

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 390  
3093892

BETWEEN                      ALAN PEARSON  
   Applicant  
  
A N D                              THE CHIEF EXECUTIVE OF  
   ORANGA TAMARIKI  
   Respondent

Member of Authority:              Peter van Keulen  
  
Representatives:                      Vanessa Baakman and Ramses Hunt, counsel for the  
   Applicant  
   Hamish Kynaston and Louise Grey, counsel for the  
   Respondent  
  
Investigation Meeting:              29 – 31 March 2021  
  
Submissions Received:              31 March 2021 and 19 April 2021 from the Applicant  
   31 March 2021 and 3 May 2021 from the Respondent  
  
Date of Determination:              6 September 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Alan Pearson was employed by the Chief Executive of Oranga Tamariki as a Youth Justice Senior Practitioner.

[2]     Mr Pearson began working at the Christchurch East site of Oranga Tamariki in June 2016. During Mr Pearson's time at the Christchurch East site various issues arose with his

conduct, resulting in disciplinary processes being undertaken and warnings issued. This culminated in a final disciplinary process at the end of 2019 and Mr Pearson being dismissed in February 2020.

[3] Mr Pearson raised various personal grievances in response to Oranga Tamariki's disciplinary actions including a personal grievance for unjustified dismissal in February 2020. Mr Pearson was unable to resolve any of his grievances with Oranga Tamariki so he lodged a statement of problem in the Authority.

[4] Oranga Tamariki responded to Mr Pearson's claims in the statement of problem in two parts. It says:

(a) Many of the personal grievances on which Mr Pearson's claims are based were not raised within the statutory time frame of 90 days and therefore I do not have jurisdiction to investigate and determine those claims.<sup>1</sup>

(b) For those grievances which were raised in time, Oranga Tamariki says Mr Pearson was not unjustifiably disadvantaged in his employment nor was he unjustifiably dismissed. Oranga Tamariki says it acted fairly, reasonably and in good faith and it followed its relevant policies and guidelines when it conducted the disciplinary processes.

[5] This determination resolves Mr Pearson's claims, including the issues raised by Oranga Tamariki.

### **Non-publication orders**

[6] Some of the evidence that formed part of the investigation meeting included evidence that referred to and could potentially identify young people associated with Oranga Tamariki. It also included some limited personal and/or private information about Mr Pearson's supervisors' health and/or work. Counsel for Oranga Tamariki applied for non-publication orders in respect of this information and counsel for Mr Pearson did not oppose the application.

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<sup>1</sup> Section 114 of the Employment Relations Act 2000.

[7] I am satisfied that the identities of those young people and personal and/or private information need not be disclosed beyond my investigation meeting and grant the non-publication order as requested.

[8] The terms of the non-publication order made pursuant to clause 12 of schedule 2 of the Act are that:

(a) I prohibit from publication the names and identifying details of young people referenced in this matter (through the source documents, audio recordings, written and oral evidence, the pleadings and submissions) and any information pertaining to Mr Pearson's supervisor's personal health information and some work matters which was part of the evidence in my investigation meeting.

(b) This order is made to protect the individuals' identities and the personal information of people not involved in the matter and in particular the investigation meeting. And, in the case of Mr Pearson's supervisors it is made to protect personal information that need not be disclosed publically. This non-publication order does not prevent the parties or any other persons involved in the investigation meeting from discussing or sharing the underlying source of evidence for the purpose of considering my determination and any challenge rights should they wish to.

[9] Further, I note that Mr Pearson's supervisors did not participate in my investigation and there was a lot of evidence about their interactions with him, including some adverse allegations or assertions that might reflect badly on them. In these circumstances I consider it appropriate to not identify Mr Pearson's supervisors but will refer to them as "LMR" and "PKB".

### **Do I have jurisdiction to investigate and determine Mr Pearson's claims?**

[10] If Mr Pearson's personal grievances were not raised within the 90 day time frame then I do not have jurisdiction to investigate and determine any claims based on them.

[11] I will briefly set out the various personal grievances and my conclusions on whether they have been raised in time so as to establish the claims that I do have jurisdiction to consider and determine.

[12] There is no question about Mr Pearson's personal grievance for unjustified dismissal being raised within time and therefore I have jurisdiction to consider and determine that claim.

[13] From Oranga Tamariki's perspective the issue with personal grievances being raised out of time primarily concerns three main personal grievances for unjustifiable action causing disadvantage. They are:

- (a) That Oranga Tamariki used various disciplinary processes to bully and harass Mr Pearson.
- (b) That Oranga Tamariki repeatedly delayed approving Mr Pearson's leave requests or in some cases denied his leave requests without good reason.
- (c) That Oranga Tamariki failed to uphold an agreement it had with Mr Pearson that he would be supervised by a registered social worker.

[14] In addition to these three grievances there were also some ancillary matters raised in relation to performance issues addressed during Mr Pearson's employment at the Christchurch East Branch.

[15] I have reviewed the relevant evidence including contemporaneous correspondence and considered counsels' submissions on the timing of the personal grievances being raised. I have also accepted various admissions made by Mr Pearson's counsel regarding personal grievances that were not raised in time, through the management and progression of Mr Pearson's claims to the investigation meeting. Based on all of this I conclude that the three main personal grievances set out above were not raised within the required 90 day period and therefore I cannot consider and determine any claims based on them. However there were some specific personal grievances raised; the following personal grievances were raised in time and these claims will therefore be considered and determined by me:

- (a) Three personal grievances relating to warnings issued to Mr Pearson; one for each of the warnings issued to Mr Pearson on 9 November 2017, 15 December 2017 and 12 December 2018.

(b) A personal grievance raised regarding the alleged actions of Mr Pearson's supervisor toward him in a meeting on 4 July 2019 and Oranga Tamariki not properly investigating Mr Pearson's complaint.

(c) Mr Pearson's personal grievance for unjustified dismissal.

### **Events that occurred during Mr Pearson's employment**

[16] Mr Pearson's evidence canvassed a number of matters which Oranga Tamariki escalated to disciplinary processes. Some of those matters are relevant to the personal grievances that Mr Pearson did raise in time and I can determine, but other events simply inform the background and context of Mr Pearson's overall employment with Oranga Tamariki.

[17] Most of the relevant events occurred when Mr Pearson worked at the Christchurch East branch of Oranga Tamariki. Whilst at the Christchurch East branch Mr Pearson's reporting line was:

(a) LMR, was Mr Pearson's supervisor until late 2017;

(b) PKB, was Mr Pearson's supervisor from late 2017 until dismissal; and

(c) Christopher Rewha, Youth Justice Manager at Christchurch East during the time Mr Pearson worked there.

#### *April 2016 - security guard complaint*

[18] In April 2016, before Mr Pearson began working at the Christchurch East site, two security guards complained about Mr Pearson's behaviour when visiting the Papanui Site. The complaint was that Mr Pearson had been rude to one of the guards, had not followed protocols and ignored the guard when she raised this with him. Mr Pearson also raised a complaint about the security guards, largely about the complaint made being untrue and the manner in which one of the guards had discussed Mr Pearson, complaining about him, to other staff.

[19] Ultimately the complaints were resolved through an informal process of expectation setting.

*October 2016 – first warning*

[20] In September 2016 Mr Pearson was rostered to cover after hours Youth Court Officer duties at Rangatahi Court on 26 September as the usual Youth Court Officer had leave booked. On 7 September, Mr Pearson advised Mr Rewha, who was dealing with the roster as LMR was on leave, that he did not feel comfortable in the Rangatahi Court and he was not willing to undertake the extra duty. There were further exchanges between Mr Pearson and Mr Rewha regarding this but ultimately Mr Pearson refused to cover the Youth Court Officer shift on 26 September.

[21] Oranga Tamariki followed up on this matter by conducting a disciplinary process with Mr Pearson and on 28 October 2016 Mr Pearson was issued with a six month verbal warning for failing to follow a lawful and reasonable instruction.

*December 2016 - supervisor complaint*

[22] In October 2016, Mr Pearson had an email exchange with an Oranga Tamariki supervisor based at Christchurch West; Mr Pearson's involvement in the exchange was as a PSA delegate representing another employee. The supervisor took exception to the tone, believing it to be belittling and threatening. In the first instance the supervisor sought to address the email through the PSA but was unsuccessful in resolving her concerns so she escalated it to a formal complaint against Mr Pearson in December 2016. Oranga Tamariki commenced a disciplinary investigation in relation to the complaint, with Mr Pearson.

[23] Mr Pearson responded to the investigation advising Oranga Tamariki that his actions were as a PSA delegate and any complaint arising out of that could not form a disciplinary matter for him as an employee. Ultimately the disciplinary process did not proceed and the issue was resolved by intervention from the PSA.

*November 2017 – second warning*

[24] Between the start of May 2017 and the end of September 2017, Mr Rewha received various complaints about Mr Pearson's conduct. Each complaint was raised with Mr Pearson as it was received and investigated by Oranga Tamariki. When disciplinary processes were being initiated in respect of some of the complaints, Mr Pearson's PSA representative suggested that complaints could be addressed together in one process rather than individually.

Oranga Tamariki agreed with this approach and seven allegations were considered in one disciplinary process.

[25] There were two meetings held as part of the disciplinary process, one on 14 September 2017 and a second on 2 November 2017. As a result of the disciplinary process Oranga Tamariki upheld three of seven allegations relating to Mr Pearson's conduct:

- (a) Mr Pearson's inappropriate conduct toward national call centre staff.
- (b) Mr Pearson refusing to contact a family about an adverse caregiver assessment.
- (c) Threatening LMR with a complaint.

[26] And as a consequence of these findings, Oranga Tamariki concluded that Mr Pearson's conduct had breached the State Services Standards of Integrity and Conduct. Mr Pearson was issued with a 12 month verbal warning on 9 November 2017.

[27] Mr Pearson raised a personal grievance in respect of this disciplinary process on 17 January 2018 and an internal review of the process and outcome was undertaken. This review resulted in the finding of one of the allegations, that Mr Pearson had threatened LMR, being reversed to "not upheld". However, the other two findings were upheld and the sanction imposed, a 12 month verbal warning, was also upheld as the appropriate sanction.

#### *December 2017 – third warning*

[28] On 3 October 2017, Mr Pearson was told to attend an urgent judicial conference scheduled for 6 October. Mr Pearson refused to attend, and then did not attend the judicial conference, as he was scheduled to attend a monthly PSA meeting.

[29] Oranga Tamariki investigated this matter and conducted a disciplinary process. Oranga Tamariki found that Mr Pearson not only failed to attend the judicial conference and in doing so he had knowingly and willingly ignored an instruction from his supervisor. And this behaviour was, in turn, a breach of Oranga Tamariki's Code of Conduct, amounting to misconduct. Mr Pearson was issued with a 12 month written warning on 15 December 2017.

[30] Mr Pearson raised a personal grievance in respect of the disciplinary process and the outcome. Oranga Tamariki reviewed the process and outcome and upheld the decision but reduced the written warning to a 12 month verbal warning.

*December 2018 – fourth warning*

[31] Mr Pearson had three days holiday booked for 15 to 17 August 2018 but subsequently cancelled the holiday for 17 August as he had a work commitment he could not change.

[32] On 16 August 2018, Mr Pearson's work commitment for 17 August was cancelled so he emailed PKB and advised her he would take the holiday on 17 August after all. PKB responded advising Mr Pearson that he could not take the holiday as he had another work commitment on that day, a Fresh Start Panel meeting, which he was still required to attend. Despite this email exchange Mr Pearson did not attend work on 17 August 2018.

[33] Oranga Tamariki investigated this absence and commenced a disciplinary process with Mr Pearson on 12 September 2018 based on two allegations:

(a) Mr Pearson failed to attend work without applying for authorisations.

(b) Mr Pearson failed to attend the Fresh Start Panel meeting as instructed.

[34] In the course of that process a further issue arose with Mr Pearson's conduct; an allegation that Mr Pearson had failed to follow instructions from PKB relating to an amendment to court documents. This allegation was included in the disciplinary process that had already been commenced.

[35] After a disciplinary meeting, Oranga Tamariki concluded that all three allegations had been made out and this was a breach of the Code of Conduct, amounting to misconduct. On 12 December 2018 Oranga Tamariki issued Mr Pearson with a 12 month written warning, which it considered to be the appropriate sanction.

[36] Mr Pearson then raised a personal grievance in respect of the disciplinary process and the outcome on 6 March 2019. Oranga Tamariki reviewed the disciplinary process and upheld the decision to impose a 12 month written warning.

*July 2019 – Mr Pearson’s bullying complaint*

[37] On 29 September 2019, Mr Pearson raised a personal grievance for unjustifiable action causing disadvantage claiming Oranga Tamariki had failed to ensure his health and safety as he felt bullied by his supervisor in a meeting on 4 July 2019. Mr Pearson said that during the meeting with PKB he was subject to aggressive and threatening behaviour and specifically PKB called him a liar, but after further discussion accepted Mr Pearson was correct yet refused to apologise to him. And Mr Pearson complained that despite raising his issues arising out of the meeting, immediately after it, Oranga Tamariki failed to investigate his concerns.

[38] The context of Mr Pearson’s complaint about PKB was that she also complained about Mr Pearson’s behaviour in the meeting on 4 July 2019.

[39] Mr Rewha responded to these complaints by speaking to both Mr Pearson and PKB about what had occurred and how the other felt about what had happened. Mr Rewha asked PKB to work through the issues with Mr Pearson and when Mr Rewha followed up with Mr Pearson he advised that he and PKB were working through their complaints and was hopeful they would be able to resolve them.

[40] It appears that Mr Pearson was not satisfied that matters between himself and PKB were adequately resolved and he raised a personal grievance. In response to the personal grievance Oranga Tamariki attended mediation with Mr Pearson on 15 October 2019 but it appears that his grievance was not resolved in that mediation. Oranga Tamariki took no further steps in relation to Mr Pearson’s personal grievance after the mediation.

*February 2020 – dismissal*

[41] In August and September 2019, Mr Rewha received complaints from PKB and a colleague of Mr Pearson who was his acting supervisor at the relevant time. In both instances PKB and the acting supervisor were visibly distressed by what had occurred. Mr Rewha was particularly concerned about the complaint by the acting supervisor as it appeared to show an escalation in Mr Pearson’s previous behaviour toward his supervisors.

[42] Having investigated the complaints Mr Rewha commenced a disciplinary process with Mr Pearson based on four concerns. These were, that Mr Pearson:

- (a) Had communicated disrespectfully with his supervisors.
- (b) Had refused to follow instructions from his supervisors.
- (c) Had threatened to act in a way that could bring Oranga Tamariki into disrepute.
- (d) Had acted in a way that made his supervisors feel bullied, personally attacked, belittled and berated.

[43] The disciplinary process in relation to these concerns took some time, with meetings between Oranga Tamariki and Mr Pearson taking place in September, October and December 2019 to discuss the allegations and hear Mr Pearson's responses to the information. There were then further meetings in January and February 2020 to discuss Oranga Tamariki's preliminary findings and proposed outcome and final findings and outcome.

[44] It was in the meeting on 5 February 2020 that Mr Pearson's employment was terminated; Oranga Tamariki having concluded that Mr Pearson had communicated disrespectfully with his supervisors, had refused to follow lawful and reasonable instructions from his supervisors and had threatened to bring Oranga Tamariki into disrepute through his actions. Oranga Tamariki concluded that these actions amounted to serious misconduct and after considering appropriate sanctions including alternatives to dismissal, it concluded that dismissal was appropriate.

### **Unjustifiable action causing disadvantage**

[45] Section 103(1)(b) of the Employment Relations Act 2000 (the Act) sets out that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[46] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?

(b) If so, did the employer's actions cause any disadvantage to the employee's employment or a condition of employment?

(c) If so, were the employer's actions justifiable?

*Warnings issued to Mr Pearson on 9 November 2017, 15 December 2017 and 12 December 2018*

[47] In terms of Mr Pearson's three personal grievances for unjustifiable action causing disadvantage relating to the warnings he received on 9 November 2017, 15 December 2017 and 12 December 2018, there is no dispute that Oranga Tamariki conducted disciplinary processes and issued warnings; that is the actions complained of occurred. And it is clear that issuing a warning to an employee does cause a disadvantage to that employee's employment. So, the outstanding question for each of Mr Pearson's grievances in relation to the warnings is, were Oranga Tamariki's actions in carrying out each disciplinary process and then deciding to issue Mr Pearson with a warning, justifiable.

[48] In the context of disciplinary processes and sanctions being imposed, the test for justification is set out in s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[49] The test for justification applies in two parts. First, whether the employer carried out a fair process in coming to the decision to issue a warning and second, whether the decision to issue the warning was substantively justified.

[50] Starting with the question of a fair process, this is governed by s 103A of the Act, but it is also informed by s 4(1A) of the Act. Based on these sections, in order to carry out a fair process Oranga Tamariki needed to:

- (a) Properly investigate the concerns it had about Mr Pearson's conduct;
- (b) Clearly outline its concerns regarding this to Mr Pearson so he could respond to them;

- (c) Give Mr Pearson a reasonable opportunity to respond to the information and the concerns, providing any contrary position if the behaviour was disputed or any mitigating explanation if the behaviour occurred; and
- (d) Consider any information or explanations given by Mr Pearson before deciding whether the behaviour occurred, if it did whether it amounted to misconduct and then what sanction, if any, was appropriate.

[51] In my investigation meeting there was a large amount of written and oral evidence about the events that comprised the allegations making up the three relevant disciplinary processes and about the actions undertaken by Oranga Tamariki for each process. I have carefully considered this evidence and am satisfied that for each process there has been a similar pattern. As my conclusion for each process are the same I do not consider it necessary to traverse the detail but rather I set out a summary of what I find for each process:

- (a) Concerns about Mr Pearson's conduct came to Mr Rewha's attention, he then investigated them and Oranga Tamariki decided as a result that disciplinary action was appropriate in each case.
- (b) Oranga Tamariki then provided information about its concerns and the disciplinary process to Mr Pearson.
- (c) Mr Pearson was given the opportunity to consider the information and then respond, including in meetings with a representative.
- (d) Oranga Tamariki carefully considered the responses before making findings about what occurred and deciding to impose a sanction.

[52] My conclusion is that through the processes adopted for each disciplinary matter, Oranga Tamariki acted in a manner in which a fair and reasonable employer could have acted in the circumstances. I am satisfied that it was objective and it kept an open mind, listening to Mr Pearson throughout the processes; supported by the fact that not all allegations were upheld. Mr Pearson had the fullest opportunity to understand what was alleged and respond to it and was able to raise any concerns about the process and the outcomes at the time, with any concerns being reviewed by Oranga Tamariki contemporaneously.

[53] Turning to the substantive justification, that is, whether issuing warnings in each process was an outcome that a fair and reasonable employer could have come to, my conclusion is that each warning was justified.

[54] It seems to me, on reflection that the underlying issue is that Mr Pearson always had an explanation for his actions, explanations that he genuinely believed justified his actions and explained his conduct. The consequence of Oranga Tamariki not accepting Mr Pearson's explanation is that he in turn could not accept any warning was appropriate; however, just because Mr Pearson thought he was right and therefore Oranga Tamariki was wrong does not mean the outcome is unjustified.

[55] The other relevant aspect here is that my role is not to determine whether Mr Pearson was right in the view he had and whether the explanations he gave excused his conduct. My investigation is not a re-hearing of the disciplinary processes and therefore replacing the outcome with my own findings on what occurred and any sanction to be imposed. Rather this is a review of whether what Oranga Tamariki concluded was something a fair and reasonable employer could have concluded in the circumstances and my conclusion is, given the evidence, a fair and reasonable employer in each disciplinary process could have concluded that the warnings issued were an appropriate outcome.

[56] Based on my findings, I conclude that Mr Pearson's personal grievances relating to the three warnings are not supported and each claim based on the grievances is dismissed.

*Mr Pearson's complaints about the meeting on 4 July 2019*

[57] There are two aspects to Mr Pearson's personal grievance for unjustifiable action causing disadvantage pertaining to the meeting with PKB on 4 July 2019:

- (a) That Oranga Tamariki failed to protect his health and safety at work as he was bullied by PKB in the meeting of 4 July 2019.
- (b) That Oranga Tamariki failed to investigate Mr Pearson's complaint to it that he was bullied by PKB in the meeting on 4 July 2019.

[58] As with the other personal grievances for unjustifiable action I will consider each aspect in three parts:

- (a) What is the action complained of and did it occur?
- (b) If so did this action cause a disadvantage to Mr Pearson's employment?
- (c) If so was the action justified or not?

[59] Turning to the failure to provide a safe workplace because of alleged bullying first, in *FGH v RST* Judge Corkill dealt with the issue of an employer failing to deal with bullying in the workplace, stating that this may give rise to an unjustified disadvantage grievance.<sup>2</sup> This is because there is a duty to provide a safe workplace. And, it follows that the failure to provide a safe workplace (as the action complained of) could cause a disadvantage to an employee's employment. Then the question becomes whether the action (the failure to provide a safe workplace) was justified.

[60] Starting with the action complained of, a failure to provide a safe workplace arises because there is an obligation to take all reasonable practical steps to maintain a safe workplace, a workplace that meets health and safety requirements.<sup>3</sup> The question of what are reasonable practical steps is informed by foreseeability and the circumstances prevailing at the time.<sup>4</sup>

[61] So, in terms of a duty to provide a safe workplace an employer need only protect employees against a risk of harm that is foreseeable and what the employer must do to protect employees against that harm is take steps that are proportionate to the known risk, i.e. do what is reasonably practical in the circumstances.

[62] Therefore, the first part of Mr Pearson's personal grievance, assessing if Oranga Tamariki failed to provide a safe work place as alleged involves the following questions:

- (a) Was Mr Pearson bullied by PKB as alleged?
- (b) If so, was the bullying by PKB a foreseeable risk?

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<sup>2</sup> *FGH v RST* [2018] NZEmpC 60 at [201].

<sup>3</sup> *FGH* above n 2 at [191] – [199].

<sup>4</sup> *Attorney-General v Gilbert* [2002] 1 ERNZ 1.

(c) If so, did Oranga Tamariki take reasonably practicable steps, in the circumstances, to protect Mr Pearson against that bullying?

[63] Assessing the evidence I am not satisfied that PKB bullied Mr Pearson as alleged, but even if this did occur, it was a one off event complained of and was not foreseeable as a result. Based on this assessment, I conclude that Oranga Tamariki did not fail to provide a safe workplace as alleged. And it follows that the personal grievance relating to this allegation cannot succeed.

[64] Turning to the failure to investigate the complaint of bullying, I accept on the evidence provided that this action did occur; Oranga Tamariki did not investigate Mr Pearson's complaint.

[65] However, I am not satisfied that the next steps of the unjustifiable action causing disadvantage grievance have been met:

- (a) The failure to investigate did not cause a disadvantage to Mr Pearson's employment because a failure to investigate did not leave him exposed to any ongoing risk of bullying (as there was no such risk in the circumstance).
- (b) Given the agreement between Mr Pearson and PKB to work out the issues between them Oranga Tamariki's decision not to investigate was justified.
- (c) And then Oranga Tamariki agreed to, and did attend mediation, to try and resolve the issues with Mr Pearson, following which Mr Pearson's employment was terminated.

[66] I conclude that whilst Oranga Tamariki did fail to investigate Mr Pearson's complaint about alleged bullying, this does not give rise to an unjustifiable action causing disadvantage personal grievance. And for this reason Mr Pearson's claim based on this grievance is dismissed.

## **Unjustified dismissal**

[67] As with the unjustified action personal grievances, an unjustified dismissal claim turns on justification pursuant to s 103A of the Act; that is whether the decision to dismiss and the actions undertaken in coming to that conclusion were ones that a fair and reasonable employer could make in all of the circumstances.

[68] Starting with the question of the disciplinary process, applying s 103A and s 4(1A) of the Act, Oranga Tamariki needed to:

- (a) Properly investigate the concerns it had about Mr Pearson's conduct;
- (b) Clearly outline its concerns regarding this to Mr Pearson so he could respond to them;
- (c) Give Mr Pearson a reasonable opportunity to respond to the information and the concerns; and
- (d) Consider any information or explanations given by Mr Pearson before deciding whether the behaviour occurred, if it did whether it amounted to serious misconduct and then dismissal was the appropriate sanction.

*Did Oranga Tamariki properly investigate its concerns about Mr Pearson's conduct?*

[69] The issue raised by Mr Pearson regarding the investigation by Oranga Tamariki into the four concerns it had was that Mr Rewha, as the investigator, was not independent. This is because he had been involved in other disciplinary matters with Mr Pearson, including being a complainant about some of Mr Pearson's conduct, relating to not following reasonable instructions and because Mr Rewha had dealt with other issues between Mr Pearson and his supervisors previously, including what was alleged to be, on occasions, inadequately dealing with issues raised by Mr Pearson.

[70] I am not satisfied that this is an issue of concern. Mr Rewha, as the Youth Justice Manager at Christchurch East was the appropriate person to investigate the concerns raised and his previous involvement with disciplinary matters for Mr Pearson did not change that; there is no basis to conclude he was biased or unable to discharge his obligations in terms of investigating the concerns, objectively.

[71] I also accept counsel for Oranga Tamariki's submission that the underlying events were largely not disputed by Mr Pearson, the disciplinary process was more about Mr Pearson's explanation for those events, so the investigation carried less significance in terms of the overall process and the outcome.

*Did Oranga Tamariki raise its concerns with Mr Pearson and provide him with the relevant information?*

[72] Mr Pearson advanced three main concerns in respect of the information provided to him:

- (a) In some parts it was not clear which complaints or what information provided about the events informing the various concerns, related to which.
- (b) That he sought explanation of or more information relating to some aspects of the concerns but this was not provided or not provided in a reasonable time frame.
- (c) That some of the information provided related to historic events, which given the lapse of time meant he was unable to adequately respond including finding witnesses to assist.

[73] On the face of it these particular issues are concerning, requiring me to analyse the evidence, particularly the contemporaneous documents and the audio recording of part of the disciplinary process closely. Having completed this I accept there was, at times, potentially a lack of clarity or some confusion about the information provided or the concerns raised. However, standing back and looking at all of the evidence I am satisfied that Mr Pearson knew what the allegations or concerns were and the events that informed them. From my perspective I think this is particularly evident from the recording and the contemporaneous documents.

*Did Oranga Tamariki give Mr Pearson an opportunity to respond?*

[74] The disciplinary process took some time to complete but this reflected the ongoing provision of information and that Oranga Tamariki provided Mr Pearson with ample opportunity to respond to the concerns and the information in meetings and then in writing.

[75] It is notable that Mr Pearson was also afforded an opportunity to respond to the preliminary decision in terms of outcome, both what occurred and the decision to dismiss Mr Pearson.

*Did Oranga Tamariki consider Mr Pearson's responses before it made a decision on the outcome?*

[76] Mr Pearson's complaint in this regard is that the outcome was a forgone conclusion; Oranga Tamariki did not properly consider his responses before it came to its decision to dismiss him.

[77] I do not find this to be the case. The evidence shows clear and full consideration of Mr Pearson's responses as part of the decision making process, this was clear from Mr Rewha's evidence and the decision letters.

*Conclusion on the disciplinary process undertaken by Oranga Tamariki*

[78] In all of the circumstances I am satisfied that the disciplinary process undertaken by Oranga Tamariki was one that a fair and reasonable employer could have conducted; Oranga Tamariki's actions, in so far as the process it undertook, were justified.

*Was Oranga Tamariki's decision to dismiss Mr Pearson substantively justified?*

[79] I will consider the substantive justification of Oranga Tamariki's decision to dismiss Mr Pearson in three parts, being the main limbs to Oranga Tamariki's decision to dismiss:

- (a) Mr Pearson communicated disrespectfully with his supervisors.
- (b) Mr Pearson refused to follow instructions from his supervisors.
- (c) Mr Pearson threatened to act in a way that could bring Oranga Tamariki into disrepute.

*Communications with supervisors*

[80] Oranga Tamariki concluded that Mr Pearson was disrespectful in his communications with his supervisors, this included his attitude and actions, such as rolling his eyes or continuing to work on matters when they try to engage with him. It also concluded that there

were specific statements made that were disrespectful, most of these arising because Mr Pearson did not seem to accept that his supervisors could make decision about his case work and instruct him to do certain things, indicating that Mr Pearson had little or no regard for the supervision being given to him.

[81] Counsel for Mr Pearson submitted that any disrespectful communication with PKB arose only in circumstances where Mr Pearson disagreed with what was required on a case and where he genuinely believed that PKB could not instruct him as to what to do when that instruction related to a matter of social work practice.

[82] I do not find this submission to be compelling in terms of Oranga Tamariki's substantive justification – it does not indicate that the findings, of disrespectful communications, were not conclusions that a fair and reasonable employer could come to in the circumstances. In fact, they support the findings.

[83] The submission does however suggest there are mitigating circumstances and these might be relevant to Oranga Tamariki's decision that any disrespectful communications amount to serious misconduct and dismissal was the appropriate sanction. That said, I am not persuaded by this.

[84] In all of the circumstances, I am satisfied that a fair and reasonable employer could conclude that Mr Pearson's communications with his supervisors were disrespectful, that this amounted to serious misconduct and dismissal was an appropriate sanction.

#### *Refusal to follow instructions*

[85] There is no real dispute over Oranga Tamariki's finding that Mr Pearson did not follow instructions from his supervisor, rather counsel for Mr Pearson says it is the circumstances of any refusal that means the decisions Oranga Tamariki came to on this issue were not ones that a fair and reasonable employer could reach.

[86] Counsel for Mr Pearson says Mr Pearson never intended to act improperly, he only acted as he did because he believed his supervisor could not instruct him to do certain things, particularly instructions that were matters of clinical practice. And, further, counsel submits that if Oranga Tamariki disagreed with Mr Pearson on matters of instruction and his supervisor could not persuade him of that then rather than simply giving Mr Pearson an

instruction to act contrary to what he believed he should do, it should have provided Mr Pearson with expert knowledge to support its position and training on the application of that knowledge.

[87] I do not accept that this excuses Mr Pearson's behaviour. In fact, it highlights the problem. That is, Mr Pearson believing he is right on a matter contrary to any instruction and concluding that as Oranga Tamariki cannot convince him otherwise then he is right to not act as he is told; yet this dogged insistence on being right and not accepting a supervisor's view could not give Mr Pearson a mandate to act as he chooses.

[88] There are two aspects to this as it applies to Mr Pearson:

(a) In some cases there may have been no clear right or wrong about an instruction but rather there was a decision made based on discretion or judgement that a supervisor tasked with supervising Mr Pearson's work was entitled to make; decisions that Mr Pearson just did not accept and therefore he did act improperly, knowing that that was the case.

(b) In other cases Mr Pearson believed his supervisor could not instruct him on matters of clinical practice, but he was wrong on this conclusion; and I do not see that it fell to Oranga Tamariki to do more to explain this to Mr Pearson, he simply chose to not accept what Oranga Tamariki told him.

[89] Overall I conclude that Oranga Tamariki's decision that Mr Pearson failed to follow instructions from his supervisor was serious misconduct and its decision that dismissal was an appropriate sanction, were decisions that a fair and reasonable employer could come to in all of the circumstances.

*Threatening to act in a way that could bring Oranga Tamariki into disrepute*

[90] Counsel for Mr Pearson submits that Oranga Tamariki's decision that Mr Pearson threatened to act in a manner that would bring Oranga Tamariki into disrepute was flawed as it was based on a subjective assessment by Mr Rewha. Counsel says Oranga Tamariki failed to consider whether an objective, fair minded, independent observer apprised of the relevant

information would have considered the threatened actions would have brought Oranga Tamariki into disrepute.<sup>5</sup>

[91] To be clear, I do not understand this submission to be one that Oranga Tamariki needed to have actual evidence of an objective, fair minded, independent observer considering Mr Pearson's actions, if carried out, would cause it to think less of Oranga Tamariki. And, if I am wrong and the submission does extend to that, I do not consider the relevant case law requires this.

[92] In any event I believe the relevant point is whether Mr Rewha did not consider what an objective, fair minded, independent observer might think rather he just based his decision on his own assessment and if so whether this means his conclusion is not one that a fair and reasonable employer could have come to in all of the circumstances.

[93] In considering this submission I have firstly considered what occurred here:

(a) Oranga Tamariki concluded that Mr Pearson had threatened to go to Court and not support a plan submitted by his supervisor by filing an amended plan. That finding is not disputed.

(b) However, Mr Pearson did not do as threatened, rather he did attend Court without filing an amended plan but he did not fully support the plan in Court in his submissions. This finding is not disputed.

[94] My enquiry then becomes, whether based on these findings of what occurred a fair and reasonable employer could have concluded, in all of the circumstances that this conduct could have brought the employer into disrepute.

[95] All of the circumstances is not limited to the finding of what conduct occurred but also the circumstances of the subsequent analysis regarding whether this could have brought the employer into disrepute. And in this regard I accept that this requires the decision maker to turn their mind to whether a fair minded, independent observer would conclude that Mr Pearson's actions might bring Oranga Tamariki into disrepute.

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<sup>5</sup> *Wikaira v The Chief Executive of the Department of Corrections* [2016] NZEmpC 175.

[96] I am satisfied, on the evidence that Mr Rewha did consider what a fair minded, independent observer might think. His evidence was that in these circumstances he was concerned that a Judge or a prosecutor might regard Mr Pearson's failure to support his supervisor's report as bringing Oranga Tamariki into disrepute. Based on the findings of what occurred I find Mr Pearson's conclusion regarding what a Judge or prosecutor might think is one that a fair and reasonable employer could come to.

[97] Finishing my analysis, I find that a fair and reasonable employer:

- (a) that has concluded that Mr Pearson threatened to go to Court and not support a plan submitted by his supervisor by filing an amended plan; and
- (b) that has also concluded that a Judge or prosecutor might consider Mr Pearson's failure to support his supervisor's report as bringing Oranga Tamariki into disrepute,

could come to the conclusion that Mr Pearson had threatened to bring Oranga Tamariki into disrepute, that this amounts to serious misconduct and that dismissal is an appropriate sanction.

#### *Alternatives to dismissal*

[98] There is a further issue raised by counsel for Mr Pearson relating to the decision to dismiss him. Counsel submits that Oranga Tamariki did not consider alternatives to dismissal such as transferring Mr Pearson to another site.

[99] Based on Mr Rewha's evidence I am satisfied that he did in fact consider alternatives to dismissal such as a transfer to another site. And I am satisfied that his decision not to do so but rather proceed with dismissal was justified.

#### *Overall finding on the unjustified dismissal personal grievance*

[100] Mr Pearson's dismissal was, in all of the circumstances justified and his claim based on a personal grievance for unjustified dismissal is dismissed.

## **Conclusion**

[101] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the Authority this would occur he decided, as he is permitted by s174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act.

[102] Mr Pearson's personal grievances have not been established and all of his claims are dismissed.

## **Costs**

[103] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[104] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority