

**Your attention is drawn to the
Non-Publication Order on p. 1
of this Determination**

AA 195/07
File number: 5041109

BETWEEN Lesley John Steed-Conway
Applicant

AND Community Living Trust
Respondent

Member of Authority: Janet Scott

Representatives: Rose Alchin, Counsel for Applicant
Glenys Steele, Counsel for Respondent

Investigation Meeting: 21 March 2007 at Hamilton

Submissions received: 1 May & 11 June 2007 from Applicant
31 May 2007 from Respondent

Determination: 13 June 2007

DETERMINATION OF THE AUTHORITY

Prohibition on Publication

With the consent of the parties I make a permanent order prohibiting the publication of the names of clients or caregivers employed by CLT or details which could lead to their identification

Employment Relationship Problem

[1] The applicant submits he was unjustifiably dismissed from his employment with Community Living Trust. To remedy his alleged grievance, he seeks lost remuneration in the sum of \$30,673 gross and compensation pursuant to s.123 (1) (c) (i) of the Employment Relations Act 2000 in the sum of \$15,000.

[2] The respondent submits that Mr Steed-Conway was justifiably dismissed for serious misconduct and declines the remedies sought.

Background

[3] Community Living Trust (CLT) is a charitable trust supporting people with an intellectual disability and other pervasive development disabilities together with their families/whanau.

[4] On 20 July 2005, Mr Steed-Conway commenced employment with CLT as a professional team leader. One factor considered in employing Mr Steed-Conway was the fact he had formerly been engaged as an auditor for CYPS and in that role had undertaken audits of CLT's Family Living Options Service. This knowledge of CLT and its processes was a positive attribute that influenced the respondent in employing him.

[5] As a Team Leader for CLT his role included responsibility for the employment and supervision of five service coordinators and one administrator. He also carried a caseload of his own.

[6] Mr Steed-Conway reported to a service manager, Ms Beverley Kohleis. The evidence shows that during Mr Steed-Conway's employment with CLT, Ms Kohleis had occasion to raise a number of performance issues with him. There was a consistent thread in the evidence that a number of these issues related to Mr Steed-Conway's observance of CLT's policies and procedures. All the concerns raised were dealt with at the time and thereafter were treated as closed.

[7] The events leading to Mr Steed-Conway's termination concerned the employment of a caregiver pursuant to a contract with Disability Support Link (DSL). DSL is a funding provider linked to Waikato District Health Board. It contracted with CLT to provide support to a vulnerable child with an intellectual disability.

[8] The problem as it initially emerged concerned irregularities in a claim made by Mr Steed-Conway for payment for a caregiver who I shall refer to as Ms X. Further investigation raised the issue that Mr Steed-Conway had entered into an employment agreement with the caregiver in question with a commencement date prior to the completion of police vetting checks and approval to employ being granted by the HR manager. As a result the Trust appeared to be committed to meet obligations under an employment agreement with the caregiver with effect from 17 March 2006.

[9] Ms Kohleis has a meeting with Mr Steed-Conway on 9 May. The HR manager, Karen Manahan, was also present. It was Ms Kohleis' evidence that it could well have been that Mr Steed-Conway could explain the matter to their satisfaction and the matter then would have been closed. However, this did not happen as Mr Steed-Conway stated that CLT was not employing Ms X for home support (in accordance with the DSL contract) and he had an arrangement with Disability Support Link (DSL) to make a contribution to Ms X for her care of the client, using the home support hours framework for expenses e.g. food.

[10] The evidence also reveals that this meeting ended when Mr Steed-Conway walked out saying he had other things to do. Ms Kohleis informed him as he was leaving that further investigation would need to be undertaken as the information he had provided was confusing.

[11] Following this, the employer initiated a formal disciplinary process to afford Mr Steed-Conway an opportunity to respond to the concerns it had about the process followed by him in employing Ms X.

[12] On 11 May 2006, under the hand of Karen Manahan (HR Manager), CLT provided Mr Steed-Conway with formal notice that it required him to attend a meeting to discuss allegations of misconduct. That letter is set out below:

“Dear Les,

Re: Allegations

We require you to attend a meeting on Wednesday 17 May 2006 at 1pm at 180 Collingwood Street Hamilton with Beverley Kohleis and myself to discuss allegations of:

- Refusing to obey a lawful and reasonable instruction; and*
- Wilfully submitting false information or claims, or deliberately falsifying Community Living or personal records.*

It is alleged that you:

- 1. Entered into an employment agreement with Ms X prior to her, or her husband's Police vetting clearance being received.*
- 2. Failed to follow correct interview procedures by asking and noting responses to only six questions from 18.*
- 3. Placed a child in the care of Ms X but informed her she could not be paid for the service until the Police vetting clearance had been received.*
- 4. Invoiced Disability Support Link (DSL) for a service provided from 7 March 2006 when the service did not commence until 17 March 2006.*
- 5. Completed a timesheet for Ms X for 48 hours with no dates or times worked that did not correspond with her commencement date or the pay period end date.*

This meeting is an opportunity for you to provide an explanation to these allegations. You are advised to bring a support person or representative with you to this meeting and due to the seriousness of these allegations you are also advised that you are entitled to seek advice. These allegations, if proven, are considered serious misconduct under Community Living Trust's Staff Handbook and Policies and Procedures and if your explanation is unacceptable your continued employment with Community Living Trust may be in jeopardy or the warning system may be invoked.

Attached for your information is the documentation received to date concerning these allegations. Any further documentation or information received will be forwarded to you at the first opportunity"

[13] The attached documentation included the interview question and answer form used in interviewing Ms X, the Individual Employment Agreement signed with Ms X, the Staff Salary Detail Forms, the Confirmation of Criminal and Driving Record, the information to be invoiced to DSL, notes of the 9 May meeting, Ms X's timesheet, notes from meetings with Jan Elliott, Barbara Walters, Peg Fong-May and Ms X, the Non-Standard Pay Requisition and an email from Carol Fleming at DSL.

[14] On 17 May, Mr Steed-Conway attended the meeting but he did not have a representative. The record of that meeting states that Mr Steed-Conway advised he had not had time to obtain support. The meeting was adjourned in order that Mr Steed-Conway could arrange support and it was agreed that the meeting would reconvene on 22 May.

[15] Mr Steed-Conway did, however, submit a written explanation responding to the allegations raised by the respondent

[16] The parties met again on 22 May. Mr Steed-Conway still did not have a support person with him. However, he advised he wished to go ahead with the meeting.

[17] It was Ms Kohleis' evidence that in the intervening period she had read Mr Steed-Conway's written response to the allegations against him.

[18] In summary, in that written response, Mr Steed-Conway refuted the allegation that he had refused to obey a lawful and reasonable instruction. He explained that he and the administrator (Jan Elliot) had signed up the paperwork with Ms X and had advised her that they needed to complete their process before it could be implemented. Mr Steed-Conway submitted he needed to review the practices of other coordinators in this regard. However, at the time he was simply completing the forms in readiness to provide the service once the recruitment process had been completed.

[19] In respect of the allegation that he had failed to follow the correct interview procedures by asking and noting responses to only six out of 18 questions, he submitted that the interview process was conducted jointly with Jan Elliott and as such the documentation was jointly made. Reference to documents made by both he and Jan Elliott was needed to show the documentation of the interview.

[20] In response to the allegation that he placed a child in the care of Ms X but informed her she would not be paid for the service until the Police vetting clearance had been received, Mr Steed-Conway's written response that he did not place the child at all. He submitted the child had been placed with the caregiver a year prior by her mother. The service was being provided every weekend plus all holidays. He noted that 20 carer support days' allocation had met part of the Christmas holiday period yet no provision had been made for weekends subsequent to this.

[21] In respect of the allegation that he had requested that DSL be invoiced for a service provided from 7 March 2006 when the service did not commence until 17 March 2006, Mr Steed-Conway responded that this discrepancy was correct. He also said that it was incorrect to state that the service commenced at the date of the contract. The service was under the mother's placement starting in 2005 and if CLT was to look at when its service should have started, it would have been started in a timely manner subsequent to the referral (in December 2005). It had, however, not started in a timely manner.

[22] In response to the allegation that he had completed a timesheet for Ms X for 48 hours with no dates or times worked that did not correspond with her commencement date or the pay period end date, it was Mr Steed-Conway's response that it was correct to say there was no correspondence between the dates or times worked. This was because there were no hours to document. As it had been stated, the purpose of the payment was to contribute to the shared care costs. Mr Steed-Conway also stated he had clarified in discussions with Margaret Thompson from DSL the understanding that the service for the client was appropriately shared care and that CLT would move to this as soon as the caregiver application process was complete.

[23] Mr Steed-Conway went on in his written response to make the following general points:

- He referred to the client's needs as complex and noted that the client had not been able to be allocated to a service coordinator due to insufficient staff and Christmas and staff holidays.
- There had been a delay in the recruitment process itself given the fact that Ms X did not have a driver's licence. This requirement had been waived following consultation with Ms Manahan and having regard to the client's mother's resistance to using any other caregiver.
- There were also delays in the Police vetting procedure. Mr Steed-Conway had had discussions with DSL (Margaret Thompson) regarding the reality of the need and the actual support being provided being that of shared care not home support¹.
- The reality of the situation on the ground was that the caregiver was receiving no financial support for the care provided. This was not the fault of the caregiver, but could be attributed to CLT staffing issues and recruitment processes.
- It was appropriate to apply CLT procedures flexibly and to provide support for the family and fairness to the caregiver.

[24] In closing, Mr Steed-Conway submitted the allegations that he had acted prematurely – ahead of the recruitment process to make a payment to a new employee – was a false allegation. He noted that the approval to employ was dated 27 April 2006 and the request for payment not made until 3 May 2006. He also considered the allegation that he had wilfully submitted false information and claims to be an extremely harsh interpretation of the steps taken by him. There had been no deception on his part, for example by artificially specifying hours worked, nor had there been any attempt by him to conceal his actions. He closed with the statement:

“Technically given that we received a referral on 5 December 2005 implementing a start date with effect from 17 March 2006, given that (a) services were being provided during this period and (b) the delays in all fairness could not be attributed to the caregiver, is not unreasonable.”

[25] At the meeting between the parties on 22 March 2006, Ms Kohleis restated the contents of the letter of 11 March. The record of that meeting shows that Mr Steed-Conway made a number of oral points. He is recorded as having said that “*the order*

¹ Home Support involves the care of the person with an intellectual disability in their home. Under Shared Care the person with a disability lives at home for part of the week and he/she stays or boards with an alternative carer for the remainder of the week.

in which things were done was incorrect, that is having the contract signed up". He said "he had had a look at his own processes around that" and that "he had not weighed enough and when he had a look again it was fundamentally correct but it did not follow the procedure. He noted, however, "he had not done this with the intent to disregard CLT's policies and procedures".

[26] There was a discussion regarding Mr Steed-Conway's reference to discussions with Margaret Thompson. Ms Kohleis noted that there was no documentation on the file relating to discussions with Margaret Thompson. Mr Steed-Conway confirmed that the referral had come directly from DSL but verbally from Margaret Thompson and he acknowledged that there were no documents recording his conversations with her. In this regard, he noted he *"was not going to say he was not at fault in this"*.

[27] Ms Kohleis summarised the situation for Mr Steed-Conway saying that he had entered CLT into a contractual obligation with Ms X before a Police check had come through and promised to backdate pay from the date of that contract. Mr Steed-Conway admitted this.

[28] He was asked how he had accounted for the time claimed for Ms X (48 hours). His response was that it was a contribution to her costs and that he presumed that Ms X could be funded relative to what CLT was being funded by DSL. Ms Kohleis expressed concern that DSL was being invoiced for a service that had not yet been provided. It was Mr Steed-Conway's response that he felt he was treating Ms X in a fair manner but he acknowledged the procedure was not followed.

[29] Ms Kohleis advised Mr Steed-Conway that the combination of his actions put the organisation and himself at considerable risk. Mr Steed-Conway's response to this was *"I acknowledge, agree with you. It was out of order. Regardless of the circumstances don't contest that at all"*.

[30] Following an adjournment of something over half an hour, Ms Kohleis communicated to Mr Steed-Conway that he would be dismissed from his employment.

[31] Following that meeting, Ms Manahan wrote to Mr Steed-Conway confirming his dismissal. The relevant features of that communication are as set out below:

“Contrary to your original statement, in this meeting you admitted that you had invoiced Disability Support Link for hours prior to the commencement of a service by Community Living Trust thereby placing the organisation at risk of fraud action being taken by the funders with the potential of bringing the organisation into disrepute. You failed to follow correct policies and procedures by entering into an employment relationship on behalf of Community Living Trust prior to a clearance from the Police vetting service and without authorisation. Given the vulnerability of the children and young people with an intellectual disability supported by the Family Living Option service the absolute necessity of following correct procedures regarding Police checks has been discussed with you on several occasions.

You were employed in the capacity of a Professional Leader and there was an expectation that you would conduct yourself and your practices in accordance with Community Living Trust Policies and Procedures. These expectations were documented to you in your position description and clearly explained to you. It was also an expectation that your conduct and professional practices would be based on best practice and be carried out with honesty and integrity and you would model these behaviours and style to your staff.

You have failed to adhere to Community Living Trust’s Policies and Procedures and act with honesty and integrity. Consequently you have placed the organisation and the people we support at considerable risk. This is totally unacceptable for any employee, and particularly so for a person in a position of responsibility such as you held.

It was found that serious misconduct did occur and this breached the employment relationship and breached the safe and proper conduct of the business of Community Living Trust. Accordingly your employment with Community Living Trust was terminated.

Legal test

Section 103A test

[32] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new s.103A:

“For the purposes of s.103 (1)(a) and (b), the question of whether a dismissal or action was justifiable must 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 the circumstances at the time the dismissal or action occurred.”

[33] In determining this matter I must make an objective assessment of the employer’s actions and weigh those actions against those of **a fair and reasonable employer ... in all the circumstances ... at the time ...**

[34] The Court has recently examined the test for justification (*Air New Zealand v. Hudson* unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer’s actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[35] At paragraph 144 the Court said in respect of the case before it:

The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her.

[36] The Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do in the circumstances. It is noted that the employer bears the burden of showing on the balance of probabilities that dismissal of Mr Steed-Conway was justified in all the circumstances at the time.

Issues to be determined

[37] In arriving at a determination as to whether the actions of this employer were consistent with those that a fair and reasonable employer would have taken in all the circumstances at the time it is necessary for me to first make determinations on a number of issues:

- Did Mr Steed-Conway have knowledge of CLT's recruitment policies and procedures (particularly the requirement that police vetting be completed prior to offering employment) and was he aware of the consequences of the breach of those policies?
- Did the respondent carry out a thorough and fair inquiry into the allegations it made against Mr Steed-Conway?
- Did those inquiries reveal the conduct complained of did occur and could that conduct reasonably be considered to amount to serious misconduct?

Documentation

[38] Mr Steed-Conway's employment was subject to a written employment agreement (IEA). Included among the provisions are the following:

“Clause 23. Termination of Employment

One month's notice of termination of employment shall be given by either party in writing, but this shall not affect the employer's right to dismiss the employee without notice for serious misconduct ...

Clause 26 Staff Handbook

A copy of the employer's Staff Handbook must be read prior to commencement of employment or where currently employed within one month after dispersion of the material. This material contains a copy of the employer's Expectations of Employees with examples of employee conduct including unsatisfactory performance, less serious misconduct and serious misconduct.

It is a duty of the employee to understand and adhere to these expectations. The employer may review and amend the material at any time and shall ensure that the employee is given appropriate notice of any alterations.

Clause 29 Obligations of the Employer

The employer shall:

Act as a good employer in all dealings with the employee;

Deal with the employee and any representative of the employee in good faith in all aspects of the employment relationship.

Clause 30 Obligations of the Employee

The employee shall:

Comply with all reasonable and lawful instructions provided to them by the employer;

Perform their duties with all reasonable skill and diligence;

Conduct their duties in the best interests of the employer and the employment relationship;

Deal with the employer in good faith in all aspects of the employment relationship;

Comply with all policies and procedures (including any Codes of Conduct) implemented by the employer from time to time;

Take all practicable steps to perform the job in a way that is safe and healthy for themselves and their fellow employees.

Clause 30 (sic) Declaration

I, [Les Steed-Conway] declare that I have read and understood this employment agreement and accept all conditions fully. I further declare that I have read (or had explained to me to my satisfaction) the Staff Handbook including Expectations of Employees and accept the terms and conditions as stated.”

[39] The employment agreement was signed by Mr Steed-Conway and Ms Kohleis on 20 and 28 July 2005 respectively.

[40] The respondent also has a comprehensive Policies and Procedures Manual. At s.2.6.26 the manual sets out disciplinary procedures which are to be followed by line managers in the event they are called on to manage poor performance or to discipline staff for misconduct or serious misconduct. The steps taken are set out together with a policy statement which describes the respondent's philosophy in such matters i.e. to ensure disciplinary action is substantively and procedurally correct and applied in a consistent and unbiased manner. The respondent's disciplinary procedures emphasise counselling in the first instance to attempt to improve the behaviour of staff where there has been a minor breach of expected staff conduct or where performance is unsatisfactory (s.2.6.27).

[41] A detailed (17 step) process is set out to guide managers who are called upon to deal with allegations of serious misconduct.

[42] At s.2.6.30 the respondent's policy on Police checks is set out:

*“Community Living will conduct Police checks on all successful applicants **prior to employment being offered** [emphasis mine].*

Community Living will not offer employment where there have been convictions in an applicant's history that are seen as extremely detrimental to the position being applied for. [Examples are provided]

An exclusion of this policy may be permitted with the approval of the Chief Executive or person of delegated authority.”

[43] CLT's policies for recruitment are set out in section 2.7 of the Policies and Procedures Manual with a statement of philosophy that it is CLT's wish to become an employer of choice and to that end it follows fair, reasonable and legislatively compliant best practice recruitment processes to employ and retain the best people to provide the best possible service to its client.

[44] The steps to be taken in recruiting staff follow this policy statement. They are comprehensive (15 pages) and consistent with clause 2.6.30 on police checks (above para. 42), police checks are to be completed *prior* to any offer of employment being made. Reference checks too are to be made *prior* to offering employment.

[45] Staff of CLT are also issued with a Staff Handbook (referred to in Mr Steed-Conway's IEA).

[46] This handbook refers to the location of the policies and procedure manual (each worksite/base). It also sets out a code of conduct including employer and

employee expectations. Included is an expectation that employees “*will comply with all lawful and reasonable instructions*”.

[47] A section of the handbook is devoted to the subject of lawful instructions. In summary it states:

“It is a fundamental term of your employment agreement that you obey the lawful and reasonable instructions of your line manager or other person who has authority to issue such instructions. Instructions may be oral or written.”

[48] Another section of the Staff Handbook deals with disciplinary action. It refers to disciplinary procedures being set out in the Policies and Procedures Manual and it sets out examples of unsatisfactory performance, less serious misconduct and serious misconduct. Included among the examples of less serious misconduct are: failing to follow Community Living policies, standard procedures and all legitimate instructions given by the line manager or other authorised person.

[49] Examples of serious misconduct include:

“Acts or omissions detrimental to the quality or efficiency of Community Living’s services or operations (7).

Refusing to obey a lawful and reasonable instruction. (13).

Wilfully submitting false information or claims, or deliberately falsifying Community Living or personal records (16).”

[50] This section concludes with a statement as to the expectations flowing from use of the disciplinary procedures i.e. that staff will ordinarily be given two clear warnings before being dismissed. However, there is also a clear statement that: *“Serious misconduct, if proven may result in a staff member being summarily dismissed (that is dismissed without previous warning and without notice.”*

Discussion & Findings

Credibility

[51] There were few differences between the parties as the facts of this matter. However, the parties have very different perspectives as to how those facts should be interpreted.

[52] Mr Steed-Conway was a confusing witness. He was also evasive which compounded the confusion in his evidence. Further, he dwelt on matters of dubious

relevance e.g. ill-informed opinions of the respondent's financial position (and therefore its ability to employ additional staff).

[53] The respondent's witnesses were, on the other hand, clear, consistent and unlike Mr Steed-Conway focussed on the issues not on personalities. Where there are disputes over the evidence it is the evidence of the respondent's witnesses that I prefer.

[54] Prior to considering the questions to be addressed in arriving at a determination in this matter I remind the parties that my determination must have regard to the information that was available to the employer at the time. (*Northern Hotel etc IUOW v Tokaanu-Turangi RSA Club (Inc)* [1989 2 NZILR, 955). A number of the issues raised by the applicant in his evidence at the Investigation Meeting were not put to the respondent by him during the disciplinary investigation. For instance, Mr Steed-Conway (referring to a tension between a potentially collapsing service to a needy family and the need to ensure police checks were completed) submitted he was *authorised* to apply CLT's policies flexibly to meet such circumstances. The evidence reveals Mr Steed-Conway made no such submission during the disciplinary investigation. On the contrary he accepted that he had not followed CLT's recruitment procedures and said that "*it was out of order regardless of the circumstances*" and "*that he didn't contest that at all*". To be clear I find that Mr Steed-Conway was not authorised to depart from CLT's recruitment policies as he now claims.

Did Mr Steed-Conway have knowledge of CLT's recruitment policies and procedures (particularly the requirement that police vetting be completed prior to offering employment) and was he aware of the consequences of the breach of those policies?

[55] Mr Steed-Conway does not dispute that he was aware of CLT's recruitment policies particularly the requirement to complete police vetting prior to offering employment. Nevertheless it is relevant to my findings in this matter to spell out the importance the respondent places on its operational policies and procedures and the steps it takes to ensure they are given effect.

[56] The respondent's Policy and Procedures Manual governs all aspects of its operations. These policies are given contractual force by the fact they are embedded into Mr Steed-Conway's employment agreement. He expressly promised to comply with CLT's policies and procedures (including any codes of conduct) implemented by

the employer from time to time. (Cl. 30 (e)). He also undertook to comply with all reasonable and lawful instructions of the employer (Cl. 30 (a) and he declared on signing the IEA that he had read or had explained to him the Staff Handbook and that he accepted the terms and conditions as stated.

[57] Between them these documents provide all of the following:

- That Police Checks will be conducted prior to employment being offered.
- It is an expectation of employees that they will comply with all lawful and reasonable instructions.
- A failure to obey lawful and reasonable instruction is described as serious misconduct that, if proven, may result in dismissal.
- Acts or omissions detrimental to the quality or efficiency of CLT's services or operations and the wilful submission of false information or claims or deliberately falsifying CLT or personal records are also described as serious misconduct with the same potential consequence.

[58] I find in this matter that the respondent was entitled to rely on its comprehensive policies and procedures which were both clear and reasonable and which were expressly incorporated in Mr Steed-Conway's employment agreement. (*Cuttriss v Carter Holt Harvey Ltd* AC 19/07).

[59] I accept too that the importance attached by the respondent to the completion of police vetting prior to employment was reinforced in staff inductions and training and frequently reiterated to Mr Steed-Conway. That he knew of the policy and its importance is underscored by two emails he wrote. In one email, (7 April 2006), he requested Karen Manahan to waive the requirement for police vetting in respect of a caregiver he wished to employ. In the other email to Ms Kohleis he scolded her for presuming he would employ someone without following the vetting process "*I do not have to have our Policy quoted to me and I do not appreciate the assumption that I would be so stupid as to disregard our Policy in this circumstance*" (Email 7 April 2006).

[60] I find the applicant was well aware of the respondent's policy regarding the completion of police vetting prior to making offers of employment. I find too, he was aware of the critical importance attached to this policy by the respondent and he was aware that a failure by him to follow what amounted to a lawful and reasonable

instruction could, if proven, lead to a finding that serious misconduct had occurred with the potential for dismissal.

[61] I also find that Mr Steed-Conway was also aware on the requirement on him to submit wages claims that were accurate and which conformed with CLT's policies and the contracts which underpin such claims.

[62] As a senior member of staff (with a background in auditing organisational compliance with policies and procedures and with responsibility for the supervision of other co-ordinators) Mr Steed-Conway was also aware of the requirement on him to conform to CLT's policies and procedures both in terms of their letter and spirit in a way that enhanced the quality, integrity and efficiency of CLT's operations and in a way that modelled best practice to those who's practice he led.

[63] Further, Mr Steed-Conway could not be but aware that any serious breach of CLT's policies and procedures would amount to serious misconduct on his part which would put his continued employment in jeopardy.

Did the respondent carry out a thorough and fair inquiry into the allegations it made against Mr Steed-Conway?

[64] I find that in conducting its inquiries into the allegations against Mr Steed-Conway the respondent followed its own disciplinary procedures to the letter. The procedure adopted was entirely transparent and fair to Mr Steed-Conway.

[65] Mr Steed-Conway submitted that the process followed by Ms Kohleis was imbued with bias and predetermination against him and had been evident for some time that Ms Kohleis wanted to get rid of him. The evidence does not support this submission. Ms Kohleis acknowledged there had been tension between her and Mr Steed-Conway in the latter part of their relationship. However, she submitted she liked Mr Steed-Conway and consistently sought to counsel and support him in his role with a view to having him succeed. The tension arose as a result of Mr Steed-Conway's discontent over her emphasis of the importance of following CLT's policies and procedures in operational matters. This, she said, was consistent with her responsibilities. I accept her evidence and find Ms Kohleis had no ulterior motive when counselling Mr Steed-Conway. I find too that the process adopted by her in managing the disciplinary process was transparent and fair. It was not attended by bias and predetermination.

[66] Mr Steed-Conway takes issue with the fact that the respondent did not interview Margaret Thompson of DSL to confirm the fact there had been agreement that the contract should have more appropriately have been for shared care than for home support given the actual nature of the care that had been historically provided and the mother's resistance to home support and that the contract would eventually be amended to reflect this.

[67] I do not consider this to have been a failing in the process undertaken by the respondent. The contract in question was for home support. How it might evolve in the future was irrelevant to an investigation into how Mr Steed-Conway acted in accordance with CLT's recruitment policies in employing Ms X. Ms Thompson could not confirm/affirm Mr Steed-Conway's compliance/non-compliance with CLT's recruitment policies. Nor could she approve his departure from those policies. I note the respondent did contact the DSL coordinator who made the client referral to DSL and asked if there had been agreed that the support funding could be used for expenses incurred by the caregiver (as Mr. Steed-Conway had explained). The DSL coordinator denied this and stated the funds were to be used for the provision of support to the child only. She confirmed this by email and this information was put to Mr Steed-Conway along with the letter of 11 May setting out the respondent's allegations.

[68] I find the respondent carried out a thorough and fair inquiry into the allegations against Mr Steed-Conway.

Did those inquiries reveal the conduct complained of did occur and could that conduct reasonably be considered to amount to serious misconduct?

[69] There is no question the conduct complained about by the respondent occurred. What is seriously at issue between the parties is whether or not the conduct could be considered to amount to serious misconduct.

[70] One of Mr Steed-Conway's defences seems to be that he did not intend to disregard the respondent's policies. I am afraid his conduct speaks for itself. He may have been well intentioned in his wish to provide support to a caregiver who had been supporting a vulnerable child in a private capacity with little support from the child's family. Within reason, who the child's mother selected as a caregiver was her business. However when publicly funded bodies accept responsibility to provide care for vulnerable persons in the community (and that is the responsibility CLT assumed

when Mr Steed-Conway contracted with Ms X) that care must meet the assessed needs in terms of the type and quality of care provided. Fundamental to this will be taking steps to ensure the person charged with the care giving role is fit to do so and free from criminal convictions which might be an indicator of potential harm to the person/child be cared for.

[71] Further, on the point of Mr Steed-Conway's submission that Ms X understood and agreed she would not be employed/paid if she did not receive a police clearance, I find that Ms X became an employee of CLT with effect from 17 March 2006 and she was thereafter entitled to the contractual and statutory protections afforded to all employees.

[72] I note too, there is a thread in Mr Steed-Conway's evidence on the importance/urgency of contracting Ms X, that he was meeting the needs of the caregiver rather than starting from the terms of the contract with DSL and then focussing on implementing that contract in the interests of the child in a manner consistent with CLT's recruitment policies.

[73] It is also argued for Mr Steed-Conway that the respondent dismissed him for failing to follow CLT's policies and procedures and that according to its own Staff Handbook this amounted only to "less serious misconduct". I don't accept this submission. The respondent made it very clear in its letter to Mr Steed-Conway of 11 May that he was being asked to attend a meeting to discuss allegations "*that he had refused to obey a lawful and reasonable instruction and that he had submitted false information or claims...*". The alleged conduct going to these allegations was explained and Mr Steed-Conway was clearly put on notice that these allegations, if proven, are considered serious misconduct. This could put his continued employment in jeopardy or the warning system could be invoked.

[74] This was clarified with Mr Steed-Conway (at his request) at the meeting with him on 22 May 2006. He was advised then that it was a lawful instruction that he comply with CLT's policies and procedures.

[75] Following its investigation, where Mr Steed-Conway's explanations were considered the respondent found the allegations proven. The respondent considered the appropriate penalty and in doing so had regard to a number of other factors at arriving its decision to dismiss Mr Steed-Conway:

- His role as a team-leader, which was to supervise the practice of other service coordinators and to model best practice.
- The fact that throughout the disciplinary investigation Mr Steed-Conway gave little sign that he appreciated the significance of the misconduct complained of. Nor did he confirm he would change his practice. (The fact Mr Steed-Conway argued at the Investigation Meeting that he was authorised to apply CLT's procedures flexibly to meet operational needs as the circumstances demanded suggests he is still unable to appreciate the seriousness of his actions).
- Past employment history (which it was entitled to do under the disciplinary procedure). This reveals that there were numerous discussions between Mr Steed-Conway where the importance of following the respondent's policies and procedures had been emphasised.

[76] In the face of all this, the fact that the respondent referred in the dismissal letter to Mr Steed-Conway's failure to follow the Trust's policies and procedures does not demote his conduct to less serious misconduct. Mr Steed-Conway was put on notice that his actions in combination would, if proven, amount to serious misconduct. That is what the inquiry revealed and the respondent appropriately weighed this together with a number of other relevant factors in arriving at the decision to dismiss Mr Steed.

[77] Lastly, on this subject I note that Mr Steed-Conway himself gave evidence that he would not find the conduct complained of to have been acceptable if one of his own reports had behaved that way.

[78] Before concluding this matter I have considered one or two other submissions made by and for Mr Steed-Conway. The evidence does not support findings of escalating/excessive caseloads. Neither does the evidence support a finding that Mr Steed-Conway received no support or training in his role. Lastly, it is not the case that Mr Steed-Conway received no response to his written complaint about Ms Kohleis (generated after these issues were first raised with him). On the contrary agreement was reached that he would have a meeting with the Chief Executive on 22 May to discuss his complaints. Unfortunately, his dismissal overtook events. It was submitted for Mr Steed-Conway that given the complaint he made about Ms Kohleis she should have been removed from dealing with the disciplinary process in train. I reject this

submission. It is my assessment on the evidence that the complaint raised - coinciding as it did with the disciplinary investigation – was a device to divert attention from allegations Mr Steed-Conway was called upon to answer. This approach to the issues was repeated by him at the Investigation Meeting.

Conclusion

[79] Relying on the above reasoning it is my finding that the respondent's actions were consistent with those that a fair and reasonable employer would have taken in the circumstances at the time.

[80] Mr Steed-Conway's conduct put CLT at significant risk of the loss of its accreditation and loss of reputation. It should be noted, however, that the respondent at no time has alleged that Mr Steed-Conway acted for personal gain.

Determination

[81] Mr Steed-Conway's claim is declined. The Authority can be of no further assistance to him.

Costs

[82] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Janet Scott
Member of the Employment Relations Authority