

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 21
ARC 59/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN BRENDAN MADDERN
Plaintiff

AND WORLDXCHANGE
COMMUNICATIONS LIMITED
Defendant

Hearing: Auckland
12 November 2010
7 December 2010

Appearances: Brendan Maddern, Plaintiff in Person
Claire Mansell and Jarred Scott, Counsel for Defendant

Judgment: 14 March 2011

JUDGMENT OF JUDGE A D FORD

The challenge

[1] In a determination¹ dated 7 May 2010, the Employment Relations Authority (the Authority) dismissed claims by Mr Maddern that he had been unjustifiably dismissed and unjustifiably disadvantaged by the actions of his employer (WorldxChange). In this proceeding, Mr Maddern has challenged only that part of the determination of the Authority which rejected his disadvantage personal grievance. He does not challenge the finding that he did not have a personal grievance for unjustified dismissal.

¹ AA 212/10.

[2] At a directions conference on 17 September 2010, Judge Travis confirmed that the entire matter relating to the disadvantage grievance would be heard again as though it was a de novo hearing and the challenge proceeded on that basis. Mr Maddern elected to represent himself and I record that he did so in a respectful and competent manner.

The plaintiff's employment

[3] WorldxChange was described to the Court as a New Zealand owned telecommunications company providing low-cost internet and phone services. At the relevant time, it had between 60 and 70 employees. Mr Maddern commenced employment with WorldxChange in November 2005 as a technical response helpdesk representative. His duties involved providing technical support to WorldxChange's customers by phone and email. The terms of his employment were recorded in a written individual employment agreement dated 2 November 2005. Mr Maddern reported to Mr Cameron Nicholson, the Technical Response Centre Manager.

[4] Although it is not part of the challenge, it is appropriate to outline, albeit briefly, the circumstances leading up to Mr Maddern's dismissal from the company which the Authority found occurred on 4 February 2009. The Authority records that as from May 2007 there was a disproportionate number of complaints about Mr Maddern's service. In essence, he needed to adopt a more responsive and friendlier manner in dealing with WorldxChange customers. A timeline produced by Mr Maddern in his submissions records the dates of the various warnings he received:

23 April 2008:	First Verbal Warning
26 September 2008:	Second Verbal Warning
13 November 2008:	First Written Warning
13 Jan 2009:	Second Written Warning
4 February 2009:	Third Written Warning

[5] The Authority concluded that Mr Maddern had been given informal and formal counselling in ways to improve his performance and that he had received appropriate advice and feedback. It concluded that WorldxChange had acted as a fair and reasonable employer would have done in the same circumstances and it

dismissed the claim of unjustified dismissal. Mr Maddern does not challenge those findings.

The paper cranes

[6] Mr Maddern's disadvantage grievance centred around alleged bullying in the workplace. He claimed to be subjected to a prolonged and focused campaign of harassment which took the form of vandalism of artwork on his office desk. His grievance also includes a specific incident relating to the artwork involving Mr Philip Moore, the defendant's operations manager.

[7] The artwork in question comprised approximately 300 to 400 origami cranes (the bird variety) made out of coloured memo cube paper. Mr Maddern told the Court that he learned the art of origami from an internet site in about March 2008 and thereafter he made a few cranes a day "that slowly grew into an impressive collection". He continued:

4. The cranes and the artwork that consisted of them were well received by a majority of both my peers and managers alike. There were times when I either donated or made cranes for the children, and in one case girlfriend, of my co-workers and that the CEO of the company on one occasion even offered to buy the cranes from me, once the pile reached the top of my workspace's partition, to be used as wedding confetti.
5. The artwork seemed to elevate me from just another computer geek to a respected office artist. People who would once not give me the time of day, so-to-speak, were now engaging me in a friendly and interested manner. Such positive feedback and pleasant interaction reinforced my emotional attachment to my creation. An attachment recognised by the Authority in its determination.
6. I was not alone in having an artist release. Other co-workers would draw artwork or design album covers at their desks, during office hours, all with the knowledge and at least tacit approval of management.

The vandalism

[8] In relation to the vandalism allegations, Mr Maddern told the Court:

7. Despite, or possibly because of, the positive feedback from co-workers the artwork became the target of vandalism and theft soon after its inception. The favoured form of vandalism was for the vandal to dig their hands into the artwork and then it appears that they threw the cranes into the air scattering them across my workspace, which is how I would find them when I came into work. The theft of cranes from the

artwork was common and ongoing throughout its installation at my desk.

...

9. While I initially viewed the thefts with an amount of tolerance, as I had hoped that the cranes were finding a good home, I found the violent vandalism of the artwork itself was inexplicable and hurtful.
10. Inexplicable as I could not imagine why someone would do such a thing to a piece of art that seemed to bring nothing but happiness to those who viewed it and hurtful as the only conclusion that I could reach was that the perpetrators, on seeing how upset each attack made me, were using something that I was emotionally attached to in order to bully me by proxy.
11. The growing frequency and seriousness of such incidents soon wore down my good humour.

The incident involving Mr Moore

[9] Mr Maddern said that it got to the stage when he would arrive at work fearing the state that he would find his birds in and he complained on numerous occasions about what he came to see as “bullying and intimidation”. He continued in his evidence-in-chief:

15. It was in this atmosphere of growing exasperation that on the first of September 2008 a manager [Mr Philip Moore] left a note publicly displayed on the origami artwork.
16. The note stated that “There will be no more of this (which I took as referring to the making of the cranes) until you start paying for the paper”. I read this to mean that in the view of the manager I was not currently paying for the paper used in creating my artwork. Which in turn meant that, as I did not have permission to use the company’s paper, that I must have been stealing it.
17. I was shocked to find such a note displayed for all to see when simply approaching and asking me if I was in fact paying for the paper would have revealed that, yes, I was paying for the paper.

[10] Mr Maddern said that he wrote a reply on the reverse of the note stating that he was paying for the paper and a short time later he handed it to Mr Moore who happened to be passing his desk. He said that as he handed the note back to Mr Moore, the latter expressed disbelief and twice asked him if he was telling the truth. He said that Mr Moore then proceeded to smile, screwed up the note and left

without another word. It is not disputed that Mr Maddern had been paying for the paper.

Mr Maddern's complaints

[11] Mr Maddern told the Court that approximately one week after the incident involving Mr Moore, he informed his reporting manager, Mr Cameron Nicholson, at a routine performance assessment meeting, about the history of theft and vandalism of his paper cranes and the effects on him of the actions of Mr Moore. He requested an apology. Mr Maddern said that he left that meeting with the impression that Mr Nicholson took his complaints seriously and that action would be taken to resolve the issues.

[12] After waiting approximately three weeks and having heard nothing back from his manager, Mr Maddern put his concerns in the form of a written complaint dated 26 September 2008. He said that on his reading of Mr Moore's note it publicly proclaimed that he had been misappropriating company property for personal use. He complained that Mr Moore had left his notice prominently displayed for other staff members to see for an indeterminate amount of time before he arrived at work at 10.30 am. He recorded that his major point of contention was that Mr Moore had not approached him with his concerns personally but instead "he chose to publicly embarrass me in front of my peers, team leader and manager".

[13] Mr Maddern said that he received no response or even an acknowledgement of his written complaint. In the meantime, when he arrived at work on Monday, 17 November 2008, he found that his origami artwork had again been scattered across his desk. On that occasion, Mr Maddern suggested to Mr Nicholson that he review the security cameras in operation around his workstation to find the culprit and Mr Nicholson agreed to take that action.

[14] The idea of using the security camera footage followed on from an email that a senior manager had circulated to WorldxChange staff that same day under the heading "Friday night bullshit". The email was directed at staff who had disabled the security cameras in reception during what was apparently a drunken party on the Friday night. The email asked the staff concerned to start saving their pennies and

invited them to front up to the manager's office with an apology. It concluded: "In case you need an incentive, there are actually more than three cameras in that area which means that we not only know who you are and what you were trying to hide, but also who was directly involved in screwing with the cameras."

[15] On Tuesday, 18 November 2008 Mr Nicholson sent an email to Mr Maddern which stated:

Haven't got around to reviewing any security footage yet. I'll see if it is possible with Paul when I talk to him about my reporting.

I would definitely suggest taking them home though if you want to safe guard them.

Mr Maddern responded by email:

Thank you for your suggestion.

However I do not feel that I should safe guard my property from my work associates.

I do not interfere with the property of others.

Is WxC unable to provide a safe working environment?

[16] Mr Nicholson responded on the same day disputing the suggestion that the working environment was unsafe and he again suggested that Mr Maddern should take his paper cranes home. Mr Maddern told the Court that: "Having developed an amount of emotional attachment to my creation, I demurred."

[17] The next development came on the morning of 1 December 2008 when Mr Maddern said that he arrived at work and once again found his artwork in disarray. He also noted two emails from Mr Nicholson. The first said that he had noted what had happened and he was following the matter up with the weekend staff. The second stated: "I have found the culprit and will be dealing with the matter very seriously." Mr Maddern responded by email thanking Mr Nicholson for looking into the matter promptly. He concluded: "As such, should it be the work of a peer, I cannot help but fear further acts of intimidation rather than this being a once off prank." Mr Nicholson responded: "I'm making it extremely clear that this kind of behaviour is completely unacceptable. I will be formalising this and taking the

appropriate action with the staff member involved. This should hopefully eliminate any further acts.” Mr Maddern said that Mr Nicholson subsequently admitted before the Authority that the culprit was not formally disciplined but rather given a “talking to”.

[18] Mr Maddern told the Court that cranes continued to go missing from his artwork and so approximately a week later he felt compelled to remove them from his workplace.

The personal grievance

[19] On 13 January 2009, Mr Maddern sent a rather lengthy email to Ms Carol Eddy, the Human Resources Manager for WorldxChange, about the fact that he had laid a formal complaint in September against Mr Moore, the operations’ manager, “for an incident that resulted in personal humiliation and emotional distress” but he had received no feedback as to its progress or potential resolution. He compared the lack of communication regarding that complaint with “the swift resolution following from another complaint of constant harassment made to Mr Nicholson”. He noted that the other complaint dealt with by Mr Nicholson related to his artwork being “the focus of the workplace bully”. He went on to state:

This time the harassment took the form of vandalism.

The culprit was caught on camera and so was soon identified by Mr Nicholson after an investigation that he initiated.

As I understand it a formal process was started that you are no doubt aware of.

So I do not seek to revisit that unfortunate period except to say that I felt compelled to remove my artwork from my workplace at Mr Nicholson’s suggestion.

I’m simply drawing the comparison between the swift resolution found regarding a mistake made by my peer and the time taken to investigate a similar complaint against management.

[20] Ms Eddy responded by email the same day:

Hi Brendan

Thank you for raising your concerns with me.

I have organised to meet with Cam tomorrow morning to discuss both your initial complaint and your subsequent follow-up e-mail in more detail; in order to get a satisfactory resolution for you.

Mr Moore to my understanding is away for the remainder of the month; so I may not be able to address this matter with him until he returns.

I will make sure you are kept informed of your progress.

Thanks kindly

Carol Eddy

[21] On 23 January 2009, Mr Maddern received an email from Mr Nicholson containing a copy of an extract from the minutes of a management meeting held on 14 January 2009 which considered his request for progress of his complaint relating to Mr Moore's actions. I set out the contents of the email in full:

RE: Employment incident follow-up

Hi Brendan

The issue was raised for follow-up at the most recent Management Meeting (14-Jan-09).

The following is from the Management minutes:

Cam and Carol [brought] up the formal complaint that was received from Brendan dating back to September regarding accusation of theft; resulting in emotional distress; made by Phil Moore in regards to Origami swans made by Brendan and displayed on his desk. Follow up e-mail was received by Carol yesterday questioning what action had been taken to date as Brendan had not received any follow up. Cecil mentioned that he had already spoken to Phil in regards to this matter. Phil apologised and understands that this is outside his scope of management and he should have approached Cameron in the first instance. Cecil made it clear to all management staff that they should always discuss these matters with a staff member's manager – it is not their place to chastise other people's staff.

In future anything concerning my staff will be taken up with me directly.

Hopefully this brings closure to this matter for you.

Thanks

Cameron

The "Cecil" referred to in the email is Mr Cecil Alexander, WorldxChange's CEO.

[22] Mr Nicholson's email did not bring his anticipated closure of the matter. Mr Maddern responded by email the same day stating:

My concern is the manner in which Mr Moore's allegations were communicated to me and the subsequent distress that his chosen course of action caused me.

At the very least I had expected some form of public apology.

After-all the accusation that I stole from WxC was displayed publicly. I see that Mr Moore apologised to our CEO, Mr Alexander, for the breach of workplace process while I myself have not heard one word of an apology from any quarter for the distress that I was made to endure.

Mr Maddern concluded his email by pointing out that he had lost faith in WorldxChange's internal complaints resolution process and he requested "Department of Labour mediation through their Mediation Service office."

[23] There then followed a further exchange of brief emails between Mr Nicholson and Mr Maddern. Mr Nicholson suggested a meeting rather than mediation. Mr Maddern expressed disquiet over the value of an in-house meeting but Mr Nicholson pointed out that the Department of Labour recommended that the parties talk to each other prior to contacting them. The meeting was scheduled for Thursday, 29 January 2009. Mr Nicholson described the purpose of the meeting as being about endeavouring to achieve "an equitable outcome for everyone involved".

[24] The meeting held on 29 January lasted for over an hour. Those in attendance were Mr Maddern, Mr Nicholson and Ms Eddy. A complete transcript was taken of the meeting which runs to 33 pages. Ms Eddy and Mr Nicholson apologised for the lack of process and for the way that Mr Maddern's complaint had been handled. They acknowledged that he had suffered "much emotional distress". They stressed, however, that the apology was not from the company but from themselves. In his closing submissions, Mr Maddern simply stated: "No equitable solution was forthcoming from the meeting."

[25] Mr Maddern told the Court that the "compounding actions of WorldxChange" left him in a "negative emotional state that made it impossible for me to positively represent the company to its customers and as such perform my job." He said that

“for emotional reasons” he was unable to attend work the following day and Mr Nicholson accepted this and seemed sympathetic to his plight.

[26] On 4 February 2009, Mr Maddern presented WorldxChange with his detailed personal grievance which ran to seven pages. In evidence he stated that his personal grievance, “encompassed all of the outstanding issues that I had with the manner by which my concerns had been treated by my employer, the issues of workplace bullying as well as the stress that I was labouring under.” He told the Court that his optimum outcome at that stage would have been some form of exit package including a measure of compensation. At a meeting called on the same date, 4 February, to discuss work performance concerns, Mr Maddern indicated to Mr Nicholson and Ms Eddy that he felt unable to return to work for emotional reasons and they raised no objection. He was told that he would be on annual leave but, at the Authority investigation meeting he learned that he had been placed on “stress leave”.

[27] On 11 February 2009, Ms Eddy sent a letter to Mr Maddern responding to his personal grievance statement. She pointed out that one of Mr Moore’s roles was property asset manager for the company and went on to note: “Phil did not consider the contents of his note a major issue or he would have requested a meeting with you in private. He was just ensuring you weren’t using company assets for the manufacture of your artwork.” Ms Eddy also stated that Mr Moore disputed that he had accused Mr Maddern of theft as a servant. She also reminded Mr Maddern that his job description was technical support representative and that it did not involve the manufacture of origami cranes although she noted, “we don’t intend to make an issue of this”. The letter further stated:

While we also apologise that you are unhappy with the way we communicated; after talking over the course of events with Mr Moore; the company does not consider this a harassment situation and struggle to understand how you feel your safety and security were in any way jeopardised by a note passed from one employee to another enquiring whether you were using company property for the manufacture of your cranes.

The letter concluded by recording that the directors acknowledged that Mr Maddern felt aggrieved at the handling of his complaint but they did not feel that a compensation package was warranted.

Submissions

[28] Against that background, Mr Maddern alleges that WorldxChange did not act in a fair and reasonable way when dealing with his concerns in the workplace nor when reviewing his personal grievance that followed. Towards the conclusion of his 153 paragraph brief of evidence he stated:

151. I hold the strong belief that the actions or in-actions of WorldxChange not only failed to address my valid workplace concerns but also contributed to the amount of emotional harm that I suffered, which eventually saw me unable to perform my job and be placed on stress leave.

[29] In her succinct submissions on behalf of the defendant in response, Ms Mansell summed up Mr Maddern's two-fold claim for unjustifiable disadvantage in these terms:

2.1 First, Mr Maddern submits that his paper cranes were interfered with by other staff members, thus creating an unsafe workplace.

2.2 Second, Mr Maddern alleges that he suffered disadvantage as a result of the way WorldxChange handled his complaint against Philip Moore.

[30] In relation to the first issue, Ms Mansell acknowledged that staff behaviour towards a fellow staff member could provide a basis for a disadvantage claim but she submitted that the behaviour in the present case did not do so because it was trivial in nature; it did not meet the generally accepted definition of "bullying" and the behaviour was addressed by management in a timely and appropriate manner.

[31] In relation to the second issue, Ms Mansell submitted that Mr Maddern's personal grievance could only succeed if the grievance had not been "addressed by the employer in an appropriate manner, i.e. if the employer's actions were unjustified". As to what is "unjustifiable", counsel correctly submitted that the test, in terms of s 103A of the Employment Relations Act 2000 (the Act), was whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances at the time the action occurred.

[32] Ms Mansell submitted that it was unnecessary for Mr Maddern to be involved in the disciplinary process involving Mr Moore because he was merely a witness and his evidence “was not contested by Mr Moore, so his involvement in this regard was not further required.” Ms Mansell further submitted: “An employee is not entitled in law to dictate the manner of the disciplinary process against another employee nor the penalties to be imposed. That process is private between employer and employee.”

[33] Mr Maddern responded to each of the defendant’s submissions in some detail but I have incorporated the thrust of his submissions in the narrative above.

The law

[34] Relevantly, a personal grievance is defined in s 103 of the Act as including any grievance that an employee may have against the employer because of the claim:

- (1) (a) ...
- (b) that the employee’s employment, or 1 or more conditions of the employee’s employment (including any condition that survives termination of employment), is or are or was (during employment that has since been terminated) affected to the employee’s disadvantage by some unjustifiable action by the employer.

[35] The statutory test for determining whether an action is “unjustifiable” is governed by s 103A of the Act:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action 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 would have done in all the circumstances at the time the dismissal or action occurred.

[36] In relation to a disadvantage grievance, while the employee has the obligation of bringing the grievance to the attention of the employer, the obligation on an employer in receipt of such a grievance is to act in the way a fair and reasonable employer would do in all the circumstances. Judge Shaw, in a passage approved by the Court of Appeal in *Waikato District Health Board v Clear*,² put it this way:³

² [2010] NZCA 305 at [58].

³ [2008] ERNZ 646 at [14].

The Court's role is to objectively review the circumstances as they existed at the time and to judge whether in all of those circumstances the employer acted fairly and reasonably.

Discussion

[37] Among the agreed bundle of documents produced was a coloured photograph of Mr Maddern's origami cranes. They are neatly arranged in a colourful display on his workstation between his computer and some other personal mementos. Although opinions on what constitutes artwork may differ, I accept that Mr Maddern regarded the display as "artwork" and that he had a genuine attachment to his cranes. The evidence was that the company had no objection at the time to the display nor to Mr Maddern continuing to pursue his origami hobby. The display constituted Mr Maddern's personal property. I accept, as Mr Maddern submitted, that he found the actions of his unknown co-worker in scattering the display across his desk emotionally offensive, malicious, intimidating and humiliating. As such, the actions in question constituted bullying.

[38] Having said that, I also accept the submission by Ms Mansell that the complaint about the bullying behaviour was "addressed by management [Mr Nicholson] in a timely and appropriate manner having regard to the circumstances and the dictates of good industrial practice". This point was acknowledged by Mr Maddern himself in his email to Ms Eddy dated 13 January 2009 (at [19] above) when he referred to the "swift resolution" of his complaint by Mr Nicholson.

[39] Mr Maddern's first written complaint about interference with his artwork came in the form of an email to Mr Nicholson dated 17 November 2008. There was then the second incident on Monday, 1 December 2008 which Mr Nicholson observed for himself when he arrived at work that morning. He immediately searched for and found the culprit and reported to Mr Maddern that he would be dealing with the matter "very seriously". In my judgment, in terms of the s 103A test of justification, Mr Nicholson's actions were what a fair and reasonable employer would have done in all the circumstances at the time.

[40] The situation regarding Mr Maddern's complaint against Mr Moore is different. Mr Maddern made it clear in his personal grievance dated 4 February 2009 as well as in his earlier emails to Mr Nicholson and Ms Eddy that the clear implication of Mr Moore's note was that he did not have permission to use the company's paper and that meant he must have been stealing it. He repeated this assertion in some detail in his brief of evidence. He also alleged that the note containing this false accusation had been publicly displayed on his desk for all to see and that when he arrived at work and pointed out to Mr Moore that he had been paying for the paper, Mr Moore clearly disbelieved him. Even the minutes of the management meeting held on 14 January 2009 acknowledge that Mr Maddern considered that Mr Moore was accusing him of "theft".

[41] It was open to Mr Moore to appear in Court and give evidence challenging any one of those assertions by Mr Maddern but he was not called as a witness. Ms Mansell confirmed in her closing submissions that Mr Maddern's evidence was not contested by Mr Moore.

[42] Although the facts are not on all fours, there are similarities between the instant case and *Hilton International Hotels (UK) Ltd v Protopapa*.⁴ In that case Miss Protopapa, a telephone supervisor at the Hilton International Olympia Hotel was suffering from toothache. She made a dental appointment without previously consulting any of her superiors but she did inform the duty manager and she expected the duty manager to pass on the message to her immediate superior, Miss Glover. The Industrial Tribunal found that the manner in which Miss Glover reproved Miss Protopapa for her conduct in making an appointment before getting clearance to do so, had the effect of humiliating, intimidating and degrading her. Miss Protopapa resigned her employment the same day and the Tribunal found that she had been constructively and unfairly dismissed. The employer appealed the decision. It was common ground that for there to be a constructive dismissal, it had to be by reason of something which the law regarded as the employer's conduct. The definition of "employer" was not dissimilar to the general definition in the New Zealand legislation. The relevant passage from the decision of the Employment Appeal Tribunal appears at [14]:

⁴ [1990] IRLR 316.

... in relation to repudiatory conduct by what I will call a supervisory employee of the employer, the question whether the conduct binds the employer is governed by the general law of contract. If the supervisory employee is doing what he or she is employed by the employer to do and in the course of doing it he or she behaves in a way which if done by the employer would constitute a fundamental breach of the contract between the employer and the applicant, then, in our judgment, the employer is bound by the supervisory employee's misdeeds. We see no basis for drawing the line in any other place than that applied by the general law for vicarious liability of an employer. That seems to us to follow from the fact that the statute is perfectly general in using the words 'the employer's conduct' and from the fact that, as was common ground between the parties and indeed before the Industrial Tribunal, the test to apply in deciding whether or not there has been a constructive dismissal within s 55(2)(c) was authoritatively explained and identified in *Western Excavating v Sharp* [1978] IRLR 27 to which the Industrial Tribunal refer. It is common ground between the parties that what is commonly referred to as the contractual test is the one which the industrial tribunals have to apply. That in our judgment imports the general law of contract just as much on the question of fundamental breach of contract as in the matter of what conduct by an employee of the employer is to be treated for the purposes of this question as constituting 'the employer's conduct'. On that basis we see no jurisdiction for introducing into this test the extraneous consideration whether or not that supervisory employee had authority to dismiss the applicant employee.

[43] Mr Moore was not Mr Maddern's line manager but he was the company's operations manager. In her letter of 11 February 2009 (at [27] above) Ms Eddy highlighted the fact that Mr Moore was also the company's property asset manager and when he accused Mr Maddern of misusing company property he was acting in that latter capacity. He was, according to Ms Eddy, attempting to ensure that Mr Maddern was not "using company assets for the manufacture" of the paper cranes. Ms Eddy further described Mr Moore as part of the management team and she stressed that as such he had an "obligation to be vigilant in controlling" how the company's time and money was spent. I find that within the scope of his special jurisdiction to manage the effective use of company resources, Mr Moore was exercising supervision and control over Mr Maddern when he wrote the note. Against this background, Mr Moore's actions were those of an employer, not merely a fellow employee, and his actions in relation to the note are to be judged against the standard contained in s 103A of the Act. The question to be asked is were those actions what a fair and reasonable employer would have done in all the circumstances at the time?

[44] I consider, as Mr Maddern submitted, that a fair and reasonable employer, in the exercise of its good faith obligations, would have sought to deal with the matter in a private setting, rather than leaving the accusatory note displayed on Mr Maddern's desk for all to see. But even if that were not the situation and it could be said that a fair and reasonable employer would have acted that way, I consider that the same employer would, consistent with its good faith obligations, have apologised to the employee as soon as the true position was revealed. Mr Moore did not apologise. On the contrary, according to Mr Maddern's evidence which I accept, he made it very clear from his reaction that he continued to hold to his false assumption. I am confident that that is not how a fair and reasonable employer would have acted in all the circumstances.

[45] I find that in acting as he did, Mr Moore clearly breached WorldxChange's obligation of trust and confidence and good faith towards one of its employees. His actions were not the actions of a fair and reasonable employer within the terms of the s 103A test of justification. Mr Maddern told the Court, in evidence which again I accept, that had Mr Moore apologised to him as soon as he had pointed out that he had paid for the paper then he would have accepted the apology and the matter would not have been taken any further. That same proposition was put to Ms Eddy by the Court and she confirmed that, in her view, if such a discussion had been held at the time then that would have been the end of it. Ms Eddy told the Court that as human resources manager, she could not instruct Mr Moore what to do but she said that several times she had suggested that he should apologise directly to Mr Maddern over the matter. Mr Moore turned down her suggestion.

[46] A possible explanation for Mr Moore's apparent intransigence in this regard may be gleaned from another answer Ms Eddy gave to a question from the Court at the end of her evidence:

We have quite a large army background in our operations team. It's just they're more confrontational. They tend to be very direct in their approach as opposed to being – doing the sensible thing. They're used to giving orders I guess would be the way that I would describe them, not just Mr Moore there is other members of that team that are the same. They're just very direct in their approach; they tend to make statements as opposed to asking questions.

I found both Ms Eddy and Mr Nicholson credible and fair witnesses.

[47] The other important aspect of Mr Maddern's complaint regarding Mr Moore is that it was not dealt with expeditiously by WorldxChange. The incident occurred on 1 September 2008. Mr Maddern reported it verbally one week later and on 26 September 2008 he reduced his complaint to writing. He then heard nothing more until he raised it again in his email of 13 January 2009. A fair and reasonable employer would have responded to Mr Maddern's complaint much sooner and kept the employee reasonably informed of developments.

[48] For these reasons, I find that, in relation to his complaint about the actions of Mr Moore, Mr Maddern has succeeded in establishing his disadvantage grievance.

Remedies

[49] In his closing submissions, Mr Maddern claimed penalties but, as no such claim was included in his statement of claim, I am not prepared to consider his late application for such relief. In his statement of claim he sought compensation in the sum of \$20,000 for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act.

[50] Mr Maddern claimed that he had suffered significant emotional stress in relation to the incident involving Mr Moore. This was acknowledged by Mr Nicholson and Ms Eddy in their evidence and it had also been recognised by them at the meeting of 29 January 2009. The transcript of the meeting records:

CE [Carol Eddy]: Processes have failed. Without a doubt. And they have failed you and I'm sorry that it has caused you so much emotional distress. And I understand that you need to take it further. And I understand... but the reason Cam and I wanted this meeting was to offer you an apology.

Not from the company's behalf. From my behalf.

CN [Cameron Nicholson]: And mine also. I should have..."

[51] In her submissions, Ms Mansell said:

10. The extent of Mr Maddern's emotional attachment to the cranes only became apparent at the ERA hearing when Mr Maddern broke down and cried when describing what the cranes meant to him.

[52] One of the difficulties in assessing compensation for Mr Maddern's non-economic loss is in trying to apportion the symptoms attributable to the actions of Mr Moore in relation to the overall humiliation, loss of dignity and injury to feelings Mr Maddern would have inevitably suffered as a result of his dismissal, which was found to be justified. There was no medical evidence which might have assisted the Court in this regard. It will be evident, however, from the timeline at [4] above that his grievance in relation to Mr Moore's actions could not have come at a worse time. Throughout the period that he was awaiting a response or some action in relation to his complaint regarding Mr Moore, Mr Maddern continued to receive warnings from WorldxChange as to the need for him to communicate better and in a friendlier manner in his dealings with customers' complaints. He did not need the additional stress associated with his complaint regarding Mr Moore's actions. He was already in a vulnerable state of mind. This point was fairly acknowledged by Ms Eddy when she told the Court that it was "very unfortunate timing".

[53] In all the circumstances, I consider \$3,000 to be an appropriate award for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act and I award compensation in that sum.

Contribution

[54] I do not consider that the plaintiff contributed in any way towards the situation that gave rise to his disadvantage grievance in relation to the actions of Mr Moore and, accordingly, I make no reduction under s 124 on account of contributory behaviour.

Costs

[55] Although the plaintiff succeeded on only one limb of his two-part challenge, it was a significant success and had he been represented by counsel, I would have been prepared to award him costs in an amount to be ascertained. The general practice of this Court, however, is that costs are not awarded to a litigant in person. Having said that, I am mindful of the fact that costs were awarded against Mr Maddern by the Authority in the sum of \$6,300. Mr Maddern has challenged that

costs award in his amended statement of claim but his challenge was not argued at this hearing.

[56] In the special circumstances of this case, where Mr Maddern has succeeded in a significant aspect of his challenge, it may be appropriate for the Court to depart from its general approach to self-represented litigants and fix an award of costs in his favour which would properly reflect the overall justice of the case. At this stage, I say no more on the matter. I invite both parties to reflect upon what I have said and, hopefully, come to an agreement in relation to costs that will avoid the need for resolution of the costs challenge. In this regard, I invite Ms Mansell to confer with Mr Maddern and advise the Registrar within 28 days of the outcome of their discussion. If agreement cannot be reached, however, I will issue further directions.

A D Ford
Judge

Judgment signed at 4.30 pm on 14 March 2011