

Attention is drawn to the non-publication order at paragraph [1] of this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 89
5437192

BETWEEN

JOSEPH BARTRAM
Applicant

AND

THE CHIEF EXECUTIVE OF
THE MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: Christine Hickey

Representatives: Andrew McKenzie, Counsel for Applicant
Susan Rowe and Jenna Silcock, Counsel for Respondent

Investigation Meeting: 5, 6 & 7 March and 14 April 2014

Determination: 23 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Joseph Bartram was a qualified residential social worker employed by the Ministry of Social Development (the Ministry) in 2007. He worked at the Waimakariri Unit of Te Puna Wai o Tuhinapo Residence (TPW), a secure youth justice facility. On 30 March 2013 three young people resident there attempted to abscond. I have determined that the names of the resident young people will not be published.¹ They are referred to by letters of the alphabet which bear no resemblance to their names.

¹ Using the power under clause 10, Schedule 2 of the Employment Relations Act 2000.

[2] One of the young people was found to have a shift leader key in his possession and a Ministry escort cell phone in his room. He said that Mr Bartram had given both of them to him.

[3] Mr Bartram was suspended pending an investigation and disciplinary process and was dismissed on 16 October 2013 for serious misconduct consisting of:

- On 29 March 2013 providing a key to a young person with the purpose of enabling that young person to abscond,
- On 30 March 2013 providing one of the escort cell phones to that same young person, and that the above actions enabled that young person and two others to leave the Waimakariri Unit and attempt to leave the residence.

[4] Mr Bartram claims that his dismissal was unjustified. He denies that he provided a shift leader key or a cell phone to a young person and says that the process whereby he was dismissed was unfair. By way of remedy he claims reinstatement, wages and benefits lost as a result of his dismissal, compensation of \$12,500 for humiliation, loss of dignity and injury to his feelings and legal costs.

[5] The Ministry considers Mr Bartram to have been justifiably dismissed for serious misconduct. It considers that its processes of investigation and decision making were justifiable. It says that any defects in the process were minor and did not cause unfairness to Mr Bartram. It further says that if the Authority determines that Mr Bartram was unjustifiably dismissed he should not be reinstated or granted any remedies because his contribution to the situation leading to his personal grievance was so great.

Issues

[6] This matter originally came before the Authority as a claim for interim reinstatement. The parties were offered and accepted early dates for a substantive hearing instead. However, for various reasons those dates were unable to proceed. Mr Bartram's application for urgency was withdrawn.

[7] There are a number of issues to be determined. However, both parties agree that if Mr Bartram did give a key and a cell phone to the young person that would be serious misconduct for which summary dismissal would be justifiable. It is also

accepted that those actions could have attracted a criminal charge carrying a fine of not more than \$1,000 for inciting or knowingly assisting any young person *to depart without proper authority from any Residence under this Act*². However, no charge has been laid.

[8] Therefore, the Authority needs to determine:

- (i) Whether the Ministry had sufficient evidence to establish that Mr Bartram supplied a key and a phone to the young person, amounting to serious misconduct;
- (ii) Whether the Ministry complied with its obligations under s.103A(3) and (4) of the Employment Relations Act which consist of:
 - (a) Sufficient investigation,
 - (b) Raising its concerns with Mr Bartram,
 - (c) Giving him a reasonable opportunity to respond, and
 - (d) Considering his explanation before deciding to dismiss him,
 - (e) Other relevant considerations
- (iii) Whether the Ministry acted fairly and in line with other procedural fairness considerations, including:
 - (a) Whether it breached an agreed process by not having a final meeting,
 - (b) Whether it was unfair that the decision maker failed to speak to the complainant, YPA,
 - (c) Whether there was investigator bias.
- (iv) Whether the Ministry acted in line with its s.4(1A)(c) (good faith) obligations when it failed to give Mr Bartram access to information relevant to the continuation of his employment and an opportunity to comment on that information before any decision was made;

² Under s.446(2)(a) of the Children, Young Persons, and Their Families Act 1989

- (v) If Mr Bartram was unjustifiably dismissed whether he should be reinstated and whether he is due any other remedies, after a consideration of his contribution to the situation giving rise to his personal grievance; and
- (vi) Legal costs.

Factual background

[9] Young person A (YPA) had been in TPW for a period of time with Mr Bartram as his “key allocated worker” and was released on 19 March 2013 after serving his sentence.

[10] On Friday evening 28 March 2013 YPA was readmitted to TPW. He was brought in and admitted through the secure sally port area where some of his belongings were kept under lock and key. The belongings he brought in to the residence were recorded. Although all pockets in his clothing should have been emptied and the contents recorded it is not clear that this part of the procedure was followed during YPA’s admission.

[11] The sally port was not accessible to all staff as only shift leader keys, and those of staff more senior to shift leaders, could access all the locks on site.

[12] Mr Bartram came on shift on 29 March 2013 in the afternoon. He was surprised and disappointed to see YPA back in residence.

[13] It was Easter weekend and there were Easter eggs in the staff office some of which were for staff and some to be given to the young people.

The alleged supply of the key and the cell phone

[14] YPA asked Matt Glanville, the shift leader, for a different pair of jeans to be obtained from the sally port. Mr Glanville gave Mr Bartram his shift leader key and asked Mr Bartram to collect YPA’s jeans after he had been on his meal break. YPA later said that he and Mr Bartram had planned that Mr Bartram would obtain the shift leader key and get another shift leader key and hand it to YPA concealed in the jeans.

[15] Mr Bartram went on his meal break to the staffroom, which is in another building. Once in that building staff from shift leader status upwards have access to

the key press where the staff keys are kept. There is also evidence that the key press area was not always locked.

[16] After Mr Bartram's meal break he went from the building in which the key press was located to the sally port, collected a pair of YPA's jeans and walked back to TPW with them and handed the jeans to YPA.

[17] Security camera CCTV footage inside TPW shows Mr Bartram entering after his meal break carrying a pair of jeans and handing them over to YPA. Mr Bartram waited to release the jeans until YPA had both of his hands holding the jeans. YPA then walked away from Mr Bartram and the other young people in the room carrying the jeans and apparently putting something in a pocket or inside his trousers. There is no view of any object like a key.

[18] There is evidence, including from Mr Glanville, that young people are only allowed two pairs of trousers at a time. Therefore, a social worker supplying a young person with a fresh pair of trousers should receive another pair of trousers from them to ensure that the young person only has two and not three pairs of trousers at all times. Mr Glanville said he would have expected Mr Bartram to have collected a pair of trousers from YPA. There is no evidence that he did so.

[19] The following day, 30 March 2013, Mr Bartram went to the administration block, where the escort cell phones were kept, at that time in an unlocked office. Mr Bartram says he went to the administration block to check if some leave forms he thought he had printed off had printed to a printer there when they had not printed in Waimakariri Unit's staff office. However, he did not find any printing in the administration block.

[20] At about 7.15 pm there is CCTV footage which shows Mr Bartram taking YPA and YPE to their rooms, which are alongside each other. Mr Bartram was being *spotted* by another staff member standing at some double doors a few metres away. It is standard practice that staff members must be in the line of sight of at least one other staff member at all times.

[21] Mr Bartram unlocked both rooms and YPE went into his room. Mr Bartram then stepped forward towards YPA, put his hand in his pocket, pulled out and handed YPA an object. A few seconds later both YPs then came out of their rooms. They did not appear to be carrying anything.

[22] When the object was handed to YPA Mr Bartram was partially obscured from the “spotting” staff member’s sight by YPE’s open door.

[23] Mr Bartram says that he decided to give YPA an Easter egg covertly, so that YPE did not see, and so the other YPs did not all clamour for one too. He decided to give YPA an Easter egg because YPA had been pestering him for one all day.

[24] There is evidence that the young people are not allowed food in their rooms and in particular would not have been allowed to have foil such as an Easter egg is covered in as it can be used for tagging. No foil was found in YPA’s room after his attempted absconding.

The attempted escape

[25] At about 8.05 pm that same evening YPA, YPB and YPC used a key to leave through the back door of Waimakariri Unit and enter the ring road around the residences. They attempted to leave the site altogether through the gym. However, a staff member from another residence had called that she had seen young people running around the ring road so staff were on alert. Mr Glanville was taking a break near the gym and heard the message about the ring road so he walked to the gym area and was present when the three young people tried to leave the gym. Mr Glanville had already called a *code red* and the young people were prevented from leaving the residence.

[26] The three young people were taken to the secure unit and were locked in separate rooms.

Recovery of the key and cell phone

[27] The three young people were questioned separately about how they got a key and were asked to surrender it. YPB said that he had obtained the key and had had it for some time although he was unable to say where the key was at that time.

[28] YPC said that YPB was the one who had the key, that it had been posted to him and was a copy of one that had previously been taken from the site³.

³ This was in Mr Glanville’s incident report dated 13/3/13. However, it must have been completed on either 30th or 31st March. The key being brought in from outside is also referred to in Donna McIntosh’s email reporting a discussion with YPC on 31 March 2013.

[29] Staff told the young people that because of the escape attempt they were likely to be sent away to residences in the North Island, especially if the key was not produced. YPA agreed to find the key and went into his room on his own. About five minutes later he gave the key to Kate Marriott, the Team Leader of Operations. Ms Marriott believes that he had hidden it in his rectum.

[30] YPA also said that he had a cell phone in his room in the Waimakariri Unit. The cell phone was recovered from his room that evening. It was a phone that had been assigned to a site escort who had been doing administrative work for about two weeks prior to this. It had not been reported missing.

[31] Once he had handed Ms Marriott the key and while still in the secure unit, YPA told Ms Marriott and Mr Glanville that Mr Bartram had given him the key when he handed over the jeans from the sally port. YPA told them that Mr Bartram had told him it was the Muriwai shift leader key.

[32] YPA was asked what colour tag was on the key when he received it and initially said that it had no tag on it. In a later interview he said it had an orange tag that he had taken off and disposed of before the attempted escape.

[33] YPA also said Mr Bartram had given him the cell phone when he took him to open his and YPE's rooms on the evening of 30 March 2014.

[34] YPA gave the place and approximate times of the alleged two hand over events. CCTV footage was obtained and viewed by senior staff for the identified times and events correlating to YPA's explanations were seen.

The suspension and investigation

[35] On 31 March 2013 Mr Bartram was placed on special leave with pay. On 2 April 2013 Parani Wiki, the then TPW manager, wrote to him outlining the allegations that he had supplied the key and cell phone to YPA with the purpose of enabling the young people to escape.

[36] Mr Bartram was told that an investigation would commence to establish whether he had given the key and phone to the YP and whether he had done anything else to assist in their attempted absconding.

[37] Mr Bartram was invited to a preliminary interview and meeting on 10 April 2013. The meeting was held to decide if an investigation was necessary and to decide whether to suspend Mr Bartram while the investigation proceeded.

[38] Before the meeting began Maureen Love, the Senior Human Resources Adviser who was assisting Ms Wiki with the investigation, showed Mr and Mrs Bartram and Janice Gemmell, Mr Bartram's National Union of Public Employees representative, the CCTV footage of the alleged supply of the key and the cell phone. She also gave Ms Gemmell a copy of a disk with the footage on it.

[39] There is a disagreement about Ms Love's demeanour when she showed the video footage and a claim that she showed pre-determination and bias about Mr Bartram's guilt. I deal with this later.

[40] Mr Bartram did not offer any explanation to Ms Love for either of the events viewed on the CCTV footage at that stage. At the beginning of the meeting Ms Gemmell said that Mr Bartram *denied completely* the allegations in the letter but would not challenge his suspension and agreed that the allegations had to be investigated.

[41] Ms Gemmell told Ms Love and Ms Wiki that Mr Bartram would not respond to the allegations until after the *draft report* of the investigation had been provided when he would decide whether to respond in writing or be interviewed.

[42] Ms Wiki outlined who they would interview as part of the investigation, naming:

Matt Glanville, Makarita, Donna McIntosh and other staff who spoke to the YPs involved [YPA, YPB, YPC, YPD and YPE], other staff who were involved Dan, Anne Forrester and Lauren – Dan and Lauren were in secure when the YPs were brought in.

[43] Ms Gemmell asked that Henry van der Velde also be interviewed as he *was with Joe on his break when he allegedly got the key.*

[44] On 12 April 2013 Ms Wiki wrote to Mr Bartram advising that she would not be able to provide a draft investigation report so that when a report was supplied:

... it will include the findings of the Investigation.

If you continue to choose not to be interviewed or alternatively to not provide a written submission as part of the investigation process then the Investigation Report will be developed without your input. ... Therefore if you now want to be interviewed or to provide a written submission to inform the investigation this must occur by 23 April.

[45] On 23 April Ms Gemmell wrote to Ms Wiki raising concerns that the process of investigation was different to previous employment investigations carried out by the Ministry and suggesting that the proposed process may breach s.103A(3) of the Employment Relations Act 2000 (the Act).

[46] Despite those concerns Ms Gemmell set out Mr Bartram's *preliminary reply* in writing. Mr Bartram said that the object handed to YPA outside his room was an Easter egg and not a phone. He asked for some kind of digital enhancement to be undertaken to assist with better identification of the object.

[47] Mr Bartram also asked for the phone records of the cell phone to be obtained *to shed some light as to the use of the phone.*

[48] Mr Bartram also wanted further video footage including of the sally port when YPA was admitted and any footage that shows whether anyone else handled the jeans before they were handed over to YPA.

[49] Ms Gemmell requested copies of all interview notes and to have an opportunity to comment prior to the investigation report being finalised.

[50] The investigation report was finalised on 13 May 2013. Notes of interviews undertaken by Ms Love and Ms Wiki were attached. YPA had been interviewed twice by then. The second time, he was shown still shots taken from the video footage of the alleged key handover and asked to explain in detail what was happening.

[51] The investigators found the allegations to be proved for the following reasons:

- a) Mr Bartram had the opportunities to access and handover both the key and cellphone in the way and at the times described by YP[A]*
- b) the limited information which Mr Bartram has provided is not consistent with and is open to significant doubt given the information available from cctv footage and witnesses*
- c) although not shown as clearly as would be ideal the unusual nature of the handover of the jeans between Mr Bartram and YP[A], along with*

the furtive nature of the handover of what Mr Bartram claims to be an Easter egg including the use of the door to hide what was occurring, would give reasonable grounds to believe that the allegations made by YP[A] that it was at these times he was being given the key and the cellphone as corroborated by his multiple statements to the investigators and others are true

- d) *given the evidence available, to find otherwise, would require an acceptance that within two days of returning to the Residence YP[A]:*
- i. *was provided with the Shift Leader key and the cellphone by person or persons unknown as he did not have the key and the cellphone on him when he entered the Residence and the key and the cellphone he was found with were not missing before he was admitted to the Residence and*
 - ii. *he was then able to manipulate Mr Bartram into getting his jeans in order to fabricate the story of the key handover and*
 - iii. *he was also able to manipulate Mr Bartram into giving him an Easter egg in wrapping that very closely resembled the colour and size of the Escorts cellphone and*
 - iv. *was so well informed by the person or persons unknown that he was able to tell the investigators accurately of Mr Bartram's movements around the Residence at the times he identified as related to Mr Bartram obtaining for him on different nights the key and the cellphone and*
 - v. *deliberately conspired with others to target Mr Bartram with one of the most serious allegations that could be made against a staff member in Residence and without any particular reason for doing so.*

[52] The report also raised allegations made by YPA to Ms Marriott that Mr Bartram used to bring the YPs "posca" pens that they could use for tagging and that he had removed a Ministry PSP player and put it in his personal cubby hole in the unit. Ms Marriott also commented that she had noticed a reduction in tagging since Mr Bartram's suspension began. The investigators, Ms Love and Ms Wiki, recommended further investigation into the new allegations.

The decision making and disciplinary process

[53] By letter of 17 May 2013 Grant Bennett, the General Manager of Residential and High Needs Services, wrote to Mr Bartram attaching the investigation report. Mr Bennett invited Mr Bartram to a formal disciplinary meeting on 24 June 2013 at which he was asked to provide his responses to the investigation report including any explanation he might wish to make.

[54] On 31 May 2013 Ms Gemmell replied on Mr Bartram's behalf again noting concerns at an apparent change in the Ministry's approach to investigations and at what appear to be adverse conclusions against Mr Bartram based on his refusal to meet before receiving relevant information.

[55] Ms Gemmell reported Mr Bartram's explanation that he had gone to the administration block to collect some printing he thought must have printed off there.

[56] The letter again requested the cell phone records and a copy of the further CCTV footage from the sally port, which had not been provided.

[57] Ms Gemmell also requested:

- An enquiry into the ability to digitally enhance the CCTV footage of the purported handover of the cell phone
- YPA be interviewed again to enquire further into an allegation that he had telephoned Mr Bartram while out of the residence between 19 March and 28 March.
- Computer records to be searched to find records to assist Mr Bartram to satisfy the Ministry that he had visited the administration area to find printing having printed out some leave forms.
- All statements and notes of interviews, especially of the young people.

[58] Ms Gemmell also asked whether the Ministry was going to take into account the two further allegations raised by Ms Marriott and requested the Ministry to put those allegations to one side.

[59] On 20 June 2013 Mr Bennett responded and annexed:

- An email from Rhino Security stating that there was no way of enhancing two images Ms Love had sent it of Mr Bartram with the disputed object in his hand.
- Phone records for the cell phone for the relevant days. The records show that there was no activity on the phone after 22 March and none in the time YPA allegedly had the phone.

- Notes of a third interview with YPA putting to him further questions, including about his contact with Mr Bartram while out of the residence.

[60] Mr Bennett also wrote that:

- a day and time had now been set for Mr Bartram and Ms Gemmell to view further CCTV footage as requested and to be shown the phone that was found in YPA's room,
- the letter of 31 May raised for the first time an explanation about why Mr Bartram went to the administration block and confirmed that the Ministry was sourcing a report on what was sent by Mr Bartram to a printer in the administration area and undertook to forward that as soon as it was received.

[61] Mr Bennett also stated that no formal interview notes or statements were recorded when the young people were spoken to while in the secure unit. However, he attached a copy of Ms Marriott's notes taken when YPA disclosed to her where he had got the key. He also attached an email from Donna McIntosh stating that she did not take notes but confirming that her email sent to Ms Wiki and attached to the investigation report was an accurate record of her discussion with YPC when YPC said that Mr Bartram had given YPA the key.

[62] An email from another staff member, Anne Forrester, was also attached with an apology as it should have been attached to the investigation report.

[63] In advance of the 24 June meeting Ms Gemmell provided a 20 page detailed written response from Mr Bartram in response to the investigation report and its appendices. It set out Mr Bartram's memory of the attempted escape and included responses to Mr Bennett's 20 June letter. In particular, Mr Bartram and Ms Gemmell had undertaken an analysis of YPA's various interviews pointing out inconsistencies in them. They asked for clarification about whether the allegation about a missing PSP was being investigated.

[64] On 21 June Ms Gemmell received copies of information promised by Mr Bennett in his 20 June letter. She emailed Ms Love stating that a further written response would be made and asking that Mr Bennett read the response already provided as well as the further one that would be provided before any meeting proceeded. She said that Mr Bartram would therefore not attend the 24 June meeting.

[65] However, that meeting did proceed with Mr and Mrs Bartram, Ms Gemmell, Mr Bennett and Ms Love present. The meeting was recorded and transcribed. Mr Bennett read through the submissions made on Mr Bartram's part once the meeting had convened⁴. There was some discussion about having the camera footage of the alleged cell phone handover enhanced. Mr Bennett said he would *rather try* and get it enhanced.

[66] On 5 July 2013 Ms Love wrote to Mr Bartram stating that the Ministry's enquiries could not establish any printing sent by any computer user at TPW on 30 March and that no email was sent by Mr Bartram on that date either. She also informed him that the Ministry had checked with Shipleys Audio and Video, a company the police use, and had been told that due to the type of footage *it was not possible to improve it*. However, the Ministry had stills of the footage of the disputed 30 March handover enhanced by photocopy enlargement and provided copies of those to Mr Bartram.

[67] Ms Love wrote that the date of the next meeting with Mr Bennett was being arranged with Ms Gemmell. On 9 July 2013 the next meeting was set for 30 July. Any written response to the information provided on 5 July was requested in advance of the meeting.

[68] On 12 July 2013 Ms Gemmell asked some questions of Ms Love by email which Ms Love responded to the same day.

[69] On 16 July 2013 Ms Love sent some still photographs of a simulated handover of the cell phone found in YPA's possession. She asked if Mr Bartram was able to provide either an Easter egg the same as the one he said he gave to YPA or a description of it so that the Ministry could simulate a handover of an Easter egg before the meeting on 30 July.

[70] On 29 July the date of the meeting with Mr Bennett was changed to 23 August 2013. Later the date was changed to 28 August 2013.

[71] On 29 August 2013 Carole Fifield, a shift leader at TPW was told by YPD, who had been resident in the Waimakariri Unit at the time of the attempted escape, that:

⁴ This is dealt with later as it was submitted that it was unfair Mr Bennett had not read the written submissions before the meeting.

... he knew that Staff Joe Bartram had given the key to the other young people as he himself was to of (sic) absconded with the others. ...

[YPD] then stated that Staff Joe Bartram had also given the boys involved, his home address for them to come if they were unable to find somewhere to go.

[72] Ms Gemmell provided a detailed six page written response to Mr Bennett in advance of the 28 August meeting.

[73] On 30 August Mr Bennett wrote that his preliminary decision was that the allegations were proved, that they each amounted to serious misconduct and that summary dismissal was the appropriate disciplinary sanction. He asked for any further submissions by 13 September so he could consider them before coming to a final decision.

[74] On 13 September 2013 Ms Gemmell sent a three page submission to Mr Bennett attaching a number of statements from staff about the security of keys at TPW. There was a statement from Matt Glanville in which he raised some other possible ways YPA could have got the key including that it was posted in, that a staff person had dropped the key and went to get another one having not reported the key missing and that it was taken by a YP from a contractor working at the site. He wrote that those alternative theories had been talked about in the residence by the YPs.

[75] Ms Gemmell also attached a number of character references for Mr Bartram.

Further investigation

[76] On 26 September staff member Luke Stenton sent an email to his team leader reporting that YPB had said:

- It was wrong that Joe Bartram was being blamed for YPA getting the key.
- That YPA had taken the key from a contractor who was in the Waimakariri Unit painting the dining room toilets and putting new glass in the wing doors.
- Once YPA got the key he went straight to tell YPB about it.
- YPB thought that YPA wanted to get back at Joe Bartram for being hard on him.

[77] On 2 October 2013 Ms Love emailed Mr Bennett that she had already checked the process of issuing keys to contractors and there had been no occurrences of contractor keys going missing in 2013. However, she proposed to re-assess the contractor key issue and to check when a contractor was at the Waimakariri Unit replacing the window and see whether there was an opportunity for YPA to take a key in the way described by YPB. She also proposed to find out how contractor keys were issued and checked back in, especially in the weekends. She proposed to re-question YPA and to ask him about what YPB alleged.

[78] On 3 October 2013 Ms Love interviewed YPB. At the beginning of the interview he signed a copy of Mr Stenton's email stating that it was a correct record of what he had said. He said he could not remember what day it had been but that YPA told him he had slipped the key off a bunch of keys that the contractor had.

[79] Ms Love pointed out to YPB discrepancies in what he had told staff about the key. When he was in the secure unit on the night of the attempted escape he told them that he had the key not YPA. A few days later he told Ms Love that he did not know YPA had a key until YPC told him when they attempted to escape. However, YPB confirmed that the contractor as the source of the key was correct.

[80] Ms Love asked YPB whether a window was being replaced or whether painting was being done. YPB said that both were being done at the same time.

[81] On 3 October 2013 Mark Quigley who works in support services at TPW provided Ms Love with information about contractor access to the site and to keys during working hours and on the weekends. He provided her with copies of the property web log for 29 and 30 March, which showed no contractors on site on either of those days. The log showed that a window was replaced on 27 March in the Waimakariri Unit but that no painting was done on site at or around the relevant time until 9 April 2013. Mr Quigley reported that there were no missing contractor keys during the relevant period.

[82] On 8 October 2013 Ms Love interviewed YPD because when he had initially been interviewed he did not say that YPA had got the key from Mr Bartram but subsequently told a staff member that Mr Bartram had given a key to YPA. He confirmed that he knew that Mr Bartram had given YPA the key because he asked Mr Bartram who confirmed it. He also said that YPA had shown him the key on

29 March and lent him the key on the morning of 30 March and he had used it to open some lockers in the unit. He said he had not heard of YPA taking a contractor's key.

[83] Unfortunately, none of that information was sent to Mr Bartram or Ms Gemmell.

Decision letter

[84] There was discussion between Mr Bennett and Ms Gemmell about having a further and final meeting with Mr Bartram. Mr Bennett says that was initially planned and its purpose was to deliver his decision to Mr Bartram in person. Ms Gemmell says she understood it was to be a further opportunity for Mr Bartram to put his views to Mr Bennett before a final decision was made. In fact, no final meeting was held and Mr Bennett is of the view that his unavailability for such a meeting was or should have been conveyed to Mr Bartram through Ms Gemmell.

[85] Mr Bartram and Ms Gemmell continued to expect a further meeting. However, on 16 October 2013 Mr Bennett's final decision letter with a covering letter from Theresa Perham, the then TPW residence manager, was delivered to Mr Bartram's home.

[86] The letter referred to further pieces of information Mr Bennett considered as well as Ms Gemmell's 13 September submissions he considered since his preliminary decision. The four further pieces of evidence were:

- YPB's allegation about the key being taken from a contractor,
- the steps taken by the Ministry to investigate that, including Mr Quigley's email and Ms Love's findings report re contractor keys, and
- the interview with YPD who said he knew that Mr Bartram had given the key to YPA.

Those documents had not previously been seen by Mr Bartram and so he had no opportunity to comment on them before the decision to dismiss was finalised.

[87] Mr Bennett confirmed his preliminary decision that Mr Bartram was guilty of serious misconduct for supplying the key and the phone and conveyed his decision to

dismiss Mr Bartram. In addition he asked Mr Bartram not to apply for any other roles with the Ministry and wrote that any application from him would not be considered.

Was there sufficient evidence to conclude Mr Bartram was guilty of serious misconduct warranting summary dismissal?

[88] Mr Bartram has raised a number of matters which lead him to feel he was treated unreasonably by the Ministry. In determining whether the Ministry acted as a fair and reasonable employer could have acted in all the circumstances at the time it decided to dismiss Mr Bartram the Authority first needs to be satisfied that the Ministry acted reasonably in forming its belief that Mr Bartram supplied the key and the phone to YPA.

[89] Mr Bartram's dismissal for serious misconduct is likely to preclude him from being able to gain registration as a social worker. The dismissal has been and will continue to be a significant detriment to his career aspirations. Mr Bartram studied to be a social worker as an adult and his family made significant financial sacrifices to allow him to do so. He had a student loan of at least \$12,000 when he finished studying.

[90] Mr McKenzie submits that because of the grave effect of the dismissal on Mr Bartram's career the Ministry had to act to a high standard when carrying out the investigation and disciplinary process. In addition, Mr McKenzie drew to my notice what the standard of proof should be in such a case when a grave type of serious misconduct is alleged.

[91] There is no doubt that the charges against Mr Bartram are grave and the evidence in support of it needed to have been convincing to allow conclusions of serious misconduct.

[92] As well as deciding whether the Ministry reasonably concluded that Mr Bartram's actions amounted to serious misconduct the Authority needs to determine whether the Ministry acted as a fair and reasonable employer in deciding to dismiss Mr Bartram.

[93] In addition, the Employment Court decided in relation to registered teachers:

...employers of teachers must act to a high standard when their decisions can have these consequences. So, too, independent courts and tribunals

*considering the justification for dismissal of teachers must be conscious of the consequences and corresponding need to examine such cases with great care ...*⁵

[94] That caution applies because an employee's career or profession is threatened by the dismissal and may apply to other similar professions, such as social work. However, unlike teachers, it is not mandatory for social workers to be registered. There is evidence that although the Ministry had requested Mr Bartram to proceed to become registered before these events occurred he had not done so.

Did the Ministry sufficiently investigate the allegations?

[95] Whether or not the Ministry had sufficient convincing information to decide that Mr Bartram was guilty of the allegations on the balance of probabilities is to an extent dependent upon whether it sufficiently investigated the allegations.

[96] Mr McKenzie submits that the Ministry breached its obligation to sufficiently investigate the allegations in a number of ways.

Failure to adequately investigate other sources of the key

[97] The first submission is that there was a failure to sufficiently investigate other possible sources of the key. Mr Glanville gave a statement on 14 August that was annexed to Ms Gemmell's letter to the Ministry on 13 September. Mr Glanville said that a number of other sources for the key were raised by the young people involved in the attempted escape on the night. These stories included one that a young person had picked up the key from a contractor who had been working in the Waimakariri Unit. On 26 September YPB's discussion about obtaining the key from a contractor was forwarded to the Ministry.

[98] Mr McKenzie submits that the Ministry too easily dismissed that possibility of a key being sourced from a contractor because of a misplaced reliance on the TPW systems for staff and contractor key security.

[99] He says that no thought was given to the fact that it could have been YPB himself who got the key off a contractor before YPA was readmitted to TPW. The Ministry did not make any effort to contact the contractor who had been working in

⁵ *Lewis v Howick College Board of Trustees* [2010] ERNZ 1, at 7.

the unit on 27 March to see if any YPs were hanging around him and did not talk to the administrative officer who received the contractor's keys back that day to see if the correct procedure was followed and whether a key may have been missing.

[100] On 8 October 2013 Ms Love interviewed YPD again who said he had always known that Mr Bartram gave YPA the key and had decided not to tell her that when he was first interviewed. He also said that on the morning of 30 March YPA had lent him the key and he had opened some lockers with it while he was supposed to be making a phone call.

[101] Mr Bennett and Ms Love gave evidence that they considered that the Ministry had done what it could to investigate any other sources of the key. When YPB raised the contractor theory Ms Love consulted Mr Bennett and carried out further investigations. Mr Bennett was satisfied that no contractor keys were missing so that source of a key could be discounted. The Ministry was also able to confirm that the key YPA had (key 1-41) had been allocated as a shift leader key and not as a contractor key.

[102] Another explanation was that an unnamed other person had been saying that an unnamed other staff member was the source of the key. As Mr Bennett said in his evidence the Ministry was unable to investigate an unnamed staff person or interview any unnamed source of that story/version.

[103] A further explanation was that the key was cut from one stolen earlier and brought in from outside. The Ministry made sufficient enquiries to satisfy itself that no shift leader keys had gone permanently missing. The Ministry also knew that the keys cannot be cut by any ordinary locksmith but only by a specific one contracted to the Ministry using special key blanks sourced from Finland. Permission for key cutting needs to come from one of only two staff in the Property Division of the Ministry.

[104] Despite not talking to the contractor who had worked on 27 March or to the administration person who gave the contractor the keys and received them back I consider that the Ministry undertook sufficient investigation into whether the key could have been a contractor's key instead of a shift leader key. There was sufficient investigation and consequent evidence for Mr Bennett to conclude that a contractor could not have been the source of the key.

[105] The failure to put the Ministry's findings from Ms Love and Mr Quigley's investigation to Mr Bennett is linked to the breach of good faith allegation. This is covered below under a consideration about whether there was a breach of good faith.

[106] There were submissions and evidence given on Mr Bartram's behalf to the effect that general key security at TPW was slack at the time of the events. Evidence was given at the investigation meeting that sometimes a shift leader's key would not be in the key press at the beginning of that shift leader's shift so they would take another one, that the relevant keys would be swapped sometimes part way through a shift, and that although the shift leader keys were supposed to have orange tags some of them had other coloured tags. There was also agreement that some of the writing on the tags had faded making it difficult to be sure which key was which.

[107] In YPA's second interview he told Ms Love that the key had an orange tag on it when he was given it. In his interview directly after the escape attempt he said that the key had no tag on it when he received it. He accounted for the difference in his interviews by saying that he knew all along that the key had an orange tag on it when he got it but that he had taken the tag off and disposed of it. However, he said his *mind was racing at the time* he talked to Ms Marriott and that he did not *think it was important*.

[108] Despite some slack application of procedure around the shift leader keys I am satisfied that the Ministry adequately investigated potential sources of the key and was able to reasonably satisfy itself that it was a shift leader key and not a contractor's key.

YPB and YPD's disclosures near the end of the process not put to YPA for comment

[109] Neither YPB's statement about a key being obtained from a contractor nor YPD's statement with his claims that YPA lent him the key on the Saturday morning and that Mr Bartram told him he had given a key to YPA were put to YPA for his comment. Mr McKenzie says that this was a failure to fully investigate matters.

[110] Putting those statements back to YPA may have been useful. It is impossible to know what difference it may have made, it may have had no effect as YPA may have stuck to his story that Mr Bartram provided him with the key and the cell phone

as he did in evidence given at the investigation meeting. If it was a procedural defect at all it was a minor one and it did not result in Mr Bartram being treated unfairly.

Failure to investigate the CCTV footage and seek greater analysis re the phone/Easter egg

[111] Mr McKenzie submits that the Ministry had agreed to get enhancement of the CCTV footage but did not do so before making the decision to dismiss and therefore the conclusion that Mr Bartram provided a cell phone was unfair. He says that what the applicant sought was not an enhancement of the footage but an ability to compare the known object (the phone) with the footage.

[112] Mr Bennett says he did not undertake to do so and the Ministry made reasonable enquiries and was informed that no greater enhancement was possible.

[113] I note from the transcript of the 24 June meeting with Mr Bennett the discussion was about enhancing the footage. It is also clear that Ms Gemmell gave the Ministry the contact details of a business in the UK called Demux Video Services.

[114] In advance of the investigation meeting Mr McKenzie and Ms Gemmell provided a report from Demux about whether and how it was possible to tell what the object in Mr Bartram's hand was – cell phone or Easter egg. That evidence was provided too late to allow the Ministry to be able to properly respond at the scheduled investigation meeting.

[115] Instead a further day of investigation meeting was timetabled, which allowed the Ministry to engage its own expert, and the Authority to hear from the experts. Three people provided written evidence on the issue of forensic analysis of the footage – David Thorne of Demux, Geoffrey Burns of the New Zealand Police and Dr Ian Calhaem, a New Zealand forensic scientist. Mr Thorne and Dr Calhaem gave oral evidence with Mr Thorne doing so via a video conferencing connection from England. Their evidence was very helpful. In summary, and in lay person's terms, after forensic analysis the mutual conclusion of Mr Thorne and Dr Calhaem was that it was not possible to say whether the object handed by Mr Bartram to YPA was or was not a cell phone of the kind found in YPA's room. It was not possible to say whether the object was or was not an Easter egg either, partly because no Easter egg was provided for comparison with the footage.

[116] That means that even if the Ministry had sought such analysis prior to making its decision that Mr Bartram supplied the phone it would not have had any additional evidence to rely on in informing Mr Bennett's decision. On the other hand there would not have been any more evidence to assist Mr Bartram to prove that he did not hand over a phone.

[117] The Ministry did not agree to obtain video analysis from an expert in relation to the object handed to YPA at the door of his room and it did not need to. It did investigate the possibility of enhancing stills from the footage and reasonably relied on being told that it was not possible. Any failure to have such analysis done was not a procedural defect and in any event did not result in Mr Bartram being treated unfairly.

Failure to interview the Muriwai and Waimakariri shift leaders on duty on 30 March

[118] The Ministry believes that the key was the Waimakariri morning shift leader key, based on Mr Glanville's evidence and the fact that once the key was put back into circulation on 17 April 2013 no other shift leader key was missing. Another suggestion made during the investigation was that Mr Bartram had told YPA that it was a Muriwai morning shift leader key. The Ministry did not question the Waimakariri or Muriwai morning shift leaders on whether their keys were present on the morning of 30 March. Mr McKenzie submits that if those keys had been present then Mr Bartram could not have given YPA the key the previous evening.

[119] This was an obvious step and should have been undertaken early in the piece. The failure to do so was potentially unfair to Mr Bartram. There is no way of knowing now whether any shift leader key, other than the one YPA had, was missing as of 30 March but was put back by 17 April. However, all staff would have known of the attempted escape and the allegations made against Mr Bartram and it would have been very unusual if any other outstanding key was not noted to be missing in the days after the escape attempt. Overall, I consider this failure was minor and did not result in Mr Bartram being treated unfairly.

Failure to interview the staff who admitted YPA into TPW on 29 March

[120] There was no investigation undertaken by questioning the admitting staff to clarify whether YPA's clothes which were in his luggage were searched when he was admitted.

[121] The evidence was that YPA would have been patted down on admission. However, no greater search would have been undertaken. YPA said at the investigation meeting that he had not been body searched.

[122] There is evidence that when young people plan to escape they routinely wear two pairs of trousers. YPA and YPB were wearing two pairs of jeans on the night of the attempted escape. Young people are only allowed to have two pairs of trousers in the residence with them at any time.

[123] YPA says that when he was patted down on admittance to the secure unit on 30 March the key was hidden in a small pocket in his inside pair of jeans and was not felt there by staff. Ms Marriott and Mr Glanville understood that YPA had hidden the key inside his body and retrieved it from there to give to Ms Marriott. At the investigation meeting YPA was adamant he had the key hidden in his inner jeans pocket.

[124] One of the alternative stories about where the key came from, covered above, was that it was brought in from outside. That meant that the Ministry should have investigated whether it was possible for the key to have been brought in by YPA when he was admitted on 28 March.

[125] Ms Love viewed the CCTV footage of YPA's admission through the sally port and arranged for Ms Gemmell and Mr Bartram to do so too. It would have been a more thorough investigation if the admitting staff had been interviewed. Overall, however, it was not a procedural defect.

Failure to interview YPF

[126] On 31 March 2013 Ms Marriott sent an email to Mr Bennett, Ms Wiki and another Ministry staff member outlining a discussion she had with YPF, who was in the unit when the attempted escape happened. She wrote that she had spoken to YPF about lunchtime on Sunday, 31 March 2013, while the attempted escapees were still in the secure unit:

...has told me that staff Joe Bartram was the person who sourced and gave the key to [YPA]. ...He stated that Joe had borrowed Matt's shift leader key to go to the garage locker and get some clothes and went to the key room for a key at the same time. He then handed the key to [YPA] when he gave him the pants. There is no possibility of this young

man having been able to have any contact with [YPA] since the incident.

...

[127] Mr Bartram was given a copy of the email but there was no investigative interview of YPF by Ms Wiki and/or Ms Love. Ms Love could not remember why YPF was not interviewed.

[128] Mr Bennett's evidence was that he placed little weight on the note about what YPF said.

[129] The failure to interview YPF was a minor breach if it was one at all and did not result in Mr Bartram being treated unfairly.

[130] Subject to my consideration of the issues relating to Dan McMillan's interview and the claim of breach of good faith overall I consider that the Ministry sufficiently investigated the allegations in a careful and detailed way. However, there are some other procedural issues to consider.

Did the Ministry raise its concerns with Mr Bartram before dismissing him?

[131] The Ministry did so and in a timely manner. When other allegations, such as the posca pens and the PSP player were raised the Ministry made a decision not to investigate those issues. The Ministry informed Mr Bartram those matters had been raised during the investigation but they did not rise to the level of *concerns* the Ministry had about Mr Bartram and I am satisfied that Mr Bennett did not take them into account.

Did the Ministry give Mr Bartram a reasonable opportunity to respond to its concerns before dismissing him?

[132] Overall, and subject to what I say below, about whether or not there should have been a final meeting between Mr Bennett and Mr Bartram and the late new information that was not supplied to Mr Bartram, I am satisfied that Mr Bartram had reasonable opportunities to respond to the Ministry's concerns about his behaviour.

[133] Mr Bartram chose not to make any verbal response to the Ministry's concerns at the first opportunity he had to do so once he had viewed the CCTV footage. That was a choice he was entitled to make and one he made on Ms Gemmell's advice. I appreciate that Mr Bartram initially understood he would see a draft investigation report without any conclusions made before he made an initial response which was to

be in writing. However, the Ministry informed him in reasonable time that the investigation report would include the investigators' conclusions on the allegations. Mr Bartram was able during the initial investigation to choose to make a response in writing or orally but chose not to do so. His first response was in writing and was before the investigation report was completed. Mr Bartram then met with Mr Bennett in person to give his explanations and had opportunities to supply other documents, including some character references, to Mr Bennett.

Were there other procedural breaches?

Was there a breach of the agreed process when no final meeting was held?

[134] There is conflicting evidence about the purpose of the final meeting. If it was just so that Mr Bennett could convey the decision to Mr Bartram in person, as Mr Bennett asserts, then any failure to hold that meeting did not result in Mr Bartram being treated unfairly.

[135] Ms Gemmell and Mr Bartram understood that it was to be a last chance opportunity for Mr Bartram to give his explanations directly to Mr Bennett in the hope of avoiding dismissal.

[136] Even if there had earlier been an agreement to have another meeting overall I consider that Mr Bartram had already had a reasonable opportunity to make his explanations to the Ministry and to Mr Bennett personally. However, there was other information that the Ministry had and took into account that Mr Bartram did not see and so could not comment on. I deal with that below.

Failure to interview Dan and Lauren/ effect of late discovered evidence

[137] Mr Bartram's initial submission was that the Ministry had not interviewed Dan and Kieran who were the staff on duty in the secure unit when the attempted absconders were brought there and therefore the investigation was insufficient. I consider that the submission must be meant to read "Dan and Lauren". Those were the staff on duty in the secure unit on 30 March and the two names identified by Ms Wiki in the meeting of 10 April when she listed who would be interviewed.

[138] Up until the final day of the investigation meeting it appeared that neither of them had been interviewed. However, on 14 April 2014 the Ministry's counsel

uncovered notes from 16 April 2013 of an interview of Dan McMillan by Ms Wiki. Apparently Lauren was never interviewed. There was no reason given why she was not interviewed.

[139] I am satisfied that because of an oversight by Ms Wiki and Ms Love the notes of Mr McMillan's interview were not provided to Mr Bartram or to Mr Bennett before the decision to dismiss was made. Therefore they were not part of the evidence the Ministry relied on to make its decision about Mr Bartram.

[140] I am also satisfied that Ms Rowe and Ms Silcock had not previously identified the notes amongst the large volume of documents included in the Ministry's files.

[141] The discovery of the interview notes does not add to the applicant's case that the investigation was insufficient. Instead, I need to consider whether the failure to provide the interview notes to Mr Bartram and to Mr Bennett was unfair.

[142] Mr McMillan was interviewed by Ms Wiki and asked about what YPA had said in the secure unit at breakfast the morning after the attempted absconding. He reported what YPC and YPA had told him. He said that he was pretty sure YPA had said that Mr Bartram had given him the key and the cell phone behind YPE's door but that YPA seemed to be *refining his story as he was telling me*. Mr McMillan said that he did not believe that Mr Bartram had given YPA the key.

[143] Mr McKenzie submits that it is not clear what difference Mr McMillan's evidence could have made but it would have meant that two people, Mr McMillan and Donna McIntosh, were reported as saying that YPA told them Mr Bartram had given him the key and the phone at the same time. It may have meant that the investigators thought to interview Lauren as well.

[144] Of course, it is not known what Lauren would have recalled YPA saying. She simply was not interviewed.

[145] Ms Rowe submits that the question of whether YPA received the key and the phone at the same time was investigated by putting that to him in his third interview. He denied ever having said that. The notes of that third interview were put to Mr Bartram and to Mr Bennett before the decision was made.

[146] The failure to give Mr McMillan's interview notes to Mr Bartram and Mr Bennett was a failure in the disciplinary process because it may have led to some more doubt about the consistency and reliability of YPA's evidence. It may have meant that Lauren was also interviewed. It may have meant that Mr Bennett decided to talk directly to YPA. The failure to disclose the notes to Mr Bartram and to put them to Mr Bennett was unfair to Mr Bartram. However, I deal with the effect of that later.

Was there investigator bias and if so, what effect did that have?

[147] Mr McKenzie submits that early in the investigation both investigators formed a view of Mr Bartram's guilt.

[148] When Mr Bartram, Mrs Bartram and Ms Gemmell were first shown the CCTV footage they say that they formed the view that Ms Love believed YPA's account of how he got the key and the phone. Mr Bartram wrote that when Ms Love was loading the footage:

... she remarked that they would not have identified the footage they were to show me without having followed the directions of the young person. ...he alleged that I gave him the phone and key at particular times and when they checked the footage "there it was just as he said". Her manner in that exchange made it clear to me that Maureen felt the young person had in this way proven himself to be reliable and truthful. I realised the investigators had already formed a judgment of guilt and yet my first opportunity for comment had not been granted.

[149] Ms Love says that she had not formed a view at that stage of Mr Bartram's guilt but was just stating that she would not have known what footage to look for if YPA had not been so specific and that she was surprised to find the footage was consistent with YPA's explanation of how he got the key and the phone.

[150] The other allegations of investigator bias relate to Ms Wiki. She told YPE when he was interviewed that she and Ms Love had seen *the handing over of the cellphone* and asking him what he knew about this.

[151] Ms Wiki also told YPD that they could *see where a cellphone is passed by a staff member to [YPA]*.

[152] Both of those interviews were conducted before Mr Bartram said that he had handed YPA an Easter egg and not a cell phone. Mr Bartram did not offer that explanation to Ms Love and Ms Wiki at the meeting on 2 April. It is not surprising then that Ms Wiki may have accepted what YPA said about the phone, corroborated as it appeared to be by the CCTV footage.

[153] Mr Bartram must take some responsibility for the fact that Ms Wiki did not know that he would in the future say he had provided YPA with an Easter egg. He had seen the CCTV footage showing he handed something over and he knew the allegation was that it was a cell phone and was silent about what he had handed over. His silence was maintained on Ms Gemmell's advice but the investigators had no other explanation at the time.

[154] Ms Wiki was not involved with the investigation once the investigation report was written so if she had any bias it no longer had any effect after 23 April 2013.

[155] On 1 May 2013 in her interview with Mr Glanville Ms Love asked:

If it was able to be proved that Joe gave [YPA] the cellphone would you then accept that Joe gave him the key

[156] Mr Glanville said that in that case he would believe it. At that stage Ms Love was aware of Mr Bartram's explanation of handing YPA an Easter egg and not a cell phone. However, her question does not indicate bias because it does not convey any conclusion it was a phone.

[157] Mr Bennett's evidence at the investigation meeting was that he took his role as decision-maker very seriously and deliberately distanced himself from the investigation so as to maintain objectivity. Mr Bennett was a calm and very credible witness who gave evidence of his consideration of Mr Bartram's explanations as well as all the evidence gathered in the investigation before making the preliminary decision and again before making the final decision. After careful consideration of his written and oral evidence I consider that even if Ms Love and/or Ms Wiki exhibited some bias, which I do not accept, Mr Bennett was not biased and was not affected by any perceived bias on the part of Ms Love or Ms Wiki.

The effect of Mr Glanville's late, new evidence at the investigation meeting

[158] At the investigation meeting near the end of his evidence Mr Glanville said that he had told Mr Bartram he could give YPA an Easter egg on 30 March. That was the first time he said that. Mr Bartram has never said that his shift leader had instructed or authorised him to give YPA an Easter egg.

[159] I consider that aspect of Mr Glanville's evidence lacks reliability being raised as it was for the first time at the investigation meeting. If he had told Mr Bartram he could give YPA an Easter egg it would have been natural and logical for Mr Bartram to tell the Ministry very early on in the investigation that his shift leader had told him he could give YPA an Easter egg and for Mr Glanville to have also said so during the investigation.

[160] Mr Glanville has a lot of respect for Mr Bartram as a social worker and cannot believe that he did as YPA alleges. Even if Mr Glanville did say Mr Bartram could give YPA an Easter egg that evidence was not before the Ministry when it made its decision and so cannot be considered in my assessment of whether the Ministry acted as a fair and reasonable employer in all the circumstances at the time it made its decision.

Was it unfair that Mr Bennett had not read the written submissions provided to him before his meeting with Mr Bennett on 21 June?

[161] Mr Bartram submits that it was unfair that Mr Bennett had not previously read the written submissions. However, Mr Bennett did read them at the meeting and take them into account before making his preliminary decision. Therefore, I do not consider that this was a breach of a fair process.

Failure of the decision maker to speak to the complainant?

[162] Mr McKenzie submits that Mr Bartram's total denial put YPA's credibility squarely in issue and so Mr Bennett should have formed his own view of YPA's credibility and not just relied on the investigators' interview notes.

[163] Mr Bennett says that he considered whether to interview YPA himself but decided against it because he did not want any suspicion of bias to attach to the investigation process. He wanted to remain objective.

[164] In this case Mr Bennett decided to accept YPA's version of events over Mr Bartram's denials despite some inconsistencies in YPA's evidence. An employer is generally entitled to accept one person's version of events over that of another's version.

[165] If Mr McMillan's evidence had not come to light I may have concluded that it was not unfair to Mr Bartram that Mr Bennett did not personally interview YPA because he had transcripts of YPA's three interviews, and also because YPA's evidence was not the only thing that Mr Bennett relied on in all the circumstances. However, the existence of Mr McMillan's evidence throws some doubt about YPA's evidence in that it suggests another area of inconsistency between YPA's early provision of information about Mr Bartram's involvement and his later and more detailed interviews.

Was there a breach of good faith by not giving Mr Bartram all the information Mr Bennett relied on to make his decision?

[166] Section 4(1A)(c) of the Act expressly provides that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment:

- must provide the employee with access to information relevant to the continuation of the employee's employment, and
- give the employee an opportunity to comment on the information before the decision is made.

[167] Any and all information uncovered during the investigation and disciplinary process was likely to have an adverse effect on the continuation of Mr Bartram's employment. Although Ms Love undertook an adequate investigation into the possibility that the source of the key may have been via a contractor the information arising out of that was never given to Mr Bartram before a decision was made. Mr Bartram expected the Ministry to investigate that allegation but did not get any opportunity to comment on the information the Ministry uncovered because he was not given access to it.

[168] For the most part the Ministry undertook a thorough and detailed investigation. However, towards the end of the investigation it breached its duty of

good faith to Mr Bartram by failing to provide him the information Mr Bennett relied on to decide that a contractor could not have been the source of the key. It also failed to supply the interview notes of Ms Love's interviews of YPB and YPD.

[169] The failure to supply the transcript of Mr McMillan's interview to Mr Bartram was also a breach of the duty of good faith, although clearly inadvertent.

[170] The breach in relation to the further information relied on by Mr Bennett for his final decision was because of the haste the Ministry clearly felt became necessary after a protracted and otherwise careful process.

Did the Ministry genuinely consider Mr Bartram's explanation in relation to the allegations before dismissing him?

[171] After hearing from Mr Bartram in writing and in person Mr Bennett caused further enquiries to be made, for example, when Mr Bartram explained why he went to the administration block. Mr Bennett struggled with the fact that Mr Bartram did not have any obvious motive for acting as was alleged. However, he decided that an understanding of motive was not necessary to decide whether Mr Bartram acted as alleged.

[172] I am satisfied that Mr Bennett genuinely and carefully considered Mr Bartram's explanations. Indeed, from his written evidence and oral evidence at the investigation meeting it is clear that Mr Bennett took his role in this, and every, regard very seriously.

Conclusion on whether Mr Bartram was unjustifiably dismissed

[173] The meaning of the test of justification in s103A of the Act was considered by the Employment Court in *Angus v Ports of Auckland Limited*:

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.⁶

⁶ [2011] NZEmpC 160 at paragraph 23

[174] Mr Bennett's evidence, which I accept, is that he did not place weight on the findings made by Ms Love and Ms Wiki in the investigation report and reached his own preliminary view on whether Mr Bartram had supplied the key and the phone.

[175] Mr Bennett placed some reliance on the CCTV footage. He acknowledged at the investigation meeting that the footage of both events is congruent with both Mr Bartram's explanation as well as YPA's explanation of what was happening. He did not rely solely on the CCTV footage. However, he was entitled to take the CCTV footage into account along with all the other evidence to decide that he accepted YPA's explanation of how he got the key and phone over Mr Bartram's denials.

[176] There were some additional investigative steps that may have strengthened the process of investigation but overall the investigation raised sufficient evidence to support the allegations. I am satisfied that the ancillary allegations about posca pens and the PSP were not taken into account by Mr Bennett in his decision making.

[177] I am also satisfied that when sufficient detail was raised of credible alternative explanations, such as a contractor's key and printing in the administration block, the Ministry undertook reasonable further investigation.

[178] There are procedural matters that taken together mean that Mr Bartram justifiably feels that he was treated unfairly in relation to the process. There was a breach of good faith by failing to supply all relevant evidence to Mr Bartram and allowing him to comment in advance of the decision being made to dismiss.

[179] Provision of that information to Mr Bartram may or may not have made any difference to Mr Bennett's decision on whether or not Mr Bartram had supplied the key although, apart from Mr McMillan's statement, the documents did not relate to the phone.

[180] However, a fair and reasonable employer could not have failed to put some new information it relied on to make the decision to dismiss Mr Bartram to him for comment. Therefore, in relation to the key alone I consider that there was a breach of the employer's duty of good faith.

[181] But, even taking Mr McMillan's evidence into account I consider that there was a low likelihood of YPA changing his evidence in relation to the key or the

phone, even if Mr Bennett had interviewed him. Also Mr McMillan's evidence had been put to YPA by way of questions in his third interview.

[182] I bear in mind that the Authority does not need to subject the employer's conduct to pedantic and minute scrutiny although to a large degree I have done so because of the seriousness of the allegations and their effect on Mr Bartram's career. The Ministry did not have to prove Mr Bartram's guilt to a criminal standard, although given the serious allegations it needed to have a convincing level of evidence.

[183] Overall, and despite a breach of the Ministry's good faith obligations in relation to the key alone, Mr Bennett had sufficient evidence and evidence of sufficient weight to conclude that the allegations against Mr Bartram were made out, perhaps more safely that of supply of the phone. Once those decisions were made dismissal was the inevitable consequence because of the security risk inherent in keeping Mr Bartram employed.

[184] That is not to say that I consider that the Ministry has proved beyond doubt that Mr Bartram supplied a key and a cell phone to YPA but that is not the test that has to be satisfied.

[185] Even if the decision about the key could not be relied on, because of the breach of good faith, Mr Bennett considered on the balance of probabilities that the object handed over covertly on 30 March was more likely to be the phone and not an Easter egg.

[186] That decision was made in reliance on sufficient information and after a thorough investigation and a generally fair process. There was no breach of good faith in failing to supply Mr Bartram with any information Mr Bennett relied upon to decide that Mr Bartram provided YPA with a phone.

[187] The job description for Ministry residential social workers includes providing effective supervision, care and custody in part by:

Minimising the opportunity for absconding....

In addition, young people in residence are not allowed to have cell phones at all and their ability to make and receive telephone calls is carefully monitored and supervised.

[188] The supply of the phone alone was an act of serious misconduct for which dismissal was an option open to a fair and reasonable employer in all the circumstances. All the circumstances include the level of trust and confidence the Ministry needed to be able to safely have in Mr Bartram. Any minor procedural defects in relation to a decision about the phone did not result in Mr Bartram being treated unfairly. Therefore I consider that Mr Bartram's dismissal was justified.

[189] I had no submissions on what specific remedy should flow from the breach of good faith. Rather I understand it was claimed as part of the claim of unjustified dismissal. Therefore I make no remedy for the breach of good faith.

[190] Even had I found that Mr Bartram was unjustifiably dismissed there would have been a number of difficulties for him in relation to remedies. Section 124 of the Act requires the Authority to consider the extent to which his actions contributed to the situation leading to his personal grievance. I would have had to take contribution into account in relation to the nature and the extent of remedies.

[191] Reinstatement is a discretionary remedy that the Authority may provide for if it is reasonable and practicable to do so.

[192] Reinstatement was strongly opposed by the Ministry. Its main objection is that the essential trust and confidence that it needs to have in Mr Bartram has been so broken that it cannot be restored. As a sub-set of that objection the Ministry submits that Mr Bartram has demonstrated that his social work practice and professional judgment is poor. That is because he deliberately gave YPA an object in a covert manner.

[193] The Ministry also submits that Mr Bartram has demonstrated that he can be manipulated by a young person and that he would not be safe from being the target of pressure from young people in residence to breach the rules and, to use a colloquial expression, do favours for them. In addition to concerns about Mr Bartram's safety and effectiveness if reinstated the Ministry has concerns about the safety of other staff who would work with him. Staff are divided in their opinions about Mr Bartram's guilt. There was evidence that some current staff, including those who gave evidence on his behalf for the investigation meeting, support Mr Bartram's return to work but that others do not.

[194] In any social work role within the Ministry the Ministry as employer and the social worker's colleagues must be able to place their trust in a social worker to comply with standard practices and procedures. They must be able to rely on the social worker unquestioningly.

[195] Mr Bartram submits that his giving YPA an object covertly was a lapse of judgment that can be overcome and that he would not do such a thing again. However, it was a lapse of judgment that breached a fundamental rule that was put in place for the safety of both the young people and the staff. In addition, it demonstrated that despite Mr Bartram's evidence that he was a strict social worker who held the young people to account he could be influenced to breach procedures merely by a young person's persistent pestering. Mr Bartram's action was blameworthy and directly led to a young person being able to point to CCTV footage showing the covert handover of an object. That led to the situation giving rise to the personal grievance.

[196] A Ministry social worker's role, particularly in the residential facilities, is to work with some of the most vulnerable young people in New Zealand society and also with young people who are accused and/or convicted of serious crimes. The security of the facilities and the safety of all the young people and all the staff are the paramount and equal considerations. In field work roles social workers are also trusted to work with vulnerable young people and their families and care givers. It would not have been feasible to reinstate the employment relationship successfully even with re-training or a re-integration programme.

Costs

[197] Costs are reserved. The parties are invited to agree on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

[198] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority