

ATTENTION IS DRAWN TO THE ORDERS
PROHIBITING PUBLICATION AT PARAGRAPH
5 OF THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 60
5378047

BETWEEN	WILLIAM SIMPSON Applicant
AND	THE NEW ZEALAND FAMILY & FOSTER CARE FEDERATION INCORPORATED operating as FOSTERING KIDS Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Vivienne d'Or and Dana Maniapoto, for the Applicant Barbara Buckett, for the Respondent
Investigation Meeting:	26 February 2013
Submissions received:	18 January, 18 February, 11 March and 3 April 2013 from the Applicant 22 March 2013 from the Respondent
Determination:	28 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Simpson says he has a personal grievance for unjustifiable disadvantage arising from his suspension from the workplace by his former employer. Mr Simpson raised other concerns during his employment relating to his treatment in the workplace where he says his explanations of events were never accepted and his concerns over lack of safety in the workplace were not addressed or taken seriously. He claims he was blamed for things that were outside his control and not provided with evidence of allegations made against him.

[2] During his employment Mr Simpson also says he was discriminated against as a Māori and a male. He would attend meetings to address specified concerns only to be met by other concerns to which he had not previously been alerted. He says, too, that he was subject to racial harassment.

[3] The New Zealand Federation of Family & Foster Care Incorporated, which operates as Fostering Kids, is a charitable organisation. It supplies support and advocacy to foster families caring for vulnerable children throughout New Zealand. Fostering Kids denies Mr Simpson's allegations. It says it had good grounds to suspend him and is confident he was treated fairly and reasonably at all times throughout his employment. Fostering Kids challenges what it sees as the causes of action introduced in the investigation meeting, and addressed in submissions by Mr Simpson's legal representatives. I will address that matter shortly.

Evidence

[4] In the course of the investigation meeting, 2 people who gave evidence for Mr Simpson disclosed personal information about clients of Fostering Kids and children in foster care. Fostering Kids requested an order prohibiting publication of such personal information. I agree with the need for that prohibition.

[5] Accordingly I make an order, pursuant to clause 10, Schedule 2, of the Employment Relations Act 2000 (the Act), that no personal information is to be published relating to any clients of Fostering Kids, or to any foster children in the care of their clients. The order applies specifically to evidence given by Kim Marie Lowe and Barbara Evans, and also applies generally to evidence and submissions made by parties and their representatives. For clarity, the order regarding personal information about clients does not apply to Mr Simpson or his wife, Maureen Bell-Simpson. I further order that the Authority's file may not be inspected by any person unless by order of the Authority.

The Personal Grievance

[6] Mr Simpson raised a personal grievance for disadvantage by letter dated 4 November 2011 from his solicitor, Dana Maniapoto. Ms Maniapoto referred in her letter to a meeting that had taken place on 17 October 2011, and to 3 letters written by Fostering Kid's Chief Executive Officer (CEO). On behalf of Mr Simpson, she claimed unjustifiable disadvantage regarding the CEO's decisions made during the

meeting of 17 October 2011, and those conveyed in the 3 letters dated 18 October, 2 November and 4 November 2011.

[7] The 17 October 2011 meeting had been called by the CEO, who at that time was Iris Clanachan, to discuss a number of *serious concerns* she wished to raise with Mr Simpson. He had attended the meeting with Ms Maniapoto. Barbara Buckett, Fostering Kids' lawyer, also attended the meeting. The CEO's letter of 18 October 2011 recorded the outcome of the meeting, including a number of agreements that had been reached over specified work issues. It set out some expectations and ground rules for Mr Simpson's ongoing employment.

[8] The letter also notified Mr Simpson of Ms Clanachan's decision to give him *a preliminary warning regarding displays of anger during work time*. The CEO offered Mr Simpson a course of anger management counselling which the employer would fund. She put Mr Simpson on notice that any breach of the agreements reached could lead to serious consequences including dismissal. The CEO expressed her wish that Mr Simpson could *move on from this so that we can have a more harmonious working environment*.

[9] The CEO's letters of 2 November and 4 November 2011 concerned Mr Simpson's suspension from work which had taken place on 2 November 2011.

[10] Ms Maniapoto included a series of notes from Mr Simpson with her letter of 4 November 2011 to the CEO. Her letter, and Mr Simpson's notes, both requested urgent mediation of the issues that had been raised. Mediation took place in December 2011 but did not resolve matters.

[11] The statement of problem, which was filed in April 2012, defined the employment relationship problem the Applicant wished the Authority to resolve as unjustifiable dismissal and unlawful suspension. While it did not specifically refer to unjustifiable disadvantage, the claim of unlawful suspension falls into that category of personal grievance.

[12] The section of the statement of problem dealing with *facts that have given rise to the problem* set out the history of Mr Simpson's employment relationship with Fostering Kids. It encompassed those matters that Mr Simpson has, through submissions from his legal representatives, referred to as disadvantages.

[13] I conclude that the matter for the Authority to determine is Mr Simpson's claim of a personal grievance for unjustifiable disadvantage, arising from his suspension on 2 November 2011. The other matters he has raised form part of the background to the increasingly problematic nature of the employment relationship, rather than constituting separate disadvantage personal grievances.

[14] The unjustifiable dismissal claim was raised out of time and Fostering Kids did not consent to it being raised outside the statutory 90 day time frame¹. Mr Simpson's application for leave to raise that personal grievance after the expiration of the 90 days was the subject of a separate determination in which I found no exceptional circumstances existed which would allow it to be raised outside the period specified by the Act².

Issues

[15] The issues for the Authority to determine are:

- (a) Whether Mr Simpson's suspension was justifiable;
- (b) Whether he was disadvantaged in his employment by his suspension;
- (c) What remedies, if any, are appropriate.

The employment relationship

[16] Mr Simpson's employment with Fostering Kids lasted approximately 9 months. He was appointed to the position of Team Leader/Regional Support Coordinator, starting his employment on 22 March 2011. For the first weeks of his employment Mr Simpson said he felt valued and treated with respect. He received positive feedback and no negative comments from anyone in the organisation. He felt part of the team.

[17] That changed, according to Mr Simpson, when three other regional coordinators complained about his performance after he had been in the role for 2 or 3 months. Mr Simpson read the comments of his colleagues which he thought to be *racial, hurtful, demoralising and in some cases outright despicable*. From that time

¹ Section 114, Employment Relations Act 2000

² [2013] NZERA Wellington 5

Mr Simpson's employment was punctuated with complaints, allegations, meetings and clashes with his employer.

[18] One such incident concerned Mr Simpson being taken to task over comments he had made to a young female Māori co-worker. His comments referred to a prostitute with whom he had had a daughter. Mr Simpson said in evidence he had taken the young co-worker aside to discuss his views around Māori and the treatment they had suffered for decades, particularly Māori women. The staff member took offence at one of his comments and complained about the conversation to her employer who then required Mr Simpson to explain himself in a meeting on 1 September 2011.

[19] The CEO had called the meeting to discuss a number of issues relating to Mr Simpson's performance and conduct. He attended with his wife, Maureen Bell-Simpson. Dianne Halsted, a member of Fostering Kids' Board of Trustees, also attended the meeting as a note taker. The issues raised by the CEO concerned leadership, communications, training skills, bringing the organisation into disrepute, and avoiding behaviour that may distress other staff. Issues of inappropriate emails, allegedly giving legal advice to a member, inappropriate conduct, and code of conduct issues were also raised.

[20] Mr Simpson says that, at the meeting, the CEO did not want to accept any of his explanations and he had the feeling she had predetermined the outcome. He says he agreed to stand down from his position as team leader but asked that all the allegations against him be taken off the table so he could start with a clean slate. He says the CEO and Ms Halsted agreed to wipe the slate clean and confirmed this later in an email to him. He acknowledged that the CEO said that if there were any other similar issues she would have to reconsider his previous lapses of behaviour and conduct.

[21] In the weeks after the meeting Mr Simpson signed a new individual employment agreement as Support Coordinator, effective from 5 September 2011. He retained the same remuneration and terms and conditions of employment, other than the diminished duties.

[22] Following the 1 September 2011 meeting, Mr Simpson says he rang Fostering Kids' cultural adviser to seek advice and support. He was encouraged by the cultural

adviser to rely on his tupuna and karakia to keep safe. He says he arrived at work the next day and began a karakia, going into a deep trance as he was speaking to his tupuna.

[23] While he says he was in this state, the young female employee who had complained about his inappropriate conversation with her greeted him. She subsequently complained to the CEO that he had been rude to her and ignored her. He says he found her attitude to be culturally insulting and was dismayed by the CEO's response when she asked both employees to come into the board room to discuss the matter.

[24] The CEO informed Mr Simpson that, if he had responded to her as he had to the female employee, she would have considered his conduct to be impolite and rude. Ms Clanachan also spoke with Mr Simpson about his practice of not responding when people spoke to him, noting there had been several complaints from people in the office about how they spoke to his back and he did not turn around to face them. Mr Simpson says he was upset at this comment, telling the CEO that all the staff, and in particular the young female employee in question, were fully aware that he suffered from a hearing disability. At times he could not hear things. He noted his annoyance at being interrupted during a karakia.

[25] On 6 October 2011 the CEO wrote to Mr Simpson requesting a meeting to discuss some *serious concerns*. These included his entry on the New Zealand Law Society website, and issues around sick leave and time in lieu. Mr Simpson was sufficiently concerned that he instructed Ms Maniapoto to contact his employer and attend the meeting with him. That was the meeting of 17 October 2011 to which I have referred above, and which resulted in a preliminary warning being issued to Mr Simpson on 18 October 2011.

[26] On 19 October 2011 Ms Bell-Simpson sent a 3 page letter to *the Board Fostering Kids and chairs of associations*. Her letter, which was signed by Ms Bell-Simpson and a caregiver, Barbara Evans, raised complaints about Fostering Kids, its CEO and 2 other named managers. It claimed the organisation was *totally unsafe for Māori caregivers* despite the majority of children taken into care being *Māori*. She noted that *(a) lot of these Māori children are cared for by non Māori so we should be seriously concerned*.

[27] It questioned the safety of Mr Simpson while employed under the CEO and while working with one of those managers. Ms Bell-Simpson demanded *a full investigation into the national office and the behaviour of the staff*, accusing national office staff of cultural bias against *Māori*. She referred to matters affecting her husband at work, stating that she was disgusted *at (the) attitude and lack of respect* shown to him.

[28] She also wanted *a full investigation* into the background of the young woman employee who had complained of her husband's inappropriate conversation regarding a prostitute with her. Ms Bell-Simpson made a number of allegations about that young woman, some of which concerned her boyfriend's presence after hours in the national office. Her letter contained a list of concerns that caregivers had with the Fostering Kids' national office and noted Ms Bell-Simpson's own concerns about safety in the office in the following terms:

...I do not feel comfortable nor do I feel safe at national office, in fact I have only been there once or twice since my husband has worked for the federation and I will not allow my son near the place unless he is with me.

[29] Ms Bell-Simpson stated at the beginning of the letter that her husband was an employee of Fostering Kids *and knows nothing about this complaint*.

Suspension

[30] Ms Clanachan no longer worked for Fostering Kids at the time of the investigation meeting and did not attend the investigation meeting or directly provide evidence. However, the evidence of Andeana Pilalis, Events and Communications Manager for Fostering Kids, is that Ms Clanachan asked her to contact Mr Simpson on the afternoon of 1 November 2011. Ms Clanachan had told Ms Pilalis she had left voice mail messages on Mr Simpson's mobile phone which he had not returned. The content of those messages, other than asking Mr Simpson to contact his CEO, is not known.

[31] Ms Pilalis spoke to Mr Simpson late that afternoon on his mobile phone and asked him to contact the CEO. Mr Simpson, who was driving back to Wellington at the time did not contact Ms Clanachan that evening. Ms Pilalis said that the Fostering Kids' staff were very upset the following morning about Ms Bell-Simpson's letter, which had now become known to them. Ms Pilalis had been shown the letter by one

of the Association chairpersons to whom it had been addressed. Ms Clanachan, who was out of the office that morning, had contacted Ms Pilalis to inform her she had not heard back from Mr Simpson, and to ask her to ensure he telephoned her as soon as he came in to work.

[32] Mr Simpson arrived at work around 8.30 a.m. and Ms Pilalis passed on the CEO's message to call her immediately. There was some consternation among the employees who were present that Mr Simpson did not immediately comply with the request. The delay was short however, as the CEO telephoned him within minutes. In the course of the conversation Ms Clanachan suspended Mr Simpson on full pay from his employment pending her investigation of the letter from Ms Bell-Simpson.

[33] Mr Simpson says he did not know about the letter; had never seen it; and did not understand why he was being suspended for it. He made this clear to Ms Clanachan while they were on the telephone on the morning of 2 November 2011. The notes made by Mr Simpson and sent with Ms Maniapoto's letter to Fostering Kids on 4 November 2011 give his account of the telephone conversation as follows:

I now answer the phone and speak to Iris and state

“Hello Iris

It was at 3.58pm yesterday that's right

I have to stop you there Can I stop you there I have read your message and I do not know what you talking about. I really don't. Well that's got nothing to do with me can you please deal with her I know nothing about it. You need to talk to her about it not me I do not know what you are talking about.”

I was then advised by Iris that I was suspended.

I respond; “Forthwith, forthwith can you give me a reason please?”

Iris then advised me that I was suspended forthwith because of the impact of a letter that was received by caregiver Maureen.

“For what reason can you give me a reason please I have not got it written down”.

Iris refused to give me a reason by telephone

[34] Notes were provided in evidence comprising a compilation of the accounts of 3 employees who overheard Mr Simpson's telephone conversation with Ms

Clanachan that morning. The notes indicate that the conversation with Ms Clanachan was brief and included Mr Simpson stating:

I don't understand, hold on, hold on, I don't understand, no, no, what I am saying is...

[35] It is clear that Mr Simpson expressed a lack of knowledge about the letter his wife had written, and lack of understanding about why he was being suspended for it. Mr Simpson's notes about the telephone suspension say he packed some personal items from his desk and left around 8.45 a.m. He says he was embarrassed by Ms Pilalis and another Fostering Kids' employee running after him as he was heading to his vehicle *calling out in public asking for the keys to the office*, which made him *feel like a criminal in public*. The notes Mr Simpson made shortly after the event record that he was *humiliated and mortified at their behaviour and how they made me feel*.

[36] Ms Pilalis said she realised just after Mr Simpson left the office that he had retained the office keys and his work mobile phone. As she was Ms Clanachan's second in command, she needed to retrieve those items. That was the reason she and another employee hurried after Mr Simpson. Ms Pilalis said they caught up with him in an alleyway, and had not called out to him in public. She had asked for the keys and mobile phone, and Mr Simpson had refused to hand them over, saying he had been suspended, not dismissed, and they should talk to his lawyer.

[37] When I questioned Mr Simpson about his suspension he became agitated and left the investigation meeting for a short time. On his return he explained that his suspension had deeply embarrassed him. He felt his employer had trampled on his mana and he found it difficult to talk about what had happened to him.

[38] Ms Clanachan confirmed Mr Simpson's suspension by letter the same day. The content of the letter is as follows:

To Bill Simpson

Further to my communications with you last night and again today relating to my concerns of the impact of a letter on staff working for the organization purported to be penned and circulated by your wife to the board and other associations, I confirm that it would be inappropriate for you to be present at work while I investigate. The letter has had a negative and disturbing effect on staff and Fostering Kids members which requires investigation and damage control.

Therefore I have decided to suspend you on full pay. The suspension is to take effect immediately.

In our discussions you indicated you had no knowledge of the letter. A copy for your information is enclosed.

As part of my investigation I will need to speak with you further about the letter and its contents.

In the meantime I require you to take steps to have the letter stopped from further circulation and to assure me that the letter will be withdrawn from circulation.

Further I require you to write a letter by tomorrow (for my approval) which will need to be signed by you and sent from Fostering Kids apologizing for the comments contained within the letter, stating that they are not true and that you do not ascribe to them. This request is made to you as an employee who has loyalty and fidelity obligations to the organization. In the event that you do not comply with my request you are on notice that I will consider this to be serious misconduct for which you may be disciplined including dismissed.

Yours sincerely

*Iris Clanachan
etc*

[39] Mr Simpson remained on suspension on full pay until his dismissal on notice on 9 December 2012.

Was Mr Simpson's suspension justifiable?

[40] For a suspension to be justifiable there must normally be an express provision in the employment agreement sanctioning suspension. Mr Simpson's individual employment agreement contained such a provision:

Where Fostering Kids considers it necessary for the protection of its operational and business interests, it may require you to undertake reduced or alternative duties consistent with your abilities or remain away from work, on pay, while it conducts an investigation into your conduct as an employee, or your performance.

Where any suspension extends beyond two weeks due to matters beyond Fostering Kids' control [such as a police investigation into your conduct] the suspension may continue without pay.

[41] While this means that suspension was an action contemplated by the employment agreement between Fostering Kids and Mr Simpson, it does not necessarily mean that his suspension was justifiable.

[42] The question of whether Mr Simpson's suspension was justifiable must be determined on an objective basis by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.³

[43] Factors that must be considered are:

- (a) *whether, having regard to the resources available to Fostering Kids, it sufficiently investigated the allegations against Mr Simpson before suspending him; and*
- (b) *whether Fostering Kids raised the concerns that it had with Mr Simpson before suspending him; and*
- (c) *whether Fostering Kids gave Mr Simpson a reasonable opportunity to respond to its concerns before suspending him; and*
- (d) *whether Fostering Kids genuinely considered Mr Simpson's explanation (if any) in relation to the allegations against him before suspending him*⁴.

[44] The Authority is constrained from determining Mr Simpson's suspension to be unjustifiable solely because of defects in the process followed by the employer if the defects were—

- (a) minor; and
- (b) did not result in the employee being treated unfairly.

[45] It is not the role of the Authority to substitute its assessment for that of Fostering Kids, but to determine whether a fair and reasonable employer could, in all the circumstances, have suspended Mr Simpson on 2 November 2011.

Discussion and findings

[46] It is clearly established that there was a telephone conversation between the CEO of Fostering Kids and Mr Simpson in which he was suspended from his employment. The submissions advanced for the employer indicate that the purpose of this conversation was to provide Mr Simpson with the opportunity to explain why he should not be suspended as a result of the letter written by Ms Bell-Simpson.

[47] However, there is no evidence that Mr Simpson was given the opportunity to comment on the suspension before it was effected. Neither Mr Simpson's account, nor the compilation of the accounts of 3 employees who overheard his side of the

³ Section 103A Employment Relations Act 2000

⁴ Section 103A(3)(a) to (d) of the Employment Relations Act 2000

telephone conversation, suggest he was given any meaningful opportunity to comment. He appeared to have been struggling to understand what the CEO was talking about and why she was raising with him a matter concerning someone else's actions, even if that person was his wife. I find he was not given an opportunity to influence Ms Clanachan's decision to suspend him before she informed him of his suspension.

[48] In *Graham v Airways Corporation of New Zealand Ltd*⁵ Colgan CJ said:

Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so.

[49] Referring to an earlier judgment of the Court, *Tawhiwhirangi v A-G in respect of Chief Executive, Department of Justice*⁶, he said former Chief Judge Goddard considered that the application of the rules of natural justice in circumstances of suspension in employment "must be looked at in a sensible, flexible, and reasonable way to ascertain what are the requirements of fairness on the particular occasion in the particular surrounding circumstances".⁷

[50] In the particular instances of Mr Simpson's suspension, I find there was no reason to dispense with the requirements of natural justice, and every reason to afford Mr Simpson a proper opportunity to comment on his employer's wish to suspend him. Ms Clanachan's letter confirming the suspension referred to *the impact of a letter on staff working for the organization purported to be penned and circulated by your wife to the board and other associations.*

[51] The underlined words indicate that Ms Clanachan did not necessarily believe Ms Bell-Simpson to be the author of the letter. They may indicate her belief that Mr Simpson was the real power behind the pen. Whether or not that is so, the fact is that the letter was not ostensibly from Mr Simpson, and that it explicitly stated his ignorance of the letter. This should have made Ms Clanachan cautious about taking

⁵ [2005] ERNZ 587, at 613

⁶ [1993] 2 ERNZ 546

⁷ [2005] ERNZ 587, at 610

the drastic action of suspending Mr Simpson because of his association with the “purported” author.

[52] The CEO was undoubtedly unhappy about the letter from Ms Bell-Simpson and may have genuinely been concerned about the effect on the employees in National Office. The letter made serious allegations against the CEO, other managers, a staff member, and the cultural bias of the organisation. It made allegations about a young employee who had complained about a conversation Mr Simpson had initiated with her that she found offensive. Mr Simpson, who did not accept that he had been in the wrong, had been taken to task over that matter.

[53] The letter from Ms Bell-Simpson had contained personal information about the young employee, which the CEO may have suspected came from Mr Simpson. However, none of those factors made it reasonable for her to suspend Mr Simpson without ensuring at least that he knew about the letter, had read it, and had an opportunity to comment on the proposal to suspend him from a position of knowledge, rather than from one of bewilderment.

[54] Fostering Kids had legal advisors, as evidenced by Ms Buckett’s attendance at the disciplinary meeting of 17 October 2011, which leads me to conclude it had adequate resources to ensure it followed a fair process in dealing with Mr Simpson. I find the failure in process was significant, and it resulted in Mr Simpson being treated unfairly.

[55] I find Mr Simpson’s suspension was not an action that a fair and reasonable employer could have taken in all the circumstances at the time.

Was Mr Simpson disadvantaged by his suspension?

[56] Mr Simpson remained suspended from his employment until his dismissal more than a month later. While he continued to receive his salary during that time, I have no doubt the withdrawal of his right to work, and the fact of his prolonged suspension disadvantaged him.

Remedies and contribution

[57] Mr Simpson did not lose salary as a result of his suspension. His dismissal was for a range of reasons, only one of which related to the reason for his suspension.

As there was no lost salary, the remedies are confined to compensation for humiliation, loss of dignity and injury to feelings.

[58] I have no doubt Mr Simpson found his suspension humiliating and distressing and find an award of \$3,000 under s. 123 (1) (c) (i) of the Act to be appropriate.

[59] In considering the issue of contribution, I am restricted to the extent to which Mr Simpson's actions contributed to the situation that gave rise to his personal grievance⁸. Although the employment relationship between Mr Simpson and Fostering Kids was clearly problematic, that is not a relevant factor. The situation that led to Mr Simpson's personal grievance was his suspension. He was suspended because of the effect on Fostering Kids' employees of a letter written by Ms Bell-Simpson. I do not find that Mr Simpson's actions contributed to that situation and, therefore, there is to be no reduction in the remedy awarded.

Costs

[60] Costs are reserved.

Trish MacKinnon
Member of the Employment Relations Authority

⁸ Section 124 Employment Relations Act 2000