

What caused the problem?

[4] Ms Howard's employment was governed by a fixed term individual employment agreement commencing on 13 February 2006 and expiring on 13 February 2007. The legitimacy of the fixed term agreement is not at issue between the parties. The agreement provided for an annual salary of \$35,360 at \$17 per hour, and the hours of work of 8.45am to 5.15pm Monday to Friday.

[5] The applicant began working at the Inner City Interagency Trust ("the Trust") largely through her friendship with Ms Lisa Mora, the manager of the Drop-in Centre ("the Centre"), who at that time was a neighbour of the applicant. Through this association, the applicant became aware of the Centre operated by the Trust and which was managed by Ms Mora. Prior to being employed, the applicant had donated a piano, furniture and art materials to the Centre. Ms Mora formally expressed the Trust's gratitude for those items and it was clear they were good friends.

[6] When a vacancy for a community development worker arose at the Centre, the applicant was employed without the usual formalities of advertising, interview and the like. Essentially, Ms Howard was engaged on the recommendation of Ms Mora and all went well initially.

[7] In early March 2006, the applicant was moving house and received a text message from Ms Mora offering her help. Ms Howard replied and advised her that Bryan Holland, a staff member at the Centre, and a friend, Jo-Leah were already with her. Ms Mora duly arrived and it is apparent that she disapproved of Mr Holland's presence. Ms Jo-Leah Zurcher says that Ms Mora's demeanour changed quite noticeably after she saw Bryan was present. Ms Mora left soon after arriving but says she was not disapproving of Bryan's presence at Ms Howard's home.

[8] Issues arose between the two women soon after the house move and the applicant says they were interpersonal rather than work-specific issues. At her request, the two met on 7 March 2006. The minutes taken at the meeting establish that Ms Howard believed Ms Mora was "*harbouring shittiness*" towards her over out-of-work issues. They also confirm Ms Mora's refusal to discuss anything other than work-related matters, and she told the applicant if she was not satisfied with Ms Mora's approach she could take her concerns to the chair of the Trust. Significantly, what the minutes do not record is that the pair had a loud argument in the course of this meeting. The applicant says that she was fed up with the way Ms Mora was treating her and of her manager's perceived problems about her friendship with Mr Holland. She also said that they argued about the requirement for her to work longer hours. Ms Howard says that at the close of the meeting she was issued with a verbal warning and when she asked Ms Mora what it was for, her manager would not

tell her. She repeated her request the following morning but was told that Ms Mora was working on something else at the time.

[9] A handwritten note was written by Ms Howard on the copy of the minutes she signed and returned to Ms Mora. It reads:

“NB: The issues remain unresolved – regrettably – I look forward to better communication and a harmonious workplace.”

[10] It is worth noting that Lloyd Robinson, a member of the Trust who was in the Centre at the time and who is partially deaf, confirmed that he could hear the argument some considerable distance away from the office in which it occurred.

[11] On 28 March 2006, an incident occurred at the Centre involving an irregular visitor inhaling a white powder while in the lounge. Later, two people each lodged a complaint with Ms Mora and other staff that Ms Howard was present in the lounge at the time and did nothing to prevent or stop this activity. One complaint was made verbally that same day while the other was made the following day.

[12] On 30 March 2006, the applicant was called into the office where Val Quinn, the then Chair of the Trust was seated and was handed a letter telling her that she had been suspended with immediate effect. She said it was the first notice she had received of the complaints and immediately denied any involvement. The applicant said she requested to have Mr Holland called as a support person for her but was told that that was unnecessary as she would be given the opportunity to give a full explanation at the investigation that was to follow.

[13] On 4 April 2006, the Trust wrote a letter to the applicant advising her that she was required to attend a meeting at 4pm Thursday, 13 April at the Centre. The letter also advised of her right to be represented, the personnel who would be present and also notified Ms Howard that depending on the outcome her employment could be terminated.

[14] An investigation meeting was held on the scheduled date and the Trust was represented by Ms Quinn, Dr Gerry Walmisley, a trustee, Lisa Mora and Mr Rob Davidson was present as representative with his client, Ms Howard. At the conclusion of that meeting, Ms Quinn advised the applicant that she would be notified as soon as possible as to the outcome of the investigation. In a letter dated 18 April 2006, Ms Quinn, on behalf of the Trust, advised the applicant that:

“After due consideration and the formal interview held with you on Thursday 13 April, the Inner City Interagency Trust considers that serious misconduct has occurred on your part as an employee.

We write to advise that your employment has been terminated as at the date of this letter, Tuesday 18 April 2006.”

Issues

[15] The relevant test in this matter is that set out in s.103A of the Employment Relations Act 2000. To determine the matter, the Authority needs to decide the following issues:

- Was the process adopted by the respondent full and fair; and
- Was the alleged conduct of the applicant capable, in all the circumstances, of constituting serious misconduct; and
- Was the applicant unjustifiably dismissed in the circumstances; and
- Did the applicant contribute to the events which led to her dismissal; and
- What, if any, remedies are due to her?

The investigation meeting

[16] At the investigation meeting, the Authority heard from the applicant herself, and also from Mr Rob Davidson and Jo-Leah Zurcher. On behalf of the respondent, evidence was presented by Ms Val Quinn, Dr Gerry Walmisley, Mr Glen Falwasser and Mr Lloyd Robinson. Ms Lisa Mora also gave extensive evidence on the matters leading up to the dismissal.

[17] There were significant issues in dispute between the parties. The matter of the notification of the suspension without warning and discussion; the refusal of the respondent to disclose the identities of the two complainants – there was no issue over provision of the complaints to the applicant; the quality of the investigation; and whether Ms Howard actually saw the incident which was the subject of the complaints. As credibility was in issue, counsel to each party consented and witnesses were excluded prior to their giving evidence.

[18] I record the Authority’s appreciation to all participants in the investigation for their frank yet courteous behaviour in front of the Authority.

Analysis and discussion

[19] There is little doubt that the incident took place at the Centre on 28 March 2006. Mr Falwasser’s identification of the offender and his having the offender admit to him and to the second complainant that the incident did take place was significant.

[20] Further, there is no doubt that the incident was a serious breach of the Centre's policy, and that the applicant was aware of the relevant policies as she confirmed this in the course of her evidence. Ms Howard had earlier acted to turn away a visitor to the Centre who was in search of marijuana and was praised for her handling of that situation.

[21] There are several difficulties however. The complainants were not available to the Authority for questioning which might have established more accurately the period of the applicant's presence in the room, the reason for the complainants delaying their complaints to other staff, the reason for not drawing Ms Howard's attention to the incident, if indeed Ms Howard was in the room at the time, and any motivation for the delay or the issues they may have had in respect to the applicant.

[22] Ms Howard, from the time she was first advised of the complaint on 30 March 2006, has staunchly maintained she did not see the incident and thus was unable to intervene. The respondent's view is that if she did not see the incident, she should have, as that is part of her role at the Centre.

[23] In the course of the investigation meeting, I paid close attention to the applicant's demeanour and her responses to questions. Ms Howard impressed me with her candour and with her willingness to make concessions on points put to her, yet she maintained throughout that she did not act because she did not see the incident. I found her a very credible witness and a person of considerable integrity. I am of the view that she did not witness the incident as she would not have been afraid to intervene given her readiness to act in a not dissimilar incident some short time earlier.

[24] Turning to the process adopted by the respondent, it has to be said that Ms Quinn, once alerted to the situation, sought advice from the Department of Labour's info-line and from one of the Department's booklets. I totally accept her evidence that she and the other trustees wanted to ensure they conducted their process fairly. The circumstances of this investigation were somewhat exceptional given the nature of the Trust's work and the client base with whom it worked in a supportive and caring role. It was a delicate situation calling for advice from an experienced professional in the field rather than what I will call "*entry level*" directions. The two sources used are reliable for basic information on procedure. However, they are unable to provide the on-point advice to meet more complex aspects of inquiries such as was required here. This in no way detracts from the Trust's earnest attempt to treat the applicant fairly.

[25] Significantly, the applicant accepted that the minutes of the relevant meetings were “*fairly much*” accurate when replying to a question from Ms Gibson. That is important in the context of the respondent’s rejection of the applicant’s claim of unjustified disadvantage as at no point did the minutes of the meeting of 13 April 2006 record any protest at the imposition of the suspension or any irregularities surrounding it. These minutes also reassure me that the trustees were endeavouring to proceed in a manner fair to the applicant who actively participated in the meeting.

[26] The minutes also make it clear that Mr Davidson specifically asked the respondent’s representatives if they were undertaking a two-part investigation. The minutes state:

“Gerry Walmisley confirmed that the Trust will first listen to Melissa’s response to the complaints and this along with the complaints and information will be given due consideration and the Trust would report back to Melissa next week.

Rob Davidson stated that they would like the opportunity to make representations in regard to any decision made.

Gerry Walmisley reiterated that this meeting was to provide the opportunity for Melissa to offer an explanation and respond to the two complaints made by the two clients in regards to the conduct.”

[27] In fact, Mr Davidson and his client were not afforded the opportunity to make any further representations as, without any further contact with either Mr Davidson or Ms Howard, the Trust forwarded the letter of 18 April 2006 imparting its decision to the applicant that her employment had been terminated. At para.2, the letter states:

“After due consideration and the formal interview held with you on Thursday 13 April, the Inner City Interagency Trust considers that serious misconduct has occurred on your part as an employee.

We write to advise that your employment has been terminated as at the date of this letter, Tuesday 18 April 2006.”

[28] In his evidence before the Authority, Dr Walmisley maintained that he misunderstood the request made of the Trust by Mr Davidson. He said that he understood the request meant:

“... that once the Trust had made a decision in respect to the action (if any) to be taken Mr Davidson would then look to negotiate with the Trust on his client’s behalf to perhaps mitigate the impact of any decision. I was clear that Mr Davidson was seeking the opportunity to discuss on his client’s behalf the implications of any decision the Trust would make. I did not believe this was giving Mr Davidson the opportunity to re-litigate any decision made. It was my belief that should the Trust, for example, bring Melissa’s brief employment to an end then there would be an opportunity to debate **conditions of severance**. Under no circumstances did I believe or give the impression that there would be an opportunity to gainsay any decision to be made.

It was on this basis that I suggested that we write advising Melissa Howard of the dismissal however giving a period of 48 hours before we deposited her final pay to enable any discussions with Mr Davidson to take place before the final payment was made.”

[29] I have no doubt that it was Mr Davidson's intention to convey to the trustees that he sought the opportunity to have input on the matter of any penalty that might be levied against his client prior to a decision on penalty being made. At the investigation meeting however, Mr Davidson did concede that it was possible that Dr Walmisley had misunderstood his request. It is clear from my reading of the minutes of the meeting that at no point, after Mr Davidson made his request, did any member of the Trust question Mr Davidson as to the precise meaning of the request he was making. The reality is that misunderstanding or not, the Trust created an expectation on the part of the applicant that she would have the opportunity for further representations prior to the confirmation of any penalty. The reality was that this did not occur as she was advised of her summary termination by a formal letter. In this context, it does not assist the respondent in that, prior to the arrival of the letter but following the decision of the Trust to dismiss Ms Howard, Bryan Holland had become aware of the decision and conveyed it to Ms Howard. As Mr Holland did not appear to give evidence to the Authority, I was unable to check how this came about. However, I accept the applicant's evidence that this is the manner in which she first became aware of her dismissal.

[30] Turning to the matter of whether there was a change of attitude on the part of Ms Mora in respect of the applicant, it is clear that prior to the incident in the Centre, Ms Mora had been exceptionally supportive of Ms Howard in her role. It is also clear that following the brief appearance she made at the applicant's home at the time of her moving house and her declining to discuss interpersonal issues with Ms Howard, a sea change had come over the relationship. I think it probable that Ms Mora disapproved of the friendship that was developing between the applicant and Mr Holland, and she appears to not to have openly discussed this with Ms Howard. In this context, the evidence of Ms Quinn when questioned by Mr Toomey is of some importance. Ms Quinn told the Authority that she became aware of the complaints via Lisa. She also made it plain that Lisa did not make any representations on behalf of the applicant at the Board meeting which decided on the suspension. Also highly significant is Ms Quinn's evidence that she personally wanted the applicant warned about the matter but that Ms Mora opposed this course of action.

[31] It has to be said that this meeting relating to the matter of suspension preceded by several days the actual formal investigation of the complaints. Ms Mora may well have been of the view that the Trust should not close off any of its options until it had undertaken a formal investigation. This was, however, not clear from her evidence in front of the Authority.

[32] Whether a dismissal was justifiable must be determined on an objective basis under s.103A of the Employment Relations Act 2000. The Authority must consider whether the employer's

actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal took place.

[33] There is no dispute that Ms Howard was dismissed from her employment. It is also clear that her employer deemed her failure to observe the incident in question constituted serious misconduct. The respondent undertook what I find to be a generally satisfactory investigation. However, I have difficulty in accepting the reasoning for the decision put before the Authority. Dr Walmisley said that:

“In reaching a decision to dismiss Melissa Howard we considered the following:

- (a) The veracity of the complainants and felt that the independent and congruent nature of the complaints demonstrated the accuracy of their description of the incident. We considered the complaints to be valid and true; and
- (b) Melissa was at the Centre that day and did not make any representations to suggest that she was occupied elsewhere at the Centre at the time the incident occurred. In fact she did not deny her presence in the lounge at the time the incident occurred. When physically located in the lounge it is extremely difficult to accept that a person could not have seen the incident complained of irrespective of the brevity of the presence in the lounge.

We reached the view that the conduct complained of was serious enough to justify a dismissal.

We considered whether our actions were being somewhat precipitate and whether a warning would suffice. However, we **believed** that the nature of the allegations amounted to serious misconduct and that there was a loss of confidence and trust in the complainant by staff, Board and more importantly the Centre clientele.

We considered that the tacit condoning (by inaction) of what was apparently serious drug use involving the snorting or inhaling of a white powder in full view of Centre users placed the Centre and its clientele in jeopardy.”

[34] What is striking is the omission of this line of reasoning, or even a concise edition of it, in the letter of dismissal.

[35] The situation which faced the Trust was essentially that of an untrained and inexperienced social worker who had been employed for some nine weeks and whose integrity before the incident had not been questioned and who had not shied from dealing with challenging situations at the Centre, firmly and consistently denying seeing the incident complained of. She was denied knowledge of the identity of the complainants on the ground that she might intimidate them. The respondent sets aside her explanation but prefers a belief that the allegations amounted to serious misconduct and that the applicant’s behaviour was deliberate.

[36] For the respondent to conclude that Ms Howard **condoned** the incident clearly indicates that the applicant made a deliberate choice to do so. That rests on the premise that she had observed the

incident and consciously chose to ignore it rather than intervene. It also takes no account of the applicant's lauded performance in a not dissimilar setting some days prior.

[37] Viewed objectively, a fair and reasonable employer would have considered all of the above aspects of the matter and found that, if misconduct had occurred, a remedy short of dismissal be decided on.

[38] I find the respondent gave far too little weight to Ms Howard's handling of difficult situations prior to this incident and has preferred the evidence of the complainants while shielding them from any, even supervised, questioning by the applicant or her solicitor. Viewed objectively, I find that the applicant has been unjustifiably dismissed.

The determination

[39] Returning now to the issues set out above in this determination, I find that with the exception of the summary suspension of the applicant, the investigation process adopted by the respondent was generally a fair one.

[40] I find that the alleged conduct of the applicant was not capable in the circumstances of amounting to serious misconduct.

[41] I find the applicant was unjustifiably dismissed in the circumstances of this particular case.

[42] I find that the applicant did not contribute to the events which led to her dismissal.

[43] Before turning to the remedies, I will now deal with the applicant's claim of unjustified disadvantage.

The disadvantage claim

[44] The letter from Mr Davidson dated 28 April 2006 notifying the grievance on behalf of his client does not allege a claim of disadvantage based on unjustified suspension. The letter is confined to the alleged unjustifiable dismissal of Ms Howard. The respondent is correct that the first notice of an alleged disadvantage was made in the statement of problem lodged with the Authority on 8 August 2006. The applicant was dismissed on 18 April 2006. The Authority has received no application for leave to lodge the disadvantage claim out of time. The statute is clear. The applicant has not notified the respondent of her alleged disadvantage claim within the 90 day period and has not sought leave to lodge the claim out of time.

[45] The Authority declines the applicant's disadvantage claim as it is time-barred. However, having found the method by which the suspension was imposed to have been unsatisfactory, will consider that matter *in globo* in considering the remedies.

Remedies

[46] Ms Howard sought other work following her dismissal and commenced employment on 15 June 2006. Her claim is for eight weeks and two days salary from 18 April 2006 to 15 June 2006 in the sum of \$5,712. The respondent did not challenge the applicant's mitigation of her loss nor did it challenge the quantum sought. The respondent is to pay the applicant the sum of \$5,712 gross as lost remuneration due to the grievance.

[47] The applicant sought compensation for humiliation, distress and injury to her feelings in the sum of \$15,000.

[48] In considering this claim, I have borne in mind that the employment was a relatively brief one and was in the context of a fixed term agreement. It is clear from both the applicant's own evidence and that of Jo-Leah Zurcher that the suspension and dismissal occasioned the applicant very considerable distress. However, an award even approaching the quantum sought would, in my view, be unwarranted in this case.

[49] I direct the respondent to pay the applicant the sum of \$5,000 without deduction.

Summary of orders

- The respondent is to pay the applicant the sum of \$5,712 gross pursuant to s.123(1)(b) of the Employment Relations Act 2000.
- I order the respondent to pay the applicant the sum of \$5,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[50] Costs are reserved. The parties are encouraged to attempt to resolve this matter between them. If this is not achievable, Mr Toomey is to lodge and serve a memorandum on costs. Ms Gibson will have 14 days within which to lodge and serve her memorandum in reply.

P Montgomery
Member of the Employment Relations Authority