IN THE EMPLOYMENT COURT
AUCKLAND

AC 5A/07
ARC 49/06

IN THE MATTER OF	a de novo challenge to a determination of the Employment Relations Authority
BETWEEN	IAO METAI ALI'IMATAFITAFI Plaintiff
AND	CHIEF EXECUTIVE DEPARTMENT OF CORRECTIONS Defendant

Hearing: 21 June 2007
(Heard at Auckland)

Appearances: Iao Metai Ali'imatafitafi, plaintiff
Megan Richards and Nick Belton, counsel for defendant

Judgment: 15 August 2007

JUDGMENT (NO 2) OF JUDGE B S TRAVIS

Introduction

[1] The plaintiff was dismissed from his job as a work party supervisor for the defendant, the Community Probation Service (CPS) of the Department of Corrections (the department) on 17 December 2002. The Employment Relations Authority found that his dismissal was justified. The plaintiff has challenged this determination and elected to have a full hearing of the whole matter.

[2] The plaintiff raised his personal grievance alleging an unjustified dismissal on 19 February 2003 and mediation later that year did not settle the grievance. The plaintiff filed a statement of problem in the Employment Relations Authority on 12 December 2005 and an investigation meeting took place on 29 May 2006. The Authority issued its determination on 15 June 2006.

[3] The Employment Court hearing of the plaintiff's challenge has been delayed due to difficulties with the plaintiff's statements of claim and a series of applications by the defendant to have them struck out and the proceedings dismissed. These applications were dealt with in my judgment of 5 February 2007 (AC 5/07) which circumscribed the matters the plaintiff was entitled to pursue in his challenge and required him to file a third amended statement of claim complying with the Employment Court Regulations 2000 and to provide certain particulars relating to his challenge. The plaintiff complied with these requirements on 23 February 2007 by filing what is to be regarded as the third amended statement of claim. The plaintiff relied on this document as part of his final submissions.

Background

[4] The plaintiff was a Work Party Supervisor from February 2001 until his dismissal. The plaintiff had previously been the Secretary of the Apprenticeship Council of Western Samoa in Apia and is a paramount Chief in his village. He was also the elected PSA delegate for Work Party Supervisors at the Periodic Detention Centre (PD Centre) at Boston Road, Mt Albert, Auckland. He had been the subject of a complaint about a minor disciplinary matter in September 2001 and did not appear to be happy at the outcome. He was also unhappy that he had not been appointed to an advertised position for a probation officer at the PD Centre.

[5] On Saturday 3 November 2001 he was assigned a group of 10 detainees to work at Mt Albert Primary School (the school). The department had arrangements with a number of organisations to provide labour for detainees. The school was one of the department's sponsors and requested groups of detainees to perform work from time to time. When the group arrived at the school in a van they were met by Mrs "M", whose name I shall not give as she was not called as a witness. The plaintiff believed that Mrs M was the principal of the school and did not find out until later that she was a member of the Board of Trustees.

[6] On previous occasions the plaintiff had met with the school caretaker who had allowed them to use the school hall for preparation and the taking of smokos and lunches. On this occasion Mrs M told the plaintiff that the hall had been hired out

but they could use one of the open classrooms for the detainees' breaks. The plaintiff claims that he was told by Mrs M that all the classrooms were secured and locked and the only unlocked room was the classroom the detainees would be using. During the lunch break the plaintiff went out into the van facing the classroom where the detainees were taking their lunches and he was able to observe them. He found out later that during the lunchtime a fire alarm had been triggered but the detainees denied any responsibility.

[7] On Tuesday or Wednesday of the following week, he was advised by a probation officer of CPS that the school had been broken into and robbed on that Saturday night and that the school had complained to the defendant about his conduct. An investigation was carried out by the defendant's Area Manager for the CPS division, Marie Faith-Allen. She eventually concluded that the plaintiff had committed serious misconduct and should be given a final written warning which would remain in force for 12 months. The plaintiff was unhappy with the adequacy of the investigation and did not consider that he had been at fault. He raised a personal grievance concerning the final written warning. The parties agreed to go to mediation, which was held on 22 March 2002.

[8] The plaintiff gave the following evidence. On 19 March 2002, in preparation for the mediation, he phoned the school for permission to meet with the principal, was told that the principal was busy but to come into the school and take his chances. When he came in through the main entrance he saw Mrs M and asked her if he could have a word with her and she asked what it was about. He replied:

> *… I said that I am having a Mediation hearing coming up and I only wanted her to confirm to me that she had told me all the class rooms are locked / and secured and that I had nothing to worry about.*

[9] Mrs M told him that she had nothing to say on the matter and that it would be better if he talked to his employer. He then left immediately. That evidence is at variance with a statement later given to Ms Faith-Allen by Mrs M. The defendant was unaware at that time of the plaintiff's visit to the school.

[10] The mediation on 22 March 2002 reached a settlement and, as a result, it was agreed the duration of the final written warning would be reduced to 6 months. The settlement agreement provided that this was to be in full and final settlement of all matters and it was to be treated as confidential between the parties.

[11] Notwithstanding that the plaintiff had agreed that the matter was fully and finally settled at the mediation, he continued to maintain a sense of grievance about it. He felt he had been unfairly treated and that he was not guilty of any fault on his part. However, by settling in mediation, the plaintiff had agreed to forego the opportunity of testing his claims by way of a formal investigation by the Authority and, if necessary, a challenge to the Court.

[12] On 5 March 2002 the plaintiff received a letter from his Manager, Mr Riach, about an entirely different matter. This contained a comment which, the plaintiff said, he found to be offensive, humiliating, embarrassing and denigrating to his integrity. He thought that the comment had been "*made with malice*" and he raised two grievances relating to it. The defendant refused to accept the grievances and would not agree to a mediation. The plaintiff made requests for mediation meetings but a final date had not been set when the events leading to his dismissal arose. The other two grievances raised by the plaintiff were not resolved prior to his dismissal and have not been pursued by him through the procedures available to him under the Employment Relations Act 2000.

[13] The plaintiff gave evidence that when he was making preparations for his two new personal grievances he had "*pondered the idea of trying to get Mrs* [M] *…to confirm that I had acted on her instruction that the school was secured / and locked when it was robbed during the night*". He had discussed with one of his fellow supervisors, Mr Henderson, his depression at being blamed for the robbery at the school. He said he had asked Mr Henderson whether it would be an idea to write to Mrs M to get her to confirm in writing what she had told the plaintiff about the security of the school. He said that Mr Henderson agreed to proofread his letter to ensure that it did not offend and contained no grammatical errors. The plaintiff said he had seen Mr Henderson as an Acting Supervisor because it was Mr Henderson

who normally gave him his instructions on the Saturday mornings. It appears that in fact Mr Henderson and the plaintiff held similar positions.

[14] The plaintiff claims that on 18 November he wrote the letter, gave it to Mr Henderson to read and that Mr Henderson said it was a good letter, it conveyed the plaintiff's intention and he should send it. He duly sent the letter of 18 November 2002, addressed to the Principal of the school. It commenced:

> *I am lodging a complaint with you to claim damages done to my professional character because of your negligence to inform my person fully of how secure your classrooms were which as a result of your negation to inform adequately, I was blamed for the theft of your school's video player and television: a final written warning was issued to my person by the Employer resulting.*

[15] The letter went on to refer to the events of Saturday 3 November 2001 and claimed that what the plaintiff had been told about the classrooms being locked and secured was incorrect and deceitful. It concluded (verbatim):

> *If you could recalled the day that I came to your school to speak with you about the incident before my hearing on an allegation to a negligent charge raised from your complaint, you had told me to go talked to my employer, you did not want to speak with my person.*
>
> *As a result of the inadequacy and erroneous of your actions and information that were misleading to extreme to the effect that I became the victim, you are responsible for the following consequences;*
>
> *I had been disadvantaged in my employment,*
>
> *Humiliated, Loss of dignity, Hurting of feelings,*
>
> *Unnecessarily distressed and, for the reasons discussed above, I am claiming damages to the amount of $2000 settlement.*
>
> *If you decided against my claim I will pursue it through the legal system.*
>
> *Thank you for your immediate response.*

[16] The letter also apparently enclosed a copy of the school's original complaint to the defendant, but that was not provided to the Court.

[17] The school's reaction to the letter was to reply to the plaintiff on 22 November acknowledging receipt, advising him that the Board of Trustees would discuss it at their next board meeting on 18 December 2002 and that his letter had also been forwarded to his employers for their information. On the same day the

principal wrote to Mr Riach, enclosed a copy of the plaintiff's letter and the school's reply and concluded: *"You will appreciate that this letter was completely unexpected."*

[18] Mr Riach contacted Mrs M, who was the chairperson of the Board of Trustees at the school. She also dealt with periodic detention and community work matters because she was also the head of the School Property Subcommittee. Mr Riach was endeavouring to establish what the school's reaction was to the plaintiff's letter. Mrs M had apparently said the school was worried that a personal vendetta would be carried out against them and she was concerned that the plaintiff would be pursuing his request for money through the legal system. Mr Riach apologised to her for the situation and asked how the defendant could best support the school. Mrs M's reply was to say that the matter would be raised at the board's meeting.

[19] As a result of what he was told, Mr Riach sent an e-mail to Ms Faith-Allen saying that the plaintiff's presence in the school many months before, during school hours, was most unwelcome and in spite of being told that he should be talking to his employer *"he carried on pushing his case"* which Mrs M felt was *"totally inappropriate"*.

[20] Ms Faith-Allen had not previously been aware that the plaintiff had made a visit to the school prior to the mediation on 22 March 2002. Ms Faith-Allen had been the decision maker in approximately 40 disciplinary investigations over the past 10 years as the Area Manager and had conducted the actual investigation in 15 of those cases. She had delegated authority to take disciplinary action, including dismissal. She decided that she would investigate the matter herself, rather than leaving it to Mr Riach.

[21] On 28 November 2002 she wrote to the plaintiff stating that she had received a complaint from Mr Riach that alleged misconduct on the plaintiff's part in the way he had written to the school to make a claim and in relation to his visit to the school before 22 March of that year. The letter stated that the plaintiff's letter and his visit were likely to bring the defendant into disrepute and jeopardise its relationship with the sponsor and, although the letter purported to relate to a private matter, his

conduct with the sponsor was as an employee of the defendant and not as a private individual. The letter stated the alleged misconduct was an example of serious misconduct under the Code of Conduct, the first principle of which was that employees should fulfil their lawful obligations to Government with professionalism and integrity. She also referred to the following principles from the Code:

> ***Dealings with the public***
>
> …
>
> In any dealings you should:
>
> - *be professional, courteous and helpful*
>
> …
>
> - *process any enquiries or complaints promptly and according to relevant procedures*
>
> - *maintain the neutrality required of you as a public servant.*
>
> …
>
> **SECOND PRINCIPLE:**
>
> ***Employees should perform their duties honestly, faithfully and efficiently, respecting the rights of the public, colleagues and clients.***
>
> This principle covers your general obligation to provide quality service, to respect the rights of the public, colleagues and clients, and to refrain from conduct that might lead to conflicts of interest or your integrity being compromised.
>
> …
>
> *Inform your manager promptly if you are involved in any activity, … which may or could be seen by others to conflict with the performance of your duties or the goals of the Department.*
>
> …
>
> **THIRD PRINCIPLE:**
>
> ***Employees should not bring their employer into disrepute through their private activities.***
>
> ….
>
> ***Personal behaviour***
>
> *You should avoid any activity (work-related or private) which could reflect badly on the Department or jeopardise its relationships with Ministers, stakeholders, or the general public.*
>
> …

[22] The plaintiff was warned in the letter that the alleged misconduct was serious and an investigation was to be conducted. He was suspended on special leave with pay until 2 December 2002 to allow him time to prepare submissions on whether the suspension should continue. It also set a meeting date and advised him of his right to support and advice, be it from the PSA if he was a member, or from any other person of his choice, and of the existence of the employee assistance programme. The plaintiff was represented throughout the ongoing investigation by the PSA.

[23] It was common ground that the Code of Conduct had been brought to the plaintiff's attention, had formed part of his contract of employment and that he was aware of its terms.

[24] The plaintiff claimed that it came as a surprise to him that the investigation focused on his visit to Mrs M on 19 March 2002 when he claimed he was collecting information for his personal grievance and that this visit should not have been criticised. He also claimed that his letter of 18 November 2002 should not have been criticised as he had shown it to Mr Henderson, who he believed to be his supervisor, and that Mr Henderson had agreed that the letter was not offensive, was a good letter and that he should send it to the school.

[25] The plaintiff also claimed that in terms of the collective agreement he had not been provided with relevant training in dealing with sponsors and had not received instructions which were necessary to equip him for the safe, efficient and proper performance of his work.

[26] The plaintiff, in his third amended statement of claim and in his brief of evidence before the Court, did not complain about the procedure adopted in the defendant's investigation. In answers to cross-examination, however, he claimed the defendant had not properly taken his explanation into account. However, it is clear from the reports prepared by Ms Faith-Allen, which were supplied in a timely manner to both the plaintiff and his PSA representative, that the explanations offered at the time by the plaintiff were taken into account and the reports duly modified to show where this was done.

[27] Throughout the investigation the plaintiff maintained that his sole purpose was to clear his name before applying for any other jobs, for example as a probation officer as he felt that he had not been negligent. The plaintiff claimed that the issue had weighed heavily on him for over a year and that it was important for him to have his name cleared. He also claimed that he had not meant his letter to be taken as claiming damages and that, as he had written it outside of his work hours, it should not affect his employment.

[28] Ms Faith-Allen contacted Mr Henderson after receiving the plaintiff's explanation of what he had done with his letter. Although Mr Henderson did not tell Ms Faith-Allen exactly what he had said to the plaintiff, the clear impression that she had got from Mr Henderson was that he did not think it was wise for the plaintiff to have sent the letter and that his checking was to do with the structure of and spelling in the letter, rather than its content. Mr Henderson had also confirmed that the plaintiff had become obsessed about the incident at the school and spoke about it every day. The plaintiff and his PSA representative were informed of the outcome of Ms Faith-Allen's contact with Mr Henderson. Mr Henderson did not give evidence to the Court.

[29] Ms Faith-Allen also interviewed Mrs M on 4 December 2002 and recorded Mrs M saying that the plaintiff was insistent and passionate during his visit to the school and that Mrs M had felt unsettled by it. In spite of Mrs M telling him that he should be talking to his employer, the plaintiff made no move to go and Mrs M had had to leave him and go to her office. As a result, Mrs M said the school had not used work parties from the defendant for some months after this incident as it considered that "*it was too much of a risk*". Mrs M said she had been shocked that the plaintiff had sent his letter to the school over one year after the original incident.

[30] Mrs M sent a letter to the department on 5 December 2002 confirming this discussion and referring to the unwelcome surprise at receiving the plaintiff's letter, that it was a shock and that she felt concerned that he "*might pursue some kind of personal vendetta*", including continuing visiting the school to keep making his point. Mrs M's letter referred in some detail to the previous visit. A copy of this letter was sent to the plaintiff and his representative to enable them to comment on it.

[31] As a result of the ongoing investigation, Ms Faith-Allen continued to amend her draft reports and each copy was sent to the plaintiff and his representative. On 17 December 2002 she met again with the plaintiff and his PSA representative to hear any further submissions.

[32] Ms Faith-Allen considered those submissions, including the plaintiff's consistent claim that he had never intended to cause offence and that he always considered he was acting in his private capacity. Ms Faith-Allen concluded that the public perception of the defendant's employees was of the utmost importance, particularly where the employees were directly interacting with third party stakeholders, such as the school. She considered that wherever the defendant had groups of offenders off site there was always the potential for the actions of the offenders and departmental employees to bring the defendant into disrepute. Employees therefore needed to be aware of the way in which their own behaviour reflected on the defendant. Third party stakeholders such as the school were vital to the defendant, for without them there would be nowhere to take the offenders to perform their community work. She considered that irrespective of the fact that the plaintiff's intention may not have been to offend the school, his actions through the initial visit and the subsequent letter clearly did so. She accepted that his initial meeting was to prepare for the mediation but that it was the manner of his approach to Mrs M that was unacceptable and which reflected badly on the defendant. In any event, she considered his writing to the school and threatening legal action brought the defendant into disrepute and that his actions were in direct conflict with the interests of the department. She did not accept that the plaintiff was acting in his private or personal capacity, as the school's only contact with him was in his role as an employee of the defendant and his actions were viewed by the school in that light. She considered that his actions were equally likely to offend the school irrespective of the capacity in which they were performed.

[33] The plaintiff had also raised with Ms Faith-Allen his claims that more serious breaches of the Code of Conduct had not led to the dismissal of other employees. She was unable to identify most of the examples to which the plaintiff had referred. Those two she could identify she considered were not comparable to his situation as they did not involve third party stakeholders, nor did they involve an employee

writing to a third party stakeholder threatening legal action. One had involved an administration officer using a departmental vehicle for personal use without authorisation. This had been investigated and appropriate disciplinary action taken but it was not a situation that involved external third parties and did not have the potential to bring the department into disrepute.

[34] Following her decision to dismiss the plaintiff, Ms Faith-Allen became aware of a second incident. Offenders had been throwing bottles at walls. She again concluded this was not comparable to the plaintiff's matter as, after those allegations were investigated, they were found to be unsubstantiated and therefore no disciplinary action was taken against the work party supervisor involved. She considered that this second incident, had it been proven, bore some resemblance to the events at the school in 2001 for which the plaintiff had been held responsible for providing insufficient supervision and for which he had been issued with the final written warning, rather than being dismissed.

[35] In his brief of evidence for the hearing, the plaintiff referred to another incident where he claimed a work party supervisor did not report to the manager the damages committed by a detainee to vehicles belonging to a sponsor. He had written to Ms Faith-Allen about the matter in June 2002, but claimed that she had never replied to him on the actions that she had taken. He also alleged that there was a case of theft by a work party supervisor that was brought to his attention by Mr Henderson. Ms Faith-Allen's response was that these matters, of which no real detail was given to the Court, were also very different circumstances to the plaintiff's situation and that she did not believe they could support any claim of disparity of treatment.

[36] Ms Faith-Allen, after completing her investigation and considering all the matters referred to her, decided that the plaintiff's conduct was both unprofessional and discourteous, had brought the defendant into disrepute, had involved the plaintiff putting his personal interests against those of his employer and, by his actions, that he had demonstrated a severe lack of judgment. As a consequence, Ms Faith-Allen concluded that she could no longer have trust and confidence in him.

[37] On 17 December Ms Faith-Allen met again with the plaintiff and his representative and advised him in person of her decision to summarily dismiss him. She handed him a letter confirming that decision together with a copy of the final investigation report which had been amended to reflect the submissions that the plaintiff and his representative had made.

[38] As to the claim by the plaintiff that he had not received adequate training, Ms Faith-Allen gave evidence that the plaintiff had received training of a general nature involving sponsor relationships and that the plaintiff had not previously mentioned any lack of training. The training included commonsense matters of courtesy and the understanding of the boundaries of the sponsor/work party supervisor relationship. She noted that the majority of training received by work party supervisors was given on the job and that the plaintiff could have sought additional training if he had wished. The plaintiff's response before the Court was to claim that Mr Riach was not there on the Saturday mornings. The plaintiff then conceded that it would have been possible to have made appointments to have seen Mr Riach during the week had there been any training issues.

[39] Before the Court the plaintiff gave evidence of what he said he honestly believed to be discrimination and prejudice to his person for his involvement with the PSA. These matters were not raised as part of his third amended statement of claim and I am not persuaded by his evidence that they bear at all on the circumstances that gave rise to his dismissal. I accept Ms Faith-Allen's evidence that there was no element of discrimination or prejudice which in any way influenced her investigation into the misconduct which gave rise to the plaintiff's dismissal. I therefore do not intend to say anything more about these matters.

Submissions

[40] The plaintiff claims, and I accept, that he did not intend to cause the defendant or the school any distress or embarrassment by the way he had written his letter. He also claims that his true intention was not to receive damages but to merely clear his name.

[41] In addition to his allegation that he had not received adequate training, the plaintiff also claimed the benefit of the protection of s121 of the Employment Relations Act 2000 when collecting information for the resolution of his personal grievances. This section provides:

> ***121 Statements privileged***
> *Any statements made or information given in the course of raising a personal grievance or in the course of attempting to resolve the grievance or in the course of any matter relating to a personal grievance are absolutely privileged.*

[42] In his final reply, and for the first time, the plaintiff submitted that he was entitled to the benefit of the right to freedom of expression provided by s14 of the New Zealand Bill of Rights Act 1990. He contended as the defendant was a government department and his communications were to a school, both being public bodies, his right to seek information was protected.

[43] As Ms Richards submitted, on behalf of the defendant, the plaintiff was dismissed on 17 December 2002 and the test for justification in s103A of the Employment Relations Act, which came into force on 1 December 2004, does not apply. Consequently the test is that contained in the Court of Appeal's judgment in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448, 457. The issue for the Court is whether the defendant has, on the balance of probabilities, discharged the onus of showing that the decision to dismiss the plaintiff was, in all the circumstances, a reasonable and fair decision which was open to it as the employer.

[44] The defendant contended that after a full and fair enquiry, in which it had taken into account everything said on the plaintiff's behalf, it had properly concluded that the plaintiff's actions breached the principles contained in the department's code of conduct. These included: the requirement in dealing with the public to be professional, courteous and helpful; and to avoid any undertaking that could compromise the performance of the plaintiff's duties and to inform his manager promptly if he was involved in any activity which may, or could be seen by others, to conflict with the performance of his duties or the goals of the department. The defendant also claimed the plaintiff had brought it into disrepute through his

activities which had reflected badly on the department and had jeopardised its relationship with the school, which was one of its key stakeholders.

[45] Ms Richards cited *New Zealand Public Service Association v Iwi Transition Agency* [1991] 3 ERNZ 147, as analogous to the circumstances in the present case. There a senior policy analyst in the housing division of the Agency had been approached by property developers as part of his work and was privately engaged by them as a project manager on a proposal they were pursuing. He had received a substantial fee. When the matter came to the notice of the employer the grievant was dismissed for possible misuse of confidential information, misuse of his employer's time and resources, a conflict of interest between his two roles, the possibility of adverse comment and publicity for the employer, and a breach of his duties as a public servant. The code of conduct in that case contained an identical clause to the one in the defendant's code of conduct in the present case relating to conflicts of interest. The Court found that the actions of the grievant breached the code, he had failed to obtain consent in advance to carry out the activities and that there was a clear conflict of interest. The Court held that the obligations contained in the code of conduct were at the heart of the contract of employment with the Agency and gave expression to a "*high level of trust and confidence reposed in him. When these obligations were not complied with by him a serious breach of the contract was committed leading to the destruction of the relationship of trust and confidence between him and the department*" (pp161, 162).

[46] Ms Richards observed that, as in the *Iwi Transition Agency* case, the plaintiff in the present case had similarly breached the code of conduct by engaging in activities which compromised his ability to perform his duties and affected the standing of the department in its relationships with the public and its clients. Like the *Iwi* case, the plaintiff's activities came to the department's attention through outside sources. It was contended that, as in the *Iwi* case, the code of conduct obligations were at the heart of the employment agreement and his breaches deeply impaired or destroyed the relationship of trust and confidence between the plaintiff and the defendant.

[47] Ms Richard's submitted that, applying *Oram*, if a fair and reasonable employer was able to view the conduct disclosed by its investigation as deeply impairing the trust and confidence essential to the employment relationship, it was hardly necessary for the employer to consider whether in all the circumstances the employee ought to be dismissed. In such circumstances dismissal would be within a range of disciplinary measures available to the employer.

[48] Ms Richards also submitted that the actions of the plaintiff were closely related to his employment, the original incident having arisen in the course of his employment and his contact with the school. She also noted that the plaintiff's explanation that his letter was in preparation for the new personal grievances, was a new explanation, not offered at the time and that it did not bear rational examination.

[49] Ms Richards also submitted the plaintiff's claim for privilege under s121 of the Act was not tenable. She submitted that s121 is intended to provide protection against defamation proceedings when allegedly false statements are made in the course of giving evidence before the Court or the Authority (see *Anderson v The Employment Tribunal* [1992] 1 ERNZ 500, 504). The section does not protect statements made by a witness from being relied upon for criminal prosecution, its protection being limited to liability for defamation: see *Davis v Bank of New Zealand* [2004] 2 ERNZ 511.

[50] Ms Richards submitted the plaintiff's claim of insufficient training and support was without foundation. She submitted that it was a matter of commonsense that the plaintiff's conduct at the school and in writing his letter making demands on it were inappropriate, with or without any specific training on relationships with the defendant's sponsors. Ms Richards pointed to the evidence that the plaintiff had received specific training on how to appropriately interact with sponsors such as the school and had also received on-the-job training from superiors who the plaintiff could have approached for help at any time. She also contended that the plaintiff's actions were not brought about by any alleged lack of training on the part of the defendant. The incident the plaintiff had referred to in his letter was resolved by a full and final settlement with his employer nearly eight months earlier and therefore there was no legitimate purpose or satisfactory explanation for him to have pursued

it. The terms of the settlement were meant to be kept confidential and the plaintiff had breached this requirement by referring to them in his letter.

[51] Turning to the issue of disparity of treatment and the various submissions made by the plaintiff Ms Richards submitted that there was a lack of sufficient particularity. She referred to the legal position on the disparity of treatment, citing *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636 where the Court of Appeal held:

> *… if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is forever after bound by the mistaken or overgenerous treatment of a particular employer on a particular occasion.* (p639)

[52] Ms Richards contended that the examples raised were not materially similar and therefore the defendant had not treated the plaintiff disparately to any other employee in comparable circumstances. The cases referred to by the plaintiff had not involved an employee directly contacting the stakeholder, demanding compensation and threatening legal action.

Reasoning

[53] I accept Ms Richard's persuasive submissions in their entirety and this is the reason I have set them out at some length. The following is a summary of my reasons for so doing.

[54] I find that the defendant undertook a fair and thorough investigation into the two matters brought to its attention by the school. At each point in the investigation the plaintiff, who was represented by the PSA throughout, was made aware of the information that the defendant had obtained and given the opportunity to comment on it.

[55] The only procedural issue, raised by the plaintiff for the first time at the hearing before the Court, was that his explanations were not taken into account. It is

clear from the way in which Ms Faith-Allen modified her reports after receiving the plaintiff's submission that these matters were taken into account.

[56] What it appears the plaintiff may be saying is that he is unhappy that the defendant did not accept his explanations. These were to the effect that his first attendance at the school was merely for the preparation for the mediation, but he did nothing wrong on this occasion, that his letter of 18 November had been approved by Mr Henderson and had been written solely with the intention of furthering his preparation and to clear his name. Even if these explanations were accepted it would have been open to the defendant to have concluded that the way in which the plaintiff had carried out his first enquiry at the school had caused Mrs M to feel "distinctly unsettled" and had resulted in the school withdrawing its sponsorship.

[57] On its own that incident may not have been sufficient to have warranted his dismissal as there was no complaint from the school at the time.

[58] The letter was far more serious and could have brought the defendant into disrepute. I agree with Ms Richards that the plaintiff's claims that his letter was in preparation for his new personal grievances, or to obtain clearance of his name, are at odds with its plain wording. The letter does not contain any requests for information or explanations from Mrs M or the school, but accuses them of negligence and deceit, threatens legal action and demands damages. Further there was no personal grievance relating to the school that was extant, the plaintiff having agreed to settle his personal grievance during the course of the mediation in March of that year.

[59] It has been established that an employer may not discipline an employee for what is said or written to the employer during the course of pursing a personal grievance, see *Burns v Chief Executive of the Inland Revenue Department* [2001] ERNZ 753. However, that case cannot assist the plaintiff because his letter was to the school and not to the defendant and there was no relevant extant grievance.

[60] Section 121 of the Employment Relations Act does not assist the plaintiff because, as Ms Richards submitted, and the authorities she cited show, it is intended

to protect the confidentiality and privilege surrounding statements made or information given in the course of raising a personal grievance.

[61] The defendant provided training for the plaintiff which involved inter-relationships with the sponsors for the purpose of the plaintiff carrying out his duties. Such training obviously did not address the extraordinary situation of an employee taking steps to threaten a sponsor with legal action if it did not provide him with what he required. I accept Ms Richards' submission that, as a matter commonsense, such specific training was not necessary and the broad statements of principle in the code of conduct should have provided the plaintiff sufficient guidance in the way he was to conduct himself with sponsors.

[62] The plaintiff's allegation that he suffered from disparity of treatment in comparison to the way in which other employees were dealt with has not been supported by the evidence. The incidents to which the plaintiff referred were quite different and did not call for an explanation of any apparent disparity. In any event the explanation given by the defendant that these other incidents did not involve a relationship with a sponsor, would have been sufficient to have explained away any disparity that might have existed.

[63] Finally I turn to the claim, raised by the plaintiff for the first time in his final reply; that he was entitled to the protection conferred by s14 of the New Zealand Bill of Rights Act 1990. This states:

> ***14 Freedom of expression***
>
> *Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.*

[64] It is arguable that the defendant being a government department would be brought within the coverage of the Act by s3(a). Section 5 of the Act provides that the rights and freedoms contained in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. A justified limitation is the contractual requirement arising both from the express terms of the code of conduct and the implied duty of trust and confidence not to bring the defendant into disrepute. The plaintiff's contact with the school prior to

March 2002, could legitimately be regarded as a request for information but the defendant's concern on that occasion was as to the manner in which he had carried out his request and the effect that it had on the school. The letter of 18 November 2002, whatever the plaintiff's intention may have been, did not contain a request for information but a threat to commence proceedings if the plaintiff's demand for monetary compensation was not met. I conclude that the provisions of the Act do not assist the plaintiff in this case.

[65] For all these reasons I find that the defendant has discharged the burden of showing that, after a fair and thorough investigation, it was entitled to reach the conclusion that the plaintiff's actions had brought it into disrepute and therefore amounted to serious misconduct which justified his dismissal. This was a decision which, in all the circumstances, was open to the defendant as a fair and reasonable employer. The challenge is therefore dismissed.

[66] Costs are reserved. If they cannot be agreed they may be the subject of an exchange of memorandum, the first of which is to be filed and served within 30 days of this judgment. A memorandum in reply should be filed and served within a further 21 days.

B S Travis
Judge

Judgment signed at 3.30pm on Wednesday 15 August 2007