

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AEA613/05
AA 17/08

BETWEEN RUTH HAWEA
Applicant

AND ATTORNEY-GENERAL IN
RESPECT OF THE CHIEF
EXECUTIVE OFFICER OF
THE DEPARTMENT OF
CHILD, YOUTH & FAMILY
SERVICES
Respondent

Member of Authority: Dzintra King
Representatives: Michelle Clark, Counsel for Applicant
Joanna Holden, Counsel for Respondent
Investigation Meeting: 3 December 2007
Submissions received: 14 December 2007 from Applicant
20 December 2007 from Respondent
Determination: 22 January 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Hawea alleges that she has been disadvantaged. The grievance relates to two situations: a meeting that took place on 13 September 2004 and the surrounding circumstances; and her return to work arrangements following a period of unpaid leave in 2005.

[2] Ms Hawea was employed as a social worker in May 2002.

[3] On 10 September 2004, Ms Andrea Nichols, the practice manager, sent a letter headed *Performance Issues* to Ms Hawea. Ms Nichols wished to meet with Ms Hawea on Monday, 13 September, together with her supervisor, Mr Mark Postow.

The purpose of the meeting was to discuss Ms Hawea's performance. The issues that required addressing were identified as being the following:

- (a) Lack of significant activity in progressing investigations.
- (b) Lack of recording on CYRAS.
- (c) Incomplete/inadequate assessment outcomes and RES.

[4] Ms Hawea was to be given the opportunity to comment on the above issues. Depending on the outcome of the meeting, a decision would be made as to the next course of action. One of the options could be a performance contract. Ms Hawea was told that she was welcome to bring a support person if she so wished.

[5] On 13 September, Ms Nichols sent a letter to Ms Hawea outlining the outcome of the meeting that had been held on 13 September. Ms Hawea was to be put on a performance contract for two months, she would be provided with assistance to improve the situation with her case load and would no longer be required to be available for critical work. The letter also said:

I am aware that you are feeling overwhelmed with one particular case and we (Mark, you and myself) have agreed to meet tomorrow after the staff meeting – 14 September 2004 – to put together a new investigation plan and look at the urgent assessment of these children.

[6] Ms Hawea's complaint is that she was given insufficient notice of the 13 September meeting. By the time she found the letter, which had been placed on the keyboard on her desk, there were only two hours before the meeting was scheduled to take place. When she arrived at the meeting, she was asked if she had a support person. She said that as she had only just found out about the meeting she did not have anyone to bring. Ms Nichols' evidence was that Ms Hawea was asked if she wanted to arrange representation and she declined. I accept Ms Nichols' evidence.

[7] Ms Hawea said that in her view the outcome of the meeting was that she was not considered to be a competent social worker. She said it was agreed during the meeting that Ms Nichols would create a plan for her to assist her to improve her performance and that they would meet the next morning at 9.30 to discuss it.

[8] The meeting scheduled for 14 September did not take place. Why that was is quite unclear.

[9] The next day, she returned to work anticipating the meeting in the morning. At 2.30 in the afternoon neither Mr Postow nor Ms Nichols had approached her about a meeting. She called a meeting with the Roopu Group, the group of Maori staff members. She was very upset and told them what had happened. She was so upset she had to leave and go home. She did not return to work due to ill health.

[10] On 15 September 2004, Ms Hawea's doctor issued her with a medical certificate stating that she was not medically fit for work due to stress. A medical certificate was issued until 18 October 2004.

[11] On 17 November, while on sick leave, Ms Hawea had a meeting with Mr Peter Topzand who is an executive manager employed by CYFS Northern Region. Ms Hawea attended the meeting with Ms Sharman, a counsellor, and her sister, Ms Barbara Hawea. Mr Alan Dunn, an HR consultant, attended the meeting with Mr Topzand.

[12] Ms Hawea was distressed about the 13 September meeting she had had with Ms Nichols and Mr Postow. Ms Hawea wanted an apology for Ms Nichols' behaviour. Mr Topzand said the meeting of 17 November was to try and find a way forward. CYFS was trying to resolve matters with Ms Hawea so that she would be able to return to work. Mr Topzand said he accepted that if there were performance issues with social workers, those should be raised with them by their supervisors. Ms Hawea said that she felt that she had not been properly advised of her performance issues by her supervisor and Mr Topzand apologised to her for that.

[13] On 18 November, Ms Hawea received a letter from Mr Topzand recording the matters discussed at the meeting. Mr Topzand wrote:

There may have been some deficiencies in the process insofar as there was no evidence of your supervisors having specifically identified concerns to you previously, and that therefore a letter and the content of the meeting may have come as a surprise to you. This is not in accordance with the Department's staff management guidelines, which require up front, clear, honest and transparent processes. Andrea states that you had been spoken with about both concerns on a number of occasions. She will be taking this matter up with the supervisors concerned.

[14] After Ms Hawea left on 14 September 2004 and went on sick leave, she remained on sick leave until 17 December 2004 which was the date on which she had previously arranged to take 12 months' leave without pay.

[15] The applicant has made much of the comments in the letter of Mr Topzand of 17 November regarding the fact that the process was flawed. Mr Topzand, however, says that that letter needs to be seen in the context of when it was written which was an attempt to resolve matters with Ms Hawea so that she would be able to return to work. I agree with that assessment.

Submissions regarding the Meeting Disadvantage

[16] The respondent says that its conduct in relation to the meeting in September did not constitute an unjustifiable action and was not in breach of the respondent's duties under the applicant's employment agreement or s.56 of the State Sector Act.

[17] After some months of relatively low key performance management by Mr Postow, the respondent determined that a more formal approach to the performance issues was required.

[18] As a result of Ms Hawea's unresolved performance issues, the meeting on 13 September was arranged. No objection was raised by Ms Hawea regarding the timing of that meeting, and despite Ms Nichols asking her she chose not to have a support person or representative.

[19] The respondent says the meeting was a justified action and that the conduct of the meeting was not unjustified or in breach of the respondent's obligations. At the time of the meeting, it appeared to be constructive and positive on both sides and Ms Hawea agreed to the proposed outcomes which were confirmed in the letter of 13 September.

[20] The applicant referred me to the respondent's professional supervision policy manual. This states that a written record is to be kept of supervision sessions and that the record should specify the cases or issues discussed, the actions planned and responsibilities and the development needs of workers. The supervision record must be recorded by the supervisor, sighted by the worker and retained by the Service.

Evidence is recorded of monitoring and adherence to supervisory plan. Where performance deficits exist, they must be recorded on the staff member's personal file.

[21] The document also provides for informal supervision comprising advice or consultancy on an ad hoc basis.

[22] The applicant's argument is that because no documents regarding supervision sessions and performance deficits have been produced, the Department has not abided by the terms of its policy. Therefore the meeting notified for 13 September was unfair because she had not previously been told about any performance deficits. However, the evidence established that the issues had previously been drawn to Ms Hawea's attention.

[23] Ms Nichols said that she had been Ms Hawea's first supervisor at CYFS. The supervision included weekly formal sessions with Ms Hawea as well as an open door policy. Ms Nichols said that she identified that Ms Hawea was struggling with report writing, both content and quality, analysing the information she was working with, and following through and completing tasks. Ms Nichols employed several informal strategies such as twice weekly supervision in an attempt to provide Ms Hawea with guidance and support to ensure that work was completed in a timely and competent manner. She often sat with Ms Hawea to go over reports and assessments to assist her with those. She allocated experienced social workers to co-work with Ms Hawea on her investigations.

[24] In June 2003, Ms Nichols completed Ms Hawea's performance appraisal for the previous year. It highlighted both strengths and areas for development. One of the areas for improvement was report writing. Ms Nichols said at the time Ms Hawea commented that she had found the appraisal to be a positive experience.

[25] In 2004, Ms Nichols returned to the Waitakere site as a practice manager. At that stage, Mr Postow was supervising the critical team of which Ms Hawea was a member. Mr Postow regularly discussed the performance of this team with Ms Nichols and raised a number of concerns regarding Ms Hawea's performance. He told Ms Nichols that he was concerned about the progress of Ms Hawea's investigations, the lack of recording on CYRAS and the quality of assessments and her use of the risk estimation system. Mr Postow and Ms Nichols discussed the strategies that he was using and also discussed putting Ms Hawea on a performance

plan. Initially, Mr Postow felt that he would like to persevere with less formal strategies before taking that step. However, as Mr Postow continued to raise concerns regarding his supervision of Ms Hawea's performance, Ms Nichols spoke to him again about the idea of a performance plan and at that stage Mr Postow agreed that that formal discussion regarding performance needed to occur.

[26] Mr Postow and Ms Nichols met to talk about how a meeting with Ms Hawea to discuss her performance issues and a possible performance plan could proceed. They were both clear that a meeting needed to promote a sense of support and encouragement. The aim of the meeting was to discuss the concerns about Ms Hawea's practice, to look at how those could be improved, and what support and assistance would be required for this to occur.

[27] Ms Nichols said that the practice issues raised in the meeting in September were those that were recorded in the letter to Ms Hawea. There were comments made about specific cases that Ms Hawea had worked on to provide examples of the gaps in her practice.

Decision

[28] I do not see that the meeting on 13 September constituted a disadvantage. I am satisfied that performance issues had previously been raised with Ms Hawea, albeit in a less formal manner than that which may have been ideal.

[29] During the investigation meeting, Ms Hawea accepted that she had been given examples of issues raised during the course of the meeting and then given an opportunity to address them. Ms Hawea said she found the September meeting upsetting and it was overwhelming. She said a lot of it was hazy. She could remember some of it but not all of it.

[30] An employer is entitled to raise matters of concern regarding performance; indeed it has an obligation to do so, particularly given the area in which Ms Hawea was working. I do not consider that the issues were raised inappropriately. While Ms Hawea may well have found the meeting upsetting, any person whose performance is being questioned will find that an upsetting matter.

Return to work

[31] In July 2005, Ms Hawea approached CYFS and advised that she wished to return early from her leave without pay. CYFS was prepared to consider an early return but wanted to be satisfied that Ms Hawea was fit for work because the last information regarding her health was that she was not capable of working safely in any capacity. That advice had been provided by a report dated 20 October 2004.

[32] Ms Susan Ross, manager, met with Ms Hawea on 29 July 2005 to discuss a possible return to work. She said the meeting was professional and they reached a number of agreements. In particular, Ms Hawea agreed that she needed to have a medical assessment to ensure that she was fit to return to work and further that she would have a performance plan put in place on her return to work.

[33] Ms Ross said that she had noted from Ms Hawea's file that she had been placed on a performance plan shortly before taking her leave without pay and therefore it was appropriate that she should return to work on a performance plan, particularly as there had been a number of changes in practice in the time that she was away. Ms Hawea agreed to both those requirements. Ms Margaret Richardson, human relations consultant, attended the meeting with Ms Ross.

[34] Ms Ross arranged for Ms Hawea to attend a medical assessment on 14 September 2005. That was confirmed to her by letter dated 25 August 2005. Ms Hawea undertook that following the medical examination a report was to be provided to CYFS on 14 September 2005. A second report was required to clarify certain matters that had not been addressed in the earlier report and the supplementary report was received on 17 October 2005. The reports advised that Ms Hawea ought to return to work in a graduated manner allowing time for exercising and with weekly supervision.

[35] Ms Ross wrote to Ms Hawea and to the occupational medical specialist on 3 November 2005 setting out a basis that she understood would be appropriate for Ms Hawea's return to work. Ms Ross proposed that Ms Hawea start back the following week on Monday, 7 November 2005. Ms Hawea was agreeable to the basis proposed for a return to work, but asked to delay her return for a further week due to some family issues. She commenced work on 14 November 2005.

[36] Ms Hawea returned on a graduated basis but on full pay. The shortfall in hours worked was deducted from her sick leave. Unfortunately, due to an oversight in the payroll division, initially Ms Hawea was not paid her full time salary but that was rectified as soon as it was brought to Ms Ross' attention.

[37] The applicant has a claim for unpaid wages. It is not at all clear to me what this relates to, given that the respondent says that the full time salary issue was rectified and the applicant accepted that in the course of the investigation meeting. It is therefore surprising to find this issue addressed in the applicant's closing submissions.

[38] Ms Ross said although Ms Hawea had initially agreed to having the performance plan under supervision, she later retracted that agreement, saying her lawyer had told her not to talk to anyone about the plan and that she would only attend clinical supervision which made it difficult for her manager to effectively manage her.

[39] As Ms Hawea objected, the proposed performance plan was not implemented. Ms Ross said that Ms Hawea had an elderly Maori woman present with her at that meeting. Ms Hawea does not recollect that. Ms Hawea says that she did not agree to the performance plan.

[40] I found Ms Hawea's recollection of meetings and her written evidence to be confused and unreliable. Dates of meetings were incorrect and Ms Hawea's recall was not good. On the balance of probabilities, I think it is more likely than not that Ms Hawea did initially agree to the performance plan and then later, after talking to her lawyer, decided that she would retract that agreement.

[41] Ms Hawea initially alleged that it was unreasonable for the respondent to require a medical examination prior to her return to work. At the hearing, that claim was dropped and it was agreed that that was a responsible action on the part of the employer, given Ms Hawea's past medical history. The claim then changed to there being an issue regarding the length of time it had taken the respondent to get medical reports from the medical practitioners. There could be any number of reasons why a medical practitioner took a particular period of time to see a person and file a report. Given that this matter had not been raised by the applicant prior to the hearing, there was no evidence from the medical practitioner concerned. In any event, I am not satisfied that there was any sort of undue delay in her seeing the doctor and in the

provision of the doctor's medical report. Ms Hawea was not in fact due to be back to work until December. The respondent was under no obligation to facilitate an early return to work. It chose to do so in order to accommodate Ms Hawea.

[42] While it is understandable that Ms Hawea was upset about having a performance plan implemented upon her return to work, when she objected to that, despite her earlier agreement, the respondent did not proceed with implementing the plan.

[43] There was no disadvantage to Ms Hawea in any of the matters surrounding her return to work. Ms Hawea does not have a personal grievance.

Costs

[44] Costs were reserved. If the parties are not able to resolve the matter themselves, the respondent should file a memorandum on costs within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority