ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2013] NZERA Wellington 154
5423590

	BETWEEN	PHILIP PETERS Applicant
	A N D	HOUSING NEW ZEALAND CORPORATION Respondent

Member of Authority:	G J Wood
Representatives:	B Paradza for the Applicant B Scotland for the Respondent
Investigation Meeting:	30-31 October 2013 at Wellington
Further information and submissions received by:	15 November 2013
Date of Determination:	28 November 2013

DETERMINATION OF THE AUTHORITY

Factual discussion

[1] The applicant, Mr Phil Peters, worked for the respondent, Housing New Zealand/HNZ, as a housing adviser in its Porirua call centre. Mr Peters worked as one of a team of two on night shift with Housing New Zealand. During part of his shift he was supported by his team leader, and he also reported to the Acting Manager of the Porirua services centre. However for most of his shifts he was working unsupervised, responding to calls from HNZ tenants. Such calls were normally dealt with within a few minutes. While the need for a night shift was basically to provide cover in case of urgent maintenance requirements, HNZ advisors on the night shift gave a full array

of information to HNZ tenants about their tenancy issues, as they were trained to do. Mr Peters also had paper work to do if calls were light on any given night.

[2] One particular tenant, with whom HNZ was in dispute, was a tenant who I identify as Mr Y. There is an order prohibiting the publication of any information that might lead to identify the names of any HNZ tenants, including Mr Y, and his interactions with Mr Peters and HNZ, but they are mentioned because they have some linkage with this employment relationship problem. Mr Y's disputes with HNZ related to, amongst other things, a dispute over the failure of HNZ to process a claim for income-related rent (with HNZ claiming it had not received such an application in 2012), whether Mr Y in fact lived in the accommodation provided by HNZ, and whether or not any actions of HNZ in respect of Mr Y were fraudulent. Given the length of the dispute and the fact that Mr Peters was one of only four staff ever rostered on for night shift, his ongoing contact with Mr Y, who rang HNZ on average ten or more times a day, was inevitable.

[3] Mr Peters, as well as anyone in HNZ at least, developed a rapport with Mr Y, who often sought him out when calling HNZ. Mr Peters came to believe that Mr Y was entitled to have his claim for income-related rent processed by HNZ and took this matter up with the income-related rents team (the IRRT) within HNZ. Accordingly, Mr Peters' emailed them on 20 March 2013 stating, amongst other things, that Mr Y had been *ringing constantly to try and fix this problem* and asking someone in the IRRT to make contact with him as soon as possible to avoid Mr Y being evicted. After further calls to Mr Peters from Mr Y, Mr Peters sent another email on 21 March requesting urgent action on Mr Y's behalf.

[4] The Manager of the IRRT responded that morning, telling Mr Peters it was important that Mr Y be connected with a particular specialist, who needed to deal with Mr Y directly. The email also contained some unfortunately worded comments about HNZ's rights as landlord to *set whatever rent we want and if we choose not to process an IRR again that is our choice...*

[5] Mr Peters responded that morning stating that Mr Y could not be transferred to the specialist because of the time of day, that the IRRT Manager was incorrect about the legislation and indicating that the IRRT's *choice not to process the IRR would then be in breach of the law, [Mr Y] believes this and I agree with him.*

[6] The IRR Manager responded the next day, quoting from the legislation, which required HNZ to be assured it had all the correct relevant information to process an IRR claim and noting that Mr Y *claims to live at the property; we are not satisfied that this information is accurate.* It was implicit from this that HNZ believed that the IRR provisions did not apply because it was not satisfied that it had all information reasonably needed to calculate an income-related rent for Mr Y's housing.

[7] This email exchange eventually reached the attention of the Acting Services Manager for Porirua. She had some concerns about Mr Peters' actions and whether he was properly carrying out his duties as a HNZ tenancy housing advisor, whose role was to provide information, not specialised assistance in the IRR area, where there was a whole team who carried out such appraisals.

