

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 516
3124414

BETWEEN RUSSELL SINCLAIR
Applicant

AND THE HAMILTON ABUSE
INTERVENTION PROJECT
TRUST
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person
Hayley Arnold, advocate for the Respondent

Investigation Meeting: 16 November 2021 by Zoom

Submissions and/or further
evidence 16 and 19 November 2021 from the Applicant
16 and 19 November 2021 from the Respondent

Determination: 23 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Russell Sinclair, claims that he was unjustifiably dismissed by the Respondent, the Hamilton Abuse Intervention Project Trust (HAIP) on 19 June 2020.

[2] HAIP denies that Mr Sinclair was unjustifiably dismissed and claims that Mr Sinclair's actions constituted misconduct, and the employment relationship was broken due to there being no trust and confidence between the parties at the time of dismissal.

The Authority's investigation

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issue

[4] The issue requiring investigation is whether or not Mr Sinclair was unjustifiably dismissed by HAIP.

Relevant Background

[5] HAIP is a not for profit organisation which offers services including education programmes for men convicted of assault in a domestic situation. It involves the offender being sentenced to a supervision order, and in that time being obliged to attend a programme aimed at eliminating violence from their behaviour, education about relationships, and resolving conflicts.

[6] Mr Sinclair commenced employment with HAIP as Mana Whanau Programmes Advocate/Kaitiaki on 14 October 2019. Mr Sinclair was provided with an individual employment agreement which he signed on 14 October 2019.

[7] Prior to June 2020 there had been some issues between Mr Sinclair and HAIP which had been addressed informally. There was no disciplinary process undertaken and there were no disciplinary outcomes for Mr Sinclair. However there was a proposal as confirmed in an email dated 15 May 2020 from Mr Sinclair's direct manager that a performance improvement plan (a PIP) be commenced, the first stage of which would be a discussion meeting scheduled to be held on 21 May 2020.

[8] The email invited Mr Sinclair to bring a support person to the meeting but stated that it would not be appropriate for this to be another member of staff.

[9] The PIP meeting took place but no formal PIP was entered into between the parties.

Incident and disciplinary process June 2020

[10] In June 2020 an incident occurred between Mr Sinclair and an external IT contractor which was escalated to the CEO of HAIP.

[11] Ms Puawai Rudman, at that time Manager Interventions and Community Engagement and Mr Sinclair's senior manager, engaged HR Connect Ltd, an employment consultancy service, to provide guidance to ensure that HAIP followed a fair process when addressing the allegation made against Mr Sinclair.

Letter dated 3 June 2020

[12] By letter dated 3 June 2020 Ms Rudman wrote to Mr Sinclair inviting him to attend a meeting to be held on 5 June 2020 to discuss the allegation that:

A phone discussion you had with our external IT contractor [name], which we allege was aggressive and inappropriate. The IT contractor also reports that he felt uncomfortable with this interaction.

[13] The letter invited Mr Sinclair to bring a support person or representative to the meeting and advised him that, if substantiated, the matters might be considered misconduct.

[14] There was no response from Mr Sinclair so HAIP followed up its request and received a response from Mr Sinclair raising concerns about workload and stress and requesting a delay in meeting until 11 June 2020.

[15] Ms Rudman in an email response dated 4 June 2020 stated that the suggested delay until 11 June 2020 was not an appropriate length of time to delay the meeting in light of the fact that Mr Sinclair was still attending work. Mr Sinclair was presented with a choice of either taking immediate sick leave and visiting his GP for assistance, or that the meeting was postponed until 8 June 2020.

[16] On 5 June 2020 Ms Rudman emailed Mr Sinclair highlighting that there had been no response regarding the options provided in the email sent the previous day, and on that basis the meeting would take place on 8 June 2020.

[17] Mr Sinclair replied by email on 8 June 2020 stating that he had an appointment with his GP on 11 June 2020. A medical certificate was received that same day signing Mr Sinclair off work from 8 June until 12 June 2020.

[18] Ms Rudman wrote to Mr Sinclair on 12 June 2020 offering two dates for the rescheduled meeting to be held before Mr Sinclair returned to work.

[19] Mr Sinclair confirmed that Monday 15 June 2020 would be acceptable and Ms Rudman replied advising that she and an external HR Consultant, Ms Claire Pilton, would be in attendance at the meeting. Mr Sinclair was again invited to bring a support person to the disciplinary investigation meeting.

Disciplinary Meeting held on 15 June 2020

[20] The disciplinary investigation meeting held on 15 June 2020 was attended by Ms Rudman and Ms Pilton, and Mr Sinclair. The meeting was recorded and a transcript provided to the Authority.

[21] Ms Pilton commenced the meeting by noting that Mr Sinclair did not have a support person and asking if he was prepared to proceed without one. Mr Sinclair responded that he was prepared to proceed.

[22] Ms Pilton stated that:

Russell, we've provided you an excerpt that the IT company Efficient Tech who do some work for HAIP have provided to us, and we'd just like to understand your side of that story and why you made that phone call.

[23] Mr Sinclair responded that he was not going to respond on the basis of previous interactions with HAIP. Ms Pilton told Mr Sinclair that the disciplinary investigation meeting it was a separate issue to the PIP process, reminded him that it was a disciplinary meeting in connection with the complaint received, and gave him the opportunity to respond to the allegation on a number of occasions as recorded in the transcript:

RS: ... I've been talking to the EPA guy and he just helped me make it, clarify that this is a battle I'm not going to win so I'm pretty much going to go down the professional route and just not answer. ...

CP: This is a separate matter. What we've put to you is wanting to understand what occurred in that phone call. Why you made the phone call and what the purpose was? ...

RS: Yep. I'm not comfortable sharing with you two because what's been happening over the last month. ...

CP: ... This is a disciplinary meeting, so this is your opportunity to give your point of view so that we can take that on board before a decision is made. ..

RS: ... all I can say is I haven't been heard. I've complained, I've emailed all management. I haven't heard. I haven't heard, I haven't heard, and just ignored, ignored, ignored and then you pull me into this meeting.

PR: ... In this particular meeting, if you can address this concern first. The other concerns that you have, that's up to you to raise them. ... So, if you want to actually bring this up, you can have that opportunity, that will be your choice. All we're asking for is a response for this.

RS: I was thinking I'd rather just no response.

CP: ... Today, we're offering you the opportunity to also put your point of view in. You've already decided that that's not going to happen, so where we're left is to make a decision in the absence of your feedback. This is a stand-alone issue. There's nothing else on the table despite what you're saying in the last six weeks; that's not what we're here to discuss today. So if you've made a decision not to give any input then we don't have any of your input to take into account and therefore we make a decision. Have I made that clear for you to understand?

RS: You made it very clear, yeah? But did you get my point of view before you made that point of view?

CP: Which was that you didn't have anything to put on the table about this particular allegation?

RS: It's on the recording so it's all good. I don't have to repeat it.

CP: The last six weeks are not relevant to this meeting.

RS: In your opinion, yes, correct.

CP: Correct okay. Alright, is there anything else that you would like to put on the table for us to consider today?

RS: No

CP: No?

RS: Like I said, this has been an exhausting process I just want it over and done with. ...

CP: Okay. I just want to put it on the record that just claiming a process is unfair doesn't make it inherently unfair, You haven't brought any reasons to the table for us to consider that would derail being able to make a decision. All you've done is say you won't answer the question. So if that's where you want to leave it, that's fine. But I'm happy to give you one more opportunity to change your mind and give us an explanation if you want to. Otherwise we can adjourn the meeting. ...

CP: Okay, today's meeting only, the outcome that we are able to share with you is all we have is the IT contractors side of the story and the decision will be made on that basis. So, last opportunity, is there anything else you wanted to say today about that?

RS: Nope.

[24] Ms Rudman said that she had been disappointed when Mr Sinclair provided no explanation at the meeting held on 15 June 2020. She said Mr Sinclair had not presented at the meeting in a professional manner, his dress was unprofessional and she found his tone to be aggressive and his attitude combative.

[25] Mr Sinclair disputed that and said that HAIP were the aggressive party and he considered the disciplinary investigation meeting was an unjust process.

Preliminary Decision 17 June 2020

[26] There having been no explanation to the allegation provided by Mr Sinclair during the disciplinary investigation meeting, HAIP sent a letter to Mr Sinclair on 17 June 2020 headed 'Preliminary outcome of disciplinary investigation meeting' together with a transcript of the meeting held on 15 June 2020.

[27] In the letter Ms Rudman was noted that Mr Sinclair had chosen to attend the disciplinary meeting held on 15 June 2020 without a support person and had agreed that he was prepared to proceed on that basis.

[28] The allegation was set out again in the letter and also stated was the fact that notes of the conversation from the IT Contractor's perspective had been provided to Mr Sinclair prior to the meeting.

[29] The letter continued:

... You refused to provide your perspective on the information provided to you or answer any questions regarding what occurred. As we advised during the meeting, simply claiming the process is 'unfair' is not sufficient; we have given ample opportunity for you to explain yourself, and you continue to refuse to participate or engage, ...

Prior to the meeting we advised you that, if substantiated as a result of this process, these matters may be considered misconduct. Having now considered all of the information available to us, including your conduct during the process and your refusal to provide any explanation, we now need to advise you that we are of the view that the allegation has been substantiated, which we believe constitutes misconduct. We also feel that you have breached your good faith obligations as an employee, to be responsive and communicative. Given how the relationship between the parties appears to have deteriorated, and ultimately damaged the trust and confidence between us, we therefore propose that your employment is terminated, effective immediately.

You are invited to provide feedback about this preliminary decision along with advising us of any mitigating circumstances that we need to take into account before finalising our decision ...

[30] Mr Sinclair responded by email on 19 June 2020 in which he stated:

I fully expected you to terminate my employment regardless of what I said in the meeting. I felt no matter what I said it would be manipulated and twisted to make it look like misconduct. I felt there was no other option but to continue to fight for a fair process.

[31] Mr Sinclair when questioned at the Investigation Meeting confirmed that he had not trusted the management of HAIP, and that there was nepotism and hate.

[32] Ms Rudman said she did not understand the reference to nepotism since she had no relationship with the employees in HAIP, and that she had wanted to ensure HAIP followed a fair process, which is why she had engaged HR Connect Ltd, an independent third party, to assist with the disciplinary process.

[33] Following Mr Sinclair's response, Ms Rudman said she had considered the issue, the meeting with Mr Sinclair and his response. Her view had been that the trust and confidence between the parties had been damaged and reached the decision that the appropriate outcome was dismissal.

Dismissal Letter dated 19 June 2020

[34] The decision by HAIP was confirmed in a letter dated 19 June 2020. The letter stated:

... In our preliminary decision, we noted that, having considered all of the information available to us at the time, including your conduct during the process and your refusal to provide any explanation, we were of the view that the allegation has been substantiated, and that it constitutes misconduct. We also advised that we felt you have breached your good faith obligations as an employee to be responsive and

communicative. Given how the relationship between parties has deteriorated, and ultimately damaged the trust and confidence between us, we proposed that your employment be terminated immediately.

You were given the opportunity to provide feedback about the decision and this afternoon we received a response from you. However there was very little to consider with regards to feedback about this decision, and instead you seem continually refer to other processes that we have advised are not relevant to this matter. ... we have decided to confirm our preliminary decision, and therefore advise you that your employment is terminated, effective immediately.

[35] The letter concluded by requesting that Mr Sinclair return all HAIP property to it.

[36] Mr Sinclair subsequently returned a mobile telephone and some keys. Ms Rudman said the mobile telephone had been wiped clean of all data which included discussions and records of meetings with HAIP clients. This was a potential risk to those clients who were expected to cooperate with the requirements placed upon them by other organisations, and failure to do so could result in a prison sentence.

[37] Mr Sinclair said that it was personal data he had intended to wipe, and that he had sent notes of the meetings he held with clients to HAIP so there was no relevant data deleted.

[38] Ms Rudman said the keys returned by Mr Sinclair were the wrong keys and despite HAIP contacting Mr Sinclair's Advisor, the correct keys had not been returned. This had resulted in HAIP having to change all its locks and key codes at a cost of approximately \$250.00.

[39] Mr Sinclair said he had not been aware there was an issue with the keys.

[40] On 3 July 2020 and advocate acting on behalf of Mr Sinclair wrote to HAIP raising a personal grievance for unjustifiable dismissal contending that :

... our client was not given enough opportunity to seek advice or meaningfully comment before the decision was made to dismiss him. His actions did not constitute serious misconduct and we allege that this was simply a premise constructed to dismiss him.

Was Mr Sinclair unjustifiably dismissed by HAIP?

[41] Mr Sinclair was dismissed from his employment following a disciplinary investigation process into an allegation of misconduct.

[42] Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- 1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- 2) 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 dismissal or action occurred.

[43] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[44] Procedural fairness required that Mr Sinclair was:

- a) informed of the allegations against him;
- b) given the right to have a support person or representative at the meeting;
- c) been advised of the possible outcomes should the allegations be upheld including the possible termination of his employment;
- d) provided with the relevant information; and
- e) provided with the opportunity to provide an explanation which would be considered before a decision was made.

[45] I find that these procedural steps were followed by HAIP. Mr Sinclair was advised of the allegation made against him in the letter dated 3 June 2020 and provided with a copy of the IT Contractor's version of the incident.

[46] Mr Sinclair was advised of his right to have a support person present at the meeting to be held on 15 June 2020 in the letters dated 3 and 12 June 2020. He was also asked at the commencement of the meeting on 15 June 2020 if he was prepared to proceed without a support person and he confirmed that he was prepared to do so.

[47] Mr Sinclair had been advised in the letter dated 3 June 2020 that disciplinary action could be an outcome of the process and he had been provided with the relevant information, being the complaint from the IT Contractor.

[48] Mr Sinclair was given an opportunity to provide an explanation to the allegation during the meeting on 15 June 2020. I observe that this invitation to provide an explanation was

repeated during the meeting and the consequences of not doing so were clearly explained to Mr Sinclair, however he persisted in refusing to do so.

[49] Given the refusal by Mr Sinclair to cooperate and provide his explanation, HAIP found that misconduct had occurred as a result of the interaction between him and the IT Contractor on 29 May 2020 and that he had breached his good faith obligations towards HAIP by failing to be: “responsive and communicative”.

[50] Mr Sinclair was provided with the opportunity to respond to the preliminary decision. In the email dated 19 June 2020 Mr Sinclair stated in his response was that he believed HAIP would ‘manipulate’ and ‘twist’ whatever he had said during the meeting held on 15 June 2020.

[51] The response by Mr Sinclair confirmed HAIP in its view that there was no trust and confidence between the parties and as a result it confirmed its preliminary decision in the letter dated 19 June 2020.

Was Mr Sinclair unjustifiably dismissed by HAIP?

[52] Section 4 (1A) of the Employment Relations Act 2000 (the Act) states the parties to an employment relationship are under a duty to deal with each other in good faith. This duty :

Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative¹

[53] I find that Mr Sinclair failed in this duty of good faith towards HAIP by not being responsive and communicative during the meeting held on 15 June 2020.

[54] Mr Sinclair appeared to have held the view that HAIP wanted him to leave its employment. I consider that this may have been because of the PIP that had been proposed and his misconceived view of its purpose.

[55] A PIP, also known as a performance action plan, is a tool used by employers to give an employee with performance issues the opportunity to succeed in their role. It is also used to address failures to meet specific goals or to ameliorate behaviour related concerns.

[56] The intention of a PIP is to give the employee the assistance they need to reach the required standards rather than to exit an employee from the business. It is unfortunate that Mr Sinclair appeared not to have appreciated this because if he had done so, his responses during

¹ S 4(1A)(b) Employment Relations Act 2000

the disciplinary investigation meeting and subsequently may have been different. I note that the proposed PIP had not been enacted by HAIP.

[57] In the circumstances which included the refusal by Mr Sinclair to provide any explanation at the disciplinary meeting held on 15 June 2020 and his comments in the email response on 19 June 2020 to the preliminary decision, HAIP confirmed its final decision which was to terminate Mr Sinclair's employment.

[58] The allegation regarding the phone conversation with the IT Contractor, had it been found to be substantiated, would be a matter of misconduct as stated in the letter dated 3 June 2020. In that situation a disciplinary step not involving dismissal was the appropriate outcome.

[59] However Mr Sinclair's refusal to cooperate and provide an explanation during the meeting held on 15 June 2020 and his feedback comments in the email dated 19 June 2020 resulted in HAIP finding that the trust and confidence between the parties had been breached.

[60] Trust and confidence between the parties to an employment relationship is of paramount importance and underpins its existence.

[61] I find that Mr Sinclair failed to act in good faith during the meeting held on 15 June 2020 in which he was unresponsive and uncommunicative, and subsequently by expressing a negative view of his employer in the feedback email dated 19 June 2020. I find that the comments made in the email made it clear that Mr Sinclair lacked trust and confidence in HAIP to act fairly towards him.

[62] In these circumstances HAIP reached the view that continuation of the employment relationship was untenable, and terminated Mr Sinclair's employment.

[63] I find this to have been a decision reached by HAIP acting as a fair and reasonable employer in all the circumstances at the relevant time.

[64] I determine that Mr Sinclair was not unjustifiably dismissed by HAIP.

Costs

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

[66] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that

memorandum the Applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[67] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[68] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Eleanor Robinson
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].