, was palpable; the client had taken a variety of extraordinary steps to protect herself and her children including moving out of their home and avoiding attending the Ministry's office and/or appearing in the business district of Kerikeri.

[13] Ms Drader met with Ms Rata on 22 March 2011, the meeting being delayed somewhat because Ms Rata was required to work in Christchurch to assist the Ministry's response to the Christchurch earthquake.

[14] A further meeting between those parties took place on 29 March 2011 at which the Ministry confirmed its intention to dismiss Ms Drader for serious misconduct.

[15] After the personal grievance was raised, the parties attempted mediation but were unable to resolve matters on their own terms and the matter proceeded to the Authority in the usual way.

### **Issues**

[16] The Authority needs to consider:

(a) was Ms Drader disadvantaged by unjustified actions of the Ministry?  
and

(b) was Ms Drader unjustifiably dismissed?

*Was Ms Drader disadvantaged by unjustified actions of the Ministry?*

[17] In the statement of problem filed in this matter, Ms Drader claims to have suffered a disadvantage by reason of the Ministry's decision to suspend her from duty after her meeting with Mr MacPherson on 10 February 2011. Ms Drader protests that this decision of the employer was an unjustified action because she was not given any opportunity, she says, to respond to it.

[18] This matter can be dealt with shortly. The claim was not made within 90 days of the events claimed of and indeed the disadvantage claim appeared for the first time in the statement of problem. According to the Ministry's calculation (which the Authority accepts) the first the Ministry heard of this particular allegation was 188 days after the events complained of. As the Ministry notes, there has been no application for leave to be granted to have the grievance heard out of time nor has the Ministry consented to the grievance being raised after that lapse of time.

[19] The matter was tacitly put aside by the applicant in the investigation meeting presumably in the expectation that the Authority would not contemplate its continuation.

[20] In the circumstances, this aspect of the claim must be struck out. The employer was not notified of it within the statutory time limit and the breach of the

time limit was egregious rather than inadvertent. No application was made for the matter to be raised out of time and the Ministry's consent to the matter proceeding out of time was not forthcoming.

*Was Ms Drader unjustifiably dismissed?*

[21] The Authority is satisfied that Ms Drader's dismissal was a justified one. Ms Drader was dismissed on 29 March 2011 and as such the test for justification which must apply is the older test that was in place before the law changed on 1 April 2011. It follows that the test the Authority must apply is whether it was available to a fair and reasonable employer, after conducting a proper investigation, to conclude that dismissal would be the appropriate response in all the circumstances that pertained at the time that the decision was taken. Central to the Authority's conclusion is the fact that Ms Drader was a manager for the Ministry. The errors of judgment of which she was found guilty, which she herself admitted to, were so fundamental as to make the loss of trust and confidence in her by the Ministry a total one.

[22] Illustrative of this complete failure of judgment is Ms Drader's inexplicable decision to not promptly report the events of 4 February 2011 to her immediate superior. The Authority is satisfied that under the terms of the Code of Conduct that formed part of her individual employment agreement, Ms Drader was under an absolute obligation to exercise her judgment appropriately and tell the Ministry what had happened. Indeed, she should have rung her immediate superior (Mr MacPherson) on the night of the incident.

[23] Instead, she waited fully six days before she took that step. In questioning by the Authority at the investigation meeting, Ms Drader accepted immediately that she should have rung Mr MacPherson earlier than she did, that she should not have attended at work on the following Monday, and that she should have attended the doctor to have the injuries from the fight treated. Her reluctance to attend the doctor was apparently a function of the fact that, having been hit with a bottle during the fight with the client, her face was badly swollen. She said that she did not consult the doctor because she was embarrassed about the way that she looked. But of course, had she consulted a doctor as she ought to have done, as well as receiving treatment for her injuries, her general practitioner would have been able to consider whether she should be put off work to recover and would then have been able to give tell the

employer of the likely consequences (if any) of the physical trauma that Ms Drader had suffered.

