

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Paula Katipa-Martinussen (Applicant)
AND Hohepa Homes Trust Board Incorporated (Respondent)
REPRESENTATIVES Megan Williams for Applicant
Karen Sagaga for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION Napier
MEETING 31 January 2006
FURTHER SUBMISSIONS Received by 7 March 2006
DATE OF 18 April 2006
DETERMINATION

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. The respondent (Hohepa) provides community residential, educational and vocational services to people with intellectual disabilities in the Hawke's Bay. The applicant, Paula Katipa-Martinussen, had been employed by it since February 2000, in her last role as a vocational co-worker. She had close contact with a number of the residents accordingly. She reported to Mr Barry McBride, the Operations Manager, and they worked reasonably harmoniously together for the time of Ms Katipa-Martinussen's employment. The residential side of the operation was managed by Mr Michael Ahrens. Both in turn reported to Mr Glen Selman, the General Manager. While Ms Katipa-Martinussen has had a number of difficulties in her dealings with Mr Ahrens and Mr Selman in the past, these related to matters not in issue in this employment relationship problem, I find. Thus although it is possible that those interactions may have coloured Hohepa management's views of Ms Katipa-Martinussen, the particular

events raised by her occurred approximately a year earlier and I therefore make no finding on those events.

2. The genesis of this employment relationship problem involved Ms Katipa-Martinussen taking home one of the residential clients whom Hohepa took care of, for an extended period. The first Mr Ahrens became aware that Ms Katipa-Martinussen was looking after the client was a few days later when the client's mother rang with concerns over her son's care, as a result of recent staff changes. Mr Ahrens then investigated to find out how and why the client was in Ms Katipa-Martinussen's care. He discovered that his senior staff had known where the client was, but expected him to be returned after a couple of nights at the latest.
3. Mr Ahrens had grave concerns about whether Ms Katipa-Martinussen had got proper permission to take the client away and what she had told the client's mother and others about Hohepa generally, and Mr Ahrens in particular. He therefore wrote to Mr Selman requesting a disciplinary investigation. Mr Selman also received reports from a house parent, Ms Tia King, the Residential Coordinator, Ms Pauline Paul, and the relevant house parents.
4. The allegations against Ms Katipa-Martinussen, as amended by me for reasons of confidentiality, were set out in a letter as follows:
 - “1. You were given permission, on Thursday 25th November, to take [the client] to stay at your home for one night or a maximum of that weekend, but kept him there for several days and had to be instructed, against your will, to bring him back on Wednesday 2nd December.
 2. You contacted [the client's] mother, ..., over that weekend, and complained that Hohepa were not supporting [the client] well.
 3. You contacted Wharerangi House on Saturday 27th November and asked if they could look after him during that day; without permission from, or information to, co-ordinators or residential management.
 4. You made insulting and disparaging remarks to Tia King about Michael Ahrens, Residential Manager on 2nd December; the day after returning [the client] to Hohepa.
 5. You removed [the client] from the Clive site on Saturday 4th December without the knowledge or approval of the Cunningham House-Parents or residential Coordinators; and without any prior arrangement with house staff.

6. *You left your work at the Care and Craft workshop, without permission from, and without informing, your Operations Manager Barry McBride of the purpose; in order to take ... ([the client's] family friend) to Cunningham House and remained there with him during his discussions with the house-parents."*
5. In the letter Mr Selman sent to Ms Katipa-Martinussen he told her that the preliminary meeting was not a disciplinary one, but that she was entitled to be represented. Ms Katipa-Martinussen wrote back contesting some of the allegations and making the point that she acted with good intentions at all times, following a request for support from a client.
6. At the meeting, held on 10 December, Ms Katipa-Martinussen explained that she did not believe she had done anything wrong and she certainly did not intend to create any difficulties for Hohepa, but was focused on the care of the client.
7. Following this meeting, Mr Selman decided to pursue a formal investigation into alleged breaches of Hohepa's house rules. These were said to come under the following headings:
- Misconduct 1: Failure to perform work to the required standards, including failure to adhere to the organisation's policies and procedures;
 - Misconduct 13: Showing discourtesy to fellow workers, residents or customers;
 - Serious misconduct 7: Working in a manner that may pose a risk to the health and safety of residents/staff/visitors.
8. Mr Selman considered the matter serious because, as he said:
- "Overall, the actions you took over the period in question appear to have shown a repeated disregard for the authority of the residential management team, and had potential to bring Hohepa Hawke's Bay into disrepute. If this allegation is upheld, it would be regarded as serious misconduct."*
9. The allegations against Ms Katipa-Martinussen were effectively that she took the client home without permission and failed to organise a return date. She then had to be instructed to bring him back. During that period, she had other people look after the client at certain times and complained to the client's mother about his treatment at Hohepa. Hohepa was also concerned that she had made disparaging and insulting

remarks about Mr Ahrens to another staff member. Finally, Hohepa had concerns that she had subsequently taken the client and a friend to a meeting without permission, when the client was expected to be at vocational activities.

10. Ms Katipa-Martinussen was then directed to a formal disciplinary meeting to be held the next day. She sought an adjournment for three weeks so that she could take annual leave over Christmas and gain further evidence. The parties therefore met on 12 January 2005.
11. At the meeting of 12 January, Ms Katipa-Martinussen stated that she believed she had permission (from Ms Paul, through Ms King) to take the client away, that she did not believe that she had done anything wrong in leaving the client at different places, that she did not initiate any concerns about the client's treatment held by his mother and that while she had problems with Mr Ahrens, she did not believe she had been rude about him, except once, calling him a "dick" to Ms King.
12. Ms Katipa-Martinussen noted that she had avoided seeking Mr Ahrens' approval for matters in the past, even although she knew that she should have done so, because of ongoing problems with him. She stated that while it might be the coward's way out, it was also the easiest. Ms Katipa-Martinussen's representative stated that he thought that she had made mistakes and lost sight of procedure, but that it would not happen again. The representative then stated that while it was fair that Hohepa should know where residents were at all times, Ms Katipa-Martinussen's intentions were good, although her actions were misguided. Ms Katipa-Martinussen confirmed that she agreed with those comments at the meeting.
13. It was agreed that the parties would meet again the next day for Mr Selman to give his provisional decision. Mr Selman concluded that while Ms Katipa-Martinussen's motives were good, her actions in removing the client for a long period, and subjecting him to a number of short stays elsewhere without the specific permission or knowledge of the appropriate people, were not acceptable. He also concluded that Ms Katipa-Martinussen knew that she had failed to go through the proper channels and that, at best; she may have considered that she had tacit permission for a shorter period. Mr Selman concluded furthermore that the disparaging remarks made about

Mr Ahrens, to which she had admitted, were unacceptable, as was her absenting herself from where she was expected to be. As Mr Selman believed serious misconduct had been established, he stated that he intended to issue Ms Katipa-Martinussen with a final written warning.

14. Ms Katipa-Martinussen stated that she had not been believed by management. Her response was then to state that the matter was a set-up and to storm out of the room.
15. This led Mr Selman to wonder whether Ms Katipa-Martinussen's admission of fault the previous day was genuine. Ms Katipa-Martinussen did not attend work the next day, despite being rostered on.
16. Mr Selman then issued a final warning to Ms Katipa-Martinussen, by letter dated 14 January, for the following reasons:

- “1. Compliance with health and safety procedures, in particular giving adequate notification and getting adequate permission for moving any resident from the site.*
- 2. Undermining management or co-workers.*
- 3. Actions that have potential to bring the employer into disrepute, (including undermining, disparagingly using abusive language about managers or co-workers, and discussing perceived problems re residents with their families, rather than referring them to the residential coordinators for information).*
- 4. Unauthorised absence or walking off the job, as discussed re your absenting yourself from the workshop to meet with [the client and his friend].”*

17. Ms Katipa-Martinussen refused to accept the warning and left work to consider her options. She then filed a personal grievance on 29 January, which has remained unresolved despite mediation and attempts during the Authority's investigation to resolve it. She chose to withdraw another claim, over a dispute of her hourly wage when doing casual work, during the investigation process.

The Law

18. These events took place soon after the Employment Relations Amendment Act (No 2) 2004 came into force. It provides a new test for the justification of actions by employers. The test now requires the Authority to determine the question of whether an action is justifiable 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 the circumstances at the time the action occurred.

19. There can be no certainty over what a fair and reasonable employer would have done in any given circumstance, so the question must be answered in terms of what a fair and reasonable employer would (most likely) have done, because of the possible wide range of responses from employers.
20. An employer can validly substitute a warning of whatever sort, including a final warning, where serious misconduct justifying dismissal is established. Where a fair and reasonable employer would have concluded that misconduct rather than serious misconduct had been established, however, it must work through the established disciplinary procedures. In Hohepa's case, this provides for a two-step warning process before dismissal can occur.
21. A finding of serious misconduct requires proof of the allegation sufficient to justify a finding not only that serious misconduct has occurred, but that the sanction of dismissal or a lesser sanction should be applied, *Honda NZ Ltd v. NZ etc Shipwrights etc IUOW* [1990] 3 NZELC 98, 130 (CA). In this context, serious misconduct requires conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship, *Northern Distribution Union v. BP Oil NZ Ltd* [1992] 3 ERNZ 483.

Determination

22. The key issue for determination in regard to serious misconduct relates to the finding that Ms Katipa-Martinussen had worked in a manner that may pose a risk to the health and safety of residents/staff/visitors. Of particular concern to Hohepa was that management did not know where the client was for long periods. This related in particular to Ms Katipa-Martinussen not giving adequate notification and/or getting adequate permission for removing the resident from its site.
23. It was clear that Ms Katipa-Martinussen failed to perform work to the required standard, by failing to adhere to Hohepa's policies and procedures when taking a client away from Hohepa's care. In this regard she knew that she should have gone to Mr

Ahrens or someone more senior than Ms King to get permission to take the client away. She also knew that she should have informed the same people when she put that client in someone else's care, albeit that they were people associated with Hohepa. That is clearly misconduct.

24. It was also clear that she showed discourtesy to a fellow worker by using abusive language about Mr Ahrens. She called Mr Ahrens a "dick" to another worker, when there was absolutely no reason to do so. While that was not of itself sufficient to give a warning, I find that any fair and reasonable employer would have concluded, in association with the above breaches of house rules, that a warning was justified.
25. On the other hand, I do not consider that there was sufficient evidence to justify a warning to Paula Katipa-Martinussen for absenting herself from a workshop so that she could meet with the client. Ms Katipa-Martinussen's evidence on this point should have been sufficient to forestall the need for any warning. She was after all, as Hohepa accepted, trying to look after the interests of the client at the time.
26. There are two reasons why I find that a fair and reasonable employer would not have considered that serious misconduct had occurred in this set of circumstances. The first is that Hohepa quite correctly accepted that Ms Katipa-Martinussen acted with good motives, namely in the best interests of the client, in removing him from Hohepa to take personal care of him. There was therefore clearly no intent by her to pose a risk to the health and safety of the client. The second reason is that there are clear grounds for Hohepa to have concluded that Ms Katipa-Martinussen's behaviour over taking the client resulted from miscommunication, rather than a deliberate decision to take the client without permission and to keep him for a period longer than any tacit permission given. This is because Mr Selman relied on the written statements of Ms King and Ms Paul to conclude that Ms Katipa-Martinussen deliberately disregarded procedures in taking the client away and for keeping him as long as he did. The written statements made available to the Authority, on which Mr Selman relied, clearly showed that there were grounds for concluding, given the graveness of the charge of serious misconduct, that while there may have been some confusion about how Ms Katipa-Martinussen came to get permission to take the client away, her taking the client away had been authorised by Ms Paul by the time she came to take him away.

27. It was also clear that Ms Katipa-Martinussen told the house parents that she intended to take the client away for a week. While the house parents had been told that she was only to take the client for only one night or the weekend at most, it was clear that this was not communicated to Ms Katipa-Martinussen. Furthermore, Ms Katipa-Martinussen subsequently left the client (for brief periods) only in the care of reliable people closely associated with Hohepa. It therefore follows that a conclusion of serious misconduct was not one that any fair and reasonable employer would have made in these circumstances.
28. I therefore conclude that while, in all the circumstances, a first warning for Ms Katipa-Martinussen's behaviour would have been justified, no fair and reasonable employer would have concluded that serious misconduct had occurred and therefore a second and final warning was not justified.

Remedies

29. Ms Katipa-Martinussen was greatly distressed by the way the investigation was handled, that she was not believed and that her conduct did not justify a final warning. This had a great impact on her, as her evidence demonstrated.
30. While Ms Katipa-Martinussen did suffer in the way she has described, she must also take responsibility for her behaviour, which would have justified a first warning. That is clearly contributory fault.
31. Taking all these factors into account, I consider that compensation in the sum of \$1,000 is appropriate. I therefore order the respondent, Hohepa Homes Trust Board Incorporated, to pay to the applicant, Paula Katipa-Martinussen, the sum of \$1,000 in compensation.

Costs

32. Costs are reserved.

G J Wood
Member of Employment Relations Authority