

**Attention is drawn to the order prohibiting publication of certain information (refer paragraph 4)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 306  
3306201

BETWEEN

JOSH SOARES  
Applicant

AND

THE SALVATION ARMY NZ  
TRUST  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Simon Mitchell K.C., counsel for the Applicant  
Alan Davis, counsel for the Respondent

Investigation Meeting: 10 April 2025 in Auckland

Submissions and/or further evidence: 11 April 2025 from the Applicant and from the Respondent

Determination: 30 May 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Josh Soares, claims that he was unjustifiably dismissed and unjustifiably disadvantaged in his employment by the Respondent, The Salvation Army NZ Trust (TSA).

[2] TSA denies that Mr Soares was unjustifiably dismissed and claims that a fair and reasonable process was conducted following which he was justifiably dismissed for serious misconduct.

[3] TSA also denies that Mr Soares was unjustifiably disadvantaged as a result of being suspended and claims that it followed a fair and reasonable process in proposing suspension and suspending Mr Soares on full pay.

## **Prohibition on publication**

[4] I order that the names of TSA clients and employees who made complaints, and any information which may lead to their identification, are subject to a permanent non-publication order and not to be published. They will be referred to by initials bearing no relationship to their actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.

## **The Authority's investigation**

[5] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Mr Soares.

[6] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Yvonne Martin, Team Leader; and Eamonn Smythe, Director of the Bridge Programme.

[7] Written submissions were received from Mr Mitchell for the Applicant and from Mr Davis for the Respondent. Whilst I have not referred to all the submissions made by the parties; I have fully considered them.

[8] 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.

## **Issues**

[9] The issues requiring investigation are whether or not Mr Soares was:

- Unjustifiably disadvantaged by being suspended from his employment by TSA
- Unjustifiably dismissed by TSA

## **Background**

[10] TSA is an international registered charity which aims to alleviate poverty and provide assistance with social issues. It has full-time officers and employees providing social and church-based services in New Zealand.

[11] TSA has a day programme referred to as the 90-day programme in accordance with which it works with people referred to it by the Alcohol and Other Drug Treatment Court (AODTC). Attendance on the 90-day programme is mandatory.

[12] TSA also has a recovery programme known as the Bridge programme which has the aim of assisting clients with reducing the physical, physiological and social harm resulting from the use of alcohol and/or other drugs. It runs from between 8 and 12 weeks and can be either day or residential. Attendance on the Bridge programme is voluntary.

[13] Mr Soares was employed by TSA in February 2019. He was a qualified Social Worker who worked as a Case Worker on the AODTC 90-day programme. In that capacity he was required to provide reports to the Court. Mr Soares also assisted with the Bridge programme.

[14] Mr Soares was a member of the NZ Public Services Association (the PSA) and covered by the terms of the Collective Agreement between TSA and the PSA. The House Rules were an attachment to the Collective Agreement. These provided examples of the standard of behaviour required of employees and included as examples of Serious Misconduct:

- Physical violence or abusive language against any person on Salvation Army premises, during work hours or while representing the Salvation Army.
- Refusal to carry out lawful instructions of a senior staff member.
- Unauthorised disclosure of confidential information regarding the Salvation Army, its personnel or clients
- Inappropriate behaviour resulting in injury to another person ...
- Proven sexual harassment in the workplace.

[15] Included as examples of Misconduct were:

- Abusive language causing offence to another person whilst on Salvation Army premises or business.
- Sexual harassment in the workplace.
- Inappropriate behaviour.

[16] Mr Soares reported to Ms Martin. Ms Martin reported via her line manager, the Clinical Workforce Development Manager, to Mr Smythe.

[17] Ms Martin said that when a client commences a programme, they receive a formal induction which includes information about how to raise complaints. Complaints may be raised with the client's case worker, or if the complaint is considered to be more serious in nature, the

client will complete a formal statement on a form located at the reception area and post it in the Complaints Box. This is emptied each day and logged on the Complaints Register.

[18] As Team Leader, Ms Martin said she would be informed about the complaint and after reading it, decide on the appropriate manner of proceeding. She would also meet with the client to acknowledge receipt of the complaint.

