

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Cindy Hamlin (Applicant)
AND The Manawatu Community Law Centre Inc (Respondent)
REPRESENTATIVES Geoff O'Sullivan for the Applicant
Genevieve Poirier for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Palmerston North, 30 & 31 March 2005
AFFIDAVITS 15 April and 6 & 23 May 2005¹
**FINAL SUBMISSIONS ON
THE AFFIDAVITS** 6, 13 and 15 June 2005
DATE OF DETERMINATION 12 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. Cindy Hamlin commenced employment with the Manawatu Community Law Centre Trust on 6 July 2002. It is also known as the Manawatu Community Law Centre Inc (the Trust or centre). From 8 August 2003 she undertook the role of Legal Services Administrator.
2. The Trust has the objective of providing free and accessible legal services and information. Employees of the respondent are required to refer clients with non legal problems to other providers. Regular staff meetings are held and risk policies are put into place to deal with difficult clients.
3. A staff health and safety meeting was held on 14 June 2004 at the community law centre where a client, P, was identified as a risk. The employees of the centre were given

¹ Affidavits received from Gregor Woollaston, a solicitor and Johanna Herbert, manager.

instructions on how and who was to deal with him. This included the conduct and practice expected from the centre staff available from the centre's safety guidelines in the practices and processes handbook. There was no written policy in the safety guidelines and processes handbook about giving clients money. The centre's employees were advised to refer P to the Prisoners Aid and Rehabilitation Society (PARS) for any welfare assistance.

4. On 2 July, Johanna Herbert the manager was informed by Brenda Osborne, a centre caseworker that she had been informed by Colleen Wilkinson, another caseworker, and Ginger Schuster the receptionist, that Ms Hamlin had given P money inside the centre on two occasions. Ms Herbert approached Ms Hamlin, and she says she asked Ms Hamlin if there was any substance to the allegation she had given money to P. Ms Hamlin says that Ms Herbert only asked her if she had given P money and she replied "yes". No other details of any allegations were given to her.
5. Ms Hamlin says she thought that Ms Herbert was referring to a situation where she met P in the street and he asked her to lend him some money. Ms Hamlin says she considered his request and she agreed and gave him some money.
6. Ms Herbert decided to conduct a disciplinary meeting upon being told about Ms Hamlin giving P money. Ms Herbert says that she was also contacted by the Community Legal Advice Whanganui (CLAW), and another organisation referred to as CRAS, where there was concern that P had obtained money from the centre.
7. On Monday 5 July Ms Herbert handed to Ms Hamlin a letter requiring her to attend a disciplinary meeting on Wednesday 7 July (letter dated 2 July produced). This letter included the comment:

An allegation was made earlier today that you had given a client, P, a sum of money. When questioned about this you indicated that you had, and that you had done so knowing that your job would be on the line.

For the above stated reasons I wish to meet with you to discuss this matter further. I need to inform you that if the allegation is established without any compelling mitigating factors being present, this could be regarded as serious misconduct.

8. Ms Hamlin denies saying that she *knew her job would be on the line* and that her answer, “yes” was an admission of any guilt.
9. The letter told Ms. Hamlin that her job could be in jeopardy depending on the outcome, and informed her of her right to bring to the meeting a support person or representative including a relative, union member, lawyer or friend.
10. In attendance at the meeting held on 7 July 2004 were Heather Allan, the Trust’s chairperson, and Mr. Hamlin, supporting Ms Hamlin. Ms Herbert says the details of the allegations, and who had made them, were read out to Ms Hamlin. She was supported in deposed evidence by Ms Allan. They say Ms. Hamlin refused to divulge the amount of money she gave to P. Ms Hamlin denies being told the detailed allegations and who made them. Mr. Hamlin’s deposed evidence supported Ms Hamlin.
11. During the meeting Ms Herbert says she disclosed the names of Ms Schuster and Ms Osborne who provided her with information that Ms. Hamlin had given P money on two occasions in June and July. Ms Hamlin says that she told Ms Herbert that she gave P her own money outside the centre. Ms. Herbert says that Ms Hamlin did not apologise and did not give any assurance it would not happen again. Ms Hamlin says that her comments have to be considered in the context of her belief at the time that she was acting within her rights outside work. For the Authority’s investigation she produced a copy of a receipt that she was able to obtain for cash Eftpos payment of \$120 on 2 July 2004 at 11:51:43. It was challenged by the respondent because the receipt had no specific details.
12. Ms Herbert says that Ms Hamlin said it was “*a conscience call*” and that she “*knew it was wrong but [she] would do it again*”. Ms Hamlin emphatically rejects this. But she did agree that she did say “*that if I hadn’t given [P] money I couldn’t live with myself*”. Further she says that she qualified that by also stating “*I couldn’t live with myself if it meant my refusal caused him to do something wrong, and he ended up back in prison*”.
13. Ms Hamlin denies that Ms Herbert said that she was in breach of the Trust’s Human Resources Manual and health and safety instructions. She says that all she was asked was

had she read the health and safety policy discussed at a staff meeting held on 14 June 2004, and says that she tried to work within the boundaries that had been laid out for the client.

14. There were other matters that they discussed and it is not necessary to mention them except to say that Ms. Hamlin and Ms. Herbert are in dispute on many of them.
15. Ms Herbert says she told Mr and Ms Hamlin that she would look at all the facts and evaluate what had been discussed before she could make a decision about the outcome. The meeting was adjourned for a decision to be made. The extent of the explanation is disputed too.
16. During the break Ms Herbert then decided she could no longer have trust and confidence in Ms Hamlin for breaching the Trust's policies and bringing the centre into disrepute. She typed a dismissal letter (letter dated 7 July produced) and met with Ms Hamlin privately to explain her decision.

The issues

17. The primary issues in this matter include:
 - o Relevant factual issues.
 - o Could a fair and reasonable employer conclude that Ms Hamlin's actions amounted to serious misconduct?
 - o Was the process otherwise fair including: - Was the 2 July meeting fair? – What allegations being relied upon were put before Ms Hamlin? - – Was the decision to dismiss Ms Hamlin predetermined?

The Findings

The meetings held on 2 July and 5 July

18. On 2 July Ms Herbert asked Ms Hamlin if she had given money to P having regard to the information she had received from Ms Osborne involving two alleged instances witnessed by Ms Wilkinson and Ms Schuster. The details were not mentioned. Ms Hamlin says what she understood was being referred to related to her giving P her own money she had obtained during a break outside the centre and decided to lend to him. It is likely Ms Herbert and Ms Hamlin referred to different instances without being specific.

19. On 5 July Ms Herbert handed Ms Hamlin the letter dated 2 July giving notice of a disciplinary meeting/investigation meeting to be held on 7 July. No details of the allegations were provided except that money had been given to P and that *when questioned about this you indicated that you had, and that you had done so knowing that your job would be on the line.*
20. Ms Hamlin was not disadvantaged by not being given prior notice of these meetings and not being given the opportunity to get representation. She was being put on notice of an investigation into the matter Ms Herbert raised. She was informed of her right to obtain representation. She was also told her job was in jeopardy. Even if she was disadvantaged without knowing the details of the allegations, or even what Ms Herbert was referring to, the formal disciplinary process followed.
21. The time existed in the disciplinary meeting to clarify what both of them might have been referring to. I am satisfied that Ms Herbert received information from Ms Osborne that concerned an allegation that Ms Hamlin had given P money. There was an issue about Ms Hamlin giving P money. Therefore Ms Herbert was entitled to raise the matter with Ms. Hamlin and she was entitled to pursue an investigation and disciplinary meeting that required due process to protect Ms Hamlin's rights.

What were the allegations?

22. Ms Hamlin reasonably concluded from the 2 July letter that she was being asked to explain her actions in giving P money that she believed was her own and in her own time outside the centre. There was nothing to alert her to any misunderstanding about her giving P money and that Ms Herbert had other information she was relying upon about P being given money and about the reputation of the centre. Ms Hamlin was not made fully aware of the allegations arising from the information Ms Herbert had received from Ms. Osborne about the two occasions that Ms Schuster and Ms Wilkinson say they saw her give P money. Concerns about her handling of P were also raised but she could reasonably believe that any concerns related to performance of her duties given the nature of the allegations.

What were the reasons for the employer meeting with Ms Hamlin on 7 July 2004?

23. Ms Herbert says that Ms Hamlin's answer on 2 July was tantamount to an admission and that everything else was secondary, and this alone was enough to amount to serious

misconduct, bringing the centre into disrepute given the contact with at least CLAW (and possibly CRAS). She says the matter was compounded during the meeting by Ms Hamlin not satisfying her that she could give an assurance it would not happen again, where Ms Hamlin believed she could act in a personal capacity.

24. Ms Hamlin's answer to the question put to her on 2 July later obscured any investigation into what others were saying.
25. Ms Hamlin produced the copy of the receipt that she was able to obtain for cash Eftpos payment of \$120 on 2 July 2004 at 11:51:43 to support her claim. It is not for me to second guess what happened but to note Ms Herbert did not have this information at the time and that its reliability has been questioned by the respondent. The situation is also muddled by the allegation that Ms Hamlin would not divulge how much money she had given to P.
26. It is more than likely that Ms Herbert relied upon knowing that Ms. Hamlin's answer that she had given P money, and had decided that that alone was serious without investigating the matter any further. With the knowledge that CLAW (and possibly CRAS) understood P had been given money she decided that she needed to do something.
27. Ms Herbert told the Authority it did not matter where Ms Hamlin gave P the money but it was the fact that she gave it to him that determined the matter for her. This is consistent with her evidence at the Authority's investigation, but not with what she put in the letters of 2 and 7 July. These letters also support the conclusion that the real matter related to the answer Ms Hamlin gave on 2 July and not necessarily the detail of any allegations from the other centre employees.

Could a fair and reasonable employer conclude that Ms Hamlin's actions amounted to serious misconduct?

28. The respondent has not been able to satisfy the requirement that a fair and reasonable employer could come to a conclusion that Ms Hamlin's actions were serious misconduct because of the underlying performance issues and the confusion about what allegations were being referred to in regard to P being given money. Therefore, the respondent cannot justify its decision. I have reached this conclusion because there was no written policy. The earlier concerns about Ms Hamlin, working within the boundaries of what was acceptable

behaviour, related to a performance issue. There was insufficient information to support the conclusion that Ms. Hamlin was acting deliberately or wilfully in breach of any policy. In this regard it is possible that Ms. Hamlin gave consideration to what might happen and appeared to genuinely believe she was able to give a person a loan outside the centre in a private capacity, albeit now in hindsight she says she would not do it again.

29. Ms Hamlin was not put on proper notice that information from CLAW and CRAS could result in a conclusion that Ms Hamlin had put the centre into disrepute. If this had been properly dealt with Ms Herbert needed to determine exactly in what circumstances Ms Hamlin gave P money. It appeared of no interest to her once she knew Ms Hamlin had given money to P from her answer on 2 July.
30. For completeness I have noted that Ms Herbert's evidence referred to the credibility findings she says she needed to make between Ms Hamlin and her colleagues: Ms Schuster and Ms Wilkinson. I am doubtful that such findings were relevant at the time considering she concluded that Ms Hamlin giving P money was enough to satisfy an admission (despite what Ms Hamlin says she said "yes" to, which was in dispute). The problem was that Ms. Hamlin continued to refer to the 2 July incident where she maintained that she had given P money outside the centre and Ms. Herbert was referring to an allegation made by a co worker. Ms Herbert's decision to believe Ms Schuster during the break led her to conclude that she could no longer have trust or confidence in Ms Hamlin. This was not put to Ms Hamlin as an issue for her to have an opportunity to comment on before the decision was made.

The procedure followed by the employer

31. Ms Herbert made her decision without giving Ms. Hamlin an opportunity to mitigate and comment on the issue that credibility and the reputation of the centre were being taken into account in the decision that led her to the conclusion of a loss of trust and confidence in Ms Hamlin.
32. Ms Herbert says she decided to believe Ms Schuster's version. However it is probable that Ms Hamlin did not fully understand what the details of the allegation were considering Ms Herbert was focussed on Ms Hamlin's affirmative answer and that Ms. Hamlin maintained her version of the event that occurred on 2 July as an explanation.

33. Furthermore, the respondent did not reasonably alert Ms. Hamlin to the possible conflict about using Mr. Hamlin as a support person and his involvement in the Schuster and Wilkinson allegations, which were not resolved.
34. Ms Hamlin claimed her dismissal was predetermined. I am satisfied that the decision was made by Ms Herbert and she likely made the decision during a break in the meeting on 7 July. It is probable that the decision was not predetermined.

Conclusion that Ms Hamlin has a personal grievance

35. I conclude that the respondent has not been able to justify its decision to dismiss Ms. Hamlin. A fair and reasonable employer could not have come to a conclusion of serious misconduct when other considerations of performance existed and an investigation failed to adequately delve into the allegations and the issue of the reputation of the centre. These were issues obscured by an admission given for different reasons and the existence of a plausible explanation. The applicant has a personal grievance.

Remedies to resolve the employment relationship problem

Loss and Mitigation

36. Ms Hamlin is entitled to an assessment of lost remuneration. She says that she attempted to obtain further employment and I accept that. She has not obtained any employment and has since February 2005 been looking after her ill husband. Therefore her loss has been from 7 July 2004 until 28 January 2005. I assess this as approximately 29 weeks.
37. Soon after her dismissal Ms Hamlin attempted to find work. She says that she sent her curriculum vitae to Mid Central Health. She says that she applied for two clerical jobs and received an acknowledgment only. She applied for an administration position in a real estate firm and only received an acknowledgment. Also she says that she applied unsuccessfully for a mail sorter position. She attempted to obtain work with a solicitor, Mr. Gregor Woollaston. There is an issue between Ms Hamlin and Mr. Woollaston about Ms. Herbert's role and the future of any legal aid referrals if he employed Ms Hamlin. Ms Herbert denies any adverse allegation about what she said or implied to Mr. Woollaston. The fact is that Ms Hamlin did not obtain work with Mr. Woollaston, for whatever reason,

and she blames Ms. Herbert for not securing the position. This has no impact on Ms. Hamlin's mitigation (except as evidence to gain other employment) considering the five matters she raised in mitigation to cover her losses and the period involved.

38. I am not satisfied that in the period before February 2005 the applicant has met the requirement to do all she could to obtain other employment and that the situation with Mr. Woollaston was linked to a loss of any other opportunities.

39. She accepted that she did not look for work from February 2005 because she was looking after her husband, after she realised he was not getting any better.

40. I am not inclined to exercise the discretion to order a reimbursement for the full loss she says occurred because she has not satisfied me she attempted satisfactorily to do all she could to mitigate her loss of wages over the full period of the claim. In my assessment Ms Hamlin is entitled to be reimbursed for 16 weeks wages for her loss. I assess the loss at \$14.50 per hour at 35 hours per week. She is entitled to \$8,120.

Contribution

41. I now have to assess any contribution by determining if Ms Hamlin's actions gave rise to her personal grievance. She was certainly naïve, and especially so after being involved in a health and safety meeting on the guidelines discussed about dealing with P. Any contribution could relate to Ms. Hamlin's personal sense of concern, and giving P money and in disputed circumstances about where the incident(s) occurred, and the circumstances about what was allegedly said between her and Ms. Herbert. These matters are not enough to draw a linkage with Ms. Hamlin's dismissal to be causative and blameworthy conduct given the failure of Ms. Herbert to properly inquire into the allegations and failure to assess the grounds for dismissal. The comments that Ms. Hamlin was alleged to have made could be explained in regard to her personal concerns about the situation and involving different instances, and if they were made, they occurred before the formal disciplinary process or were in dispute with Ms Herbert. Ms Hamlin has no responsibility for Ms Herbert's actions. Therefore there will be no deduction for contribution.

Compensation

42. I consider this is also a matter for compensation under section 123 (c) (i) of the Act for humiliation, loss of dignity and injury to feelings. I order the centre to pay Ms. Hamlin \$10,000 compensation. Ms Hamlin referred to the financial, physical and emotional and mental affects of her dismissal on her. I accept her feelings were affected by the dismissal and that she was humiliated by it and it impacted on her relationships with her contacts, friends and family.

Costs

43. Costs are reserved.

Conclusion

44. The Manawatu Community Law Centre Inc is to pay Cindy Hamlin the sum of \$8,120 reimbursement of lost wages due to her dismissal and \$10,000 compensation for humiliation, loss of dignity and injury to feelings.

P R Stapp
Member of the Authority