

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 8
5624155

BETWEEN KERRY COLLINS
Applicant

A N D CHIEF EXECUTIVE OF THE
MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: Helen Doyle

Representatives: Andrew McKenzie, Counsel for Applicant
Hamish Kynaston and Emma Rose Luxton, Counsel for
Respondent

Investigation Meeting: 18 and 19 October 2017 at Christchurch

Submissions Received: On the day from both parties
3 November 2017 from Respondent

Date of Determination: 25 January 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A The final written warning issued to Kerry Collins was a justified action on the part of the Chief Executive of the Ministry of Social Development.**
- B Costs are reserved and failing agreement a timetable has been set.**

Employment relationship problem

[1] Kerry Collins is employed as Team Leader Support Services (TLSS) at the Te Oranga Care and Protection Residence Facility in Christchurch (Te Oranga). She was employed by the Chief Executive of the Ministry of Social Development (“the

Ministry”) at the time that she says her employment relationship problem arose. Ms Collins has, aside from a period of four to five years, worked for the Ministry and its predecessors and/or successors from 1984 in a variety of roles and locations.

[2] Te Oranga residence is a ten-bed care and protection facility in Christchurch. The children in the residence range in ages from 10 to 18 years. The administration building where Ms Collins works is on the same site as the Te Oranga secure facility but separated by a fence. Staff in the administration role are responsible for the operation of the site. The administration team has three staff, including the TLSS.

[3] In 2010 Ms Collins applied for the Senior Administrator role at Te Oranga. She set out in her application letter that she has extensive experience in the administration, finance and human resources area and a strong skillset from the various roles held with Child Youth and Family (CYF) and its predecessors and other organisations that she had worked for. She was appointed to the senior administration role at Te Oranga from late 2010.

[4] By letter dated 17 June 2011 from the then Residence Manager of Te Oranga who I shall call JH, Ms Collins was advised that there had been a change of the position title to TLSS and a change to salary in the remuneration range. A position description for the role of TLSS was attached to the letter. The letter confirms that all other terms and conditions remain the same.

[5] Michelle Hughes is currently employed as Residence Manager at Te Oranga and commenced that role in May 2014. Prior to Ms Hughes commencing her employment there was another Residence Manager who I shall call PG who was in that role for most of the material time.

[6] Ms Hughes oversees the whole operation for the residents and one other supervised group home in Christchurch. She has 74 people who report to her and 7 direct reports, of which one is Ms Collins. Ms Hughes in her role signs off on all financial decisions relating to the site.

[7] Ms Hughes’ initial interactions with Ms Collins were predominantly the signing of requisitions that Ms Collins would bring to her. In late August 2014 some three months after Ms Hughes commenced in the residence manager role Ms Collins had a work accident when she fell through a deck. She was taken to hospital and was then on sick leave.

[8] In her absence, Ms Hughes wanted to understand the way finances worked at Te Oranga. Several matters caused her to become concerned about the way finances were run.

[9] Ms Hughes talked to the team leaders at Te Oranga, the senior Management Accountant and her manager Nova Banaghan, who was at that time the General Manager Residential and High Needs Services. Ms Banaghan was then known as Nova Salomen. Ms Hughes remained concerned that there were problems with finances at Te Oranga including of a nature that could suggest some wrong doing. In or about October 2014 she spoke to Human Resources consultant Maureen Love about how she should proceed.

[10] Following advice from those that she had spoken to at a senior management level, Ms Hughes wrote on 30 September 2014 to an investigator from the Internal Fraud Unit (IFU) at the Ministry setting out the concerns. Investigators at IFU investigate internal allegations of fraud.

[11] Ms Hughes arranged a meeting with Ms Collins on 2 October 2014 and advised her that an employment investigation was being undertaken. She handed her a letter 1 October 2014. It stated amongst other matters that as the result of a number of discrepancies in financial transactions and associated records including petty cash, coding, petrol vouchers and the debit card for which Ms Collins held responsibility as TLSS, she had made the decision that a full investigation is warranted. The letter provided that while the investigation was being undertaken it would be appropriate for Ms Collins to be on special leave with pay and to cease having access to the Ministry's system. Ms Collins was asked to return Ministry property, including laptop, keys and security card and was advised in the letter that she would be on special leave for the duration of the investigation or until advised otherwise, and that she could bring her union representative or support person to an interview. Ms Collins was also advised that should misconduct or serious misconduct be found by the decision maker, disciplinary action, including dismissal, may be an outcome. The Employee Assistance Programme (EAP) was offered to Ms Collins.

[12] After a process involving the IFU initially and then an employment investigation, Ms Collins was issued with a final written warning dated 18 February 2016 to remain in effect for a period of two years from that date.

[13] The amended statement of problem lodged on behalf of Ms Collins contains three disadvantage grievances. The Authority was advised by email dated 29 September 2017 from Mr McKenzie, and copied to Mr Kynaston and Ms Luxton that:

On reviewing the proceeding, it is decided that the applicant will pursue only the personal grievance for unjustified disadvantage arising from the final written warning. There is no issue that this grievance was raised in time.

[14] Mr McKenzie in final submissions stated that if the Authority got to the point of remedies it should weigh conduct at the time of the first grievance which concerned absence of process about a suspension but was not raised within the statutory timeframe. Mr Kynaston did not accept such an approach was available.

[15] A second grievance specifically about the IFU investigation was raised within the statutory timeframe that the Ministry failed or refused to recognise Ms Collin's union representative at a meeting on 16 June 2015. Final submissions focussed primarily on knowledge about the information gathered during the IFU investigation and its use in the employment investigation.

[16] The Ministry says that objectively assessed fairly and reasonably it could have issued a final warning to Ms Collins and that the procedural concerns raised either were not unjustified and did not cause disadvantage to Ms Collins and/or if defects are found they were minor and did not result in Ms Collins being treated unfairly.

[17] Ms Collins seeks payment of compensation in the sum of \$15,000 together with costs. In final submissions but not in the statement of problem Mr McKenzie additionally sought the removal of the warning.

The issues

[18] The Authority needs to determine the following matters:

- What were the relevant provisions of Ms Collins' job description, employment agreement, code of conduct and policies including disciplinary policies in place at the material time of the process leading to and at the time of issue of the final written warning;
- The reason for the finding of serious misconduct and final written warning;

- Was there a full and fair process undertaken by the Ministry at the conclusion of which a fair and reasonable employer could have found serious misconduct;
- Could a fair and reasonable employer have issued a final written warning for the conduct?

[19] The answer to these matters will include an objective assessment of the following matters specifically raised on behalf of Ms Collins:

- Did lack of knowledge that the information from the IFU process was given little if any weight in the employment investigation cause unfairness to Ms Collins?
- Was there procedural unfairness when the content of the memorandum dated 9 October 2015 from Ms Hughes to Ms Banaghan was not put to Ms Collins?
- Was there adequate investigation of the handover issue at the time Ms Collins started at Te Oranga and, if not, did it cause unfairness?
- Did the statement by the decision maker, Ms Banaghan, in a meeting on 21 January 2016 about setting aside some issues but then referring to those issues in the employment investigation outcome letter result in unfairness?
- Did the letter of 3 February 2016 cause unfairness to Ms Collins.
- Was it procedurally unfair that Ms Banaghan did not, as set out in the disciplinary policy guidelines, consult with her immediate manager before issuing a final written warning?
- Should the audit findings in 2010/2011 advised to the Ministry in 2012 have been given more weight and is there a disparity of treatment issue arising from the 2015 review of processes at residences?
- If the process leading to and the final written warning was unjustified, what remedies should be awarded and are there issues of contribution?

The test of justification

[20] The Authority is asked to consider whether the action of the Ministry in issuing Ms Collins with a final written warning was justified and is required to apply the justification test which is set out in s 103A of the Employment Relations Act 2000 (the Act). The Authority does not determine justification by considering what it may

have done in the circumstances. It is required under the test to consider on an objective basis whether the Ministry's actions in finding serious misconduct and imposing a final written warning and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the warning.

[21] The Authority must consider four procedural fairness factors set out in s103A (3) of the Act. These are whether the allegations against Ms Collins were sufficiently investigated, whether the concerns were raised with her, whether she had a reasonable opportunity to respond to them and whether such explanations were considered genuinely before the warning was imposed. Other factors may also be taken into account as appropriate and the Authority must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly. The Ministry could be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

The relevant documents

[22] At the end of the Authority investigation meeting, Mr Kynaston and Ms Luxton were asked to provide copies of the material disciplinary policies and managing performance policies. Mr McKenzie was to provide a copy of the full collective agreement because there was only an extract provided in the agreed bundle of documents. The Authority received copies of the disciplinary policy and guidelines from Ms Luxton and some brief additional submissions to those already provided to the Authority at the conclusion of the second day of its investigation meeting. Mr McKenzie was asked on several occasions to supply the collective agreement, and given opportunities to make submissions in response to those of Ms Luxton's about the disciplinary policy and guidelines she provided. Unfortunately he did not respond to emails from the Senior Authority Officer.

[23] The Senior Authority Officer advised counsel by email that the Authority would proceed to determine the matter on the basis of the information before it. I am satisfied from the content page of the collective agreement that disciplinary processes and guidelines sit outside of the collective agreement. No reliance was placed by Mr McKenzie on the content of the collective agreement in his submissions delivered on the second day of investigation.

Collective employment agreement

[24] Ms Collins' work was covered at the material time by the National Union of Public Employees (NUPE) and CYF collective employment agreement 2012 to 2015. Clause 1.2 of the collective agreement provides that the terms of employment include the agreement itself, appointment letter and any additional matters not inconsistent with the agreement. Clause 1.2 further provides that other Ministry policies and procedures, which may be amended by the Ministry from time to time, also apply and this is expressed to include the code of conduct that may be amended from time to time by the Ministry in consultation with NUPE.

Position description

[25] The position description for TLSS dated December 2009 provides under Purpose of Position:

The position's primary objective is to lead and manage residential administration and support staff in the provision of effective and efficient systems, processes and support services to aid the smooth running of the residence.

The role also provides advice and support to the Residence Manager and the Residential Management Team regarding all aspects of administrative, financial, HR and support services run by the Residence.

In carrying out this function the Team Leader Support Services will consult and liaise as appropriate with National Office and Team Leader Support Services in other residences to ensure that systems, processes and procedures are consistent, follow best practice and comply with relevant organisational policy and legislative requirements.

[26] One of the key accountabilities set out in the position description is to ensure efficient and effective systems, procedures and processes are in place including: HR and payroll processing, finance and general administration systems.

Code of Conduct

[27] The Code of Conduct is dated July 2011. Under the heading "Responsible" there is a subheading "Probity". This provides as follows:

When we deal with public money and resources, there is a standard of behaviour expected of us. This is called probity.

Probity means we have shown integrity and professionalism in using public money to do our work.

Probity isn't about setting a list of rules; it's about showing we have used good judgement and a sensible process to make out decisions around how we spend money.

When spending public money, you can show probity if your expenditure:

- is reasonable
- demonstrates value for money
- is relevant to what we do, or to our goals
- can satisfy the questions of anyone who asks about it, including the public.

If you have questions about probity or how to apply it in your role, talk to your manager.

The Ministry's financial policies are available on our intranet.

Financial Policies and Procedures

[28] On the Ministry intranet known as "Doogle" there are financial policies which are mandatory. There are also procedures (best practice) that provide a framework for financial accounting and reporting standards within the Ministry. As well as the behaviour expectation in the code of conduct there is also a Probity Policy with expectation of behaviour for staff members who are spending public money that expenditure decisions must be capable of withstanding internal and external scrutiny.

[29] Another Policy referred to during the process was the Records Management Policy the purpose of which is to ensure full and accurate records of the business activities of the Ministry to account for actions and decisions.

Disciplinary Action Policy, Disciplinary Process Guidelines and the Ministry Formal Disciplinary Process

[30] The disciplinary process guidelines define serious misconduct as behaviour that "destroys the Ministry's trust and confidence in the employee." Examples of actions which may be treated as serious misconduct include acts of wilful negligence or gross incompetence.

[31] The Ministry Formal Disciplinary Procedure is for managers where there is a performance problem not resolved through the normal processes for managing performance, misconduct or serious misconduct.

[32] One of the submissions made by Mr McKenzie about the final policy, the Disciplinary Action Policy, emphasises the part which provides: "before issuing a

final written warning, the immediate manager must first consult with their own manager and an HR Consultant.”

What were the reasons for the final warning?

[33] The final written warning is recorded in an eight page letter. Findings are that there was an absence of expected financial systems, processes and records resulting in the Ministry being unable to identify and account for expenditure at Te Oranga. There are also aspects of concern about unreasonable and excessive expenditure.

[34] Financial systems found not to be in place and resulting issues about identifying and accounting for expenditure are summarised below:

- (i) No system in place to enable the Ministry to account for all items purchased as used “*goods to the value of \$...*” paper purchase orders (requisitions). Excessive confectionary type foods/soft drink found to be purchased between 21 August 2012 to 26 June 2014.
- (ii) No system in place to track attractive items such as toasters, microwaves and boom boxes. The Ministry had no assurance that items purchased are being used for business purposes, or that they are remaining in the Residence or in the supervised group home. There was a concern that there were multiple appliances purchased beyond the needs of Te Oranga and the Supervised Group Home.
- (iii) No system to track MTA (petrol) vouchers purchase and use. Further that the advice to budget managers to approve purchasing a total of \$4,500 vouchers between 18 October 2012 and 30 May 2014 (20 months) has not been able to be justified. The Ministry is unable to account for \$1,900 worth of MTA vouchers.
- (iv) No system for access to the safe that managed business risk.
- (v) No system in place to identify all business risks with the management and use of the Supervised Group Home (SGH) debit card ensuring cash withdrawals were managed to avoid loss, theft or fraud. There was a finding that there was failure to have such a system in place because Ms Collins’ deliberately destroyed documentation. There was a finding that Ms Collins was responsible for the loss of \$60 from the Ministry because it is unable to be accounted for from a cash

withdrawal of \$260. Further, in the period between 11 May 2012 and 7 July 2014 when Ms Collins was responsible for the bank card management and use, \$1,640 was withdrawn in cash either by Ms Collins or one of the administration staff. The documentation that may have been completed to record the request for cash and the amount subsequently provided was destroyed and the Ministry is unable to verify that all of the remaining \$1,380 withdrawn over that period was provided to the SGH Team Leader or delegate.

- (vi) No system in place to account for cash for weekly tuck shop orders.

[35] The warning letter provides that Ms Banaghan in coming to her final decision regarding the overall finding of serious misconduct took into account Ms Collins' circumstances, mitigating factors, the purpose of the TLSS role and its key accountabilities, policy, procedure and audit requirements which Ms Collins in her position is required to ensure are met.

[36] There was a finding that a performance improvement plan was to be developed with the Residence Manager to address specific areas of performance in relation to identified deficiencies that would benefit from further support and attention. This was to be in effect for six months unless determined Ms Collins was meeting all of the requirements of the job description to the level expected.

Was there a full and fair process undertaken by the Ministry at the conclusion of which a fair and reasonable employer could have found serious misconduct?

Serious Misconduct

[37] Mr McKenzie's primary submission about the final written warning is that Ms Collins' actions did not amount to serious misconduct. He submits her actions were not intentional or wilful so as to result in a loss of trust and confidence but were more inadvertence, oversight or negligence – *Makatoa v Restaurant Brand*¹ and *Angel and Hutton v Fonterra*.² He refers to the decision maker seeming to justify the finding of serious misconduct on the number of concerns rather than their nature.

¹ *Makatoa v Restaurant Brands* [1999] 2 ERNZ 311 at pg 319

² *Angel and Hutton V Fonterra* (2007) 8 NZELC 98,643, [2006] ERNZ 1080

Further he submits that an audit in 2011 noted that there was no proper reconciliation of petrol vouchers or an appropriate asset register and no feedback about that was given to Ms Collins. Similarly Mr McKenzie submits that a 2015 audit undertaken as a result of the concerns at Te Oranga indicate some common systems/process gaps across a number of residences and that it is unfair to find serious misconduct on the part of Ms Collins alone.

[38] Mr Kynaston and Ms Luxton whilst acknowledging the line between performance and misconduct is “not a bright one” submit that serious non-performance which is gross negligence can amount to serious misconduct that goes to the heart of the employment relationship.³ They submit that the failings in this matter were serious, repeated, longstanding, knowing and fundamental to Ms Collins role. Ms Collins was they submit an expert, a leader and in a position of trust with the decision maker describing her as the “first line of defence” but that she offered none in some important respects.

[39] There is a fine line between incompetence and negligence. The Authority will need to objectively assess whether a fair and reasonable employer could conclude that Ms Collins’ conduct was sufficiently serious to deeply impair trust and confidence. That will require an objective assessment of the conclusion reached by the Ministry in reaching its findings of wilful negligence and gross incompetence that it did not accept Ms Collins was unaware of the standards expected nor that she did not know what to do or could not do what was required.

[40] There were a number of issues raised about the fairness of the process by Mr McKenzie and these will need to be objectively assessed to determine whether they were defects in the process that ultimately lead to unfairness or whether to the extent that there were defects they were minor and did not cause unfairness. The Employment Court stated about investigation fairness and fullness in *King v PPCS Richmond Ltd (formerly Richmond Ltd)*⁴ that the focus is not on minute and pedantic scrutiny of individual elements but a broad assessment of fairness in light of the seriousness of the allegations and its potential consequences.

³ *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29; *Click Clack International Ltd v James* [1994] 1 ERNZ 15

⁴ *King v PPCS Richmond Ltd* EmpC Auckland AC61/05 at [78]

[41] Ms Hughes started the employment investigation but Ms Banaghan was the ultimate decision maker.

IFU investigation October 2014 – June 2015

[42] The purpose of the IFU investigation is to determine whether there is fraud. It is not an employment process. If the outcome of the investigation is that there is fraud that can be established to the criminal standard then the matter is referred to Police. The investigation into the financial matters commenced with the IFU criminal investigation between October 2014 and June 2015. Ms Collins was medically unfit to be interviewed until after late May 2015. Other staff had been interviewed by that time. Ms Hughes kept in touch by telephone with Ms Collins over this time to check on her health and notes about that are in the bundle of documents.

[43] Ms Hughes had asked staff to sign an agreement on 1 October 2014 near the start of the process not to repeat, share or talk about any information discussed or overheard within the administration building.

Was Ms Gemmell's role recognised by the IFU investigator?

[44] An interview date and time with Ms Collins was scheduled for 16 June 2015. In the letter from Ms Hughes confirming the interview she was encouraged to bring a representative and Janice Gemmell Union Organiser and Secretary of NUPE duly attended in that role. The interview was recorded. There was no advance disclosure of information to Ms Collins and Ms Gemmell when requested because of the focus on preservation of evidence. Although Ms Gemmell was not permitted to answer any questions for Ms Collins the transcript from the interview supports she made various comments from time to time. Ms Collins was advised that she could leave the interview at any time and that she did not have to answer questions. I am not satisfied that there was a failure to recognise Ms Gemmell, rather that the type of investigation reflected the limited nature of her representation. I accept that the process was particularly difficult and stressful for Ms Collins.

[45] On 1 July 2015 the IFU investigator sent a memorandum to Ms Banaghan, Ms Hughes and human resources providing final information from the IFU

investigation. The main areas of concern for the IFU investigation was around the petrol vouchers and the \$1900 worth of vouchers that could not be accounted for and the \$260 withdrawn for the SGH from a debit card of which there was a written request for money and receipt for \$200 only. I could not be satisfied that an assurance was given to Ms Gemmell that the interview transcripts would not be provided to human resources.

[46] Materially the memorandum provided that it was unable to be proven to the criminal burden of proof that Ms Collins was responsible for \$1900 of unaccounted petrol vouchers and \$60 discrepancy in cash withdrawn. It was concluded on the available evidence that Ms Collins had not committed any offence under the Crimes Act 1961. It was noted that the lack of record keeping along with insufficient checks and balances at that time made it difficult to ascertain where the funds have gone but noted that the lack of financial processes at Te Oranga under the supervision of Ms Collins may be an issue for Code of Conduct proceedings.

[47] The transcripts of all interviews were attached to the memorandum together with copies of the signed receipt for \$200 and a banking transaction list.

Reinstatement of the employment investigation

Letter dated 7 August 2015

[48] Ms Hughes by letter dated 7 August 2015 wrote to Ms Collins and confirmed the outcome of the IFU investigation. She set out a number of matters for which explanations were sought. It was suggested the allegations changed over time and I have considered the disciplinary outcome letter against this first letter, subsequent letters in the process and the disciplinary meetings. Some of the allegations were not maintained and therefore not the subject of the final warning. I am satisfied that all allegations in the final outcome letter were put in that first letter although the approved purchases from 31 July 2012 to 19 June 2014 which the Ministry was unable to account for in the sum of \$730 were put with more specificity at the disciplinary meetings and in Ms Banaghan's letter to Ms Collins of 22 October 2015.

[49] Relevant documents were attached to Ms Hughes letter as below. Doogle as already set out is the intranet system on which policies can be accessed by employees.

- (i) TLSS position description.
- (ii) Purchasing and expenses policy, probity policy, financial policies and procedures, the Ministry financial procedures and policies as found on Doogle.
- (iii) Transcript of Ms Collins' interview with IFU and a transcript from the interviews of the other employees of the Ministry interviewed by IFU.
- (iv) Spreadsheet showing all purchase orders with the highlighted sections the ones being queried and delegation forms which provided Ms Collins with the authority to approve purchases on each form.
- (v) Documents relating to the petrol vouchers.
- (vi) Documents relating to the SGH cash advances and withdrawals.
- (vii) Documents pertaining to the Tuck Shop.

First Disciplinary meeting 1 September 2015

[50] Ms Collins attended this meeting with Ms Gemmell and Ms Hughes with Ms Love.

Explanations to the allegations

[51] One of the main explanations throughout the disciplinary meetings was that there was a lack of training for Ms Collins and that she was inexperienced in working at a residence. Her previous financial training before Te Oranga she explained was as a financial analyst for 12 months secondment and then a business analyst. She described that at the "high end" and very different to Residential Services. She said that there was no handover when she started as a Senior Administrator at Te Oranga and that the Senior Accountant had cancelled training on 6 occasions. She also emphasised a period of disruption and business at Te Oranga after she started including earthquakes and staff changes.

[52] Ms Collins also gave specific explanations orally and by way of written submission at the disciplinary meetings. Ms Collins said that she followed the systems to the extent that there were some at Te Oranga including for purchasing that was to describe the purchase of “goods to the value of.....” on the paper requisition form to be signed as approved by the residence manager. She said that the purchase of confectionary/soft drinks over the 22 months period was discussed with the residence manager before the requisitions were signed off and that the whilst the sum spent on those items over the period may sound significant it was not significant broken down to a daily amount. She explained why such purchase of those items was necessary and when the confectionary was used. She was unaware of missing receipts and had not been advised by the administrator about that.

[53] Ms Collins said she could not find a system for tracking attractive items and attempted twice to implement systems but these were not followed by unit staff. Ms Collins said that it appeared this was an issue across other residences. She said that she purchased multiple items to save money when they were on special.

[54] The explanation about petrol vouchers was that they were purchased after discussion with the residence manager and there was an increased need after the 2010 and 2011 earthquakes. Ms Collins explained how the vouchers were used. She explained there was no tracking system for them when she started. She said that one of her administrative staff shortly after her appointment in 2012 told her of problems elsewhere in the Ministry with missing petrol vouchers and Ms Collins asked her to set up a system to track the vouchers, reminding her several times but it was not done until July 2014 and it was therefore impossible for Ms Collins or other staff to “populate” the information before that date.

[55] Reliance was placed on the audit shortly after Ms Collins’ commenced at Te Oranga. Ms Collins said that she was questioned about the processes for petrol vouchers and petty cash but she was not advised to change what she was doing.

[56] Ms Collins said that she continued with the existing system for the safe and did not receive advice from the auditors that it needed to change.

[57] Ms Collins explained that SGH's came to be under the management of residences after she commenced employment and the debit cards for an SGH was then located at Te Oranga and funds requested from there. There was no system in place but Ms Collins created a form using the existing petty cash form to show cash advances given to staff. Ms Collins said that the form she created was an internal system and once receipts for the money were returned then she destroyed the advance and receipt form. The only form therefore that was still available for amounts withdrawn from the debit card refers to a request for an advance of \$200 and a signed receipt for the same. The bank account withdrawal was for \$260. Ms Collins said in her explanation that the amount of cash withdrawn would not always be the same amount as the cash advanced as the team leader SGH may bring in receipts for purchases made before the withdrawal of cash and would be given the cash equivalent of the receipt value at that time. She explained that this would not be recorded as an advance on the form.

[58] The explanation about the young person's tuck shop purchases was that Ms Collins was about to set up a scheme for this before she was injured. She said that there was no system when she commenced at Te Oranga for the receipting of the tuck shop cash and Ms Collins continued with this.

After the 1 September meeting – further investigations

[59] Following the 1 September 2015 meeting Ms Hughes undertook further investigations in light of the explanations. They included questions to the Senior Management Accountant who said in response that she was required when Ms Collins was first appointed to the position to offer training and assistance. She said that she offered Ms Collins various forms of training and any assistance that she may require but it was refused in all cases. She denied setting up and cancelling four meetings because she said Ms Collins did not wish to have any form of training.

[60] Ms Hughes also spoke to one of Ms Collins staff members who I shall call T. T said in response to questions that she created a spreadsheet on 29 July 2014 for the petrol vouchers which was sent to Ms Collins the same day and she placed it on the S/Drive.

[61] Ms Love interviewed an employee who worked as the Regional Financial Analyst at the time Ms Collins provided support to the permanent Financial Analyst. I'll call that employee P. The notes record that P said Ms Collins would have had to have known the finance policies and procedures and that Ms Collins did the budget manager training. P said the training covers a checklist about systems with petty cash and expenditure. The notes reflect she said that Ms Collins would know that there had to be tracking systems for money and purchased items and that Ms Collins appeared confident in her role.

Fairness of the investigation about the handover with the previous Senior Administrator at Te Oranga – Sandra Bond

[62] One of the issues Ms McKenzie raised was the fairness of the investigation into the handover to Ms Collins in late 2010 as further investigation would have clarified there was no full handover. Ms Bond was questioned during the employment investigation by both Ms Hughes and Ms Banaghan. The Authority heard evidence from Ms Bond. It was concluded by Ms Banaghan incorrectly, but understandably, given the information she had during the employment investigation that Ms Bond had provided Ms Collins with a full handover. The evidence to the Authority confirmed that did not happen.

[63] In response to questions throughout the disciplinary process Ms Bond said that she was in the senior administrator role from 1 July 2005 until 27 June 2010 at Te Oranga. She explained that she had a system for petrol vouchers signing in and out and other systems and processes she had developed and that there was a full handover provided to Ms Collins on her appointment. Ms Collins continued to maintain during the disciplinary process that there was a handover when she commenced employment at Te Oranga.

[64] When Ms Bond gave her evidence to the Authority she said that around the time Ms Collins applied for the role of TLSS she had spoken informally to her. She said that systems and processes she had developed were saved in the desk file. There was obviously a gap between Ms Bond leaving and Ms Collins starting but Ms Bond said that there were two experienced administrators in place and that she had left good systems in place. Ms Collins did not accept that there were systems in place as

detailed by Ms Bond. It was agreed they had a meeting on 11 February 2011 although there is some dispute as to the length of that meeting. Ms Collins says it was half an hour and Ms Bond says it was an hour. I accept on the balance of probabilities that there was some discussion at that time about systems.

[65] Mr Kynaston and Ms Luxton submit that Ms Banaghan did not rely on the presence or absence of a handover in making her decision. The reference to Ms Bond in the letter containing the preliminary outcome was about her availability for support and advice. In the final outcome letter whilst there was reference to Ms Bond having systems in place for petrol vouchers and attractive items but there is no reference to a handover.

[66] There was a failure to investigate further in the face of Ms Collins denial whether there was a handover in 2010 between Ms Bond and Ms Collins. I am not however satisfied that the issue of a handover or not in 2010 was a matter Ms Banaghan placed particular reliance on. Reliance was placed on Ms Collins' role to lead and manage effective and efficient systems. The focus for the petrol vouchers was from 2012 when Ms Collins knew about the risk of not having a system from her staff member T. Ms Collins had tried to establish a system for attractive items so it was not unreasonable to conclude she knew there should be one. The SGH debit card was not kept at Te Oranga until well after 2010 and Ms Collins created her own system for that. Further Ms Bond advised Ms Hughes in her email answering questions in September 2015 that she believed the tuck shop was introduced after she left.

[67] To the extent that the failure to investigate the handover issue further was a procedural defect then I find it was minor and I do not find it resulted in unfairness under s 103A (5) of the Act.

[68] Mr McKenzie also suggested that the prevailing financial processes/systems in place at Te Oranga when Ms Collins started in 2010 should have been investigated further but I do not find that was required for a full and fair investigation.

Knowledge about what would be taken into account from the IFU investigation in the employment investigation

[69] Ms Banaghan in her evidence said that she essentially gave little or no weight to the information from the IFU investigation at the Authority investigation meeting. Ms Gemmell in her evidence said that came as a surprise to her.

[70] Mr McKenzie submitted that raised procedural issues and was contrary to Ms Hughes' letter of 7 August 2015 that attached the interviews from the IFU as documents with others that were relevant to the explanations being requested.

[71] The Ministry properly conducted its own employment investigation. I accept there must have been some reliance on the finding that \$1900 worth of MTA vouchers were missing and that despite reconciliation checks made through various other areas of finances at Te Oranga \$60 remained unaccounted for. Those records of financial analysis were the investigator wrote to Ms Hughes available on request.

[72] The IFU investigation had a different focus, as to whether there was criminal offending, to the employment investigation. I am not persuaded that not placing weight on the interviews undertaken by the IFU and not advising Ms Gemmell and Ms Collins of this caused unfairness. Ms Collins and Ms Gemmell had copies all the interviews. The employment investigation covered additional concerns with a different focus. Mr McKenzie did not elaborate on what the unfairness was in submissions except to say there is no evidence from three people. One of those three T was interviewed again during the employment investigation and no unfairness I find could result from not taking her earlier interview into account. The allegation concerning another C was not pursued and there can be no unfairness there. The third person was the SGH team leader and it is unclear what unfairness there could be in not taking his statement to IFU into account.

Additional investigation material forwarded to Ms Collins

[73] By email dated 17 September 2015 Ms Love forwarded all of the additional investigation material and some other relevant material including Ms Collins

performance development agreements from 1 July 2011 to 20 June 2014 to Ms Collins.

Referral by Ms Hughes onto Ms Banaghan

[74] Ms Hughes said that she considered the material and did not feel the explanations were sufficient to explain the discrepancies. She referred the matter on to Ms Banaghan who had the required delegation to make a decision as to whether Ms Collins' behaviour could be considered serious misconduct and the required delegation to make a disciplinary outcome decision up to dismissal. Ms Hughes prepared and provided a detailed memorandum dated 9 October 2015 to Ms Banaghan to brief her on the disciplinary matters involving Ms Collins. This was not provided to Ms Collins. This is raised as one of the concerns about the process as there was no opportunity for her or Ms Gemmell to make representations that the matter should remain with Ms Hughes as one of performance rather than serious misconduct.

[75] I accept Mr Kynaston's submission that although this memorandum was not forwarded to Ms Collins she was advised of the concerns contained in it. I note Ms Hughes memorandum does goes further than simply setting out the concerns to making statements about possible disciplinary and employment outcomes with and without extenuating circumstances. Ms Banaghan said regardless of what was in the memorandum she made her own decision and the disciplinary outcome of a final warning seems to support that. I do not find that the failure to provide the memorandum caused unfairness therefore in the sense of pre-determination when the overall process is considered together with the outcome. Ms Gemmell and Ms Collins maintained the explanation that the concerns should be seen as performance issues to Ms Banaghan so that was not an opportunity lost when the matter was referred from Ms Hughes.

[76] If the failure to provide the memorandum can be seen as a procedural defect I find under s 103A (5) of the Act that it was minor and did not cause unfairness.

Ms Banaghan's involvement

[77] Ms Banaghan now works for another government department but at the material time in her General Manager Residential and High Needs Service role she had 16 people directly reporting to her and responsibility for approximately 750 employees. She was primarily responsible for the Residences under her management being run appropriately and in compliance with the Ministry policies, procedures and statutory obligations. Ms Banaghan had been involved with the Ministry and its predecessor at the time she became involved in the investigation for 19 years.

[78] Ms Banaghan was aware of the issues about potential mismanagement of finances at Te Oranga from October 2014 having been advised at an early stage by Ms Hughes. To the best of her ability she said she could not recall having contact with Ms Hughes about the matter whilst investigations took place.

Letter dated 22 October 2015

[79] Ms Banaghan wrote to Ms Collins on 22 October 2015 inviting her and her representative to a meeting on 26 November 2015. The letter set out the areas of concern for explanation.

[80] Ms Banaghan stated in the letter that if Ms Collins was unable to provide to her acceptable explanations for the matters and she found that they constitute serious misconduct then disciplinary action up to dismissal may occur. In her written evidence Ms Banaghan said that the apparent failings seemed to be such a major departure from the Ministry's expectations of someone in Ms Collins' position with her experience.

Meeting on 26 November 2015

[81] On 26 November Ms Love and Ms Banaghan met with Ms Collins and Ms Gemmell. Ms Love took notes which were not verbatim. These were provided after the meeting to Ms Gemmell and Ms Collins who made some alterations and additions to them. At the meeting Ms Collins read a pre-prepared submission that provided background and explanations. In answer to Ms Banaghan's questions

Ms Collins again referred to a lack of training and lack of systems and said training would have helped. She confirmed when asked by Ms Banaghan that she would know where to find the Ministry polices about probity and financial management. Ms Gemmell said that there were unusual amounts of disruption when Ms Collins started her role. Ms Collins said T was asked to produce a spreadsheet for petrol vouchers shortly after she started in 2012 but had delayed doing so for two years. Ms Banaghan said that she would make a decision by 1 December 2015 but after the meeting decided that she needed to do further investigations.

[82] The notes from these further investigations were provided to Ms Gemmell and Ms Collins. Ms Gemmell advised that she would not be able to meet until the New Year because of the holiday period until the week beginning 18 January and a meeting was set up for 21 January.

Meeting 21 January 2016 and advice that there was a preliminary decision to dismiss

[83] Ms Love and Ms Banaghan attended this meeting with Ms Collins and Ms Gemmell. Ms Gemmell had provided some written responses to the additional information obtained after the meeting on 26 November 2015. Ms Love took notes although not verbatim.

[84] Ms Collins did not accept that she refused training from the accountant and wrote that she was never approached about any performance concerns although it appeared the accountant had some concerns about Ms Collins' accounting knowledge early on in her role.

[85] Some focus was placed on the following statement in the notes attributed to Ms Banaghan. Ms Banaghan is recorded as saying that the "biggest thing for me is there were failings regarding the MTA vouchers, the debit card & the Tuck Shop receipt. These are the 3 big areas. The others I am setting aside" Ms Banaghan in her evidence said that this was a reference to "lollies and fizzy and issues of wastage". Immediately after this the notes reflect statements about the goods to the value of issue... "One of the trust and confidence issues is that the paperwork does not reflect the detail of what was to be purchased.." There is then reference to the

purchase of lollies and fizzy and a statement “I am not going to pursue, we shouldn’t have wastage. ” It is clear however from the next statement that a concern remained about the limited detail on the paper requisition form about what was purchased. There is reference to the assets register and later in the notes reference to the safe. I accept that the notes are somewhat confusing but do not conclude that it was intended that only three issues would be pursued. It does seem more likely when I consider the matter as a whole that it was the allegation of waste resulting from items of confectionary and fizzy drinks not consumed by their best before date that was not to be pursued. I have reached that conclusion because that is the only matter not referred to in the final decision.

[86] Ms Banaghan refers at the disciplinary meeting to the seriousness of the core failings around cash. She advised her preliminary decision was dismissal. Ms Gemmell voiced strong opposition to that preliminary decision to dismiss and said that she needed a letter stating the reasons for the preliminary view which Ms Banaghan said she would provide and she would then hear further from Ms Gemmell and Ms Collins.

Letter dated 3 February 2016

[87] Ms Banaghan sent a letter dated 3 February 2016 to Ms Collins and referred amongst other matters to submissions that any deficiencies and breaches identified were as a result of Ms Collins not being trained in the financial systems and processes. Ms Banaghan stated that the weight of evidence was to the contrary. Ms Banaghan stated in the letter that Ms Collins was a very experienced administrator and had been part of the CYF regional finance team including providing training to budget managers which included training on the financial policies. Further that there were opportunities to access training, and that Ms Collins had not identified any areas relating to financial administration systems or processes for training or development in the PDA’s.

[88] Ms Banaghan set out why she did not accept that the matters referred to as disruptions explained the deficiencies and breaches.

[89] The preliminary view was that it was not accepted that Ms Collins was unaware of the standard expected of her given her background, knowledge and experience or that she did not know what to do or could not do what was required. There was reference to the consequences of not following the policies and discharging duties, a serious lack of care and judgement amounting to wilful negligence and gross incompetence which included the Ministry incurring loss.

[90] It was concluded that when viewed as a whole Ms Collins actions, inactions and conduct had deeply impaired the trust and confidence necessary to the employment relationship to function properly and there has been an irreparable breakdown in the relationship. It was concluded the preliminary view was that the appropriate course of action was dismissal. Ms Collins was invited to a final decision meeting on 19 February 2016 but if she did not wish to meet then she was to advise how she wished to receive the decision.

Letter from Ms Gemmell in response 15 February 2016 referring to inability to respond because of inadequacy of information

[91] Ms Gemmell wrote to Ms Banaghan by letter dated 15 February 2016. She stated amongst other matters that there was fundamental disagreement with the preliminary finding that the conduct complained of is serious misconduct. Further that even if training and such issues do not excuse any lapses they must be mitigation. Ms Gemmell referred to the difficulty in responding to the entirety of the letter because the policies and procedure referred to are not specified nor is the evidence that outweighed the explanations of Ms Collins. Ms Gemmell wrote that Ms Collins did not see a further meeting to be of assistance and the decision letter could be sent to her.

[92] Mr McKenzie submits that failure to provide sufficient information about the reasons findings was made and the policies was procedurally unfair. Mr Kynaston submits that Ms Collins had already by that stage of the process confirmed she was aware of the relevant policies and the specific concerns had been put to her many times. Mr Kynaston submits these were not technical breaches which turned on fine distinctions.

[93] I accept that the concerns had been put several times to Ms Collins and that the 3 February letter dealt adequately with the reasons why the explanations about training and other distractions for the breaches was not accepted. There was enough information for a response to that. I have then considered whether good faith obligations and a proper opportunity to explain required more than a statement that there were multiple breaches of the Ministry's policies without referring to specific policies and sections.

[94] The policy requirements had been discussed at meetings. Ms Collins said that she knew where the policies were and she had been provided early on in the disciplinary process with copies of these. The final outcome letter does refer to breaches of policies. I accept Mr Kynaston's submission that there was nothing technical in this case about the breaches of policies turning on fine distinctions as they do in other cases. The policy provisions alleged to be breached are three in number. The first is a breach of the Financial Policy BO2.3.6 about sufficiently documenting expenditure to support audit standards and to avoid a suggestion of impropriety. This was alleged to have been breached for a number of allegations found to be made out. The second is Financial Policy BO2.3.2 that expenditure must be appropriate to the occasion, moderate and take into account the use of public funds. The third is a breach of the Recordkeeping policy for both the failure to have adequate records about the petrol vouchers and for destroying the SGH documents for request and receipt.

[95] All of these were discussed in a general way about documenting expenditure adequately, excessive expenditure and the need to keep adequate records and concerns about the destruction of records during the investigation process. Explanations were given.

[96] I find to the extent that failing to specify the policy and sections is a defect in the process it was minor and did not cause unfairness under s 103A (5) of the Act in the particular circumstances of this matter.

Letter of 18 February 2016

[97] The employment investigation outcome letter was then received and Ms Banaghan changed her preliminary view of dismissal to impose a final written warning. This was set out to be on the basis of a previously unblemished record of service over a significant period. Further that whilst it was not accepted that lack of training was the reason for most of the deficiencies it was unwise of the Ministry to have considered her previous experience in financial administration would lead to Ms Collins effectively managing systems and processes to the standard required of a TLSS.

No consultation with Manager

[98] Ms Banaghan did not consult with her manager as the Disciplinary Action Policy says she should have. Mr McKenzie raised a procedural concern. I accept Ms Luxton's submission that the Disciplinary Policy provides guidelines that depend on the circumstances of each case. Interestingly if Ms Banaghan had decided to dismiss Ms Collins then she would not it would appear have been required to consult with her manager who was a Deputy Chief Executive. To the extent this could be seen as a defect in the process then I find it was minor and Ms Collins was not treated unfairly in circumstances whether the disciplinary outcome was reduced to a final written warning from a preliminary view of dismissal.

Conclusion about whether there was a full and fair investigation?

[99] There was an adequate investigation by the Ministry into the conduct and explanations. The concerns were raised clearly and Ms Collins had an opportunity to respond. Her explanations were considered and further investigations were undertaken in what was objectively assessed an open minded and careful manner. There was an opportunity for comment to the preliminary decision and the disciplinary outcome was reduced. The process satisfied the requirements of s 103A (3) of the Act and other factors that were raised as procedural concerns were to the extent they could be considered defects minor and did not result in Ms Collins being treated unfairly. There was a full and fair investigation undertaken by the Ministry.

Conclusion about the finding of Serious Misconduct

[100] Mr McKenzie submits it is not clear how the conduct complained of could be seen as serious misconduct rather than performance concerns and that it seemed to turn on the number of concerns rather than the seriousness of the conduct itself.

[101] I find objectively assessed that the Ministry could fairly and reasonably have pursued the concerns as a disciplinary matter on the basis of misconduct rather than performance. Ms Banaghan could fairly have had regard to Ms Collins role, background, knowledge and experience to conclude that she should have been aware of the standard expected of her and that she knew what to do and could have done it. The primary purpose of the TLSS role is about leading and managing staff to provide effective and efficient systems and processes. Ensuring those systems and processes are provided is a key accountability. Ms Collins was in a position of trust and leadership. PG who commenced as residence manager after Ms Collins had commenced employment at Te Oranga said as part of the disciplinary investigation that she implicitly trusted Ms Collins and did not really question her. It was not a situation where any failing or deficiencies on the part of Ms Collins would easily have been picked up in the ordinary course of events. Ms Banaghan's conclusion that Ms Collins was the "first line of defence" was fair and reasonable..

[102] A fair and reasonable employer could have concluded that there were opportunities for Ms Collins to seek advice and training and that she did not advise that there were training needs. Ms Collins referred during the process to a handwritten supervision note dated 14 February 2012 following supervision with PG that referred to limited experience and guidance in her job description and role. There was reference to clarity around expectations and processes. If there were issues about this then they were not carried across to the formal Pay and Development Agreement 2012/2013 and 2013/2014. There is also an earlier 2011/2012 Pay and Development Agreement that states that when Ms Collins arrived at the residence there were very few systems and processes in place but in the last 12 months she has developed a desk file for administration that covers all financial and other systems that is constantly being updated.

[103] A conclusion was available to a fair and reasonable employer that Ms Collins was very experienced in administration and there was no obvious reason to doubt her competence. She had been part of CYF's regional finance team and had provided training to budget managers on the financial policies and she knew where the policies were. Ms Collins was regarded as somewhat of an expert in administration matters. I accept that the Senior Management Accountant did seem to have some concerns early on about Ms Collins' accounting ability although that was not pursued which was unfortunate. That does not change the conclusion fairly and reasonably reached that Ms Collins was very experienced in administration and could be seen as competent.

[104] A fair and reasonable employer could conclude the failings, deficiencies and breaches were serious, longstanding and that there was knowledge about risk and the need for accountability with public funds and a need for systems. Ms Collins knew at least from early 2012 that there should be systems to record petrol vouchers to protect against theft or loss. No system was put in place until mid-2014. There was no record until then. The Ministry cannot account for \$1900 worth of vouchers. The failure to provide a handover in 2010 or pass on a 2010/2011 audit finding in residence report about deficiencies at Te Oranga does not explain this failure.

[105] Objectively assessed a fair and reasonable employer could conclude a considerable amount was spent on petrol vouchers of \$4,500 in a 20 months period and the level of purchase was not able to be justified because there was no system to track the use of vouchers. A fair and reasonable employer could conclude that was not satisfactorily explained by earthquakes, difficult clients and other matters. Ms Hughes in her evidence said that over two and half years only \$500 has been spent on MTA vouchers at Te Oranga.

[106] It could be fairly and reasonably concluded that Ms Collins knew about the need to maintain records to account for public funds but having developed a system to record a request for and receipt of cash withdrawals from the SGH debit card she destroyed the records once receipts were available. The Ministry is not able to account for a cash amount of \$60 and a further \$1,380 withdrawn using the card.

[107] A fair and reasonable employer could conclude that Ms Collins knew about a system being required to purchase and track attractive items because of her

explanation that she tried to implement a system. There was however no system to track multiple purchasing of goods including microwaves, rice cookers, toasters and boom boxes. Many of the items cannot be traced.

[108] It could also be fairly and reasonably concluded that Ms Collins knew she should have a system for cash used for tuck shop transactions as she explained she was working on a system at the time of her work accident. As there was no system the Ministry has a basis on which to conclude that the cash was correctly accounted for over a number of years.

[109] A fair and reasonable employer could conclude that Ms Collin should have known that expenditure should be sufficiently documented for audit purposes and to avoid a suggestion of impropriety. The paper purchase requisition orders that were signed by the residence manager only set out “goods to the value of \$...” and not a full description of what was being purchased. Ms Collins said that she discussed what was to be purchased and was only following the previous system. Ms Banaghan appropriately took into account and weighed interviews from the two Residence Managers who signed the forms in that state and did not require more detail on those forms. She noted that they were both new and implicitly trusted Ms Collins. One believed she knew what was being purchased but the other said that she would not have approved the amount spent on confectionary which a fair and reasonable employer could conclude was considerable. A fair and reasonable employer could conclude that the lack of detail on the requisition order created audit issues and that Ms Collins must have known about accountability for spending public funds and that her explanation that she was simply following an existing process was not acceptable.

[110] There was no system in place to manage who accessed the safe and what they took. The safe had petty cash, tuck shop money, petrol vouchers and taxi chits. Over a period from July 2012 to June 2014 the Ministry is unable to account for \$730 worth of purchases as there are no paper requisitions or receipts.

[111] Viewed overall I find that a fair and reasonable employer could conclude that the conduct breached Ministry policies and the code of conduct and amounted to gross negligence from someone in the TLSS role. Objectively assessed a conclusion was

available to Ms Banaghan that the actions, inactions and conduct impaired deeply the trust and confidence the Ministry needed to have in Ms Collins in her TLSS role.

The 2015 review

[112] Mr McKenzie placed some reliance in final submissions on the 2015 review Ms Banaghan asked for after the issue at Te Oranga came to light suggesting similar issues existed across all residences. He submitted there was a disparity type argument in treatment, potential or actual, of Ms Collins. As this did not seem to have been clearly raised before the Authority's investigation meeting I asked Ms Banaghan whether to her knowledge there had been similar issues to those with Ms Collins at other residences and she responded that there were not. That matter can be taken no further.

[113] A fair and reasonable employer could have found that there was serious misconduct on the part of Ms Collins.

Could a fair and reasonable employer have given Ms Collins a final written warning?

[114] A fair and reasonable employer having found there was serious misconduct could have in all the circumstances given Ms Collins a two year final written warning with a performance improvement plan. Ms Collins has returned to work and has been successful I understand in completing the Ministry's requirements.

[115] The action of the Ministry in giving Ms Collins a final written warning is justifiable under s 103A of the Act.

Costs

[116] I reserve the issue of costs. There may be agreement reached about costs failing which Mr Kynaston and Ms Luxton have until 14 February 2018 to lodge and serve submissions as to costs and Mr McKenzie has until 7 March 2018 to lodge and serve a response to those submissions.

Helen Doyle
Member of the Employment Relations Authority