

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 380
3042114

BETWEEN	JOANNE MORRISON Applicant
AND	WESTGATE & WILLIAMS LIMITED Respondent

Member of Authority:	Andrew Dallas
Representatives:	Mary-Jane Thomas and Katherine McDonald, counsel for the Applicant Len Anderson, counsel for the Respondent
Investigation Meeting:	5 March 2019 at Dunedin
Submissions	13 and 25 March 2019 for the Applicant and 19 March 2019 for the Respondent.
Determination:	26 June 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Joanne Morrison was employed by Tina Williams as a personal assistant in her legal office in Balclutha in February 2013. Ms Morrison was not provided with an employment agreement. In early 2016, Ms Williams merged her legal practice with that of Joanne Westgate and Ms Morrison's employment continued with the new entity, Westgate & Williams Lawyers. However, Ms Morrison was still not provided with an employment agreement.

[2] Ms Morrison was dismissed following an investigation into her dealings with a client file. Ms Morrison said her dismissal was procedurally and substantively unjustified. A personal grievance was raised on her behalf. Ms Morrison also said Westgate owed her holiday pay and said penalties should be imposed for this and for failure to provide an employment agreement. Westgate resisted all of Ms Morrison's claims.

The Authority's Investigation

[3] During the investigation meeting, I heard evidence from Ms Morrison, Ms Morrison's daughter, IT contractor Sharon Goatley, and for Westgate, I heard evidence from its law partners, Joanne Westgate and Tina-Maree Williams.

[4] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[5] The following are the issues for investigation and determination:

- (i) Was Ms Morrison disadvantaged through an unjustified suspension of her employment;
- (ii) Was Ms Morrison's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time;
- (iii) If Westgate's actions were not justified what remedies should be awarded, considering:
 - (a) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act;
 - (b) reimbursement of lost wages under s 123(1)(b) of the Act;
- (iv) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Ms Morrison that contributed to the situation giving rise to her grievances;
- (v) Is Ms Morrison owed holiday pay and if so, is interest payable on the money;

- (vi) Is Westgate liable for penalties for failure to:
 - (a) provide an employment agreement;
 - (b) keep wages and time records;
- (vii) Should either party contribute the cost of representation of the other?

What caused Ms Morrison's employment relationship problem with Westgate?

[6] The situation giving rise to Ms Morrison's dismissal arose as a result of a review of a departing solicitor's files. As part of this review, a closed client file for which work had been done by the solicitor but not invoiced for came into clear focus. Evidently the client was known to Ms Morrison through personal connections.

[7] After reviewing the solicitor's file list, Ms Williams said she could not find a physical or electronic version of the closed client file. The solicitor told Ms Williams he did not know where the file was but suggested Ms Morrison may know. The solicitor described the file as a "Jo Morrison special".

Events of 18 July 2017

[8] On 18 July 2017, Ms Morrison was asked by Ms Williams to locate the client's electronic file. Ms Morrison was unable to locate the file but suggested it had been accidentally moved within the file management system. Ms Morrison said Ms Williams became angry at this suggestion. Ms Williams denied this. Rather, Ms Williams said she told Ms Morrison not to panic and that they would get to bottom of the matter before the solicitor left the firm's employ.

[9] Ms Williams said that Ms Morrison told her that another staff member had emailed her about the file in March 2017. Ms Morrison subsequently forwarded this email to Ms Williams.

[10] Later that evening, Ms Morrison went to the office after contacting Ms Goatley, who had supplied and installed the computer system in the firm's Balclutha office. With Ms Goatley's assistance – who accessed the computer system remotely – the electronic file was found. Ms Morrison said the file had been deleted on 7 July 2017. Ms Morrison said she did not believe she was doing anything wrong and had previously utilised the services of Ms Goatley.

Events of 19 July 2017

[11] On 19 July 2017, Ms Morrison emailed Ms Williams and Ms Westgate advising them about the events of the previous evening. Ms Williams was driving when the email arrived, so did not attend to it at that time. Ms Westgate said she had been very surprised to receive the email and had no knowledge the file in question was missing. Ms Westgate engaged with Ms Morrison about the situation in an increasingly tense email exchange, which including Ms Morrison asking Ms Westgate if she was accusing her of something. Ms Williams then joined the email discussion and asked to meet with Ms Morrison. Ms Morrison said she was available to meet the next day but requested the presence of Ms Westgate.

[12] Ms Williams said she received a phone call from Ms Westgate asking her if she knew Ms Morrison had attended the office the previous evening and, with Ms Goatley's assistance, had found the file on the computer system. Ms Williams said she was not aware of the situation. Ms Williams said she was concerned about the unauthorised involvement of Ms Goatley and that Ms Goatley had access to Westgate's computer system.

[13] During a subsequent telephone conversation that day, Ms Williams told Ms Westgate the file in question related to a personal acquaintance of Ms Morrison and it had not been billed. Ms Westgate said she was also concerned by this. Ms Williams and Ms Westgate decided the matter needed to be investigated. As part of their decision to investigate, and despite agreeing Ms Morrison was a "trusted employee and it seemed so out of character", they decided to suspend Ms Morrison.

Suspension: 20 July 2017

[14] Due to the listing of an urgent fixture in Dunedin, the proposed meeting to discuss the matter could not take place. Ms Morrison was told this via email from Ms Westgate on 20 July 2017. The email advised her that "given the issues that have arisen in relation to your employment, we need to investigate matters more fully". The email further stated

In the circumstances, we consider it appropriate to utilise the suspension clause in your contract to suspend you from your employment (on full pay) until we have completed our investigation and can convene a formal meeting. Tina or Jo will be available to discuss the proposed suspension with you. If you agree, then we

suggest that this suspension takes effect immediately and we ask that you leave all keys relevant to the office on your desk.

[15] Ms Morrison responded to the email advising that she did not understand what she had done wrong and did not agree to her suspension. She also had a discussion with Ms Williams where she asked if the suspension was about “yesterday”, to which Ms Williams said it was but that she could not discuss the matter further.

[16] Ms Morrison said she then removed her personal photos from her work computer, placed her keys on her desk and closed down the firm’s “Facebook” account due to her being the moderator and not wanting anyone to write derogatory remarks in her absence from the workplace.

Letter of 24 July 2017

[17] On 24 July 2017, Westgate issued Ms Morrison with a letter. The letter contained three allegations which were, in summary:

- (i) Ms Morrison had entered Westgate’s Balclutha office after hours and had accessed the firm’s computer system with the help of Ms Goatley to recover a missing client file without the knowledge or authorisation of Ms Williams and Ms Westgate. And that the file, for which Ms Morrison had personal knowledge of the client, had been closed and not billed and that she had denied all knowledge as to how the file came to be deleted;
- (ii) Ms Morrison had appeared to provide her private email address as an appropriate email address to receive work emails to and respond from without the authorisation of Ms Williams and Ms Westgate; and
- (iii) Ms Morrison appeared to be accessing work emails on her personal mobile phone without the authorisation of Ms Williams and Ms Westgate.

[18] The letter also:

- (i) advised Ms Morrison her actions could amount to serious misconduct, which if substantiated could result in her dismissal;
- (ii) requested she attend a disciplinary meeting on 27 July 2017;
- (iii) proposed she “continue” to be suspended; and
- (iv) advised her she could bring a support person or representative to the disciplinary meeting.

[19] Enclosed with the letter were Ms Morrison’s employment agreement, which she said she had never seen before and several employment policies, of which Ms Morrison said she had no knowledge.

[20] Ms Morrison’s solicitors replied to this correspondence on 25 July 2017. They requested all information relevant to the investigation and advised that they (presumably due to being based in Invercargill) and Ms Morrison (due to distress) would attend the disciplinary meeting via phone.

Further allegations

[21] The proposed meeting did not take place on 27 July 2017. Westgate engaged an IT firm to assist it to recover various information it alleged Ms Morrison had deleted from her computer.

[22] Arising out of this, Westgate furnished Ms Morrison with further allegations on 28 July 2017 and again on 31 July 2017. These were, in summary:

- (i) Ms Morrison had during the course of her employment deleted financial information from her desktop and placed it in another drive which Westgate did not have access to;
- (ii) whether Ms Morrison had deleted Westgate’s “Facebook” account and if so, why;
- (iii) alleging Ms Morrison had entered the office without authorisation and had accessed her computer and removed Westgate materials, including a receipt book, from her desk; and
- (iv) Seeking confirmation of (iii) above, otherwise the matter would have to be reported to the police as a break in.

[23] Ms Morrison's solicitors responded to Westgate's allegation via letter on 3 August 2017. The allegations were denied and, where applicable, innocent explanations or honest excuses were provided.

Disciplinary meeting

[24] The disciplinary meeting was eventually held on 3 August 2017. Ms Morrison and her solicitor attended the meeting via phone. Ms Williams said attendance via phone was not ideal but she said Westgate did not want to delay matters further.

[25] Ms Westgate and Ms Williams described the disciplinary meeting as "challenging" and "difficult" respectively. Ms Westgate said there were also issues with the telephone connection. Despite all this, Ms Morrison provided detailed responses to the allegations. During one of her responses to the allegation about the missing client file, Ms Morrison referred to emails between herself and the solicitor.

[26] After the disciplinary meeting, Ms Westgate or Ms Williams, who appeared not to be aware of the emails, attempted to access them on Ms Morrison's computer. Eventually, they were recovered from the solicitor's computer. There were 37 in all. Ms Westgate and Ms Williams said they disclosed extensive involvement in the file. They both suggested this contradicted Ms Morrison's claim of limited involvement. However, the emails did disclose that Ms Morrison discussed payment for the work undertaken by the solicitor. Further, Ms Williams would concede in her evidence she had been told by Ms Morrison the client, for whom the file went missing, needed legal advice and that she told Ms Morrison to approach the solicitor about it. Ms Morrison said in her evidence that Ms Williams actually said "ask [solicitor] to do it for something to do".

[27] On 4 August 2017, Ms Morrison's solicitors provided a statement by Ms Goatley. However, Ms Westgate said the statement appeared to contradict what she had been previously told by Ms Goatley.

Letter of 10 August 2017

[28] On 10 August 2017, Westgate set out its response to the disciplinary meeting in a letter to Ms Morrison via her solicitors. The preliminary view was that her conduct amounted to serious misconduct justifying dismissal. However, Ms Morrison was advised that decision was open to reconsideration. Specifically, Westgate said the allegations set out in paragraph [17] had been substantiated including the key finding that Ms Morrison had deleted the client file from the computer system. In addition, Westgate found Ms Morrison's *suspension* of the firm's "Facebook" page – although this was variously, and erroneously, referred to as *deletion* – without notice to her employer constituted serious misconduct.

[29] Ms Morrison's solicitor responded on 11 August 2017. The letter raised further responses from Ms Morrison but otherwise declining to further meet. The letter concluded by saying that a fair and reasonable employer could not have reached the findings it did about Ms Morrison's alleged misconduct.

Ms Morrison's dismissal

[30] Ms Morrison was dismissed without notice for serious misconduct on 15 August 2017. Both Ms Westgate and Ms Williams said the decision to dismiss was extremely difficult but was one that was open to them because they had lost trust in her and, according to Ms Westgate, was the only decision available because Ms Morrison refused to meet again to discuss their preliminary decision.

Holiday pay

[31] Westgate said they could not calculate Ms Morrison's final holiday pay. Evidently, Ms Morrison was responsible for maintaining her own leave records for most of the period of her employment. However, from February 2017, this exercise fell to Westgate's accountant. Ms Morrison said she had provided her records to the accountant and they were accurate. Ms Morrison said she was owed \$4660.85 as arrears of holiday pay based on figures provided by the accountant.

[32] Westgate said Ms Morrison had not kept records or, in the alternative, they were destroyed by Ms Morrison. Ms Morrison rejected these contentions. Ultimately, Westgate said Ms Morrison was not owed any holiday pay and she had not advised the accountant of any leave taken in 2017.

The Authority's view of Ms Morrison's employment relationship problem

Procedural fairness

[33] Westgate submitted that Ms Morrison's dismissal was procedurally and substantively justified. I do not accept this submission. There were several defects in Westgate's employment investigation into Ms Morrison's alleged serious misconduct which seriously calls into question the validity of its substantive findings.

[34] Despite believing Ms Morrison to be a "trusted employee" and her alleged conduct "seemed so out of character", I accept, as a general proposition, Ms Morrison's submission that Westgate closed its mind to the genuineness of her explanations about the same.

[35] Westgate failed to properly investigate the allegations against Ms Morrison by not seeking to interview several relevant witnesses. For example, it failed to contact a person who had relevant information to give about the allegation of Ms Morrison receiving work information via her personal email including in circumstances where prompted to do so by Ms Morrison and her solicitor.

[36] Furthermore, Westgate also failed to interview the former solicitor about his recollection of the file in general and the statement that the file was a "Jo Morrison special" in particular. The implication for the use of this phrase is that there was some sort of wrongdoing on the part of Ms Morrison. It is curious it was not investigated. Additionally, after having discovered the existence of the emails between Ms Morrison and the solicitor as a result of the disciplinary meeting, it was commensurate upon Westgate to contact the solicitor in relation to these and then reconvene the disciplinary meeting to put both the emails and whatever information had been obtained from the solicitor to Ms Morrison for comment. Rather, it did neither, and instead used the emails to support a finding that Ms Morrison had, in effect, been untruthful during the investigation by concealing the level of her involvement in the file.

[37] Westgate also failed to investigate the apparent contradiction between what Ms Goatley had advised Ms Westgate about recovery of the deleted file and what she said in the written statement provided to Ms Morrison's solicitors and subsequently provided to Westgate.

[38] Finally, the involvement of Ms Williams as joint decision-maker with Ms Westgate was a further procedural misstep by Westgate. Ms Williams was clearly a witness in the investigation and ought to have been treated as such. Additionally, given the size of the firm and the place of Ms Williams within it, it may have also been prudent, while not strictly necessary, to engage an independent investigator.

[39] Ultimately, I find these procedural deficiencies were not minor and they resulted in Ms Morrison being treated unfairly.¹ I find Westgate carried out an unfair employment investigation.²

Substantive justification

[40] Ms Williams, as joint decision-maker with Ms Westgate, in her evidence to the Authority conceded a key finding that led to the substantiation of the allegation about Ms Morrison's conduct in respect of the client file. Ms Williams told the Authority that she had not reached a conclusion that Ms Morrison deleted the file and "to this day" (being the day of the investigation meeting) did not know who had deleted it.

[41] Even in the absence of this concession by Ms Williams and taking the most jaundiced view of Ms Morrison's conduct in relation to the file, as Westgate ultimately did, it is very difficult to accept that Ms Morrison would somehow believe that deleting the file in circumstances where, on the evidence, both she and Ms Williams knew of the solicitor's involvement with the client, and, indeed, again on the evidence, Ms Williams appeared to direct that involvement would be in any way successful.

¹ Employment Relations Act, s 103A(5)

² Employment Relations Act, s 103A(3)(a)

[42] Ultimately, I find Ms Williams' concession is fatal to the substantiation of this allegation. All facets of the allegation about Ms Morrison's conduct, including attempts to recover it with the assistance of Ms Goatley, and the circumstances of that, critically hang off a finding that Ms Morrison deleted the file.

[43] Within this context, and for completeness, in the absence of such a finding and any express instruction about (a) not entering the Balclutha office after hours, for which, on the evidence, Ms Morrison had keys or (b) not engaging with Ms Goatley with whom Westgate had dealings to assist in trying to ascertain the whereabouts of a file, a fair and reasonable employer could not have arrived at a conclusion that dismissal was justified.

[44] In the absence of the substantiation of the allegation against Ms Morrison in relation to the file, the three remaining allegations of "serious misconduct" do not, I find, reach that threshold.

[45] In relation to the allegation Ms Morrison used her private email address to receive work emails, Westgate found that Ms Morrison "as a non-lawyer" was not authorised to do this. Objectively assessed, the circumstances relating to this allegation were plausibly explained and justified by Ms Williams. However, and in any event, Westgate did not have an employment agreement or policy in place which authorised this practice or rendered it impermissible.

[46] In relation to the allegation Ms Morrison accessed work emails on her personal mobile phone, Westgate found that as Ms Morrison "as a non-lawyer" was not authorised to do this. Again objectively assessed the circumstances relating to this allegation were plausibly explained and justified by Ms Williams and in any event, Westgate again did not have an employment agreement or policy in place which authorised this practice or rendered it impermissible.

[47] In relation to Ms Morrison’s involvement with Westgate’s Facebook page, there is some confusion as to whether it was *deleted* or *suspended*. Westgate used these terms interchangeably. While there was no reference in the substantiation of this allegation to Ms Morrison being a “non-lawyer”, the circumstances surrounding its suspension – and I find Ms Morrison’s explanation about this entirely believable – arose directly out of the unsatisfactory nature of Ms Morrison’s own suspension, which is discussed below, and the consequences flowing from that are for Westgate, itself, to bear.

Could a fair and reasonable employer have reached in all the circumstances the decision to dismiss Ms Morrison?

[48] I have found Westgate carried out an unfair and inadequate employment investigation.³ I further find that Westgate’s investigation failed to yield a proper and substantive basis to justify Ms Morrison’s dismissal. A fair and reasonable employer could not have concluded Ms Morrison’s actions amounted to misconduct that was so serious so as to deeply impair or destroy trust and confidence and justify dismissal.

[49] I find that the decision to dismiss Ms Morrison was not one a fair and reasonable employer could have reached in all the circumstances at the time. Having found Westgate was not justified in dismissing Ms Morrison, she is entitled to an assessment of remedies to settle her personal grievance.

Was Ms Morrison’s suspension by Westgate justified?

[50] Ms Morrison pursued a claim for unjustified action causing disadvantage before the Authority arising out of her suspension on 20 July 2017. I find this was, in the circumstances of the case, effectively subsumed by the substantive employment relationship problem of unjustifiable dismissal.⁴ However, on the facts, a suspension in the absence of an employment agreement empowering such, which is fraught legal territory, coupled with a lack of procedural fairness and substantive reason for it at the time, means it was unjustified and not the action of a fair and reasonable employer. This finding is reflected in the “global” award of compensation under s 123 (1)(c)(i) of the Act below.

³ Employment Relations Act, s 103A(3)(a)

⁴ Employment Relations Act, s 160(3).

What remedies should Ms Morrison be awarded?

Reimbursement for lost wages

[51] Ms Morrison initially claimed reimbursement for lost wages but this was withdrawn by her solicitor in submission.

Compensation for humiliation, loss of dignity and injury to feelings

[52] Ms Morrison sought \$30,000 compensation for humiliation, loss of dignity and injury to feelings. Ms Morrison said she was left humiliated and emotionally distressed by first her suspension and then her dismissal. She said she was fearful living in a small community due to what she regarded as the unjustified accusations made against her by Westgate. She said she suffered panic attacks, anxiety and a sense of isolation. Ms Morrison said she consulted her general practitioner several times about her mental health. Ms Westgate said she encountered Westgate's accountant in the supermarket and was scolded by him when he gave her "the dirtiest of looks, shook his head, tutted and walked away from [her]". She said as a result she left her shopping and walked out of the supermarket.

[53] Ms Morrison's evidence in this regard was supported by thoughtful evidence given by her daughter. I accept that Ms Morrison suffered humiliation, loss of dignity and injury to feelings as a result of her dismissal. Her evidence here was compelling.

[54] Subject to any consideration of contribution under s 124 of the Act, I find \$25,000 as compensation for humiliation, loss of dignity and injury to feelings is an appropriate amount to award under s 123(1)(c)(i) of the Act.

Contributory behaviour by Ms Morrison?

[55] Having found that Ms Morrison is entitled to remedies for her personal grievance, I was required by s 124 of the Act to consider whether Ms Morrison's actions were causative and blameworthy of the situation she found herself in.

[56] Having found Ms Morrison had a valid personal grievance for unjustified dismissal against Westgate in the circumstances that she does, I find, on the balance of probabilities, Ms Morrison's actions did not contribute to the situation that led to her personal grievance and I decline to reduce remedies as a consequence.

Ms Morrison's claim for arrears of holiday pay

[57] Westgate accepted that it was under a legal obligation to maintain wage and time records for Ms Morrison. Westgate said Ms Morrison was not owed any holiday but was unable to produce any convincing evidence, beyond assertion, to support this. Westgate appeared to suggest Ms Morrison had not recorded her leave properly during the period she was keeping her own records before these were handed over to Westgate's accountant.

[58] Ms Morrison said the value of her holiday pay arrears was \$4660.85. In the absence of cogent evidence to the contrary, and despite the confused picture here, I am satisfied that Westgate owes Ms Morrison this sum and it must be paid to her.

[59] Ms Morrison sought interest. I have decided in the circumstances this is appropriate. Interest is to be calculated from the day that Ms Morrison's claim for holiday pay crystallized, being the day of her dismissal, until the day paid in full in accordance with the Interest on Money Claims Act 2016.⁵

Ms Morrison's claim for penalties

[60] Ms Morrison claimed a penalty under the Act for failure to provide her with an employment agreement and a penalty under the Holidays Act 2003 for failure to pay her full holiday pay entitlement upon termination. However, given the confused circumstances surrounding Ms Morrison's holiday pay, I have decided not to impose a penalty on Westgate for breach of the Holidays Act 2003.

[61] The maximum penalty that can be imposed on Westgate for failure to provide Ms Morrison with an employment agreement is \$20,000. The requisite standard of proof is "on the balance of probabilities".

⁵ See, www.justice.govt.nz/fines/civil-debt-interest-calculator/

[62] When asked by a party to impose a penalty the Authority undertakes a “penalty analysis”. Useful guidance has been set out by the Court in *Borsboom v Preet PVT Limited*.⁶ Section 133A of the Act also sets out criteria to be taken into account when imposing penalties. Additionally, in *Nicholson v Ford*⁷, the Court provided guidance about the inter-relationship between *Preet*, s 133A of the Act and other relevant factors also to be taken into account.

[63] Having undertaken this analysis, I find it is appropriate to impose a penalty on Westgate of \$2000. As Westgate did not oppose the payment of this penalty to Ms Morrison, and having regard to all the other relevant circumstances of the case, I have decided to exercise my discretion under s 136(2) of the Act to award a portion of the penalty to Ms Morrison.

[64] So then, Westgate must pay Ms Williams \$1500 as a penalty for failure to provide her with an employment agreement. The balance of the penalty of \$500 must be paid by Westgate to the Authority for subsequent transfer into a Crown bank account.

Summary of orders made in favour of Ms Morrison

[65] The orders made are for Westgate to settle Ms Morrison’s personal grievance claims and other claims by paying her the following sums within 28 days of the date of this determination:

- (i) A global figure of \$25,000 as compensation for humiliation, loss of dignity and injury to feelings;
- (ii) \$4660.85 as holiday pay arrears plus interest calculated with reference to the Interest on Money Claims Act 2016;⁸ and
- (iii) \$1500 as a penalty for failure to provide an employment agreement under s 65 of the Act with the balance of \$500 payable to the Authority for subsequent transfer into a Crown Bank Account.

⁶ [2016] NZEmpC 143

⁷ [2018] NZEmpC 132

⁸ See para [59] above

Costs

[66] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Ms Morrison has 28 days from the date of this determination in which to file and serve a memorandum on costs. Westgate has a further 14 days in which to file and serve a memorandum in reply. If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff of \$4500, adjusted upwards or downwards for relevant factors.⁹

Andrew Dallas
Member of the Employment Relations Authority

⁹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.