[8] As part of the investigations held by the Manager and Human Resources, transcripts of Mr Peters' telephone interactions with Mr Y for the period 20 March to 2 April 2013 were made. In addition, an email from Mr Peters' team leader was prepared and was distributed before Mr Peters' shift on 28 March 2013, which was just before the commencement of the Easter long weekend. Mr Peters was one of several staff who were informed:

> *…Should the tenant call to make any further inquiries regarding his complaint and IRR DO NOT enter into any further conversation and advise as appropriate*
>
> - *follow-up contact will be made by the 8th April regarding his IRR*
> - *further information the tenancy is being provided by Area Manager for Hutt North ...*
> - *information requests regarding his complaint are being provided by ...*
>
> *The above contact points have been provided to the tenant in a formal communication by the Regional Manager.*
> *The escalation contact over this holiday period and after hours is to transfer this customer to .....*
>
> ***In Nutshell***
>
> ***DO NOT enter into discussion and transfer the customer as required and after hours contact is*** *…*

[9] This email followed a general alert, which Mr Peters had overlooked, requesting staff to refer Mr Y directly to three named individuals. Mr Peters received the email, but claims that he understood it only lasted over the Easter period. There is

nothing in the body of the email to lead one to such a conclusion, other than the use of the words *holiday period*. However those words are immediately followed by the words *and afterhours*. For these reasons and for reasons given below it was therefore open to HNZ to expect that such a direction would be followed. Indeed, Mr Peters' co-worker (a supporter of his) did in fact follow the direction to the letter. For whatever reasons Mr Peters did not do so and had a further conversation with Mr Y on 2 April 2013.

[10] The transcripts of the four conversations show Mr Peters empathising with Mr Y's issues, which is undoubtedly good practice for a person in his position. However the calls are also punctuated with comments of concern to HNZ. These include the following on the following dates:

20 March 2013

- Some of the notes taken by a co-worker are *unusual. I wouldn't put them in. I don't think they are professional...*

- Mr Peters informing Mr Y that the IRR was not processed correctly at the right time and this has led to an order from the Tenancy Tribunal for him to vacate and that this *should have been self evident to anybody who sees the case. I made that point clearly, so they can't.*

- Mr Peters doing his own research on the Housing Restructuring Act and telling Mr Y that with respect to his IRR that *essentially you should never have been declined.*

25 March 2013

- *I can see the problem, it's obvious one, and it confuses me that they haven't sorted it out. They haven't gone to any lengths to get the information that they're looking for.*

- Mr Y's response to the above point is – *Now they're going to mediation? To mediate what? Fraud?* Mr Peters responds – *exactly*.

- He also states *there's really no excuse why they haven't contacted you on this number.*

26 March 2013

- Mr Peters acknowledges that he was required to connect Mr Y with the specialist in the first instance.

- He reads out his concerns that he raised with the IRR Team about Mr Y's claim, ending with ... *I really shouldn't read this in its entirety of the email, but I have*.

- Mr Peters states - *As far as it goes if you do end up having to go to Tenancy Tribunal you can ask for me to come along and support you I will. I'm frustrated and angry.*

- He also states - *Ya know, personally, I've staked my career somewhat on this aspect. It seems to me whatever I do, they are either saying no you're wrong. Ya know this is what we're going to do. I say there's a simple solution. Work out the IRR, and see what's left, the difference in arrears and get it sorted. I believe it would take them maybe 10-15 minutes, instead of the hours and hours of your time and their time – why can't they just do their job is all I'm thinking.*

- Mr Peters refers back to the earlier email from the IRRT and states - *Now that sentence alone suggests he knows nothing at all about the law regarding the IRR and this is the guy who manages the team. I could understand why .... might not have been trained about IRR because the person who is in charge of the IRR doesn't know anything about it. So yeah, all I can say is that some things will be beyond some people in the Corporation because they may not have been trained at, because it's quite a new system still.* However the IRR manager was seen to be *a different story altogether.*

2 April 2013

- Mr Peters describes the time taken to process Mr Y's applications was *ridiculous.*

- Mr Peters informs Mr Y that all HNZ staff were informed that only certain named people could deal with him.

- Mr Y described that action as unfair and humiliating, and Mr Peters agreed with him.

- Mr Peters stated, over Mr Y's application and interpreting the IRR legislation, that HNZ *wouldn't go to the effort to look into the same piece of information*.

[11] Each call was in excess of 20 minutes.

[12] HNZ had a number of concerns about the content in the calls, and Mr Peters being involved to the degree he did on 2 April, in the face of the direction not to. It was determined to launch a formal investigation and Mr Peters was invited to a disciplinary meeting in four days' time. Unfortunately the letter of notice sent out to Mr Peters stated, amongst other thing:

> *You are advised that these matters constitute serious misconduct and may result in termination of your employment.*

[13] I accept the evidence of Housing New Zealand's witnesses that this was a simple error because the word 'may' was missing. This error was later remedied.

[14] Mr Peters' manager and a human resources advisor approached him, and he suggested that perhaps his team leader should be involved. He was told that was not required. When Mr Peters was read the letter Mr Peters was not provided with a copy of the document he now relies on entitled *Investigate Performance Issues*, because HNZ uses the *Standards of Integrity and Conduct* document, which it did provide to him, amongst other attachments. While the dual existence of these two documents was never satisfactorily explained, I accept HNZ's evidence that the latter document is the one provided to staff and generally applicable within HNZ.

[15] The latter document sets out that staff need to comply with any requirements of HNZC policies. Clause 6.5 deals with taking formal disciplinary action, as well as with suspension, including that an employee must be given an opportunity to make representation on the issue of suspension.

[16] Mr Peters was told of the disciplinary investigation and was given the option to go home to gather his thoughts and prepare for the meeting, or do non-phone work for the rest of his shift, as HNZ was concerned he would be in no fit state to answer

the phones given the news he had just received. Mr Peters chose to carry on with non-phone work, but went home after it had been completed.

[17] Mr Peters and his manager had email discussions subsequently, the effect of which was to, amongst other things, defer the meeting until 8 April. The correspondence also shows that Mr Peters was not away from work for long, because he worked his full normal role for some shifts after the night that he was given the disciplinary letter.

[18] Mr Peters did in fact return to his full duties on 6 April. He was told by his supervisor not to speak with Mr Y again except about any urgent maintenance issues.

[19] However earlier on the same day of the planned meeting on 8 April, HNZ discovered from its list of calls that Mr Peters had again spoken to Mr Y for over 20 minutes. HNZ therefore determined that, as it could not transcribe the content of the discussion in time, consideration should be given to Mr Peters' suspension and that it would not be beneficial for the disciplinary process to continue when new concerns had come to light.

[20] Mr Peters was not prepared to discuss the issue of suspension when raised by HNZ, as he claimed he did not have any knowledge of the allegations. However, the call by Mr Y had been made that day and Mr Peters was made aware that suspension was being considered because of that conversation in the context of the prohibition against him dealing with Mr Y. Thus Mr Peters elected to make no submissions although he was given the opportunity. Instead Mr Peters wanted to address substantive issues of why the team leader was not conducting the investigation and who had raised a complaint against him. HNZ did not wish to address those matters at that time.

[21] After a 45 minute adjournment, HNZ returned to announce to Mr Peters that he would be suspended on full pay. Mr Peters was also told that he needed to maintain confidentiality about the process, and in particular not talk to Mr Y about it. This was reinforced in a letter sent to Mr Peters the next day.

[22] The transcript of the 8 April discussion records Mr Peters telling Mr Y that he had been advised that he was not allowed to speak to him and that he must speak to other people in the organisation. These comments were made on several occasions during the first minute of the call. He then informs Mr Y that matters were being

taken up *directly to me* and that he was not permitted to go into what was going on, but that Mr Y needed to ring the others dealing with his case. He then informed Mr Y, in response to Mr Y's inquiry, that this direction came from his manager. Mr Y stated that people in the SSC were watching what was happening in HNZ to ensure staff do not end up being targeted. Mr Peters responds *trust me, may well happen today um tonight in fact.* Mr Peters then informs Mr Y that he intended to use a personal email in support of him that Mr Y had sent. He then says that he really must end the call, but then goes on to discuss Mr Y's support for him. He then states *it only takes one person to stand up and say the truth and um I hope that we, what has happened in the past and just know that if I could I would still be here helping you out.* He then again says that he is truly and sincerely sorry that he has to end the call, but in fact does not end the call. Instead he talks about him doing his best for Mr Y and offers to send an email on his behalf to one of the people Mr Y was to be directed to.

[23] On 10 April Mr Peters made a formal complaint of bullying and harassment against his manager, with whom he had previously had concerns over matters such as changing his break times. HNZ took two particular steps in relation to this allegation. First, it had the manager replaced as the decision maker by her Auckland equivalent, who did not know Mr Peters. Second, it instigated an investigation by a barrister. While subsequent evidence showed that Mr Peters' manager had a very dim view of him and emailed one of her colleagues several times with negative comments about him, the independent investigator found that Mr Peters' claims could not be substantiated. Because Mr Peters' manager was no longer involved in the process, I am satisfied that the process had not been tainted by whatever animus she held towards Mr Peters.

[24] Another disciplinary letter was sent on 17 April 2013 setting out further grounds of concern, namely the discussion with Mr Y on 8 April and another discussion, on 6 April, where he was overheard referring to HNZ's tenants as *arseholes* and accusing them of *diddling the country out of money*.

[25] I note the letter of 17 April sets out the allegations in some detail in six areas:

(a) Inappropriate discussions about HNZ and its processes (with examples given);

(b) Offering to support a client to the Tenancy Tribunal against his employer;

(c) Questioning the integrity and competence of his colleagues (examples given);

(d) Engaging in discussions with Mr Y in direct breach and deliberate breach of lawful and reasonable instructions not to do so on 2 April;

(e) Doing so again on 8 April;

(f) Using inappropriate and offensive language about customers (the overheard discussion on 6 April).

[26] Mr Peters was told that he could face dismissal for these matters which, if proven, may constitute serious misconduct. This seems to reinforce that the previous letter that did not have the word "may" as a result of an oversight, rather than as evidence of pre-determination.

[27] The parties met at a disciplinary meeting on 6 May 2013. At that meeting Mr Peters' then lawyer raised a number of issues about the process, stating in particular that the issues should have been dealt with as performance issues rather than misconduct. Mr Peters' lawyer provided a letter of explanation. In it he stated: *Mr Y is a "difficult" client who is "difficult to please".* He noted that HNZ had now processed Mr Y's IRR *which seemingly validates Phil's point of view all along.* Mr Peters denied behaving wrongly, but rather, simply informed Mr Y that HNZ had made substantial mistakes in relation to his case.

[28] Mr Peters did accept that he should not have offered to support Mr Y in any proceedings to the Tenancy Tribunal. On the other hand, he also stated that what he would have done differently was to ask his team leader about appearing at the Tenancy Tribunal.

[29] Mr Peters accepted that his remarks about the IRR Manager should not have been made, but noted that he was incredibly frustrated.

[30] Mr Peters claimed ignorance of instructions, and conflicting instructions, in the letter and at the investigation meeting. I do not accept that Mr Peters was unaware of the written restrictions on his contacts with Mr Y or the team leader's instructions. It is clear that he chose to override those. As HNZ concluded, Mr Peters' explanation

that he felt the written instruction only related to the Easter period cannot be supported on an objective reading of the document. There is nothing unclear about an instruction that said in effect that he was not to enter into any further conversations with Mr Y. His responses were also not consistent with his own behaviour when he acknowledged to Mr Y that he should not have been talking with him.

[31] In response to the issue of comments about him *staking his career* during his discussions with Mr Y, this was explained as relating instead to Mr Peters questioning someone in authority.

[32] Mr Peters claimed that his comments made about clients, when he did not know that a customer was listening, were not offensive, nor damaged HNZ's reputation. He felt that his comments were alright, because they were made as an aside. I note, however, they were overheard because he made the comments at work, and therefore there was always the possibility that he would be overheard. At the investigation meeting Mr Peters did give a clear apology for his comments that were overheard.

[33] Mr Peters sent another email on 7 May making further explanation. He stated that he was considering raising his concerns about the IRR approval with the Chief Executive directly. But he also accepted that he could have handled matters differently and shown a greater loyalty to HNZ. He also apologised for any offence which has been caused and that he would handle the matter differently in the future and would *continue to seek guidance from the people above me until they responded fully in a way which answered my questions.* This was an equivocal comment, which HNZ took to mean that he would question authority, right up to the level of chief executive (and beyond, as it later transpired), if he did not get the response he wanted. Mr Peters went on to acknowledge that he had made a few less than professional statements, but felt that this would have been better discussed directly between him and his team leader.

[34] Mr Peters' then lawyer sent another email on 13 May, further explaining that he did not wish to hang up on Mr Y although he made some attempts to do so, and that this was an error of judgement, but that it should have been remedied by his superiors had they given him clear direction and intervened earlier.

[35] HNZ also re-interviewed Mr Peters' team leader, who was clear that Mr Peters had been made well aware on several occasions on the restrictions on the interactions he was to have with Mr Y.

[36] Another meeting was held on 24 May, at which Mr Peters reiterated that he would do things differently were the same circumstances to happen, but noting that sufficient training had not been provided. Mr Peters also raised that other staff members had been speaking to Mr Y, although he provided no names when asked to do so. The point was repeated that this should have been dealt with as a performance review matter rather than a disciplinary matter.

[37] At the end of the meeting it was decided that HNZ would then move to provide a preliminary decision about the disciplinary outcomes for Mr Peters. In its preliminary decision HNZ concluded that all but the allegation of questioning the integrity and competence of colleagues (where misconduct justifying a warning was proposed) had been made out to the level of serious misconduct. Cumulatively and separately they were said to justify summary dismissal, other than a final warning for the comments overheard about HNZ's clients. In particular it was noted that Mr Peters questioned HNZ's decision making, record keeping, and gathering of information, in that he told Mr Y that HNZ was not doing anything to rectify issues and that the time taken was ridiculous. HNZ noted that Mr Peters had not raised any of these issues directly with HNZ and that rather than empathising with Mr Y in order to help HNZ and Mr Y, that he was inflaming matters by telling Mr Y that he was frustrated and angry, amongst other things.

[38] HNZ believed that Mr Peters' offer to support Mr Y at the Tenancy Tribunal was not done in the heat of the moment and that it could be repeated in similar circumstances.

[39] HNZ also considered that because Mr Peters disagreed with the actions taken towards Mr Y by some staff he sought to undermine that by collusion with Mr Y. In particular it was considered that this failed to meet HNZ's standards of integrity and conduct.

[40] HNZ considered that Mr Peters had clearly breached the instructions to cease contact with Mr Y and that the transcripts showed that at least on two occasions Mr Peters indicated that he knew what he was meant to do, but carried on discussing

matters with Mr Y anyway. On 8 April, the same thing occurred again, with Mr Peters acknowledging once more that he was aware of the instruction.

[41] Mr Peters admitted inadvertently using the language referred to and apologised, and there was no complaint. However, HNZ concluded that his comments were in breach of the standards of integrity and conduct and values of HNZ.

[42] The conclusions were for summary dismissal, except for the issue of questioning the integrity and competence of his colleagues (a warning) and offensive comments about clients (a final warning).

[43] Mr Peters was given the opportunity to respond in writing, which he did. There he noted that he had apologised for not handling the cause of Mr Y in a manner consistent with HNZ's policies and that he would alter his behaviour in respect of support for clients at the Tenancy Tribunal. He referred to the lack of support within HNZ for Mr Y's concerns and Mr Y's persistence, the lack of any specific guidance on how to deal with Mr Y (which is, I note, inconsistent with a clear written instruction on how to deal with him), that the directive only applied over the Easter Holiday period (which is inconsistent with what the directive clearly stated), that he was given no instructions on how to terminate the calls and that instead HNZ should have contacted Mr Y and told him not to ring Mr Peters.

[44] In its final decision summarily dismissing Mr Peters, the Auckland-based manager effectively repeated her conclusions in the preliminary findings. However there was also reference to HNZ's conclusion that Mr Peters was given specific guidance on how to handle calls from Mr Y, as set out in email and as given orally by Mr Peters' team leader. With respect to the Tenancy Tribunal issue, HNZ remained concerned that if Mr Peters did not get the answer he wanted from his team leader, he would go to other staff in the organisation in an effort to get the position reversed, as was consistent with his email of 7 May. It was therefore concluded that Mr Peters could not be trusted to follow the instructions of his team leader.

[45] HNZ was of the view that Mr Peters had twice deliberately failed to follow a lawful and reasonable direction to limit his interactions with Mr Y to maintenance issues and that the transcripts supported that. In its decision HNZ noted that Mr Peters was working with little supervision and that the issue was about HNZ's

ability to trust and have confidence in Mr Peters' judgement, which it did not see as a performance issue. Because it would have to monitor all of his calls, given its concerns, HNZ decided against transferring Mr Peters to the day shift as an alternative to dismissal. Therefore Mr Peters' employment was terminated in respect of all the allegations, except the undermining of colleagues and offensive comments about customers.

[46] While the parties made substantial efforts to resolve matters, this has not proved possible and therefore it falls to the Authority to make a determination.

The law

[47] Section 57 ff in *Angus & McKean v Ports of Auckland Ltd* [2011] NZEempC 160 sets out how the Authority is to deal with claims for unjustified dismissal.

> *The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer's dismissal or disadvantage of the employee, and how the employer did it. This man plead findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if facts about material events are disputed.*

[48] At 58

> *Next, relying on evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it.*
> *Sub-section (3), (4) and (5) must be applied to this exercise.*

[49] At 59

> *Finally, in determining justification under new s 103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or the Authority must do so objectively, that is ensuring that they do not substitute their own decisions for those of the fair and reasonable employer in all the circumstances.*

[50] The issue of the difference between poor performance and serious misconduct was dealt with in *Chief Executive of the Department of Corrections v Imo* (unreported, Shaw J, AC57/07, 14 November 2007) as follows in para. 49 ff.

> *The question of where any particular behaviour by an employee falls on the spectrum between the two extremes of poor performance and serious misconduct will depend on a number of factors. These include but are not limited to whether the employee's acts were deliberately inimical to the employer's interests (*Honda New Zealand Ltd v New Zealand Shipwrights Union *[1990] 3 NZILR 23); the effect of the employee's actions on the employer's business (*W & H Newspapers Ltd v Oram *[2000] 2 ERNZ 448); and whether an employee could reasonably have been given an opportunity to mend his ways and show that he can do the job (*Polkey v A E Dayton Services Ltd *[1987] 3 All ER 974, 983-984 (HL)).*
>
> *All of these aspects must be examined in the light of the circumstances of the parties at the time which may include the nature of the employee's work; the training and support afforded to the employees; the background leading to the allegations including any outstanding performance issues which may have preceded the dismissal; the length and type of service of the employee; the nature and standards of performance reasonably to be expected by the employer; and any statutory or policy expectations imposed on or by the employer*.

Determination

[51] I turn first to how HNZ acted and assess what is known as procedural fairness. While I accept that the investigate performance issues document would have been in existence at the relevant time, it did not appear to be published on the intranet, HNZ relied on its primary document (S*tandards of integrity and conduct*), which was published on the intranet to all staff. While both deal in some detail with how to take formal disciplinary action, I accept that it is the standards of integrity and conduct document that is the primary document and was binding on HNZ. In any event I conclude that there has been no breach by HNZ of the Investigate Performance Issues document, which can deal with misconduct as well as performance issues, which effectively covers the same ground. I disregard the latter document from here on in the analysis.

[52] I note that the document, while setting out the expected process HNZ will follow, expressly provides at clause 1.0 that it provides guidelines only and that HNZ is entitled, where appropriate, to follow a different procedure.

[53] While 6.2 does provide that the emphasis should be on corrective action to improve performance rather than punishment, it clearly does not apply to allegations

of serious misconduct, where issues of trust and confidence come into issue. Rather it refers to performance standards generally.

[54] It is true that had HNZ intervened directly with Mr Peters as a result of his interactions with the IRR Manager by email, then matters may have turned out differently. However, that is to place HNZ in a position of having to have had perfect knowledge of how Mr Peters was to behave in his future interactions with Mr Y, something beyond even the most fair and reasonable employer. In any event, HNZ did take action to try and prevent such issues by issuing the prohibitions on staff such as Mr Peters dealing with Mr Y, which he subsequently failed to observe. Furthermore, it is clear that HNZ did move on to looking at the issues fairly quickly and that this would have happened even more quickly had Mr Peters not complained about his manager, leading HNZ, responsibly, to replace her as decision maker. I therefore reject the claim that Mr Peters' interactions with Mr Y were being deliberately monitored in order to entrap him into making errors.

[55] The policy refers to *line managers* carrying out the disciplinary process. While I accept that technically Mr Peters' team leader was his line manager, the reference to line managers plural means that it was not a breach of policy for HNZ to delegate the process to his manager rather than his team leader. Her replacement following Mr Peters' complaint about her cannot be (and was not) questioned as unfair. In any event, Mr Peters was in dispute with his team leader over whether he had received clear oral instructions from him to limit his interactions with Mr Y. In these circumstances it would have been entirely inappropriate for the team leader to be the investigator and decision maker. Furthermore, the policy did not have to be followed word for word in all cases, as noted above. Even if I were wrong on these points, such an error by HNZ would undoubtedly be a minor defect in the process and did not result in Mr Peters being treated unfairly. A full process involving several meetings and much correspondence was carried out, and Mr Peters' behaviour was assessed by a manager reasonably removed from him, but knowledgeable about his work.

[56] While it is not best practice to seek to prohibit employees under investigation from discussing their situation with others (as an employee may wish to canvass support for their position from any number of sources, including co-workers and even clients) I accept the evidence from human resources that any request for exemptions

would have been positively considered, that there were no such requests, that this concern was not raised at the time and that there was no evidence from Mr Peters that this prejudiced his defence of the allegations in any way. Similarly, when Mr Peters was given the opportunity to name staff who had also breached the instructions, he failed to do so. I note also that one of those witnesses who did give evidence on Mr Peters' behalf at the Authority highlighted the fact that the instructions were clear and that he had limited his interactions with Mr Y accordingly.

[57] I have already dealt with the error of leaving out the word *may* in one of the disciplinary meetings. That is not sufficient evidence of pre-determination, and the fact that Mr Peters complained about his manager, leading to her being removed as the decision maker, is evidence to the contrary.

[58] I accept that there was clear evidence of alleged serious misconduct, as analysed in more detail below, thus permitting HNZ to move directly to a disciplinary process without the need for a formal preliminary investigation. In particular, there were directions given about how staff were to limit interaction with Mr Y, and these had clearly not been followed. While there are no specific examples of serious misconduct in any policy or document that HNZ seeks to rely on, I accept that the duties of fidelity and to follow lawful and reasonable instructions are so clear and so fundamental to the law of employment relationships that HNZ was on sound ground in investigating the issues in a disciplinary setting.

[59] I do not accept that Mr Peters was unjustifiably suspended when informed that he may carry on doing work, but not on the phones, for the evening. Even if it was a suspension on the basis that he was not allowed to carry out his full range of duties, in my conclusion this was justifiable on the basis that Mr Peters would not have been in a position to professionally deal with calls on behalf of HNZ the very evening serious allegations of misconduct were provided to him. This is because HNZ, knowing Mr Peters, justifiably felt that he would not be in a good enough state of mind to deal with customers on the phone that evening while dealing with such serious matters.

[60] I also conclude that Mr Peters was later justifiably suspended. He had been clearly informed in different ways not to continue discussions with Mr Y. But it was clear that he had had another call of some length with him that very day. This was clearly grounds to justify a suspension, given the apparent repeated breach of direct instructions. In this regard, Mr Peters was given an opportunity to respond over a

matter that would have been clear in his memory, and it was open to HNZ not to accept his desire to carry on working without any explanation for the latest discussion with Mr Y.

[61] I do not accept that it was not open to HNZ to consider the course of conduct by Mr Peters during the disciplinary process. Mr Peters' choices to complain formally about other managers and to escalate matters to the Chief Executive, the Minister and the SSC are not grounds for discipline in themselves, but I do not consider that HNZ did take that course of action. Rather, they do give some insight into how Mr Peters reacted to being questioned and whether he would obey lawful and reasonable instructions in the future. In any event I accept HNZ's evidence that these were supportive matters, but not reasons for dismissal, as HNZ's primary focus was, as it should be, on the allegations of misconduct in relation to his dealings with Mr Y.

[62] I do not accept Mr Peters' claim that there was disparity of treatment between him and others who took calls from Mr Y. Instead I conclude that HNZ was under no duty to search through all of Mr Y's calls to other staff, especially given the number of staff and the large number of calls by Mr Y each day, when Mr Peters would not provide information of which staff members he believed had breached HNZ's standards in the same way as he had. Had he been prepared to name other staff, and HNZ had declined to enquire into those calls, then the situation may well have been different. However I also note that the transcripts provided at the investigation meeting from other staff did not display the support for Mr Y and opposition to HNZ shown through the transcripts of Mr Peters' calls.

[63] In all other respects I accept that HNZ acted as a fair and reasonable employer could have done and in doing so followed its own *Standards of integrity and conduct*. The key point here is that a fair and reasonable employer could rely on the transcripts that it had produced as to what Mr Peters had said at the time. In many ways this made things much easier to investigate, for both HNZ and the Authority, because the transcripts are a far better option than relying on people's memories of what was said many weeks or months later. I therefore confirm that for the purposes of section 103A the investigation was sufficiently proper and fair.

[64] I now turn to what HNZ did, namely the decision to dismiss, and whether that was justifiable. HNZ essentially determined that there were four grounds that separately and in conjunction constituted grounds for summary dismissal.

[65] It was open for HNZ to conclude that this was not a matter of insufficient training. Mr Peters' job involved dealing with customers, many of whom could be difficult. There had never been any problems in the past with him dealing with such clients and he had never raised any issues about a lack of training about that. I accept that Mr Peters had been trained in dealing with difficult customers and that he was quite capable of doing so when he chose to. I also accept that given his length of experience, he should have been adept at this skill in any event.

[66] It was a key part of Mr Peters' job description to provide *a fair, timely and appropriate advisory service to tenants and customers by responding to general enquiries promptly, identifying maintenance needs accurately and processing appropriately and informing customers of eligibility, needs assessment and waiting list processes*. Clearly this implies that specialist services, as opposed to general services or specialist processes, would be dealt with by specialist advisors within HNZ. That provides support for the assessment by HNZ that Mr Peters was not to criticise the actions of HNZ's specialist staff. Indeed he was responsible under the job description for ensuring positive working relationships with colleagues. He was clearly required to be a *self-manager*, as significant trust was placed in him to communicate properly with clients given his hours of work, when little or no supervision was available. Notwithstanding any specific HNZ policies on what constitutes serious misconduct, the law is clear that it may occur wherever an employee breaches her or his duties of fidelity to his or her employer, and where he or she breaches a lawful and reasonable instruction to cease from certain activities. Not behaving in the interests of one's employer, or failing to follow reasonable and lawful instructions, can often be seen an inimical to the trust and confidence that must exist between employer and employee. If such failures occur then they are clearly in the range of matters that a fair and reasonable employer could consider justifying dismissal. It also follows that they cannot be merely labelled as performance issues.

[67] Here it was clearly open to HNZ, on the basis of the transcripts, to conclude that Mr Peters was deliberately siding with a client against the interests of HNZ, and running down his employer and some of his fellow staff at the same time. Some

examples include his support at the time for Mr Y should he continue to be involved in Tenancy Tribunal proceedings; his anger at his employer; his repeated criticism of HNZ to Mr Y because of his belief (which remains unproven, despite Mr Y eventually receiving his IRR, because HNZ did not have to process an IRR if it believed it did not have full information from Mr Y, and it did not at that time believe that he was in residence at the property in question) that HNZ did have to process the IRR, whatever its specialist staff advised; determining for himself that HNZ was in the wrong and telling Mr Y that; telling Mr Y that the HNZ had not gone to any lengths to get the information it was looking for; carrying on with calls when he knew he was not permitted to; and describing HNZ's approach to dealing with Mr Y as ridiculous.

[68] Furthermore, the fact that Mr Peters knew that he was acting in disobedience to his instructions is clear throughout the last two conversations, where on numerous occasions he tells Mr Y that he either should not be doing this, or that he is putting his career at risk in doing so. It was therefore open to HNZ to conclude that this was not just about how long the calls were taking, but also about the content of the calls.

[69] I have no doubt of the lawfulness and reasonableness of the instruction to not deal with Mr Y, but to leave it to HNZ's specialists, the key one of whom had all the details relating to HNZ's interactions with Mr Y, unlike Mr Peters. Furthermore, there was no doubt as to the clarity of the instructions provided to Mr Peters not to have dealings with Mr Y, but to leave it to HNZ's chosen liaison staff. It follows that Mr Peters clearly disregarded these instructions, including during a period when he knew that he was under investigation for that very thing. Mr Peters did not need to share all the information on 8 April that he did with Mr Y. In doing so he clearly again breached a lawful and reasonable instruction.

[70] Finally, it was clearly open to HNZ to conclude that Mr Peters' offer to support Mr Y in the Tenancy Tribunal against his own employer was in breach of his duties of fidelity. Mr Peters acknowledged as much in evidence in the Authority, but his response to HNZ at the time involved much less acceptance of blame.

[71] I consider that the real issue in dispute in this case is whether or not it was open to HNZ, as a fair and reasonable employer, not to give Mr Peters an opportunity to mend his ways and show that he could do his job fully and properly. I have no doubt that another fair and reasonable employer may have decided to give Mr Peters another chance, although no doubt under warning. That would have been an option

open to a fair and reasonable employer because Mr Peters did have a good performance record and he did express regret for some, if not all, of his actions. He was also clearly acting in what he thought was the best interests of the client, which is an important facet to any customer service advisor's job. However I accept that HNZ did consider all these factors and the test is whether a fair and reasonable employer could justify summary dismissal here, not what the Authority thinks might be another available course of action. It certainly considered alternatives to dismissal, this being covered in the dismissal letter itself.

[72] HNZ could rely on the repeated actions of Mr Peters in his failures to obey clear instructions and in acting against the interests of his employer by so trenchantly and repeatedly criticising it and his fellow staff members, given his semi-autonomous role working night shift. Thus it was open to it to conclude that there had been a loss of trust and confidence justifying summary dismissal. In particular, Mr Peters' failure to seek and/or accept specialist advice and/or management assistance, and his repeated failure to follow a lawful and reasonable instruction about his contact with Mr Y demonstrate why HNZ came to the conclusion it did. Just as one example, it is fundamental to the employment relationship that when a lawful and reasonable instruction is given an employee will follow that instruction and not repeatedly and deliberately flaunt it.

[73] I have determined that HNZ's actions and how it acted are what a fair and reasonable employer could have done in all the circumstances. It therefore follows that Mr Peters' claims must be dismissed.

Costs

[74] Costs are reserved.

G J Wood
Member of the Employment Relations Authority