

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 198  
5381774

BETWEEN                      BRETT RODNEY LARKIN  
   Applicant  
  
A N D                              NGATI KAHU SOCIAL AND  
   HEALTH SERVICES  
   INCORPORATED  
   Respondent

Member of Authority:      T G Tetitaha  
  
Representatives:              M Tawhara, Counsel for the Applicant  
   D Grindle, Counsel for the Respondent  
  
Investigation Meeting:      30 April and 1 May 2015 at Kaitaia  
  
Submissions Received:      29 April and 1 May 2015 from the Applicant  
   28 April and 1 May 2015 from the Respondent  
  
Date of Determination:      30 June 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.      The personal grievance of unjustified disadvantage is dismissed.**
- B.      Mr Larkin was unjustifiably dismissed by Ngati Kahu Social and Health Services Incorporated.**
- C.      There is an order Ngati Kahu Social and Health Services Incorporated pay lost remuneration of two months ordinary time remuneration less PAYE and to be reduced by 50% for Mr Larkin's contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**
- D.      There is an order that Ngati Kahu Social and Health Services Incorporated pay compensation of \$500 including a reduction of 50% for Mr Larkin's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**

**E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

### **Employment relationship problem**

[1] Brett Rodney Larkin alleges he was unjustifiably disadvantaged by bullying behaviour between 5 December 2011 and 21 February 2012. He also alleges he was unjustifiably dismissed and his employment contract was breached by the respondent's failure to address grievances. In the alternative there was a breach of good faith in respect of all of the above actions.

### **Facts leading to dispute**

[2] The respondent is an incorporated society with the aim, amongst other things, of supporting social, economic and cultural circumstances affecting children, young persons and their families.

[3] On 19 March 2007, Mr Larkin was employed as a Whanau Support Worker, Child & Youth Mental Health Services.

[4] On 3 February 2011, Mr Larkin received a verbal warning about communication from his team leader, Glenys Harrison. He had been asked on several occasions about his movements and had not told Ms Harrison where he was going.

[5] On 21 April 2011, Mr Larkin received a written warning from Ms Harrison about his failure to produce the last three months' reporting for the respondent's quarterly report to the Ministry of Health and failure to attend staff training on 5 April 2011.

[6] On 13 May 2011, Mr Larkin received a final written warning from the then Chief Executive Officer, Grant Berghan. Mr Larkin called the Police about a person he had seen on the respondent's premises. He was subsequently advised Mr Berghan had given permission for that person to be on the premises.

[7] On 16 May 2011, Mr Larkin was sent an employment contract and job description for the day programme coordinator. He was asked to sign the contract and return one copy to the new Chief Executive Officer, Marihi Langford.

[8] On 20 May 2011 Mr Larkin sent an email to Mr Berghan setting out his concerns regarding the lack of support and training for the day programme coordinator, the final warning and there would be a formal response from his lawyer. Ms Langford acknowledged his email advising they would wait for his lawyers' response.

[9] On 23 May 2011, Mr Larkin sprained his back whilst digging in his garden. He was unable to return to work until December 2011.

[10] During the period he was away from work, Ms Langford met with Mr Larkin, his occupational therapist and spoke to his GP. She also required medical certificates.

[11] On 11 August 2011, Mr Larkin raised a personal grievance about the final written warning dated 13 May 2011.

[12] In September 2011 the parties corresponded about Mr Larkin's return to work. No medical certificates were received between 6 and 28 September 2011. Ms Langford required he attend meetings about his return to work but these did not occur.

[13] On 28 October, 1 and 2 November 2011 Mr Larkin came into work. There is a dispute about whether he left voluntarily or not.

[14] On 5 December 2011, the parties attended mediation. The mediation resulted in a Record of Settlement pursuant to s.149(3) of the Employment Relations Act 2000 (the Act). The agreed terms of settlement included a full and final settlement of all matters to date between the parties arising out of the employment relationship, payment of \$855 to Mr Larkin and an agreement he would obtain a medical clearance by 9 December and return to work on 12 December 2011.

[15] On 12 December 2011, Mr Larkin obtained a medical certificate and returned to work.

[16] On 23 December 2011 Ms Langford met with the staff and gave them a ham and in the case of a staff member who did not eat meat, a \$50 Pak n Save voucher. Mr Larkin had left the building and did not attend the meeting. He returned and asked where his ham was. He was offered a box of chocolates which he declined.

[17] During January and February 2012, he undertook training with Ms Harrison and Adrienne Marsden, a fixed term contractor filling in during his sick leave. During the training period there were problems with Mr Larkin's computer.

[18] On 2 February 2012, Mr Larkin was invited to attend a meeting on 9 February about concerns about his behaviour on 1 February including his lack of participation and falling asleep at a staff training day.

[19] On 8 February 2012 Mr Larkin was informed the 9 February meeting was cancelled and he was required to attend a meeting on 16 February. The letter set out a number of concerns about his behaviour between 1 and 3 February 2012 which was serious misconduct, referred to a final written warning dated 13 May 2011 and if the allegations were established it could result in his position being terminated.

[20] On 9 February 2012 Mr Larkin wrote complaining about the change in dates, stating *"I feel I have been picked on since I have been back in work"* and that he *"will be taking Grievance Procedure against the way about how I have been treated."* Ms Langford replied the same day stating she was prepared to look at an alternative meeting time no later than 21 February.

[21] On 15 February 2012 Mr Larkin sent a letter asking to reschedule the meeting to 23 February stating *"Im looking at getting legal advice. You have said that to me many times go ahead & get your lawyer so Im doing that."*

[22] On 16 February 2012 Ms Langford advised the meeting had been shifted to 21 February 2012.

[23] On 21 February 2012, Mr Larkin attended with his wife, Kiringawai, and a kaumatua, Hector Busby. At the meeting, Mr Larkin made no response to the allegations. Ms Langford adjourned the meeting then returned. Mr Larkin was subsequently dismissed.

[24] Following the dismissal, Mr Larkin asked if he could say goodbye to staff which was granted. Ms Langford subsequently rescinded permission and asked that he leave or be escorted out by security.

[25] The same day Ms Langford sent a letter confirming the dismissal and the reasons.

[26] On 21 August 2012, Mr Larkin raised a personal grievance about the dismissal and other matters.

[27] On 19 March 2015 I gave an oral determination dismissing the grievances that arose prior to 5 December 2011.<sup>1</sup> The personal grievances that have arisen between 5 December 2011 and 21 February 2012 are before me for determination.

### **Issues**

[28] The parties agreed at the start of the hearing that the following issues were for determination:

- a) Was the applicant unjustifiably disadvantaged by actions between 5 December 2011 and 21 February 2012 by bullying behaviour of Ms Langford including:
  - (i) Threatening his employment if he did not return to work during the extended sick leave period from 27 May to 12 December 2011;
  - (ii) Sending him home in November and December 2011;
  - (iii) Failing to provide sufficient training or counselling upon return to work as per the mediation agreement;
  - (iv) Creating an unsafe working environment, for example yelling on 5 December 2011 to go home;
  - (v) Differential treatment by failing to give him a Christmas ham or \$50 voucher as a bonus;
  - (vi) Failing to acknowledge good work; and
  - (vii) Allowing staff to discuss his dismissal.
- b) Did the respondent breach the applicant's employment agreement by failing to address his grievances when raised about being picked on?
- c) In the alternative, an action for breach of good faith pursuant to s.4A of the Act regarding the above actions?

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<sup>1</sup> *Larkin v Ngati Kahu Social and Health Services Inc* [2015] NZERA Auckland 82

- d) In respect of the dismissal, could a fair and reasonable employer conclude the employee's conduct was misconduct justifying dismissal?
- e) Was the process leading to dismissal of the employee what a fair and reasonable employer could have done in all the circumstances?
- f) What remedies should be awarded (if any) for the above applications?

**Was the applicant unjustifiably disadvantaged by actions between 5 December 2011 and 21 February 2012 by bullying behaviour of Ms Langford?**

[29] A personal grievance of unjustified disadvantage arises under s.103(1)(b) of the Employment Relations Act 2000 (Act). The employee must show that one or more of the conditions of their employment was affected to their disadvantage by some unjustifiable action by the employer.

[30] There is a substantial conflict of evidence between the parties. This requires express findings of credibility<sup>2</sup> about the evidence given by brief and orally at hearing.

[31] Credibility can be assessed on two bases – the witness personally<sup>3</sup> and the story the witness tells. Some factors relevant to personal credibility are:

- (a) Demeanour<sup>4</sup>;
- (b) Inconsistencies and contradictions of all kinds<sup>5</sup>;
- (c) Prevarication<sup>6</sup>;
- (d) Reasons to lie<sup>7</sup>; and
- (e) Concessions made where due, despite any perception by the witness of a risk to credibility in giving that evidence<sup>8</sup>.

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<sup>2</sup> *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6

<sup>3</sup> *Kelly v Accident Rehabilitation & Compensation Insurance Corporation* EMC Wellington WC 13/99, 24 March 1999 at p69

<sup>4</sup> *Hakaraia v Foodstuffs (Wellington) Co-operative Society Ltd* Employment Court, Wellington WC6/01, 22 February 2001 at [14]; *T v SAR Ltd* ERA Christchurch CA126/05, 23 September 2005; *Young v Venables t/a Mt Eden Bakery & Delicatessen* Employment Court Auckland AC88/00, 7 November 2000 at p 6

<sup>5</sup> *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252

<sup>6</sup> *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108]

<sup>7</sup> See above at [109]

[32] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?<sup>9</sup>

[33] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.<sup>10</sup>

[34] The burden of establishing each of the disputed factual elements lies with the applicant and the standard is the balance of probabilities.<sup>11</sup>

***Threatening his employment if he did not return to work during the extended sick leave period from 27 May to 12 December 2011***

[35] Mr Larkin believed Ms Langford was hassling him to return to work earlier than he was able to. He believed he did everything he could to recover and kept the respondent informed by medical certificates.

[36] An employer is not bound to hold open a job indefinitely for an employee who is unable to work<sup>12</sup>. An employer will be justified in taking action up to dismissal of an employee for a long term absence where it can be shown that the decision was substantively and procedurally justified<sup>13</sup>.

[37] Under s103A of the Employment Relations Act 2000 an employer must afford a genuine opportunity to the employee to explain prior to taking any action. If the employee refuses or fails to make an adequate explanation then a dismissal may be justified<sup>14</sup>.

[38] The ability of the respondent to assess Mr Larkin's fitness to return to work was severely hampered by his medical advisors. The medical certificates gave limited periods of 8-14 days where he was assessed as unfit to return to work. For reasons

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<sup>8</sup> See above at [110]

<sup>9</sup> See above at [111]; *Corbett v National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10

<sup>10</sup> *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603

<sup>11</sup> *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [33]

<sup>12</sup> *Canterbury Clerical Workers Union v. Andrews & Beavan Ltd* [1983] ACJ 875

<sup>13</sup> *Motor Machinists Ltd v. Craig* [1996] 2 ERNZ 585

<sup>14</sup> *Northern Club Auckland v. Northern Hotel etc IUOW* [1989] 1 NZILR 764 (LC)

unknown, his doctor was unwilling to assess him as unfit to work for longer periods or give any realistic view of when a fulltime return to work was likely. The respondent was unable to make any short or long term plans around his job or workload.

[39] The respondent gave evidence it was under enormous pressure from funders to ensure the contracts including the one Mr Larkin was employed under were completed within budget and delivered the contracted services. He was a member of team. While he was unwell other team members and contractors were covering his position. This could not continue indefinitely. Ms Langford's actions in meeting with Mr Larkin, his occupational therapist and seeking his doctor's opinion about his likely return to work were reasonable. There is nothing threatening in these actions.

[40] Given the lack of medical evidence in September 2011, Ms Langford's letter dated on 19 September 2011 inviting him to meet on 26 September 2011 to discuss his continued employment was reasonable. Ms Langford's follow up letter on 26 September 2011 seeking a meeting on 30 September 2011 was also reasonable. Mr Larkin did not attend either meeting.

[41] Instead on 30 September he sent the respondent a letter enclosing a copy of a medical certificate for the period 28 September to 12 October 2011. He explained he had a new postal address, denied any agreement to meet in September and stated he was still awaiting advice from two doctors about further treatment.

[42] Ms Langford reply dated 30 September 2011 noted his absence on 26 September 2011, the length of time he had been away from work (19 weeks), pressure on his team to cover his position, concerns about the 14 day medical certificates and the inability to fill his position until his return date. She advised she would keep his position open until 28 October 2011 but Mr Larkin needed to contact them by Friday 7 October 2011. There is nothing threatening in this correspondence. It is appropriate and professional and deals with the respondents concerns about his return to work.

[43] Mr Larkin came into work on 28 October, 1 and 2 November. He attended mediation on 5 December 2011 that resulted in a Record of Settlement. He eventually returned to work on 12 December 2011.

[44] The respondent's actions in contacting Mr Larkin about his fitness to return to work through May to December 2011 were justified in the circumstances. His return to work was uncertain. The respondent could not continue holding his job open indefinitely. There were periods he had ceased contacting the respondent to provided updated medical advice. He cannot complain about the respondent requiring he produce medical certificates because his employment contract allowed it.<sup>15</sup> He had been absent from work for a substantial amount of time. There was no unjustified disadvantage here.

### ***Sending home in November and December 2011***

[45] The applicant was unclear about the dates he alleged this happened with the exception of 5 December 2011. He was adamant he was sent home that day. Ms Langford gave evidence that she met with him on 28 October and 1 and 2 November 2011. She denied meeting with him on the day of the mediation, 5 December 2011.

[46] The respondent produced minutes from the meetings with Mr Larkin on 1 and 2 November 2012 which referred to a meeting on 28 October 2011.<sup>16</sup> The minutes were recorded by Glenys Harrison, ex-employee of the respondent and a witness produced by Mr Larkin. She confirmed the minutes were true and accurate record of the meetings.

[47] The 1 November minute recorded an agreement on 28 October that Mr Larkin "*would only return if at full capacity.*" Permission was given for Ms Langford to ring his doctor. Mr Larkin advised his doctor would not give full clearance "*until he has injections*" and until then could not return to full duties. Ms Langford referred to an expectation from the 28 October 2011 meeting that "*your return to work meant 8.30am to 5pm Monday to Friday.*"

[48] Mr Larkin's day programme coordinator position required him to be fit and well because it involved physical activity. He was required to transport programme participants, do shopping, opening and closing the programme and supporting

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<sup>15</sup> There is a dispute about which employment contract applied at the material time. Both alleged employment contracts provide that a claim for sick leave shall be supported by medical certificate "where required by the employer" (clause 10.1(vii) employment agreement dated 19 March 2007; clause 9.1(vii) of the employment agreement dated 7 March 2011).

<sup>16</sup> The respondent's replacement bundle of supplementary documents dated 22 April 2015, Document 1.

participants, taking leads roles in activities and cleaning and washing duties.<sup>17</sup> Mr Larkin would not have been able to undertake some if not all of his duties suffering from back pain.

[49] A further minute dated 2 November 2011<sup>18</sup> records a meeting where Ms Langford confirmed his doctor had told her he was not ready to return to work. She then states:

*“I am not pushing you to return to work, but I can’t have you at work until you have a full clearance from your doctor, you need to return when well enough I won’t have health and safety issues. Have now had confirmation written and verbal from Dr Long that you are not ready. I need a good safe place for you.”*

[50] The Minute then records Mr Larkin stating *“sounds like you terminating position.”* Ms Langford denies this saying *“I make it clear that I am not terminating your position, for this position you need to be fit and well to carry out the duties.”*

[51] Nothing in the minutes indicated unjustified action by the respondent. There are continuing concerns about Mr Larkins fitness to return to work given the recent medical advice. Sending him home in these circumstances was fair and reasonable. To allow or require him to work when he was unwell would have constituted a breach of his employment, placing him at risk of further injury.

[52] Mr Larkin is adamant he met with Ms Langford in Kaitaia at his place of work on 5 December 2011. I do not accept this meeting occurred. 5 December 2011 was the same day the mediation was held in Kerikeri. From my knowledge of the area, this is a 1.5 hour one way trip, 3 hours return. The mediation took an entire day. In my view there would have been little or no opportunity for Mr Larkin or Ms Langford to meet at the workplace given the travelling.

[53] Even if he had presented for work on 5 December, his doctor had advised the respondent he was unfit to return to work. The Record of Settlement from the mediation recorded an agreement he would not return to work until 12 December 2011 with a medical clearance. As at 5 December 2011 he had no clearance to return to work. The respondent would have been well within its rights to send him home. There is no disadvantage in this action if sending home had occurred.

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<sup>17</sup> Bundle of documents, pg 133

<sup>18</sup> The respondent’s replacement bundle of supplementary documents dated 22 April 2015, Document 2.

***Failing to provide sufficient training or counselling upon return to work as per the mediation agreement***

[54] I do not accept there was insufficient training. Glenys Harrison's evidence was she provided adequate training giving Mr Larkin a working knowledge of their computer systems. The only issue was his ability to put that training into practice due to problems with the respondent's work computers. An email from Adrian Marsden was produced setting out the training she gave about his role. Ms Harrison did not recall Mr Larkin complaining about the adequacy of his training at the time.

[55] It seemed the principal complaint was that the training was not offered within the first three weeks of his return to work as set out in the Record of Settlement.