[24] As it is, none of that information was available to the employer and therefore none of it can be taken into account. Submissions for Ms Drader encourage the Authority to conclude that the Ministry ought to have realised that Ms Drader's behaviour was *out of character* and that that was because she had had a bang on the head. But it is not for the Authority to second guess what the employer might have done if they had received different information; had Ms Drader been less than lucid during the various exchanges with the employer, the Ministry may well have sought medical advice on her status. There is no evidence before the Authority that she was anything other than lucid. If she had wanted to make the argument that her injuries created some frailty which the employer should take into account, then she ought to have seen her doctor and facilitated that. She did not and the Authority can take that aspect no further.

[25] Ms Drader was a manager employed on an individual employment agreement. That agreement incorporated the terms of the Ministry's Code of Conduct and the Code of Conduct for the State Services generally. In addition, a separate document entitled "Staff Fraud and Misuse of Client Information: Zero Tolerance Policy" is also subsumed within the Ministry's Code of Conduct and develops the Code of Conduct materially in relation to that subject matter.

[26] The evidence before the Authority discloses that Ms Drader was fully trained and experienced as a manager and had, during her career with the Ministry, multiple opportunities to confirm in writing her understanding of the terms and conditions of her employment particularly as they related to the standards that the Ministry expected from its managers. Those written confirmations are before the Authority.

[27] In specific terms, clause 2 of the Ministry's employment agreement with Ms Drader provides *inter alia* that she will ... *comply with the Code of Conduct and other policies and procedures that apply to you and your work with the Ministry*. It is the essence of the Ministry's case that Ms Drader failed to comply with that fundamental obligation and therefore inevitably placed herself in the position of being at risk of a finding of serious misconduct leading inexorably to a summary dismissal.

[28] The elements that weighed with the Ministry in making the finding it did are now referred to in turn. It is common ground that Ms Drader was involved in a fight with a client in a public place. Interestingly, the Ministry was less concerned about who started the fight than they were with the consequences of it. Ms Rata's evidence is clear on that aspect. While Ms Drader sought to influence the Ministry to conclude that she was the victim rather than the aggressor, the Ministry's position was that the consequences of the fight and its aftermath were more important than who initiated the fight.

[29] To that end, the solicitor then acting for Ms Drader produced various affidavits at the meeting with Ms Rata with a view to trying to influence her as to who initiated the fight but Ms Rata took the view that if she were to contemplate the receipt of that evidence, she would, of necessity, have to go back to the client who had complained and get her response. Ms Rata was happy to rest on the footing that each party to the fight accused the other of starting it.

[30] Certainly, the Ministry's position was that Ms Drader did not behave in good faith by delaying the reporting of the altercation until fully 6 days after it had happened. Had Ms Drader done what was required of her by the Ministry's Code of Conduct and reported the event immediately to her manager, she could, in the Authority's view, have expected a far less jaundiced response from her employer. As it was, she not only delayed telling her employer what had happened for that length of time, but she also was plainly not intending to admit to the subsequent threatening telephone call to the client until the Ministry was in receipt of the client's own complaint making that allegation. It was only when the allegation was put to Ms Drader that she pleaded to it; there was no sense on the facts the Authority heard, that she was intending to tell the employer before she had to.

[31] The Ministry were also concerned about what Ms Drader told them about the immediate aftermath of the fight and her own evidence that she effectively needed to be restrained by her husband from seeking out the client for further engagement. Again, it is important for the Authority to record that this aspect of the evidence comes exclusively from Ms Drader's own testimony to the Ministry. She made observations to this effect both in the first meeting with Mr MacPherson on 10 February 2011 and again on the second meeting with Mr MacPherson on 14 February 2011. Ms Drader complained generally about the accuracy of the notes

taken by the Ministry and provided to the Authority as part of the documentary trail for the investigation meeting but the Authority notes that the thrust of Ms Drader's comments in those notes is consistent with her own brief of evidence to the Authority and on that basis, the Authority considers that the observations she made on the point are accurately recorded by the Ministry.

[32] The point the Ministry makes about Ms Drader's response after the fight is that if she was, as it seemed, seeking to re-engage with the client then that would bring the Ministry into disrepute and of itself raised grave questions about Ms Drader's judgment when under pressure.