#### *Complaints 29 March 2023*

[19] Ms Martin said that on 29 March 2023 a complaint was received from the male client MOA. The complaint was that Mr Soares had repeatedly touched MOA's shoulder although MOA had asked him twice to stop doing so.

[20] Ms Martin met with MOA on 30 March 2023 to obtain more information and typed up details of the interview, during which MOA said that after he had been speaking to Mr Soares, he (Mr Soares) made a comment in a group setting about men finding it more difficult to talk about sexual abuse than women. As a survivor of sexual abuse, he thought Mr Soares had indirectly let his peers know this comment related to him.

[21] Ms Martin afterwards discussed it with her line manager to determine whether the complaint was minor, moderate or major in nature.

[22] On 29 March 2023 Ms Martin received a second complaint about Mr Soares. This was made by a female client HOP who also referred to the comment by Mr Soares that it was harder for men to deal with sexual abuse than women. HOP stated that this had upset her because she had experienced sexual abuse, and she felt Mr Soares was being dismissive of her experiences.

[23] Ms Martin received a third complaint about Mr Soares by way of an email from a member of staff FPW. In the email the staff member commented on what she had overheard Mr Soares say to another employee FLO about her being 'good on her knees' during First Aid Training. At first, she had disregarded the remark, but it had been repeated by Mr Soares, and this concerned her because she was also aware of the comment by Mr Soares which had upset HOP.

[24] An employee UPF wrote stating that she had not overheard the remarks made by Mr Soares, but she was aware that FPW was concerned and raised them with Mr Soares. UPF had observed the interaction between them, which escalated and ended when FPW had walked away.

[25] On 29 March 2023 Ms Martin received a complaint from FLO, who complained that Mr Soares had repeatedly made a comment to her during a First Aid course about her being 'good on her knees' which she regarded as being sexual in nature. She had disregarded it the first time, but Mr Soares had repeated it. FLO stated that the comments upset her, especially as they were made in front of other TSA employees who were attending the First Aid training.

[26] Ms Martin said at this stage the complaints were concerning her. She sent an email to her line manager stating;

I have just finished the investigation.

I will get the findings in an email to you then decide once the information is collated.

[27] Ms Martin when questioned said she had not meant that the investigation was concluded, but that her initial enquiry into the complaints was concluded, pending a meeting with Mr Soares to hear his explanation.

[28] Ms Martin said her line manager discussed the complaints with Mr Smythe, and she was advised to contact the Human Resources department (HR) for advice on the next step. With the assistance of an HR Advisor, she wrote a letter to Mr Soares dated 11 April 2023 inviting him to a meeting: "to discuss my concerns relating to allegations of inappropriate behaviour with clients and other staff members"

[29] The letter stated that the allegations if upheld could be a breach of the House Rule: 'Inappropriate behaviour towards staff and clients' Attached to the letter were copies of the complaints received.

[30] The letter further advised Mr Soares that the matters were potentially serious and, if there was no reasonable explanation provided after he had had a full opportunity to respond to the allegations, could result in disciplinary action which could include dismissal.

[31] Mr Soares was invited to have a support person at the meeting to be held on 19 April 2023. A copy of the complaints was attached to the letter. Mr Soares was also advised that he could access support via TSA's Employee Assistance Programme.

[32] On 19 April 2023 Ms Martin received an email from an employee COJ who had been working with clients MOA and HOP both of whom told her about the incidents they had complained about to Ms Martin, being the sexual abuse comment and the shoulder touching incident. COJ said both clients were extremely upset as a result.

*First Meeting 19 April 2023*

[33] On 19 April 2023 Ms Martin said she and her line manager met with Mr Soares. Mr Soares said he did not take a support person because he did not believe he needed one.

[34] Ms Martin started the meeting by reading each complaint and asking Mr Soares for an explanation. Mr Soares asked to stop the meeting because he thought the tone was accusatory rather than mere information gathering, and he considered he needed to have representation with him.

[35] Prior to the next meeting held on 8 May 2023 being held, Ms Martin received further complaints about Mr Soares.

[36] One of these related to interrelated complaints from clients OSB and YQS about an interaction between them which OSB had discussed afterwards with Mr Soares. YQS complained that Mr Soares had shared information with OSB that YQS had wanted to remain confidential, and both complained about Mr Soares talking about their interactions in front of a group of their peers.

[37] A second complaint was received from client EPR which related to his having asked Mr Soares repeatedly not to use bad language and Mr Soares having told the group members about it, thereby breaching his (EPR's) confidentiality.

[38] Ms Martin emailed Mr Soares confirming a new date for meeting on 3 May 2023 and enclosing copies of the additional complaints.

[39] Mr Smythe said he received an email from Mr Soares asking for him to become involved in the investigation process. He responded by email dated 26 April 2023 stating that in regard to the complaints made:

..as this process has started I need to let this continue and cannot meet with you to discuss this matter as this is an ongoing investigation into alleged serious misconduct. If there is a recommendation made at the end of this process this will come to me as director so need to remain apart from this until then.

*Second Meeting 8 May 2023*

[40] The rescheduled meeting took place on 8 May 2023 and was attended by Ms Martin, her line manager, Mr Soares, his external Clinical Supervisor, and a PSA representative.

[41] At the start of the meeting Ms Martin explained that the meeting was not disciplinary but an information gathering process.

[42] All the complaints were addressed in turn with Mr Soares being provided with an opportunity to provide an explanation for each. Mr Soares confirmed he had an opportunity to offer an explanation in the meeting, and responded that in relation to the complaint by HOP, he had been referring to how men struggled to deal with sexual impropriety, not sexual abuse. In relation to the complaint by MOA, he did not recall touching him.

[43] In relation to the complaint about OSB and YQS this had arisen because Mr Soares had been made aware of tensions between the two men. What was referred to was a conversation in which he sought information as to the nature of the issues between them.

[44] The complaint by FLO arose in the context of the First Aid training when he commented that she had done well in rising from her knees so quickly. The comment was not intended to be sexual in nature and Mr Soares denied making the comment more than once.

[45] Ms Martin concluded the meeting by advising that the meeting notes would be typed, sent to HR, and she would notify Mr Soares and his PSA representative of the next step.

[46] Mr Soares said that he considered Ms Martin had concluded her investigation at the end of the meeting and she had decided he had been at fault.

[47] Following the meeting Ms Martin said she had been concerned that the situation was more serious than she had initially thought. She therefore discussed it with her line manager and HR.

[48] Having been advised by HR on the process to be followed, Ms Martin emailed Mr Soares on 19 May 2023 to propose a meeting to provide feedback to his responses on the complaints which had been raised and discussed in the meeting.

### *Suspension*

[49] On 25 May 2023 Mr Soares said he was finishing a group session when Ms Martin approached him, handed him a letter and told him to leave the premises immediately, informing him he was suspended with immediate effect. Mr Soares said he left the premises, attended a meeting with his external Clinical Supervisor and called the PSA.

[50] Ms Martin denied that she had told Mr Soares to leave work. She said she had invited Mr Soares into her office and given him the letter dated 25 May 2023 which he opened and read. He had asked her if she agreed with the proposal to suspend him, and she responded that

that she could not comment. Ms Martin said Mr Soares was very upset after reading the letter, he had asked to go home, and she granted his request to do so.

[51] Ms Martin said the letter invited Mr Soares to attend a meeting on 29 May 2023. It stated that the purpose of the meeting was: “to discuss with you my proposal to suspend your employment on pay, whilst two new issues are investigated.”

[52] The two new issues were set out as being: “inappropriate behaviour resulting in injury (Mental) to another person” (EPR) and “Unauthorized disclosure of confidential information regarding TSA, its personnel or clients”: (specified as client EPR).

[53] The letter stated that the meeting would also discuss reporting timelines as part of the AODTC process and stated that the issue had been brought to Mr Soares attention on several occasions, and that: “Timeframes to comply have not been complied with”.

[54] The letter advised Mr Soares that the matters were potentially serious misconduct which could result in a disciplinary outcome, including termination of employment and reporting to his professional body.

[55] Ms Martin said that copies of the details in the new complaints were sent with the letter to Mr Soares and the PSA representative, and typed copies of the meeting on 8 May 2025 were sent to Mr Soares’ home address, to the PSA representative and to Mr Soares’ external Clinical Supervisor.

[56] Mr Smythe wrote to PSA organiser on 25 May 2023 with a copy to Mr Soares. The letter stated:

We have two additional concerns raised.

A concern raised by the drug court Re: the late arrival of reports.

Meeting the reporting timelines is part of the overall Auckland Drug Court process of which we are part, Josh’s reports go to the caseworker employed at [...] with whom we have a contract to deliver services, both residential and day services. They in turn review and supply these updates to the courts. This issue has been brought to his attention several times by both his current and previous team leader and timeframes to comply have not being complied with.

In addition, we have received new allegations which, if upheld, could be a breach of the House Rules, and code of conduct both from the TSA and his professional body, which are potential grounds for serious misconduct:

- inappropriate behaviour resulting in injury in (Mental) to another person (EPR)
- Unauthorised disclosure of confidential information relating regarding the Salvation Army, its personnel, or clients (in this case, a client, EPR).

It appears that this complaint, coupled with the other list of complaints relating to the professional services provided by Josh, puts into question whether Josh should remain at work until we are able to meet and complete the investigation process currently underway

[57] Mr Soares did not return to the workplace until 29 May 2023, the day of the meeting.

*Third Meeting 29 May 2023*

[58] The meeting held on 29 May 2023 was attended by Ms Martin, her line manager, Mr Soares and a PSA representative (by AVL).

[59] Ms Martin said that she commenced the meeting by explaining the details of the new complaints referred to in the letter dated 25 May 2023, and Mr Soares was invited to provide an explanation. Once he had done so, he was asked for his view on the suspension proposal.

[60] Mr Soares denied he had been asked for his explanation in response to the new complaints, and said he was not allowed to provide one.

[61] However, the notes of the meeting dated 29 May 2023 taken by the PSA Organiser who represented Mr Soares at the meeting set out details of responses provided by Mr Soares to the complaints raised in the meeting. I find that Mr Soares did have an opportunity to provide an explanation.

[62] The PSA representative objected to Mr Soares being suspended, on the basis that there was no provision to suspend included in the Collective Agreement.

[63] The meeting was adjourned while Ms Martin spoke to Mr Smythe. who in turn contacted an HR Advisor. Mr Smythe told Ms Martin that he was advised by HR and that it was permissible to place Mr Soares on paid leave whilst the investigation was undertaken. Mr Smythe said he had made the decision to suspend Mr Soares on the basis that there was a risk to the clients who had made the complaints if Mr Soares, who had power and control over them, remained in the workplace during the investigation.

[64] The meeting recommenced and Ms Martin outlined that proposal to suspend Mr Soares on full pay until the completion of the investigation.

[65] Ms Martin wrote to Mr Soares on 31 May 2023 confirming the three further complaints had been discussed in the meeting (two from EPR and the AODTC reporting timelines), and that Mr Soares responses were either a denial or that the issues were not significant.

[66] The letter confirmed the decision that he would be suspended on pay stating:

...paid suspension was the only viable option, given the number, seriousness and apparently lack of concern expressed by Josh in respect of the initial investigation outcomes and today's outcomes.

[67] Ms Martin said that following the meeting of 29 May 2023 she considered all the information to that point and contacted Mr Smythe.

*Mr Smythe's involvement*

[68] Mr Smythe said he had been made aware of the first three complaints by Ms Martin and of her preliminary view that they warranted further investigation. He asked her line manager to provide oversight of the process she was to undertake, and asked Ms Martin to discuss matters with HR.

[69] He was subsequently informed of the further two complaints, and of a further matter regarding the timeliness of court reports provided by Mr Soares.

[70] On 7 June 2023 Mr Smythe emailed Mr Soares and the PSA advising them of feedback comments made by a National Consumer advisor who had visited clients on the 90 programme and the Bridge programme. Mr Smythe advised that the feedback comments would form part of the information being considered before a final decision was made.

[71] Comments by the National Consumer advisor and which Mr Smythe said "speaks directly to the points raised previously and discussed with your PSA representative" included:

- Several whai ora spoke of the breaches in client confidentiality from their discussions with Josh ...
- I have significant concerns with regards to the process of the Court reports ...
- Two women in the group both spoke of their distress in the way Josh engages with them ....

[72] In early June 2023 Ms Martin informed him that she had concluded her investigation. After considering the complaints, her interviews with the complainants, and reviewing her notes of interviews with Mr Soares, she had reached the conclusion that the complaints were upheld.

[73] Mr Smythe said he met with Ms Martin and her line manager to discuss the information and the appropriate next step in the process. He reviewed all the information which had been provided during Ms Martin's investigation and as set out in the investigation report she had completed.

[74] Following the discussion with Ms Martin and UPF he felt confident that he had a sufficient basis to understand the issues and Mr Soares' responses to them for him to have an informed view of the matter. Given the findings made by Ms Martin, he did not think it necessary for him to meet with Mr Soares before concurring with Ms Martin's findings and making the interim decision that dismissal was an appropriate response to the findings.

*Interim dismissal decision*

[75] Mr Smythe sent a letter to Mr Soares dated 15 June 2023 setting out each complaint and the conclusion reached by Ms Martin in her report:

1. Complaint from HOP: Complaint is upheld;
2. Complaint from MOA: Complaint is upheld;
3. Complaint from OSB: Complaint is upheld;
4. Complaint from YQS: Complaint is upheld;
5. Complaint from HOP (as upheld by another staff member) Complaint from HOP: Complaint is upheld;
6. Complaint from EPR of inappropriate behaviour resulting in injury (Mental):
7. Complaint from EPR of unauthorized disclosure of confidential information regarding TSA, its personnel or clients: Complaint not upheld.

[76] Mr Smythe stated that having considered the responses provided by Mr Soares and all the information available to him, he concluded he had sufficient evidence to support breaches of the House Rules, the Code of Conduct of the TSA, and Mr Soares' professional body, and confirmed a finding of serious misconduct. Mr Smythe stated in the letter:

I have made a tentative decision to terminate your employment and given the nature of these complaints inform your professional body. However we will not make a final decision until we have met with you to hear your response. I therefore wish to invite you to a meeting to convey this proposed decision and action.

[77] The meeting date was proposed as 16 June 2023 at 10.00 a.m. Neither Mr Soares nor a PSA representative contacted him as invited to do in the letter to advise that they preferred a different date for the meeting.

[78] Mr Smythe and Ms Martin therefore attended the meeting on 16 June 2023 with the expectation that it would proceed as arranged, however neither Mr Soares of the PSA attended.

[79] Mr Soares said he was advised not to attend the meeting on 16 June 2023 by the PSA who told him that information relating to the new complaints had not been provided, and that this would be required prior to a decision being made.

[80] Mr Smythe said following Mr Soares' failure to attend the proposed meeting, he considered alternatives to dismissal including a transfer, but having considered the findings made with the benefit of Mr Soares' responses to them, decided there were no alternatives to dismissal.

[81] He spoke with an HR Advisor and sent a letter to Mr Soares dated 16 June 2023 confirming that his employment with TSA had been terminated summarily on the basis that:

... it is my view that I can no longer have trust and confidence in you as an employee, that there is evidence that you have breached the House Rules, Code of Conduct of the Salvation Army, and the Codes of Conduct of DAPAANZ and Social work.

Based on this we will be required when dealing with an ethical breach raise this with your respective professional bodies.

[82] Mr Smythe emailed the Social Worker Registration Board informing them of Mr Soares' dismissal.

### **Was Mr Soares unjustifiably disadvantaged by being suspended by TSA?**

[83] Mr Soares is claiming unjustifiable disadvantage arising from the suspension. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[84] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[85] Mr Soares must therefore establish that there was some unjustifiable action by TSA which affected his terms and conditions of employment to his disadvantage.

[86] During the meeting held on 29 May 2023 the PSA raised the fact that the Collective Agreement contained no provision to suspend an employee. However, as observed in *Munro v NS Security Ltd formerly known as Hibiscus Coast Security Ltd*, (*Munro*) despite there being no contractual right to suspend, suspension may still be justified in certain circumstances, namely in circumstances in which the employee's continued presence may result in some other significant issue.<sup>1</sup>

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<sup>1</sup> *Munro v NS Security Ltd formerly known as Hibiscus Coast Security Ltd* [2012] NZEmpC 38 at [19].

[87] A suspension, as acknowledged by the Employment Court in *Mutonhori v Wairoa District Court* frequently results in disadvantage to an employee, however in that case the Court concurred with the finding in *Munro* that there may be circumstances which would render the suspension justifiable. The Court observed:

An employer is required to be fair to an employee when considering suspension. But that issue must be looked at in a sensible, flexible, and reasonable way to ascertain what the requirements of fairness are on the particular occasion and in the particular surrounding circumstances. By its nature, suspension often needs to be considered and implemented quickly, and the Court may need to take this into account in assessing the requirements of natural justice in any particular case.

A suspension is not justifiable on the basis of suspicions of misconduct but may be justifiable where the employer has good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue. This would include, for instance, creating adverse impacts on other employees, which should be handled promptly.<sup>2</sup>

[88] In this case there had been earlier complaints and two meetings (on 19 April and 8 May 2023). These complaints had resulted in TSA being concerned, as stated in the letter containing the proposal to suspend dated 31 May 2023: “was Josh professionally safe to practice?”

[89] There is a legislative requirement that parties to an employment relationship deal with each other in good faith as set out in s4 of the Act.

[90] In respect of the requirement to provide Mr Soares with information about the continuation of his employment, the information relating to the proposed suspension was provided to him in the letter dated 25 May 2023. During the meeting held on 29 May 2023 Mr Soares was asked for his response to the suspension proposal.

[91] After the objection had been raised by the PSA representative, the meeting was adjourned, and when resumed it was confirmed that TSA considered it was permissible to place Mr Soares on paid suspension during the investigation.

[92] TSA had received a number of complaints from clients and from members of staff regarding Mr Soares' conduct. I find that in these circumstances the suspension of Mr Soares was justified given the fact that he interacted with the complaints on a daily basis. In the case of the TSA clients, these were vulnerable individuals and Mr Soares was in a position of authority in relation to them.

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<sup>2</sup> *Mutonhori v Wairoa District Council* [2025] NZEmpC 44 at [80] and [81].

[93] I find the TSA had been responsive to Mr Soares during the process, his concern about the suspension had been considered and a decision was made to suspend by Mr Smythe only after advice had been obtained from the Human Resources Advisor. I find that TSA acted in good faith.

[94] I determine that in all the circumstances, the suspension of Mr Soares was justifiable.

### **Was Mr Soares unjustifiably dismissed by TSA?**

[95] Justification for dismissal is set out at s 103A of the Act. The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair.

[96] 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.

[97] In accordance with s 103A (3) of the Act, TSA was required to carry out a fair investigation and to follow a fair procedure. The Authority must also consider whether:

- (a) ... the employer sufficiently investigated the allegations against the employee ...
- (b) ... the employer raised the concerns that the employer had with the employee ...
- (c) ... the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[98] I note also that employers and employees are under a duty of good faith to behave towards each other in good faith pursuant to s 4 of the Act. In accordance with s 4(1A)(c) of the Act an employer who is proposing to make a decision that will, or is likely to have, an adverse effect on the continuance of an employee's employment is required to provide the affected employee with:

- (i) Access to information relevant to the continuation of the employees' employment, about the decision, and
- (ii) An opportunity to comment on the information to their employer before a decision is made.

[99] Ms Martin, upon receipt of the written complaints, held interviews with each complainant. Ms Martin prepared copies of the written complaints, and these were provided to Mr Soares and, once engaged, to the PSA representative.

[100] I find that Mr Soares, who had union representation throughout the process after the initial meeting held on 19 April 2023, had been provided with copies of the complaints and was provided with an opportunity to provide an explanation in the meetings held on 19 April, 8 May and 29 May 2023. In particular I note that each complaint was put to him, and he was given the opportunity to provide a response to each.

*Were Mr Soares' explanations considered?*

[101] During a fair and reasonable investigative process, the employee is provided with the opportunity to offer an explanation. The fair and reasonable employer is then under a duty to genuinely consider that explanation.

[102] It is submitted for Mr Soares that TSA did not genuinely consider his explanations because it did not put his version of events to the complainants, and that therefore TSA failed to conduct a fair and reasonable investigation before reaching the conclusion that Mr Soares had committed serious misconduct.

[103] I note that Mr Soares explanations, apart from his explanation in relation to the complaint by HOP, that he had referred to 'sexual impropriety' rather than 'sexual abuse'; Mr Soares either did not recall the action complained about (e.g. touching MOA on the shoulder), or denied the substance of the complaint (e.g. that his comment to FLO had been of a sexual nature). I find that these circumstances differ from those in which additional information is offered, or new witness evidence or documentation is available for checking.

[104] Following the meeting held on 8 May I find that Ms Martin did consider Mr Soares' explanations, discussing the complaints and Mr Soares' explanations with her line manager and with HR.

[105] After the meeting held on 29 May 2023 Ms Martin considered all the information she had accumulated and discussed this with Mr Smythe. In early June 2023 Ms Martin informed Mr Smythe of her conclusions, setting these out in a report. Her evidence was that she had compiled the report after considering (i) The complaints; (ii) her interviews with the complainants; and (iii) reviewing the notes from her interviews with Mr Soares.

[106] I find that while Ms Martin was inexperienced in conducting an investigative process, she did so carefully, taking advice at each step from UPF, HR and, when appropriate, from Mr Smythe.

[107] Ms Martin also provided Mr Soares with the opportunity to provide an explanation and although Mr Soares claimed he was not allowed to offer an explanation during the meeting on 29 May 2023, I find this not credible given the opportunities provided by Ms Martin during the meetings held on 29 March and 8 May 2023, the fact that Mr Soares had union representation at the 29 May meeting and the PSA notes of the meeting set out explanations provided by Mr Soares, and in addition by his PSA representative..

[108] In completing her report therefore, I find that Ms Martin had genuinely considered Mr Soares' explanations to the complaints before reaching a view as to whether or the complaint was upheld.

*Was it unclear who was the decision-maker?*

[109] It is submitted for Mr Soares that it was unclear who was making the decision regarding the outcome of the disciplinary process with him.

[110] As observed in *E Tū Inc v Singh* an employee is entitled to know who was making the decision and to have the opportunity to engage with them.<sup>3</sup>

[111] In the meeting held on 29 May 2023 the PSA attendee made a note of Ms Martin advising, in response to a question about the identity of the decision-maker, that this was her and HR. However almost a month prior to this, Mr Smythe had advised Mr Soares in the email dated 26 April 2023 that if there was to be a recommendation made, it would “come to me as director”.

[112] Mr Smythe had been aware of the complaints from their receipt on 29 March 2023 and having been informed of them by her line manager, had requested that Ms Martin contact HR for advice.

[113] Mr Smythe was consulted during the meeting held on 29 May 2023 when the issue of suspension arose. Following that meeting Ms Martin had contacted Mr Smythe and he took over the process at that point.

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<sup>3</sup> *E Tū Inc v Singh* [2024] NZEmpC 84 at [85].

[114] Mr Smythe wrote the letter dated 15 June 2023 which set out the allegations and the findings as to whether or not they were upheld and provided a preliminary decision which was dismissal based upon a finding of serious misconduct. The letter invited Mr Soares to a meeting to provide further comments before a final decision was reached.

[115] I find that it was clear that Mr Smythe was to be the decision maker. This was explained as the reason for him not being involved in the investigative process in the email to Mr Soares dated 26 April 2023.

[116] At the stage when a decision was reached, Mr Smythe had been fully informed about the progress of the investigation and of the basis for the conclusions reached by Ms Martin.

[117] I find that the decision that Mr Soares's actions amounted to serious misconduct to be a conclusion open to TSA as a fair and reasonable employer.

*Was dismissal an outcome that a fair and reasonable employer could have reached?*

[118] TSA considered that Mr Soares actions breached the House Rules, the Code of Conduct of TSA and the Code of Conduct of DAPAANZ. These breaches were so serious as to undermine its trust and confidence in him and to justify dismissal.

[119] I have found that TSA conducted a fair process. Having undertaken a fair procedure in which Mr Soares' explanations were considered and TSA having found serious misconduct, I find dismissal was an option TSA could have reached as a fair and reasonable employer.

[120] I determine that Mr Soares was not unjustifiably dismissed by TSA.

### **Costs**

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

[122] If they are not able to do so and an Authority determination on costs is needed TSA may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Soares 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.

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

[124] 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.<sup>4</sup>

Eleanor Robinson  
Member of the Employment Relations Authority

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<sup>4</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].