[56] The Record of Settlement did not require his training to take place within 3 weeks of his return to work. It stated an expectation "*he will be competent in the role within 3 weeks of returning to work.*"<sup>19</sup> He returned to work one week prior to the Christmas shutdown period. There was no reason to start his training in the week period prior. It is not unreasonable to wait until January/February 2012 to start and complete his training without the interruption of Christmas. There cannot be any disadvantage here of training not being provided in the first three weeks of his return to work if no issue about his competency was raised.

***Creating an unsafe working environment, for example yelling on 5 December 2011 to go home***

[57] Given I have already determined he did not meet with Ms Langford on 5 December 2011 I do not accept yelling occurred on that day.

[58] Mr Larkin produced several ex-work colleagues to give evidence about the working environment. None of these ex- colleagues confirmed Ms Langford yelled at him.

[59] Glenys Harrison, gave evidence that the "*bullying arose from Marihi's [Langford] focus on Brent and her tone and body language.*" The tone of voice was described as "*high pitched as opposed to loud*" and her body language was "*a stance standing and holding her arms closed in front of her when she spoke.*" She confirmed Ms Langford was not standing close to Mr Larkin when she spoke to him. Angela Witana, an ex-work colleague referred to the number of times Ms Langford was

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<sup>19</sup> Bundle of Documents Record of Settlement p110

calling Mr Larkin during his extended period of sick leave. She believed that was bullying. Mr Larkin agreed this was the evidence of alleged bullying.

[60] The definition of bullying must include elements of repeated actions, carried out with the desire to gain power or exert dominance and with the intention to cause fear and distress.<sup>20</sup> Warning or disciplining employees in line with the workplace's code of conduct is not bullying.<sup>21</sup> Criticism or feedback from an employer is not bullying.<sup>22</sup>

[61] The above evidence does not in my view constitute bullying. Using a high pitched voice with a closed arm stance does not of itself constitute bullying. I have already concluded Ms Langford's actions towards Mr Larkin about his extended sick leave were justified.

***Differential treatment by failing to give him a Christmas ham or \$50 voucher as a bonus***

[62] It is accepted Mr Larkin was not present when Ms Langford handed out the hams to staff. The hams were a thank you to staff for all the work during the year and had been ordered months earlier.

[63] Mr Larkin's employment contract does not provide for bonuses. There was no legal entitlement for him to be presented with a ham or a \$50 voucher. There can be no disadvantage to a term of his employment by not receiving a ham, although I accept it may have been unintentionally hurtful.

***Failing to acknowledge good work***

[64] This appears to be a general allegation about Ms Langford focusing on negative aspects of Mr Larkin's employment.

[65] The respondent's code of conduct sets out the standards of behaviour required of its staff. It provides for the Chief Executive to "*monitor the performance of staff, draw their attention promptly to any unsatisfactory aspect of their work, ensure they*

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<sup>20</sup> *Kneebone v Schizophrenia Fellowship Waikato Inc* ERA Auckland AA31/07, 13 February 2007 at [207]

<sup>21</sup> See Workplace NZ "What is workplace bullying"  
<http://www.business.govt.nz/worksafe/information-guidance/all-guidance-items/bullying-guidelines/01>

<sup>22</sup> *Isaac v Chief Executive of the Ministry of Social Development* ERA Auckland AA200/08, 5 June 2008

*are aware of the standard of work required of them and ensure they are given adequate counselling, advice and training necessary to enable them to reach the required standard.”*<sup>23</sup> While Mr Larkin may not appreciate Ms Langford speaking to him about performance issues, that was part of her role as Chief Executive. I cannot see how this is a disadvantage in Mr Larkin’s employment.

***Allowing staff to discuss his dismissal***

[66] This appears to be based on hearsay evidence of Angela Witana. Ms Witana attested to hearing staff discussing his dismissal that infers this was orchestrated by Ms Langford.

[67] There is no evidence Ms Langford encouraged or allowed staff to discuss his dismissal. It is more likely they become aware of the dismissal through Mr Larkin or the fact he did not return to work. I am not convinced on the balance of probabilities that this occurred.

***Did the respondent breach the applicant’s employment agreement by failing to address his grievances when raised about being picked on?***

[68] There was some dispute about which employment agreement applied to the applicant. An employment agreement for the day programme coordinator was produced. It had been signed by Ms Langford but not Mr Larkin. He acknowledged receiving a copy but denied signing it and therefore it should not apply. He did not raise this with the respondent at the time they gave him the agreement. It was raised for the first time at hearing.