[33] Next, the Ministry refers to Ms Drader's entirely unauthorised accessing of the client's telephone number (which was unlisted) and then using that number to ring the client and make some comments to her. While what Ms Drader said is more or less common ground, her intention is not. Or at least it would perhaps be more accurate to say that Ms Drader has offered two different explanations for why she did what she did. Dealing with the fact of accessing the unlisted telephone number first, again this allegation is made out by Ms Drader's own frank admissions that that is what she did. The statements made by Ms Drader at the meetings with Mr MacPherson on 10 February 2011 and 14 February 2011 are supported by Ms Drader's own brief of evidence to the Authority's investigation meeting. She says in the clearest terms that she accessed this personal information for her own purposes. That of itself without more is a breach of the Ministry's Zero Tolerance Policy on the misuse of client information. That Policy document is clear that misuse of client information *cannot and will not be tolerated* and that that ... *means that the Ministry will dismiss ...* in those circumstances.

[34] The second aspect of this matter is what Ms Drader's motive was in ringing the client. At the meeting with Mr MacPherson on 16 February 2011, Ms Drader acknowledged that what she did was wrong and that she should not have done what she did. Her early observations to the Ministry about her motive suggested that she had simply wanted to threaten the client but later on, she developed the gloss that the purpose of the communication was to warn the client because Ms Drader's own whanau were keen to pursue the matter against the client.

[35] These two explanations of why Ms Drader made the comments that she did are carefully reviewed in Ms Rata's brief of evidence before the Authority, in which she

discusses her meeting with Ms Drader on 22 March 2011. The Authority agrees with Ms Rata's assessment that Ms Drader's second explanation of her behaviour is not credible and that the better view is that Ms Drader's motive was indeed to threaten the client because she was angry with the client as a consequence of the assault.

[36] But even if Ms Drader's second explanation were to be accepted, her behaviour in accessing a client's unlisted telephone number without proper authority and then ringing that client to utter the words broadly accepted as having been uttered is a breach of the Ministry's *strict liability* policy of zero tolerance for the misuse of client information. That is to say, the very accessing of the information is enough to ground a basis for dismissal under the terms of the policy which as the Authority has already noted, forms part of the terms and conditions of the employment.

[37] In summary then, in the Ministry's investigation into this matter, its primary findings of fact were based on statements made by Ms Drader in the various meetings that she had with her employer after the events in question became known to the Ministry. Her quarrel with the terms of the Ministry's notes of those various meetings does not avail her because on the one hand the salient aspects of what she said is confirmed by the sworn evidence of Ministry officers who were physically present at those meetings and on the other, Ms Drader herself has confirmed the central aspects of what she said in her own brief of evidence.

[38] In the Authority's opinion, the Ministry's investigation into the circumstances giving rise to the events complained of was greatly facilitated by the various admissions made to it by Ms Drader. Nonetheless, the Ministry is entitled to rely on those admissions, as it has done, as well on the other inquiries that it has undertaken. Primarily those other inquiries have revolved around contact with the client and various of her whanau and supporters which has provided the Ministry with other information. Broadly speaking, that other information has been at variance to the claims made by Ms Drader, particularly in relation to the circumstances of the physical altercation.

[39] But the essence of the matter is that the Authority is satisfied that the Ministry conducted a proper inquiry to establish the facts of the matter.

[40] Looking then at the test provided by the law, the question is whether the dismissal of Ms Drader is justifiable and that must be answered on an objective basis

by considering what the employer did and how the employer behaved so as to assess whether a fair and reasonable employer would have concluded that dismissal was the appropriate outcome in this case.

[41] The Authority's considered view is that a fair and reasonable employer, after the consideration of the facts obtained from a proper inquiry would conclude that Ms Drader's conduct amounted to serious misconduct and that the only available sanction given the irretrievable breakdown in trust and confidence, particularly given her managerial status, was to dismiss her from the employment.

[42] On the face of it, a fair and reasonable employer would conclude that any one of the several grounds identified could ground a dismissal. However taken in their totality, the lack of judgment and the failure to follow the Code of Conduct in respect to the physical altercation, the like breaches in respect to the accessing of the client's unlisted telephone number and the conclusion on the balance of probabilities that a threat was intended and made, a justified dismissal must be the outcome.

### **Determination**

[43] For reasons just analysed, the Authority is satisfied that Ms Drader's dismissal from the Ministry's employment was justified in all the circumstances.

### **Costs**

[44] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority