

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 319
3204059

BETWEEN	DANIEL WILLIAMS Applicant
AND	TE WHATU ORA – HEALTH NEW ZEALAND Respondent

Member of Authority:	Sarah Blick
Representatives:	David Feist, advocate for the applicant Rebecca Rendle, counsel for the respondent
Investigation meeting:	8 February 2024
Submissions received:	At the investigation meeting and 28 February 2024 from the applicant 12 February 2024 from the respondent
Determination:	29 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Daniel Williams was employed as a Senior Health Security Officer (HSO) and acting team leader based at Auckland City Hospital until his dismissal in August 2022. He was employed by the former Auckland District Health Board, which is now Te Toka Tumai, the Auckland District of Te Whatu Ora – Health New Zealand (TWO). I refer to the respondent as Te Toka Tumai in this determination.

[2] Mr Williams was dismissed for serious misconduct in relation to an incident in early May 2022. During the incident, Mr Williams and another HSO used physical restraint on an 18 year-old female, who, attempting to visit her grandfather, did not wait for confirmation from hospital screening staff to proceed to the relevant hospital ward.

After speaking with the visitor and making a risk assessment, Mr Williams says he made the call to go “hands on” to restrain the visitor.

[3] Mr Williams claims his dismissal was unjustified on both substantive and procedural grounds, with delays in interviewing him and other witnesses prejudicing a fair investigation. He seeks remedies, including now reinstatement.

[4] Te Toka Tumai says Mr Williams was justifiably dismissed following a full and fair investigation process, the timeline of which was reasonable in the circumstances. It says training and education provided to Mr Williams was explicit that personal restraint was only to be used as a last resort to maintain the safety of patients, service providers or others, and restraints could only be applied under the direction of a responsible clinician, unless in an emergency situation, which in this case, was not. Te Toka Tumai denies Mr Williams has a personal grievance, but if a personal grievance is established, it strongly opposes reinstatement.

The Authority’s process

[5] Mr Williams lodged his application with the Authority on 9 December 2022. In March 2023 the Authority set the investigation meeting down for September 2023. The Authority received written statements from Mr Williams, Te Toka Tumai’s Director of Healthcare Security Services Suzanne Ramsay, and Security Operations Manager William Boyle (known as Brett Boyle).

[6] At the start of the investigation meeting in September 2023, Mr Williams raised with the Authority for the first time that he wished to be reinstated. After consulting with the parties, the Authority adjourned the investigation meeting, and additional evidence relating to the issue of reinstatement was later lodged by the witnesses.

[7] Each witness was questioned under oath or affirmation at the investigation meeting in February 2024. Mr Williams’ advocate subsequently lodged written submissions, which were neither sought nor timetabled by the Authority, which Te Toka Tumai has objected to being accepted. Having reviewed the submissions, the Authority did not consider the submissions need to be addressed by Te Toka Tumai.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received and considered

but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders as a result.

The issues

[9] The issue for investigation and determination is whether Mr Williams has a personal grievance for unjustified dismissal, and if so whether remedies including reinstatement should be ordered.

Background

[10] Mr Williams commenced employment as an HSO in Te Toka Tumai's security team in about October 2019, later progressed to Senior HSO, and then became an acting team leader. By the time of the incident, he was carrying out some shifts as a Senior HSO, and others as a team leader.

[11] It is common ground that Mr Williams' was provided with safety intervention, restraint minimisation and safe practices and emergency induction training. He received CALM (Communication, Assertiveness, Look, Measured tone) training relating to conflict situations, in which CALM verbal de-escalation techniques were taught. He also received team leader training which included threat identification. Te Toka Tumai says it continuously reinforced the expectation that the least physically restrictive practices applied in all situations where personal restraint can be applied.

[12] Security Operations Manager Mr Boyle, to whom Mr Williams reported, highlights that people in the hospital may appear to be a security threat because they are agitated or anxious. He says this is covered extensively through security training. He says team members should be always monitoring for signs of anxiety and elevated behaviours. Engaging physically with a person in this state can harm them psychologically as well as physically, so it is something Mr Boyle says they try to avoid. Even when team members need to engage physically with a person, they should be verbally communicating with the person the entire time and using only approved restraint techniques.

[13] Mr Boyle gave evidence that there are many other ways of handling a perceived security threat, which involves using verbal de-escalation techniques. This can include spending a long period with individuals to talk to them and help them reach a calmer place. Ms Ramsay says there is no time limit on the use of de-escalation techniques.

[14] Ms Ramsay and Mr Boyle emphasise that a key theme that comes across in security training of HSOs is that the hospital is providing security in a unique healthcare setting where they are dealing with people who are unwell or may be visiting people close to them who are unwell. They can often be in an unfamiliar setting and under stress or upset, and therefore need to carry out their roles in a sensitive way that is different from security in other settings like a nightclub or prison. A key part of this is that it is regularly reinforced that restraint is a serious intervention that impacts on an individual's freedom of movement and could be viewed as a false imprisonment or lead to an allegation of assault.

[15] Training also included the importance of involving clinical staff (nursing or medical) to have clinical rationale and oversight before exercising a restraint. The Restraint Minimisation and Safe Practice Policy for Patients emphasises the importance of clinical staff involvement. It provides that the decision to approve a restraint must occur only under the direction of the responsible clinician. It provides that a clinician must remain throughout the full length of a restraint. Security team members are required to refrain from resorting to a physical restraint (including on visitors) unless there is imminent danger of serious harm to themselves or others, or if they seriously compromise the therapeutic environment (e.g. by damage to property). Restraint is a last resort and a number of considerations must be applied before it is used. At the investigation meeting, Mr Williams said he was aware of the circumstances in which restraint could be used, and that it was to be used as a last resort by HSOs.

[16] Mr Boyle gave evidence about the expectations on a team leader to lead their teams on a day to day basis providing guidance and direction that aligns with Te Toka Tumai's policy and procedures. Among team leader responsibilities is ensuring any incidents of escalated behaviour are attended to immediately and where a physical restraint may be required that they obtain instructions from the relevant clinician on duty, often the clinical nurse manager on the ward (CNM).

Visitor incident on 8 May 2022

[17] It is common ground that on 8 May 2022, a Sunday, the female visitor entered through a main entrance at Level 5 of the hospital, but did not wait for hospital screening staff to confirm access to the relevant ward was given. The visitor proceeded through to a lift and went up to Level 7. As it turned out, she was in the wrong building, with

this Level 7 not being the level her grandfather was located. She was in an area which Mr Boyle says has offices, and the main dialysis unit for hematology. Mr Boyle says the unit runs by appointment from Monday to Friday, and emergency dialysis on the weekends is run at a different location in the hospital.

[18] The Authority has viewed CCTV footage provided by Te Toka Tumai which shows the female visitor, who is of a small build and frame, arriving by lift on Level 7. The lift and adjacent corridor are empty, and she walks around, apparently unsure where to go. The visitor holds her phone to her head, speaking on her mobile phone. There is no audio with the CCTV footage. A male HSO (the first HSO) exits a lift shortly after and attempts to speak with the visitor. She continues to speak on her mobile phone and they seem to engage in some dialogue. Mr Williams appears from down the corridor a short time later with another male HSO (second HSO) following behind him.

[19] It is clear Mr Williams starts talking to the visitor, whose back is to the CCTV camera. She continues to hold her phone to her head with one arm, and gestures with the other arm, although does not appear to be physically aggressive. She then backs away from Mr Williams and the lifts, closer to the camera behind her. As Mr Williams gestures to the first HSO to come forward, another male HSO exits the lift and stands there (fourth HSO). Mr Williams and the first HSO move towards the visitor, who backs up further out of sight of the camera, and they follow her out of sight. Mr Williams says the visitor moved to a locked door and slumped to the floor. They all reappear and the visitor is held by each arm, and the fourth HSO attends behind, assisting to drag her to the lift while she resists.

[20] The next footage is from Level 5, and shows Mr Williams and the first HSO on either side of the visitor, still restraining her arms, walking her over to a screening officer at a table. The other Te Toka Tumai HSOs follow them. They remain holding her arms for about 15 seconds while standing stationary, after which point she pulls away from the holds, releasing herself. The visitor then shows an agitated demeanour, and while speaking or shouting gesticulates with her arms. She then leaves towards the main entrance through which she came a few minutes earlier. It appears Mr Williams continues to talk to the visitor near the exit.

[21] It appears the first HSO called a “code orange”, which escalates a situation where someone is exhibiting escalated behaviour, triggering the attendance of a clinician and a further security response.

[22] A few minutes after the code orange was called, the CNM arrived and spoke with the visitor and her mother outside the main entrance at Level 5. It appears they were very verbally abusive. On the day of the incident, the CNM emailed Mr Boyle, stating she had completed a report in relation to the incident, and she had a slight concern the HSOs went hands on the visitor without waiting for a CNM.

Te Toka Tumai’s initial response

[23] On 9 May 2022, Mr Boyle reviewed the shift report for the time of the incident, and found one completed by Mr Williams and one by the first HSO. Mr Boyle says he decided that given Mr Williams was the most senior team member present at the incident, he would need to speak to him.

[24] Mr Boyle informally spoke to Mr Williams about the incident on 9 May 2022, regarding his recollection of what took place on Level 7 and his reasons for the actions he took. Mr Boyle recorded Mr Williams’ responses in his notebook immediately after the conversation. Mr Boyle’s notes show that after the discussion ended, he viewed the CCTV footage of the incident.

[25] Mr Boyle says he spoke to the first and second HSO on 10 May 2022. His notebook entries record their responses. The notes record the first HSO saying when Mr Williams approached, the visitor kept swearing, was verbally abusive, and “try to punch me and Dan”, and “Dan made the call to go hands on”. He is also recorded as saying the call was made “in my opinion because she would not listen to directions, she was not punching windows or kicking doors or anything”. He is recorded as saying he “thought she may throw punches and I was the only male with her”. The second HSO is recorded as saying “she tried to push past us but she was not physically aggressive” and “she was not trying to damage anything or ADHB property”, and did “not try to harm herself”.

[26] From 23 May 2022 to 6 June 2022 Mr Boyle went on annual leave. While he was on leave, Ms Ramsay met with Mr Williams on 30 May 2022 and advised him that

Te Toka Tumai had some concerns about his behaviour in relation to the incident and that Mr Boyle would meet with Mr Williams when he returned from leave.

[27] On 10 June 2022, Mr Boyle emailed Mr Williams inviting him to a meeting to have a “preliminary conversation” about some concerns regarding his actions on 8 May 2022. In the email, Mr Boyle explained he would consider Mr Williams’ response before he decided on any further action, including a further investigation meeting or initiating a further disciplinary process. He encouraged Mr Williams to bring someone to the meeting. He sent a copy of the CNM’s report and email. Mr Boyle says he attempted to speak to Mr Williams as well, but he indicated he was too busy to discuss the matter at that time but, that he would come at the completion of his shift. He also stated that he understood that the meeting was not a disciplinary meeting and that he did not require a support person as he could remember everything that happened.

[28] He says relying on his notes, he then prepared statements for them. The first HSO signed their statement on 14 June 2022. The second HSO’s statement is unsigned. At the investigation meeting Mr Boyle could not recall why it was not signed.

14 June 2022 meeting

[29] Mr Boyle and Mr Williams then met on 14 June 2022, with an HR representative for Te Toka Tumai present. Mr Williams recorded meeting with Mr Boyle’s permission, and a transcript has been provided.

[30] At the start of the meeting Mr Williams advised he did not have a support person given the short notice of the meeting. Mr Boyle told Mr Williams the meeting could be postponed to give his support person a chance to attend, however Mr Williams said he did not want to postpone, and wanted to get the meeting done and over with. Mr Williams read from a prepared statement explaining his account of the incident and reasoning for his decision to go hands on without CNM input. Mr Williams stated after he attempted to talk to the visitor about returning to the screening area, “she reacted by running into the corner of the corridor adjacent to the orange lifts sitting on the floor”. At the 14 June 2022 meeting Mr Williams confirmed he did not feel threatened by the visitor. He referenced ‘erratic behaviour’ by the visitor as the reason for his decision. The statement did not say anything about kicking doors, but Mr Williams stated verbally that the visitor was kicking doors open. He also said he did not feel threatened by her and the main reason he went hands on was because she looked like she was going

to do something. Mr Boyle attempted to ask further questions, but Mr Williams asked that they not continue repeating things and that Mr Boyle use the statement he had signed. The meeting ended.

17 June 2022 – meeting to hand over letter

[31] Mr Boyle met briefly with Mr Williams to hand a letter and relevant documents to Mr Williams. The letter was dated 15 June 2022 and set out the process and findings to date, and invited Mr Williams to a disciplinary meeting to further discuss the findings. It offered the opportunity to bring a support person, and referenced the seriousness of the concerns and that disciplinary action up to and including termination of employment may result once the process had been completed. He says he advised Mr Williams to take his time to read through what was there and to arrange for a support person to be present at the next meeting.

27 June meeting

[32] A disciplinary meeting was held on 27 June 2022 with Mr Boyle, an HR representative and Mr Williams, to hear Mr Williams' responses to the concerns in the letter. At this meeting, Mr Williams stated that he did not know that the meeting was a disciplinary meeting. Mr Boyle told Mr Williams it may be best to reschedule the meeting so that he could prepare by reviewing the documents. Mr Boyle advised Mr Williams that he could arrange a support person and encouraged him to do so. Mr Boyle says Mr Williams insisted that he wanted to provide his response, which he did. Mr Boyle asked questions about why Mr Williams decided to go hands on with the visitor. Mr Williams responded that the visitor was threatening. When asked how she was threatening, he responded that it was the look in her eye, and that she was therefore unpredictable.

[33] The HR representative asked Mr Williams to describe other situations where he might go hands on. He responded usually he would do this when people were throwing objects or kicking things. However, he held the view that he only went hands on here because of the look in the visitor's eyes. Mr Boyle recalls he said there was a possibility the visitor could start kicking doors or smashing windows because she was not listening to the security team and was highly agitated, she was abusing them, and this is why he decided to go hands on to stop this happening. Mr Boyle's recollection is that he did

not say that she was physically abusing them, or verbally threatening to physically abuse them.

[34] After the meeting Mr Boyle provided a further opportunity to provide feedback in person and/or in writing. Mr Boyle emailed Mr Williams on 28 June 2022 for that purpose, and Mr Williams responded less than 15 minutes confirming he had no further feedback.

[35] Mr Boyle says he considered all of Mr Williams' responses to understand why he had made the decision to go hands on with the visitor before consulting a CNM and without CNM supervision, as required by training and policy. In the end, he says he could not see any reasonable explanation for his decision. To Mr Boyle, the evidence showed Mr Williams did not see the visitor as a threat, and she was not violent towards him.

18 July 2022 – proposed outcome meeting

[36] Mr Boyle had a further meeting with Mr Williams on 18 July 2022. The preliminary decision was outlined in a letter provided to Mr Williams at the meeting. The letter stated Mr Boyle's belief that:

...your action and decision to physically restrain a visitor without having a Clinical Charge Nurse present at the scene was not aligned with the Restraint Minimisation Policy, MAPA training, Auckland DHB's values and our expectations of your [sic] as a Healthcare Security Officer.

[37] Mr Boyle says he told Mr Williams he was not expected to respond at that time, and he could have up until 22 July 2022 to seek advice from his support person, read through the letter, ask questions, and provide feedback. At the meeting Mr Williams stated he would now like his support person to be involved – a union representative - because Te Toka Tumai was now proposing to terminate. They agreed to provide further time for Mr Williams to speak to the union representative.

29 July meeting

[38] Mr Boyle met with Mr Williams and his union representative on 29 July 2022 to provide any further feedback before a final decision was reached.

[39] In another response to Mr Boyle, Mr Williams stated in response to him stating they would escort her to Level 5 without restraint, she "reacted by backing into a corner wall and sat on the floor cursing". He said his "risk assessment" led him to believe

because of her reaction and escalating behaviour that “she might run for the stairs and fall or possibly attempt to break glass panes on the doors to leave”. At this meeting, Mr Williams apologised for his actions for the first time and in his written feedback said:

In hindsight I realise I might have got things wrong. I apologise if my actions misrepresented the best interests of Auckland Hospitals Security Services and Health New Zealand – Te Whatu Ora.

Despite apologising, Mr Boyle considered Mr Williams also appeared to be maintaining that he did the right thing.

Final decision

[40] By letter dated 2 August 2022, Mr Boyle advised Mr Williams of the decision to dismiss.

Justification for dismissal

[41] Section 103A(3)(a-d) of the Act sets out the elements that the Authority must objectively measure an employer’s actions against, which are in summary:

- (a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee.
- (b) Did the employer raise the issues of concern with the employee prior to deciding to dismiss?
- (c) Was the employee afforded a reasonable opportunity to respond to identified concerns.
- (d) Did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- (e) Any other contextual factor the Authority regards as appropriate to consider.

[42] Applying the above elements requires the Authority to look at whether Te Toka Tumai’s actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

Analysis

[43] Te Toka Tumai, given its resources and recourse to legal advice at an early stage, should be held to a reasonably high standard.

[44] Mr Williams has taken issue with the way Mr Boyle first raised the incident with him on 9 May 2022, suggesting it occurred while he was in the control room while a control operator was present, and that this breached his privacy. At the investigation Mr Boyle was clear that while he would have gone to the control room initially to see Mr Williams, they would have gone to a breakout room to speak about the incident. I prefer Mr Boyle's recollection. Either way, I am not satisfied making the initial inquiries in the presence of the control operator was a breach of privacy or that it resulted in any unfairness to Mr Williams.

[45] Mr Williams raised questions about how long the investigation and disciplinary process then took. Relevant to the issue of delay is Te Toka Tumai's Discipline and Dismissal Policy (policy), which stated when disciplinary action of any kind was undertaken, promptness was one of the general principles, specifically stating that "disciplinary action must be taken as soon as practicable after the event which warrants action". It also stated one of the employee rights included "prompt written advice of the result of the investigation".

[46] Although in my view Te Toka Tumai could have taken more stringent steps to arrange a meeting with Mr Williams, I accept there was limited time to do so between 12 and 22 May due to scheduling issues, including Mr Boyle's Monday to Friday working week, Mr Williams' rostered days off, weekends, and general lack of common availability when their shifts did cross. Unfairness could have arisen if Mr Boyle had attempted to schedule meetings despite the scheduling issues, such as requiring Mr Williams to attend work during one of his days off.

[47] There was then also a delay due to Mr Boyle being on leave from 23 May to 6 June 2022, and it was not until 30 May 2022 that Ms Ramsay alerted Mr Williams that the incident was still an issue. It was not until 10 June 2022 that Mr Boyle notified Mr Williams that he wished to further investigate the incident.

[48] On return, Mr Boyle sought further information and responses from Mr Williams and received verbal and written accounts of events and responses from Mr Williams over the course of a number of meetings. Mr Williams' advocate submitted memories fade within a few weeks and recollections of the visitor's demeanour and behaviour would have been affected. However, Mr Williams did not raise any concerns about recall during any of the subsequent meetings or in written responses. It is noted

both Mr Williams and the first HSO completed incident reports less than 24 hours after the incident, on 9 May 2022. Mr Williams had spoken to Mr Boyle on 9 May 2022, and the two HSOs on 10 May 2022. Mr Williams' claims about memory/recall do not have force when there was an opportunity to document and relay events in such close proximity to the incident on 8 May 2022 and which could later be used to his refresh memory.

[49] The principle of promptness in the policy referenced what was "practicable" in the circumstances. Although there were delays in progressing the investigation and reaching a result, the Authority does not consider these were unreasonable in all the circumstances. The circumstances were not such that Mr Williams was prejudiced in the preparation or conduct of his response by the lapse of time, that it might become unfair to continue the investigation. Mr Williams also remained working the same duties, and there is no apparent disadvantage arising from by the delays. The delays were not unreasonable, nor do I find they resulted in unfairness to Mr Williams.

[50] The Authority is satisfied a fair and reasonable employer in the circumstances could conclude Mr Williams breached training and policy by engaging in a physical restraint in the absence of an emergency and without the direction of a CNM. This is because despite the emphasis of training on de-escalation, when Mr Williams arrived at the scene, as the Senior HSO present, Mr Williams spent just a few moments attempting to talk to the visitor before calling to and using restraint (Te Toka Tumai says it was 27 seconds).

[51] Independently of any responses or statements obtained from Mr Williams and the HSOs, the CCTV footage showed although the visitor was likely verbally aggressive, she was not physically aggressive. Mr Williams authorised the restraint although he did not feel threatened by the visitor. She was not taking any action to hurt herself or others, or to damage property. There was no one in the immediate vicinity.

[52] As Mr Boyle also states, the visitor was "boxed" in on all sides by a locked door and security team members. A secure/swipe card access only door was behind the visitor, an empty corridor to her left and another secure/swipe card access only door in front of her and three security officers between the visitor and the lifts. She backed away from the HSOs just prior to the restraint, and again when Mr Williams and the

first HSO decided to go hands on. The visitor was sitting on the floor at the time the restraint was implemented.

[53] Swearing and not engaging/listening did not provide justification for implementing a physical restraint rather than waiting for a CNM to arrive and provide direction. Absent an emergency situation, it was the CNM who had authority to determine whether a restraint is appropriate and, if so, oversee this to ensure it was explained and undertaken in a way that minimise the risk of harm or distress.

[54] In these circumstances, it was clearly open to Te Toka Tumai to make a finding the visitor was not posing any threat to Mr Williams or to the other HSOs or to herself or that there was an emergency situation. Te Toka Tumai justifiably concluded that Mr Williams unreasonably directed a restraint on a visitor in the absence of an emergency, or any reasonable indication that the visitor posed an imminent threat to herself, anyone else or to property. Restraint was not used in accordance with Mr Williams' training and its policy, that restraint was to be used as a last resort.

[55] Mr Williams refers to concerns relating to the spread of COVID-19 to immunocompromised patients, with the visitor being an unscreened visitor at the time of the incident. Mr Boyle points out Mr Williams did not give that response during the disciplinary process. He says in any event it would not excuse Mr Williams' actions or explain his failure to follow his training and policy. Mr Boyle and Ms Ramsay were clear HSOs did not have authority to restrain unscreened visitors absent clinical oversight and authorisation, except in the event of an emergency situation. This was not an emergency situation, and the HSOs failed, on Mr Williams' direction, to wait for the direction of the CNM.

[56] At the investigation meeting, it became apparent that Mr Boyle believed Mr Williams was the acting team leader on the shift at the time of the incident. Having considered the evidence and findings, that mistaken belief was not material to Mr Boyle's ultimate findings as decision-maker, as it was clear Mr Williams, as the Senior HSO present, made the call to go hands on with the visitor. As a Senior HSO and an acting Team Leader, it was open to Te Toka Tumai to find Mr Williams did not demonstrate leadership in how such a process should be handled in front of two other less senior security guards who were required to follow his direction.

[57] Mr Williams' advocate suggested in cross-examination that the team leader on duty at the time of the incident was in dereliction of his duties, because he either did not answer the back-up call or code orange. There was no evidential basis for this suggestion, nor do I find it relevant to the actions Mr Williams' took as a Senior HSO in making the call to go hands on at the time of the incident.

[58] Mr Williams says he made a judgment call to go "hands on" in a difficult situation. His advocate suggested the matter ought to have been dealt with as a performance issue under Te Toka Tumai's policy, and/or if it was misconduct, it warranted at best a warning. The policy provided that no employee will be dismissed without previous warnings, except in two cases, one of which was serious misconduct.

[59] The Authority is satisfied the conduct here met the definition of serious misconduct in the policy which defined it as behaviour which: (a) "Undermines the trust and good faith inherent in the employment relationship" and/or (b) "Seriously threatens the well-being of the organisation, the staff, or clients". The disciplinary action further reflects the policy statement that "Disciplinary action will be decided in the context of the overall good of both the organisation and the employee".

[60] In all of the circumstances, Te Toka Tumai was justified in concluding that it was for the overall good of both the organisation and Mr Williams not to place him in a situation where he was highly likely to face a similar set of circumstances given his role, where it was a core requirement of his role to manage escalated behaviour in circumstances where people may be unwell, agitated and/or anxious, and when he had consistently failed to appreciate the seriousness of his actions or to provide any real assurance that he would act differently in future.

[61] I agree the unique context of Te Toka Tumai's organisation as a public health agency, providing health services (including hospital and specialist services, and primary and community care) is important to this case. Health and safety is a matter of priority for Te Toka Tumai and it is responsible for the health and safety of, not only the patients directly within its care, but also its employees, visitors and other people who are on site. It says it was in this context that Te Toka Tumai reached the view that Mr Williams' actions constituted serious misconduct. Te Toka Tumai submits that, a fair and reasonable employer, who operates in a healthcare environment, could have

found that Mr Williams' actions amounted to serious misconduct, justifying dismissal. I agree.

[62] The Authority finds that the investigation was fair and reasonable, with Mr Williams given opportunities to be heard at each stage of the investigation, with time frames either being extended or the opportunity for them to be extended given. He was provided with relevant information, including the opportunity to review the CCTV footage. It appears Mr Williams' did not apprehend the seriousness of the situation he was in because he did not consider his actions in relation to the visitor were problematic. When he did apprehend the seriousness of his situation, he requested and was given the opportunity to include his union representative in the remainder of the process. I am satisfied he was afforded a reasonable opportunity to respond to identified concerns, and Te Toka Tumai genuinely considered his explanations before deciding to dismiss.

[63] Te Toka Tumai says it considered alternatives to dismissal but concluded there was an irreparable loss of trust as a result of his actions and that dismissal for serious misconduct was appropriate in the circumstances. Dismissal was a fair and reasonable response which could be justifiably applied in the circumstances.

[64] Mr Williams suggests there was a disparity in the way he was treated, based on a claim a guard on Level 5 who let the person through without screening was not disciplined or even spoken to. Mr Williams would need to have shown the comparative conduct of the guard and his conduct was sufficiently similar. I accept Te Toka Tumai's submission that this has not been shown, because the guard was a contractor who did not have authority to physically stop or restrain people at screening, nor did screening staff; the guard followed policy by calling security for back up when the visitor did not wait; and the guard did not go hands on with the visitor in breach of policy, which was the issue of concern with Mr Williams. The claim of disparity is not established.

Outcome

[65] Mr Williams' claim of unjustified dismissal is not made out. Accordingly, no orders for remedies are made.

Costs

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

[67] If the parties are unable to resolve costs, and an Authority determination on costs is needed, TWO may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Williams will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[68] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.

Sarah Blick
Member of the Employment Relations Authority