[69] Section 63A of the Act applies to bargaining for variations to existing employment agreements. This section applied to Mr Larkin’s intended employment agreement for the day programme coordinator because it was a variation to his existing contract. An **intended agreement** under s 63A is not to be treated as the employee’s employment agreement if the employee has not signed it or agreed to any of the terms and conditions specified in it.

[70] Mr Larkin’s previous employment contract does not exclude oral variations to the terms of his employment. Oral variation may be inferred from conduct that gives an appearance of mutual agreement. This may occur where the communications

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<sup>23</sup> Bundle of Documents p52

between, and conduct of, the parties is such that a reasonable bystander would consider the offeree to have assented to the terms of the offeror.<sup>24</sup>

[71] An oral employment agreement, entered into and performed without compliance with the requirements of s 65(1)(a) that such agreements be in writing, remains valid and enforceable.<sup>25</sup>

[72] There is evidence Mr Larkin accepted an oral variation to the terms of his employment consistent with the intended agreement for the day programme coordinator. He accepted and undertook the role of day programme coordinator from May 2011 when the contract was given to him. He accepted the increased salary. He did not raise any objection to the intended agreement at the time. There is no evidence of duress, mistake etc which would challenge the legality of the intended employment agreement. Accordingly the terms that govern this employment relationship are those in the individual employment agreement dated 7 March 2011.<sup>26</sup>

[73] The applicable agreement does not provide any timeframe for responding to the raising of a personal grievance. The Third Schedule to his employment agreement sets out how to resolve an employment dispute including a meeting with the employee, employer and representatives to discuss the dispute in a constructive manner with the intention of resolution. If the dispute remains unresolved, options for mediation assistance and taking action in the Authority and appeal to the Employment Court are set out.

[74] Mr Larkin was not unfamiliar with the raising of personal grievances. He had raised them before in 2009 and 2011.<sup>27</sup> Any complaint about the timeliness of the process was primarily due to difficulties in arranging mediation. The August 2011 personal grievance was referred to mediation by the applicant. This did not occur until 5 December 2011.<sup>28</sup> The personal grievance of being picked on was raised on 9 February 2012. The applicant sought to have this referred to mediation which occurred on 27 June 2012. I have no evidence showing fault or blame on the respondent's part in resolving this grievance. The respondent simply did not agree with the applicant's view of the alleged bullying.

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<sup>24</sup> *Law of Contract in New Zealand* Burrows Finn and Todd 3<sup>rd</sup> ed para 3.3.1 at p 46.

<sup>25</sup> *Warwick Henderson Gallery Ltd v Weston* [2006] 2 NZLR 145, [2005] ERNZ 921 (CA)

<sup>26</sup> Bundle of Documents at p34.

<sup>27</sup> Bundle of Documents at p69 and p92.

<sup>28</sup> Bundle of Documents at p108.

***In the alternative, an action for breach of good faith pursuant to s.4A of the Act regarding the above actions?***

[75] Given my above findings, there cannot be any breach of good faith. There was no evidence the respondent breached their duty of good faith.

***In respect of the dismissal, could a fair and reasonable employer conclude the employee's conduct was misconduct justifying dismissal?***

[76] The fact Mr Larkin's employment was terminated is accepted. The onus falls upon the respondent to justify on the balance of probabilities whether its actions "were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred" (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[77] The Authority must not determine the dismissal or disadvantage unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.<sup>29</sup>

[78] The respondent alleges there was serious misconduct justifying dismissal is set out in the respondent's letter dated 8 and 21 February 2012.<sup>30</sup> The misconduct was lack of participation including falling asleep and non-participation in the korero and exercises at the training day on 1 February 2012, inappropriate verbal challenge to the declining of bereavement leave on 1 February, late attendance at a meeting on 2 February, lack of preparation on 3 February for the start of programmes on 7 February and ignoring a directive about the structure of the day following a powhiri. There was reference to breaches of the Code of Conduct numbers 1,2,3,11,21 and 22 and a final written warning dated 13 May 2011 for misconduct and poor performance. A copy of the final written warning, Email dated 3 February, Code of Conduct and Disciplinary Policy were provided.

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<sup>29</sup> *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]  
<sup>30</sup> Bundle of Documents at p138-139 and 158.

[79] It is part of Mr Larkins employment agreement that he comply with the Code of Conduct and Disciplinary Policy.<sup>31</sup>

[80] At hearing Mr Larkin admitted most of the alleged conduct. He admitted falling asleep and not participating in the exercises but said he was not the only one. He admitted late attendance at the 2 February meeting due to the amount of time cleaning up. He did not deny verbally challenging Ms Langford when she declined tangihanga leave because he believed Ngati Kahu had in the past and should continue to attend local tangi. He denied lack of preparation and ignoring the directive.

[81] Although the correspondence referred to the behaviour being serious misconduct, it was not. None of the alleged misconduct fell within the definition of serious misconduct set out in the Code of Conduct. It may have breached the standards of behaviour set out in the Code of Conduct, but that did not make the behaviour serious misconduct. Serious misconduct “... *will generally involve deliberate action inimicable to the employer’s interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.*”<sup>32</sup> It is conduct which “*deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*”<sup>33</sup>

[82] Mr Larkin’s behaviour was not deliberate action harmful to the employer’s interests and destructive of basic trust and confidence. Rather his behaviour was repetitive, the subject of previous warnings and showed little signs of improvement. It was behaviour that could have resulted in a dismissal on notice.

[83] However I have concerns about the opportunity he was given to improve his behaviour prior to dismissal taking place. There are defects in the three warnings. The verbal warning dated 3 February 2011 does not comply with the requirements of the Code of Conduct. It does not warn of the consequences of the failure to improve. It does not give a reasonable opportunity to correct the performance issue through training, coaching or counselling as appropriate. It does not give any time limit for improvement.<sup>34</sup> Further it does not indicate how long this warning was to remain in

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<sup>31</sup> Bundle of Documents at p 39 Clause 10.2 Employment Agreement dated 7 March 2011.

<sup>32</sup> *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

<sup>33</sup> *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

<sup>34</sup> Bundle of Documents at p 57 and p72.

place. This warning appears to have been relied upon as a basis for the issuing of the next two warnings.

[84] Similarly the written warning dated 21 April 2011 does not comply with the Code of Conduct. It does not warn of the consequences of the failure to improve. It does not give a period for improvement. It does not give any time limit for improvement. It makes no reference to previous warnings<sup>35</sup> yet the verbal warning may have been relied upon as a basis to issue a written warning instead. It also does not indicate how long this warning was to remain in place. This warning appears to have been relied upon for the issuing of the final written warning.

[85] The Code of Conduct does not provide for a final written warning. It only provides for a written warning. The final warning also does not comply with the Code of Conduct. It does not warn of the consequences of the failure to improve. It does not give a period for improvement. It does not give any time limit for improvement. It makes no reference to previous warnings<sup>36</sup> yet the prior warnings may have been relied upon as a basis to issue a final written warning. It also does not indicate how long this warning was to remain in place. This warning is relied upon for the decision to dismiss on notice.

[86] The respondent submits the settlement prevents Mr Larkin from relying upon any defects in the final warning or previous warnings as giving rise to an unjustified dismissal. The respondent further alleges it was abundantly clear to the applicant what the consequences of having a final warning were. The Record of Settlement dated 5 December 2011 records an agreement that *“the final warning dated 13 May 2011 stands”* and it is *“in full and final settlement of all matters to date between the Applicant and the Respondent arising out of the employment relationship.”*<sup>37</sup>

[87] The Record was intended to resolve Mr Larkin’s personal grievance of unjustified disadvantage about the final warning. It could not have resolved his grievance of unjustified dismissal. The Record of Settlement must be limited to settlement of claims in existence of which both parties were aware and to claims of

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<sup>35</sup> Bundle of Documents at p 58 and p73.

<sup>36</sup> Bundle of Documents at p 58 and p73.

<sup>37</sup> Bundle of Documents at p110.

the nature they were discussing.<sup>38</sup> Therefore it cannot prevent Mr Larkin from raising a grievance of unjustified dismissal due to termination at a later date.

[88] The purpose of warnings specifying matters such as consequences of failing to improve behaviour within a timeframe must be to justify any subsequent disciplinary action taken as a result of the warning up to and including dismissal.

[89] I am not sure on the balance of probabilities Mr Larkin was aware of the possibility of dismissal following the issue of any of the warnings. Under cross-examination Mr Larkin stated he believed the respondent just “*wanted to get rid of me*”. He did not confirm he was aware of the consequences of failing to improve his behaviour including dismissal. There is no evidence the respondent warned him of any consequences prior to instituting the disciplinary process leading to dismissal in February 2012. There is no evidence he was aware of the Code of Conduct prior to receiving the 8 February letter. The only information he confirmed he received about his previous behaviour were the warnings themselves.

[90] It was not until he received the letter dated 8 February 2012 that the possible consequences of dismissal were raised. By then any opportunity to improve conduct and avert dismissal had been lost.

[91] The test for justifying the actions of the respondent is whether the dismissal was what a fair and reasonable employer could have done in all the circumstances. The respondent’s omission to warn Mr Larkin of the consequences of failing to improve as required by the Code of Conduct were not the actions of a fair and reasonable employer. This omission was not minor and did result in unfairness for Mr Larkin. Brett Larkin was unjustifiably dismissed by Ngati Kahu Social and Health Services.

***Was the process leading to dismissal of the employee what a fair and reasonable employer could have done in all the circumstances?***

[92] I do not have similar reservations about the process leading to dismissal. There was sufficient investigation of the allegations especially in light of the fact he subsequently admitted most of them had occurred.

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<sup>38</sup> *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206 (EmpC) [2000] 1 ERNZ 206, 215.

[93] He was given an opportunity to seek legal advice. The letter was delivered on 8 February 2012. He did instruct a lawyer but they were not available until 23 February. The meeting had to be held on 21 February 2012 due to the Ms Langford being unavailable on 23 February.

[94] At the meeting on 21 February Mr Larkin was given an opportunity to respond but would not. The minutes of the meeting taken by Glenys Harrison record Mr Larkin being asked if he wished to respond to the allegations which he refused.

[95] Where an employer affords a genuine opportunity to the employee to explain their actions but the employee refuses or fails to make an adequate explanation then a dismissal may be justified<sup>39</sup>. In my view the process leading to dismissal was what a fair and reasonable employer could have done in all the circumstances.

***What remedies should be awarded (if any)?***

[96] Mr Larkin seeks lost remuneration from the date of dismissal and hurt and humiliation of \$40,000.

**Lost Remuneration**

[97] Where the Authority determines an employee has a personal grievance and has lost remuneration as a result of that grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration pursuant to s128.

[98] In considering an order for remuneration under s128, the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether he seeks reinstatement.<sup>40</sup>

[99] An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.<sup>41</sup>

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<sup>39</sup> *Northern Club Auckland v. Northern Hotel etc IUOW* [1989] 1 NZILR 764 (LC)

<sup>40</sup> *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

<sup>41</sup> *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

[100] In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like<sup>42</sup>.

[101] He was ineligible for a WINZ benefit but I do not know if this continued or was for a six week stand down period only. A portion of his time was initially spent hunting and fishing to provide food for his family. His wife had left work due to personal health issues.

[102] Mr Larkin's evidence about applications for jobs was sparse. I allowed extra time for him to compile copies of his applications and to give oral evidence about his job hunting efforts. There are only a few written applications for jobs. He tried approaching some employers directly asking for work. He signed up with the WINZ Training Centre for Employment and would drop in to check for work when he was in town. Most of his job hunting efforts appear to have occurred in February and March 2012. There appear to be gaps thereafter which in my view break the chain of causation to show continued mitigation of lost remuneration.

[103] The evidence supports an award of two months ordinary time lost remuneration subject to any reduction for contributory behaviour.

#### Hurt and Humiliation

[104] There is no basis for an award of \$40,000. The evidence about his hurt and humiliation relies upon reputational loss. There were no physical ramifications for him of the job loss. I appreciate there was stress for his family but the purpose of these compensatory damages awards is to place Mr Larkin back in the position he would have been if he had not lost his job. A modest award to mark his humiliation of \$1,000 is appropriate.

#### Contributory Conduct

[105] An employee's conduct may be relevant to remedies. Section 124 requires the Authority "consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance" in deciding the nature and extent of remedies to be provided in respect of a personal grievance.

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<sup>42</sup> *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

[106] In order for contributing behaviour to be taken into account in the reduction of remedies, the actions of the employee must be both causative of the outcome and blameworthy.<sup>43</sup>

[107] Mr Larkins behaviour was both causative and blameworthy. His February admitted conduct and refusal to respond to the allegations led to the dismissal. A 50% reduction in remedies is appropriate.

### **Orders**

[108] There is an order Ngati Kahu Social and Health Services Incorporated pay lost remuneration of two months ordinary time remuneration less PAYE and to be reduced by 50% for Mr Larkin's contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.

[109] There is an order that Ngati Kahu Social and Health Services Incorporated pay compensation of \$500 including a reduction of 50% for Mr Larkin's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

[110] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>43</sup> *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at para.[49].