

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 343
5316152

BETWEEN

DAVID DUMOLO
Applicant

AND

LAKES DISTRICT HEALTH
BOARD
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Gregory Peplow, Advocate for Respondent

Investigation Meeting: 24 June 2011 at Tauranga

Determination: 29 July 2011

DETERMINATION OF THE AUTHORITY

A. Lakes District Health Board's dismissal of Mr David Dumolo was justified.

Employment relationship problem

[1] Mr Dumolo claimed he was unjustifiably dismissed on 17 May 2010 by Lakes District Health Board ("LDHB") for taking one of its blank DVDs. LDHB said dismissal was justified because Mr Dumolo had engaged in serious misconduct, and it did not trust him to act appropriately in future.

Relevant Facts

[2] Mr Dumolo was employed by LDHB on 21 September 2009 as an Information Systems Support Level 2 Technician. This role required him to provide IT support for all of LDHB's Information Systems infrastructure across its hospital sites in Rotorua, Taupo and various ancillary sites.

[3] Mr Dumolo worked autonomously and, with the exception of the Pharmacy and MRI scanner, he had swipe card access to every area of the organisation, including the hospital sites. As a person with access to LDHB's IS network he had considerable access to sensitive and confidential medical information as well as to business records and commercial information. Accordingly, it was critical for LDHB to have high levels of trust and confidence in him.

[4] Mr Dumolo has a keen interest in martial arts. He runs the Indomitable Mind Body Combat Academy which is a martial arts school ("the school"). Mr Dumolo set up the school before he started work at LDHB and he continued to run it after he was employed. Mr Dumolo described the school as more of a hobby than a business but acknowledged clients of the school paid him for martial arts training.

[5] In March 2010 Mr Dumolo introduced himself to the LDHB Site Services Manager, Mr John Nieuwoudt, and offered to run a knife defence seminar for security staff at the Rotorua hospital. This resulted in an agreement Mr Dumolo would provide a two hour "*bladed weapon defence*" seminar on Saturday, 10 April 2010 for an agreed cost of \$120.

[6] Mr Dumolo presented the seminar and subsequently invoiced LDHB \$219 consisting of \$120 for the seminar, \$72 for ten rubber knives (which he retained), and \$7 for a courier fee to deliver the knives from Auckland to Rotorua.

[7] Nine LDHB security staff attended Mr Dumolo's seminar and he received excellent feedback about his training and techniques. Some of those who attended the seminar subsequently became private paying clients of the school. Mr Dumolo also used Mr Nieuwoudt to publicise the school and its activities to LDHB staff via its email system.

[8] After the first seminar Mr Dumolo made a number of offers to provide further training to LDHB staff at a proposed cost of \$60 per staff member for each two hour seminar. None of these offers were accepted because Mr Nieuwoudt wanted to ensure Mr Dumolo had been paid for the first seminar before LDHB committed to further training.

Disciplinary incident

[9] Mr Dumolo admitted that on Saturday 24 April 2011 he went in to work and took a blank DVD. Mr Dumolo agreed he knew the DVD was LDHB's property and that he did not seek authority to take it. Mr Dumolo said he did not think he had to ask permission to take the DVD because it was a low value item he used every day for work, so he likened it to taking a pen or paper.

[10] Mr Dumolo's actions were observed by a colleague, Mr Chris Dixon, who was in the office on Saturday writing up a report. Mr Dixon reported seeing Mr Dumolo take a stack of CDs or DVDs and he believed Mr Dumolo had been surprised to see him there. Mr Dixon said Mr Dumolo's manner seemed defensive and his demeanour and conversation was unnatural and somewhat forced. Mr Dixon said he felt something was a bit odd and that Mr Dumolo's manner had made him suspicious.

[11] Mr Dixon raised his concern about Mr Dumolo's actions with his manager Mr Greg Martin, Systems Operations Manager, who told him to put it in writing. Mr Dixon then emailed Mr Martin with his account of the incident.

Investigation

[12] Mr Martin met Mr Dumolo to discuss Mr Dixon's email and to see if Mr Dumolo agreed he had taken CDs or DVDs and, if so, to find out if he had a legitimate reason for doing so. Mr Dumolo was shown Mr Dixon's email and asked if he wanted to respond to it.

[13] Mr Dumolo admitted taking one of LDHB's blank DVDs. He said he took it to copy martial arts material which he intended to show students at his martial arts training seminars. When asked if the DVD related to his work, Mr Dumolo said it did because he provided martial arts training to LDHB security staff. Mr Dumolo agreed LDHB had not asked him to make a DVD and said he did not intend to give the DVD to anyone, but was just going to show it to his students.

[14] Mr Dumolo concluded the meeting by stating "*I can't believe this has turned into such an issue.*"

Rules of Conduct

[15] Mr Dumolo's offer of employment stated he was required to abide by LDHB's Disciplinary Policy and Rules of Conduct. A copy of the LDHB Rules of Conduct was attached to his offer of employment.

[16] The Rules of Conduct set out some non exhaustive examples of serious misconduct which may result in dismissal. Examples included "*unauthorised possession of LDHB property*" and "*dishonesty*".

Disciplinary allegations

[17] Mr Dumolo's meeting with Mr Martin occurred on 5 May 2010. Mr Dumolo was scheduled to attend a disciplinary meeting on 6 May 2010 to discuss an allegation that he had engaged in misconduct. This allegation related to a back up tape failure which had occurred on the weekend of 30 April to 2 May 2010.

[18] Mr Martin raised the DVD incident with the Human Resources Manager for LDHB and it was decided that the back up tape disciplinary meeting would be cancelled and a new disciplinary letter issued, which included both the back up and DVD concerns, and which set up a new disciplinary meeting to discuss both allegations.

[19] On 10 May 2010 Mr Dumolo was issued with a letter which contained two disciplinary allegations and which scheduled a disciplinary meeting for 12 May 2010. The first allegation involved the failure of a backup tape over the weekend of 30 April-2 May 2010. The second allegation involved the "*alleged removal of organisational property without permission*". Attached to the letter was information about the alleged backup tape failure together with a copy of Mr Dixon's incident report and the notes of the meeting with Mr Martin on 5 May 2010.

[20] The disciplinary letter stated:

This incident alleges fraudulent activity/dishonesty and if proven, is considered to be serious misconduct and a breach of the Lakes DHB rules of conduct.

...

As one of the allegations is regarded as serious misconduct your continued employment at LDHB may be in jeopardy.

...

You are encouraged to bring a support person or representative to this meeting.

Justification test

[21] Prior to 1 April 2011, the test for justification was set out in s.103A of the Employment Relations Act 2000 (the Act) which required justification to be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all of the circumstances at the time the dismissal occurred.

[22] A new statutory test for justification came into effect on 1 April 2011. Section 103A was substituted on that date by s.15 of the Employment Relations Amendment Act 2010 which did not contain any transitional provisions, although I note the Employment Relations Amendment Act (No 2) 2004 which first introduced the s.103A justification test did.

[23] All amendments are subject to the Interpretation Act 1999, unless an enactment provides otherwise¹. An enactment does not have retrospective effect². The repeal of an enactment does not affect an existing right³, and it does not affect the completion of proceedings that relate to an existing right⁴.

[24] Mr Dumolo's dismissal occurred on 17 May 2010 and his statement of problem was lodged prior to 1 April 2011. I therefore consider that the LDHB is required to justify Mr Dumolo's dismissal in light of the pre-1 April 2011 s.103A justification test.

Disciplinary meeting

[25] At Mr Dumolo's request, the meeting was rescheduled to 14 May 2010. In attendance were Dr Lloyd Lang - Mr Dumolo's support person, Mr Dumolo, Mr Alex Wheatley - Chief Information Officer at LDHB, and Mr Hannes Schoeman - General Manager Human Resources LDHB. Mr Wheatley was the decision-maker and Mr Schoeman provided HR advice and support.

¹ S. 4 Interpretation Act 1999

² S. 7 Interpretation Act 1999

³ S.17(1)(b) Interpretation Act 1999

⁴ S.18(1) Interpretation Act 1999

[26] Mr Dumolo was given the benefit of the doubt regarding the backup tape failure so no sanction was imposed. I therefore do not need to address that allegation.

[27] Notes of the disciplinary meeting were taken which summarised the main points discussed. Mr Dumolo said he ran classes in self defence through the school and that mostly LDHB staff attended his classes. He said he had been trying to arrange a training programme for staff so he took one of LDHB's blank DVDs so he could compile video footage of self defence material which he intended to use to train LDHB staff.

[28] Mr Dumolo admitted he had walked past or near to Dick Smith Electronics, which sold blank DVDs, but instead of buying one he had decided to take one of LDHB's DVDs because it was not worth much.

[29] Mr Dumolo confirmed he was a registered instructor so people paid to attend his self defence classes. He agreed he had invoiced LDHB for the self defence training he had provided to its security staff.

Finding of serious misconduct

[30] The meeting was adjourned to discuss Mr Dumolo's response. Mr Wheatley gave Mr Dumolo the benefit of the doubt regarding his explanation that some unknown person's actions may have contributed to the back up tape failure. However, he did not accept his explanation to the DVD allegation.

[31] Mr Dumolo's primary explanation for taking the DVD was that it was the equivalent to taking home paper with notes on it. He also said he had taken the DVD primarily for the benefit of LDHB staff.

[32] Mr Wheatley did not accept that taking the DVD was a minor or trivial matter because it was a low value item. The DVD had a cost to the organisation and Mr Wheatley felt it was inappropriate for Mr Dumolo to believe he could take LDHB's property because it was a low value item. He said LDHB had 1300 staff so it would be costly if all staff took home blank DVDs. However, Mr Wheatley felt the primary concern was one of principle, not cost.

[33] Mr Wheatley did not accept Mr Dumolo's explanation that it was okay for him to take the blank DVD because he intended to use it to help train LDHB staff. Mr

Wheatley did not believe Mr Dumolo took the DVD for LDHB's benefit for the following reasons;

- a. LDHB had not asked Mr Dumolo to provide more training to its staff;
- b. Although Mr Dumolo had made a number of offers to provide more training to LDHB, these offers had not been accepted, and no future training had been arranged;
- c. LDHB had not asked Mr Dumolo to provide it or its staff with a DVD of martial arts material;
- d. Mr Dumolo intended to keep the martial arts DVD himself. He never intended to give it to LDHB;
- e. The DVD was going to be used by Mr Dumolo for his own purposes because he intended to show the martial arts content to students who paid to attend his seminars;
- f. The DVD was not a resource which was going to be given to LDHB staff to keep, in the way a course handout would be;
- g. Mr Dumolo's intended seminars would be open to anyone who paid to attend, they were not going to be restricted to LDHB staff;
- h. Some LDHB staff had become students of Mr Dumolo's martial arts school after attending the seminar LDHB had paid him to provide. These people were then trained by Mr Dumolo as private paying clients of the school. The fact his private paying clients were also employed by LDHB did not mean Mr Dumolo's training of them was provided for LDHB's benefit;
- i. Mr Dumolo expected to be paid for any future training LDHB asked him to provide to its staff. The DVD was therefore a business tool for him to use when conducting the school's business (i.e. training for payment), so he should have purchased it himself;
- j. There was no good reason for LDHB's property to have been used;
- k. Mr Dumolo's training was not part of his LDHB role;

- l. It was not reasonable for Mr Dumolo to believe he was entitled to take the DVD or that it was going to be used for LDHB's benefit;
- m. Instead of asking his manager if he could have a blank DVD Mr Dumolo went in to the office on a Saturday and took one, but did not record that in the IS loans book.

[34] I consider there was sufficient evidence from which LDHB could fairly and reasonably conclude that Mr Dumolo did not take the DVD for its benefit, and that he took it to use as a training tool for his school. Mr Dumolo's martial arts school clients were paying for the training he provided, so he should have funded his training materials as his own business expense.

[35] It is clear Mr Dumolo had unauthorised possession of LDHB property and I consider it was open to LDHB to conclude he had acted dishonestly. Mr Dumolo had taken an item belonging to LDHB, in breach of the Rules of Conduct, to use for his own purposes. He had deliberately deprived LDHB of its property so he could use it for his business, which was unrelated to his employment with LDHB.

[36] Mr Wheatley did not agree with Mr Dumolo's view that because the DVD was of low value he was entitled to take it. Mr Wheatley believed such an attitude called into question Mr Dumolo's trustworthiness.

[37] I consider a fair and reasonable employer would have concluded that Mr Dumolo's action in taking LDHB's DVD amounted to serious misconduct because it fundamentally undermined the trust and confidence inherent in the employment relationship.

Disciplinary sanction

[38] Mr Wheatley concluded that there were no mitigating circumstances because Mr Dumolo did not have a satisfactory reason for taking the DVD. He had not taken it inadvertently, there was no emergency situation or legitimate time constraints to explain why he had taken the DVD on a Saturday.

[39] Mr Wheatley was concerned Mr Dumolo had gone out of his way to return to the hospital on a Saturday in order to take LDHB's DVD when he could and should have purchased a DVD from Dick Smith Electronics, which he had walked past on his

way to the IS office. He considered Mr Dumolo's actions were deliberate and calculated.

[40] Mr Wheatley noted Mr Dumolo's attitude was unrepentant and dismissive. Mr Dumolo did not believe he had done anything wrong and he could not understand why LDHB was concerned. He felt LDHB was making a big deal out of nothing and he reiterated that view a number of times during the Authority's investigation.

[41] Mr Wheatley believed Mr Dumolo had an attitude of entitlement whereby he believed he could take LDHB property if he felt it appropriate. I find the responses Mr Dumolo gave to LDHB's concerns justified that view.

[42] Mr Wheatley was mindful Mr Dumolo had almost unrestricted access across all of LDHB's operations, and that there was no way of monitoring or overseeing his actions because he mostly worked alone. Because of the nature of his role, Mr Dumolo's access to LDHB's premises could not be restricted, nor could he be supervised whilst he was at work. This meant LDHB had to be able to trust him in order for him to do his job.

[43] I find his actions in taking the DVD and his responses to LDHB's concerns broke that trust.

[44] Mr Wheatley considered Mr Dumolo's employment record, which he described as short and chequered, suggested action short of dismissal was unlikely to be successful.

[45] Mr Dumolo had one recent warning, for unrelated conduct, which had related to a failure to follow protocols around the use of back up tapes. However, Mr Dumolo was the subject of ongoing performance concerns, primarily around his attitude. He had also been subject to numerous and ongoing complaints, despite only being employed for seven months. These complaints indicated Mr Dumolo lacked self awareness and had not responded well to guidance, instructions, or constructive criticism.

[46] This history lead Mr Wheatley to conclude Mr Dumolo was unlikely to respond favourably to action short of dismissal, particularly because Mr Dumolo did not comprehend what he had done wrong.

[47] Mr Wheatley said his decision to dismiss Mr Dumolo was based on the following factors:

- n. Mr Dumolo's relatively short period of employment;
- o. The number of issues which had arisen regarding Mr Dumolo's attitude and interactions with others which suggested he lacked self awareness or insight into his behaviour, so was unlikely to respond to action short of dismissal;
- p. his unrepentant and dismissive attitude towards LDHB's concerns;
- q. the nature of his position and in particular the access he had to sensitive and confidential material which required LDHB to have high levels of trust and confidence in him;
- r. the fact that he worked unassisted and unsupervised meant it was impossible for LDHB to monitor his activities whilst he was at work;
- s. he did not trust Mr Dumolo to act appropriately in future.

Was dismissal justified?

[48] The s.103A justification test does not differentiate between aspects of a dismissal process, but it does require the employer's actions, and how it acted, at each stage of the process to be assessed. The statutory good faith obligations contained in s.4 of the Act apply, and inform the decision under s.103A about whether LDHB's actions, and how it acted, were objectively justified.

[49] I find LDHB adopted a fair and proper process before it concluded serious misconduct had occurred and that dismissal was appropriate. It conducted a preliminary investigation, it then put specific disciplinary allegations to Mr Dumolo, it complied with its good faith obligations, it advised him of his right to have a support person, it gave him a genuine opportunity to respond to its concerns, and his explanation was properly considered before LDHB made a final decision.

[50] A fair and reasonable employer would have concluded that Mr Dumolo had engaged in serious misconduct. The Rules of Conduct, which Mr Dumolo was

provided with at the outset of his employment, identified unauthorised possession of LDHB property and dishonesty as serious misconduct.

[51] Mr Dumolo admitted taking LDHB property, and LDHB was entitled to view that seriously. Mr Dumolo's explanation for taking the DVD was unsatisfactory and LDHB was entitled to conclude that Mr Dumolo took the DVD for his own use and benefit, rather than for its benefit.

[52] Notwithstanding the low value of the item, I find that a fair and reasonable employer would have concluded summary dismissal was appropriate in all the circumstances.

[53] Mr Dumolo had only been employed for seven months, he had received one formal warning, and he had been spoken to on numerous occasions about a variety of incidents, this history suggested action short of dismissal was unlikely to be effective in addressing his behaviour because he had not responded well to previous guidance.

[54] I consider LDHB had reasonable grounds for concluding it was unable to trust Mr Dumolo to act appropriately in future. He had not demonstrated any remorse. He strongly believed he had done nothing wrong. He maintained his view that LDHB was overreacting and had only taken disciplinary action because it "*was out to get him*". He was unable to understand why LDHB was concerned, and he had not given LDHB any reason to believe he would comply with its Rules of Conduct in future.

Outcome

[55] I find that, objectively viewed, LDHB's actions, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time it dismissed Mr Dumolo. Accordingly, Mr Dumolo's dismissal was justified.

Costs

[56] LDHB was represented by an in house advocate, which I understood meant it had not actually incurred any legal costs in defending Mr Dumolo's claim. If that is correct, then there is no issue as to costs.

[57] However, if LDHB has incurred actual legal costs, then it has 14 days within which to file a costs memorandum together with evidence of its actual costs.

Mr Dumolo has 14 days within which to respond, and LDHB has seven days thereafter to reply.

[58] Departure from this timetable requires the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority