

**Attention is drawn to the
order prohibiting publication
of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 144
5442608

BETWEEN

GAVIN TEMARA
Applicant

A N D

CHIEF EXECUTIVE OF THE
MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: T G Tetitaha

Representatives: A Davies, Counsel for Applicant
S Cook/S McFetridge , Counsel for Respondent

Investigation Meeting: 10 to 11 March 2014 at

Submissions Received: 7 and 17 March 2014 from Applicant
6 and 17 March 2014 from Respondent

Date of Determination: 14 April 2014

DETERMINATION OF THE AUTHORITY

- A. There is a non-publication order in respect of evidence and pleadings that identify the names of the respondent client children and families giving rise to this matter.**
- B. Gavin Temara was not unjustifiably dismissed.**
- C. The application for personal grievance is dismissed.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of**

this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Gavin Temara was employed as a social worker by the Ministry of Social Development (MSD) until he was dismissed on 18 November 2013. This was because he failed to notify his superiors of a missing child in their care, failed to document the child's status, brought his employer into disrepute and displayed a negative attitude towards Police dealing with the child.

Non Publication Order

[2] There is a non-publication order in respect of evidence and pleadings that identify the names of the respondent client children and families giving rise to this matter. The respondent client children and family names shall be referred to as the K family.

Facts leading to dismissal

[3] Mr Temara was employed as a social worker on 21 June 2004. He transferred to the Clendon worksite of Child Youth and Family in July 2008.

[4] In 2010, the K family came to the attention of Child Youth and Their Families Service (CYFS). A file was created and a responsible social worker assigned at the Papakura CYFS site.

[5] In May 2011, Mr Temara received a verbal warning based upon two complaints about his behaviour. The behaviour was "negative" attitude and behaviour at a meeting on 5 November 2010 and failure to inform his supervisor about a child client's travel plans.

[6] On 12 September 2011, Mr Temara received a final written warning. The behaviour was failure to complete a Court review plan on time, failure to complete a financial proposal for home to life outcomes, failure to review or assess the approval process for a proposed caregiver, failure to prepare a care plan for a child in a post-seven day emergency placement, and making financial commitments to a caregiver that did not meet Ministry criteria.

[7] Between February and April 2013, Mr Temara's (then) supervisor, Marcelle Lamont, made several complaints to her manager about his alleged "*deterioration in his attitude and performance*". This was inconsiderate behaviour towards staff, unexplained absences and large amounts of sick leave.

[8] By 16 March 2013 his supervisor noted continuing failures to contact children and families and an inability to meet deadlines. On 2 April 2013, his supervisor again noted Mr Temara's absence during a period he was supposed to be on duty without arranging any replacement. He was transferred to another supervisor, Terri O'Neill, shortly thereafter.

[9] Between 2010 and 17 June 2013 26 notifications of concern were received about this family. In May 2013, the K family file was transferred from the Papakura CYFS site to the Clendon CYFS site. Mr Temara was assigned as the responsible social worker.

[10] A pathways meeting was held on 9 May 2013 to determine the progression of the K family file. Mr Temara was present with his supervisor, Terri O'Neill and four other staff. Concerns were raised about the parents' ability to control an 8 year old child (MK) aggressive behaviour. MK had recently absconded from the family home. He was located by Police. The next steps required were a home visit, sight and interview the children, assess immediate safety of and complete safety assessment within timeframe. The timeframe was seven days. Mr Temara was directed by Ms O'Neill to complete a safety assessment within the seven day timeframe by the duty supervisor.

[11] Mr Temara completed a safety assessment report on or about 10 May 2013 without interviewing the K children. The report identified a long history of neglect and violence. He did not recommend further assessment because there was existing involvement addressing concerns, namely a family group conference (FGC) to be held. He did not interview the K children.

[12] On 14 May 2013, a further report of concern was received about a domestic violence incident between the K parents. The mother was issued with a temporary protection order. The timeframe for responding to this notification was given a seven day timeframe.

[13] On 16 May 2013, Mr Temara was directed to complete a further safety assessment on the K family. On 20 May 2013, Mr Temara completed a safety assessment report without interviewing the K children. His report identified vulnerable infants and one of the children, RK, a 10 year old, was exhibiting dangerous and criminal behaviours. He again recommended no further assessment was necessary because there was existing involvement addressing concerns. This was through an open intervention, FGC and Court applications. He again, did not interview the children.

[14] A professional's case consultation about the K family occurred on 23 May 2013. It recommended a referral for FGC, obtaining s.78 orders for RK only and a s.140 care agreement for the remaining siblings.

[15] Mr Temara prepared and obtained s.78 orders for RK only. He then interviewed RK. The child raised no concerns about the K family home environment. He also had an informal chat with another 15 year old sibling, MIK, while shopping for clothes for RK at The Warehouse. MIK raised no concerns about the K family home environment. He did not interview the remaining K children.

[16] On 1 July 2013, the social worker in schools dealing with the K family contacted Mr Temara to advise that 8 year old MK had gone missing from the family home. He had been missing since the previous day. The parents were going to the Police. The Police also contacted Mr Temara about MK's disappearance.

[17] Mr Temara took no further action on the file. He did not note MK's disappearance in CYFS records or advise his supervisor this had occurred.

[18] On or about 4 July 2013, Clendon CYFS site manager, Jonelle McNeill, was contacted by an outside agency advising the Police were going to go to the media about MK, a child CYFS were involved with. Ms McNeill reviewed the K family file overnight.

[19] The following morning, Mr Temara was contacted by Police advising they had located the child. He told the Police he could not pick the child up and they were to ring the after-hours service. The Police were unhappy with his response. They contacted Ms McNeill. She went to the Police station shortly thereafter.

[20] Mr Temara arrived at work later that morning. He was met by Nicola Windle, Clendon CYFS Practice Manager. They both went to the Police station. On the way to the meeting, Mr Temara was concerned whether he needed to have his union involved. Ms Windle told him to seek their advice.

[21] Following their arrival, they met Ms McNeill who subsequently left. Ms Windle and Mr Temara met with the Police to discuss MK. MK had disclosed to Police incidences of violence against the children. During the meeting Ms Windle and the Police were concerned about Mr Temara's negative attitude at the meeting. The Police recommended all children be placed in CYFS care immediately. Mr Temara believed it was too earlier to make that decision. He wanted it to be discussed in a more appropriate forum. He also had concerns about the Police interviewing the children.

[22] MK was placed with emergency caregivers. Custody orders were obtained for all of the K children.

[23] On 10 July 2013, Mr Temara was invited to a meeting to discuss his suspension. It was agreed he would remain on special leave. On or about 16 July 2013, he was advised he was suspended.

[24] An investigation was undertaken by John Mitchell, manager of administrative services for MSD. His report identified five factual allegations giving rise to serious misconduct:

- (a) On 1 July 2013 failure to escalate/notify his site manager MK was missing;
- (b) This failure may have resulted in the Ministry appearing in the media without its knowledge;
- (c) Failure to input CYRAS notes on MK's disappearance and implement a plan to recover him;
- (d) Failure to interview children given the concerns about their living environment and the removal of an older sibling; and
- (e) On 5 July 2013 unprofessional conduct towards the Police dealing with this matter.

[25] He was invited to an investigation meeting. The above findings were summarised and he was invited to comment, bring a support person and advised the outcome may be dismissal. At the meeting he did not have any questions or comments.

[26] On 25 October 2013 he was advised that Ms Thom's preliminary view was there were three concerns namely failure to 'escalate' MK's disappearance to the site manager or other person on the Clendon Leadership team, possible media exposure without the Ministry's knowledge and unprofessional behaviour to the Police. Her view was his actions amounted to serious misconduct and the most appropriate course was dismissal. He was invited to provide further written submissions. Further submissions were provided.

[27] On 13 November 2013, a final decision was made to dismiss Mr Temara.

[28] On 20 November 2013 Mr Temara raised a personal grievance about the dismissal.

[29] On 10 December 2013 Mr Temara applied for interim reinstatement. The matter has come before the Authority for determination.

Issues

[30] The following issues arise:

- (a) Could a fair and reasonable employer conclude Mr Temara's conduct was misconduct justifying dismissal?
- (b) Was the process leading to dismissal of the applicant what a fair and reasonable employer could have done in all the circumstances?
- (c) If the dismissal was unjustified, what remedies should be granted?

Could a fair and reasonable employer conclude Mr Temara's conduct was misconduct justifying dismissal?

[31] Mr Temara submits his actions do not fit within the definition of serious misconduct within the Disciplinary policy. At best it was "conduct that brings the employer into disrepute". Only potential for this occur was established which is

insufficient to prove serious misconduct. The failure to escalate was not mandated policy or the subject of the investigation report.

[32] This employment relationship was governed by a collective agreement.¹ The collective agreement provides for Ministry policies and procedures are part of the terms and conditions of employment.² The disciplinary action policy³ defines “*serious misconduct*” resulting in dismissal. This included:

- Repeated or deliberate refusal to follow a lawful and reasonable instruction
- Acts of wilful negligence or gross incompetence
- Conduct that brings the Ministry of Social Development into disrepute

[33] The decision maker was Sharon Elisabeth Thom, Regional Director. She had Mr Mitchell’s investigation report, the Ministry’s policies and interviews and statements from Mr Temara.

[34] CYFS assessment and decision-making policy⁴ required “*face-to-face engagement with the child*” as part of the assessment of a child’s safety and risk. The care and protection practice framework⁵ also required a child-centred approach. The framework inferred direct interviewing of the child occurred.⁶

[35] Mr Temara was directed to undertake a safety assessment report twice. The engagement and safety policy required “*engagement with the child or young person and their family.*” This needed to include engagement with any children under the age of five years or for whom the notifier identifies particular concern.⁷ MK had absconded under the first notification and his mother knew but had not reported it. The second notification involved domestic violence between the parents. There was a history of 17 previous domestic violence incidences. Mr Temara, in his evidence,

¹ Nupe Collective Agreement with Child, Youth & Family effective 1 July 2012.

² ABD document 9, page 59.

³ ABD document 1 pp 4-5.

⁴ Respondent ex. 1 produced L Holt, 11/03/14.

⁵ Respondent ex. 3 produced L Holt, 11/03/14 Care and Protection Practice Framework.

⁶ See above. The framework proposed a series of questions “*how are we consulting with and informing the child about practice decisions?*”; “*how we actively involve the child in decision-making processes?*”; if child had “*someone they can talk to*” and ensuring the child “*understood about care decisions and what was happening*”. These questions presuppose direct interviewing of a child.

⁷ Respondent exhibit 6 produced L Holt, 11/03/14 Engagement and Safety Policy (Care and Protection)

relied upon his interviews with the parents and believed he needed further time to establish rapport before engaging the children directly. This was contrary to the expected engagement under the Ministry's policies. The parents' views of the children's safety should be given little weight. They were protagonists. He had no reasonable evidential basis to make any recommendations about the safety of these the children.

[36] The failure to interview the K children when directed to do so for two safety and assessment reports was a repeated or deliberate refusal to follow a lawful and reasonable instruction. It was also an act of wilful negligence or gross incompetence. These were serious misconduct.

[37] At hearing Mr Temara confirmed he was aware of the escalation policy.⁸ He chose not to follow it because the K children (including MK) were not in CYF's care by custody order. He believed he not have the same legal obligations to act. There was no basis for a different approach to MK because the Ministry had no custody orders in respect of the child. The escalation policy clearly states missing children are to be notified to the Executive Manager the following morning and site duty social worker. It does not restrict escalation to children whom are the subject of custody orders. He made no notification the following day. It was not until 4 days later that the Ministry became aware he was missing at all. This prevented the Ministry from using its considerable resources to assist and co-ordinate the location of the MK.

[38] The remaining issues of failure to enter CYRAS notes, reputational damage and unprofessional conduct towards the Police appear more likely to be misconduct issues. Although there was previous disciplinary action about incomplete paperwork and negative attitude, this was not a factor the decision maker took into account. I accept Mr Temara's submission there was potential not actual reputational damage. This would have been insufficient in these circumstances to warrant summary dismissal.

[39] In the circumstances, the Authority determines there was serious misconduct, and a fair and reasonable employer could have concluded Mr Temara's conduct was misconduct justifying dismissal.

⁸ ABD Document 44 pp 280 - 282

Was the process leading to dismissal what a fair and reasonable employer could have done in the circumstances

[40] Mr Temara submits there was insufficient investigation of the allegations because of the disputes and the evidence. The explanations proffered by the applicant were not put to the witnesses by the investigator. There was no contemporaneous review of the applicant's workload prior to the determination it was *not especially heavy*. The professional consequences for Mr Temara require the need to examine his case with greater care.

[41] A Senior Advisor, Pamela May Lafferty, analysed his caseload concluding it evidenced "*avoidance of work, rather than overwork.*"⁹ There was little, if any evidence his workload would have prevented compliance with the Ministry's policies. Certainly not to a degree where a different outcome than dismissal would have been appropriate.

[42] Given Mr Temara did not greatly dispute the facts leading to his dismissal, there was little to be gained in putting his explanation to any of the other witnesses.

[43] Although there are serious professional consequences for Mr Temara, there was no evidence the mandatory matters in s103A were not complied with. The nature of social work requires strict adherence to policies and practice. There were potentially serious consequences for a missing 8 year old child of his wilful negligence or gross incompetence.

[44] In the circumstances, the Authority determines there was no failure to sufficiently investigate these concerns. Therefore the Authority determines the process leading to dismissal was what a fair and reasonable employer could have done in all the circumstances.

[45] Mr Temara was not unjustifiably dismissed. The application for personal grievance is dismissed.

[46] There is no necessity to consider the remaining issues of remedies.

⁹ Brief of evidence PM Lafferty paragraph 22

[47] Costs are reserved. If a party seeks costs, they shall have 14 days from the date of this determination to file submissions. The other party shall have 14 days thereafter to file any reply. The decision shall be made on the papers.

T G Tetitaha
Member of the Employment Relations Authority