

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 73
3058815

BETWEEN

JAN HENDERSON
Applicant

A N D

SOUTHERN DISTRICT HEALTH
BOARD
Respondent

Member of Authority: Peter van Keulen

Representatives: Mary-Jane Thomas and Katherine McDonald, counsel for the
Applicant
John Farrow, Malcolm Couling and Jessica Frame, counsel
for the Respondent

Investigation Meeting: 3 and 4 September 2019

Submissions Received: 4, 6 and 19 September 2019 from the Applicant
4, 18 and 30 September 2019 from the Respondent

Date of Determination: 19 February 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jan Henderson worked for the Southern District Health Board (SDHB) at the Southland Hospital from 2002.

[2] Ms Henderson's role changed over time and in 2018 her position was Admin Support. In this role Ms Henderson had responsibility for aspects of accommodation provided by the hospital for staff, locums and students on placement at the hospital.

[3] In February 2018, a member of the SDHB HR team at the hospital became aware that Ms Henderson had received a payment for short term accommodation, provided to an employee, in cash. Further enquiries by members of the SDHB HR team in March 2018 indicated that the cash payment could not be accounted for by the hospital's finance team.

[4] As a result of this the SDHB commenced a disciplinary process with Ms Henderson. The SDHB was concerned that cash received by Ms Henderson might not have been processed, which in turn might amount to a breach of the SDHB Code of Conduct and be serious misconduct.

[5] By the end of the process the SDHB had concluded that cash collected by Ms Henderson was missing and/or had not been banked, that Ms Henderson had not followed cash handling procedures and Ms Henderson's responses throughout the process had been incorrect and misleading. The SDHB decided that this amounted to breaches of the Code of Conduct, was serious misconduct and that it had lost trust and confidence in Ms Henderson. The SDHB dismissed Ms Henderson.

[6] Ms Henderson raised personal grievances for her dismissal and for the SDHB suspending her during the disciplinary process. Ms Henderson says:

(a) The decision to suspend her was flawed; and

(b) Her dismissal was not substantively justified nor was the process which led to her dismissal carried out in a fair manner.

[7] It is these two grievances that formed Ms Henderson's claim against the SDHB which I have investigated. I will consider each grievance in turn.

[8] This determination, reserved at the conclusion of my investigation, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Employment Relations Act 2000 (the Act) to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

Issues for the grievance relating to Ms Henderson's suspension

[9] The grievance relating to Ms Henderson's suspension is an unjustified action causing disadvantage grievance. To resolve this grievance I must address two issues:

- (a) By suspending Ms Henderson did the SDHB cause disadvantage to Ms Henderson's employment or a condition of her employment; and
- (b) If so, was the SDHB's action justified?

Analysis of Ms Henderson unjustified action causing disadvantage grievance

[10] On the morning of 6 March 2018, Ms Henderson's manager, Heather Fleming and a member of the SDHB HR team, Janine McLennan, came to Ms Henderson's office. Ms Fleming explained to Ms Henderson that they had discovered discrepancies in the cash payments received for accommodation, which the SDHB was investigating. Ms Henderson asked for more information but was told she did not need to respond to anything at that time. The SDHB explained that it wanted to protect her while it was investigating, that it thought she should get some advice and that it was considering suspending her whilst it carried out its further investigations.

[11] Ms McLennan then told her the SDHB wanted to meet with her later that day to discuss the potential suspension and then she asked Ms Henderson for her work keys and swipe card and told Ms Henderson that she needed to leave work.

[12] Ms Henderson left work and went to see her lawyer to obtain advice.

[13] The problem that arose was that Ms Henderson believed that she had been suspended as a result of the conversation, because she had to hand back her swipe card and work keys and because she was told to leave. She did not understand that she was meant to meet with the SDHB later that day to discuss the possible suspension, rather she thought that meeting was to confirm the suspension by giving her a letter setting out the reasons for the suspension.

[14] In an email on 6 March 2018 sent at 12:04 pm, Ms Henderson's lawyer recorded to the SDHB that Ms Henderson had been suspended and would not be attending a meeting later that day and would attend a meeting after she had received various documents and information requested (in that email).

[15] There was then an exchange of emails between the SDHB and Ms Henderson's lawyer which culminated in the SDHB sending a comprehensive letter, dated 6 March 2018, which set out the SDHB's concerns about cash payments made to Ms Henderson and addressed the issue of suspension for Ms Henderson.

[16] In relation to suspension the 6 March letter recorded the following:

We met with you briefly on Tuesday 6 March 2018, advising that we had received information which indicates a potential financial discrepancy in regards to cash payments in relation to DHB accommodation. At the meeting you were advised that we were potentially looking to suspend you while we undertake an investigation. However we wanted you to seek independent advice/support and come back to meet us at 1pm, to give you the opportunity to provide a reason as to why we should not suspend you while we undertake an investigation into the above allegation and until we had the opportunity to meet formally with you.

[17] The 6 March letter went on to record that there had been a miscommunication with Ms Henderson's lawyer so the 1pm meeting did not proceed and it needed to be rescheduled. The SDHB suggested that the meeting could be convened by telephone the next morning or Ms Henderson could simply provide a written response.

[18] The proposed meeting to discuss the suspension never occurred and Ms Henderson did not provide a written response; essentially Ms Henderson refused to discuss suspension any further taking the view she had already been suspended.

[19] The SDHB says that in the absence of any response to its request for comment on the proposed suspension from Ms Henderson, it decided to suspend her.

Did the suspension cause disadvantage to Ms Henderson's employment or a condition of her employment?

[20] The suspension caused a disadvantage to Ms Henderson's employment.

Were the SDHB's actions justified?

[21] In order for an employer's action to be justified its actions and how it acted must be what a fair and reasonable employer could have done in all of the circumstances¹. In order to assess this there are two parts; whether the action was substantively justified and whether the process by which the employer came to the decision to carry out the action was fair.

[22] In this case, however, before I can assess if Ms Henderson's suspension was an action that a fair and reasonable employer could have come to in the circumstances, I need to determine when she was in fact suspended.

[23] In the circumstances, I am satisfied that the SDHB's actions in the morning of 6 March 2018 amounted to a suspension.

[24] Counsel for Ms Henderson submitted that this suspension was simply about removing Ms Henderson from the hospital premises because there were concerns about missing cash – and I think this has some merit. It is clear to me that the SDHB had already decided it would suspend Ms Henderson, it then removed her from the hospital, taking her keys and access card and making it clear she was not to come back, pending a further meeting.

¹ Section 103A of the Employment Relations Act 2000.

[25] Whether the proposed meeting on suspension occurred or not is immaterial. Suspension had been effected as the SDHB had made a decision that suspension was appropriate and any subsequent discussion was moot.

[26] It follows from this conclusion that Ms Henderson was suspended without being given the opportunity to comment on it, i.e. there was no consultation over a possible suspension, it was just imposed.

[27] In terms of process, an employer is not always required to tell an employee about a pending suspension with a view to the employee commenting on the proposal before a decision is made whether to effect a suspension or not². If there is some valid reason why the employee's view on a proposed suspension should not be sought before a decision is made then an employer cannot be said to have acted unfairly.

[28] However, in this case, I find that a fair and reasonable employer could not have concluded that consultation was not necessary and my conclusion is the SDHB should have consulted with Ms Henderson before suspending her.

[29] Turning up unannounced, providing limited information to Ms Henderson to the extent it was not even clear to Ms Henderson what the issues were, requiring Ms Henderson to leave without giving her an opportunity to respond by taking her access card and work keys and sending her away was unjustified and was a humiliating and undignified experience for Ms Henderson.

[30] I conclude that the SDHB acted in an unjustified manner which caused disadvantage to Ms Henderson's employment when it suspended her on 6 March 2018.

² *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587

Issues for unjustified dismissal

[31] There are two questions for Ms Henderson's unjustified dismissal claim:

- (a) Did the SDHB follow a fair disciplinary process in coming to the conclusion to dismiss i.e. did it act as a fair and reasonable employer could in the course of the disciplinary process, particularly in light of its obligations under the Act?
- (b) Was the decision to dismiss substantively justified i.e. did the SDHB reach conclusions on what occurred and the appropriate sanction, which a fair and reasonable employer could have reached in all of the circumstances?

Did the SDHB follow a fair disciplinary process?

[32] As set out above, the first issue on the justification is whether in coming to the decision to dismiss, the SDHB followed a fair process, which is informed by ss 4(1A) and 103A of the Act. In summary the SDHB needs to show that:

- (a) It investigated the allegations of serious misconduct sufficiently;
- (b) It set out the allegations, provided relevant information and explained the possible implications of a finding of serious misconduct, so that Ms Henderson could consider all of this and respond;
- (c) It gave Ms Henderson a reasonable opportunity to respond to the allegations, before it made its decision on what had occurred and whether this amounted to serious misconduct;
- (d) It properly considered the explanations given by Ms Henderson before it made its decision on sanction;
- (e) It gave Ms Henderson an opportunity to respond to its decision on sanction, in this case its decision to dismiss, before it imposed that sanction;

(f) It then considered any responses given by Ms Henderson to its decision to dismiss, before it finally decided dismissal was the appropriate sanction.

[33] If there was a failing by the SDHB in any of the steps above, I must then decide if that renders the disciplinary process unfair.

The SDHB's initial investigation

[34] On 14 February 2018, Diane Moate, from the SDHB HR team heard from a recruitment advisor with the SDHB, that a payment for hospital-provided accommodation had been paid in cash. Ms Moate thought this was odd and mentioned it to Ms Fleming when she met with her to discuss an unrelated matter. Ms Fleming advised that this was unusual and they agreed to investigate it further.

[35] Ms Moate spoke to the employee who had advised her of the cash payment and Ms Fleming made enquires through the finance department. As a result of these enquiries Ms Moate and Ms Fleming confirmed that an employee had paid \$520.00 in cash for accommodation, the employee had been provided a tenancy agreement from Ms Henderson to confirm receipt of the money but the money could not be accounted for by the finance team.

[36] On 2 March 2018, Ms Moate obtained a statement from the employee that confirmed the cash payments he had made to Ms Henderson.

[37] On the evening of 2 March, Ms Moate and two other employees searched Ms Henderson's office to see if they could find the cash paid by the employee and a copy of the tenancy agreement or any form of receipt. They were unable to find the cash, the tenancy agreement nor any receipt.

[38] Ms Moate then passed the matter over to her colleague, Ms McLennan, as she went on leave.

[39] Ms McLennan was involved in suspending Ms Henderson, which I have addressed above. And, as I have outlined, the exchange over Ms Henderson's suspension included a comprehensive letter dated 6 March 2018 setting out the SDHB's concerns.

The SDHB raises its concerns with Ms Henderson

[40] The letter of 6 March set out that the SDHB had information that indicated that Ms Henderson had received cash payments for accommodation that had not been processed through the SDHB finance system. The letter addressed the detail of this allegation and included the statement from the employee who had paid cash for his accommodation and a copy of the tenancy agreement. The letter then set out the concern for the SDHB that this might amount to a breach of the SDHB Code of Conduct and be serious misconduct. Ms Henderson was invited to attend a meeting to respond to the allegations.

[41] A meeting was held on 12 March 2018. By this stage the issues with Ms Henderson had been escalated to Julie Rickman, the Executive Director Finance, Procurement and Facilities at SDHB. Ms Rickman was responsible for conducting the disciplinary process for Ms Henderson together with Ms McLennan, and then making a decision on the outcome. So Ms Henderson and her lawyer met with Ms Rickman and Ms McLennan.

[42] In this meeting Ms Henderson explained what had occurred with the cash payment in issue. She acknowledged that she had received the cash payments and had put the money into an envelope and left it in her office as she had not been able to give it to the finance administrator as she was not in her office. Ms Henderson further explained that she had left the cash in a pile of documents and it may have therefore been shredded with those documents.

[43] There was further discussion around the circumstances in which this occurred and discussion around Ms Henderson's normal practice when dealing with cash. During this discussion Ms Henderson said on two occasions that she very rarely gets cash, sometimes once a year and these cash payments were the only ones in the last six or seven months. Ms

Henderson also said that if she did receive money, she would always take it to the finance administrator, but on this occasion (actually two occasions as there were two payments made in cash) the finance administrator was not available.

The SDHB investigates further

[44] During the meeting on 12 March, Ms McLennan received information relating to a possible further cash payment for accommodation made to Ms Henderson by a second employee. Ms McLennan spoke to that second employee after the 12 March meeting.

[45] This second employee confirmed to Ms McLennan that she had paid cash to Ms Henderson for accommodation in January 2018 and had received a tenancy agreement from her. The employee was able to describe where Ms Henderson had filed a copy of the tenancy agreement in her office, so Ms McLennan went to Ms Henderson's office and found that further tenancy agreement. Ms McLennan also found tenancy agreements for four other employees that indicated cash payments had been made for accommodation.

[46] Ms McLennan then obtained access to Ms Henderson's email account and searched for references to cash payments. This search revealed 74 emails in which Ms Henderson had referred to cash payments being made for accommodation.

[47] Ms McLennan chose to focus on the more recent cash payments from January 2018 for which she had tenancy agreements and she spoke to three employees about cash payments made to Ms Henderson.

The SDHB provides further information to Ms Henderson

[48] The SDHB then provided a second letter to Ms Henderson dated 26 March 2018. In this letter the SDHB summarised the responses Ms Henderson had provided in the 12 March meeting and it then went on to set out its further concerns from the subsequent investigations.

[49] In doing this the SDHB identified that it had discovered further cash payments made to Ms Henderson from January 2018. It set out what it had discovered from the second employee and two others, including providing statements from these three employees. The SDHB also set out what it had found in respect of the additional tenancy agreements, providing copies of these agreements.

[50] In totality the evidence from the SDHB indicated that Ms Henderson had received cash payments from five employees since January 2018, in addition to the first cash payments that had already been discussed. The 26 March letter invited Ms Henderson to address the additional five lots of cash payments.

[51] On 29 March 2018 the SDHB met with Ms Henderson and her lawyers. At the start of the meeting, they advised the SDHB that they would like to go to the SDHB documents centre as they believed it would help clarify what had occurred. When they got to the documents centre, Ms Henderson went to a filing cabinet and pulled an envelope which had cash in it. On the outside of the envelope Ms Henderson had written references to the cash payments made by the five employees identified in the 26 March letter and the amount of cash in the envelope was \$10.00 more than the total recorded on the outside.

[52] Ms Henderson then went on to explain that when she collected cash for accommodation the finance administrator was not available for her to give the cash to, explaining that the finance administrator finished early. So, Ms Henderson would put the cash in the envelope and record the amount on the outside so that she could issue a receipt later and then give the cash to the finance administrator.

[53] The SDHB took that information away to consider its position. On 5 April 2018 the SDHB sent Ms Henderson a third letter summarising its concerns, including concerns that had been investigated as they came to light in the disciplinary process.

[54] The 5 April letter addressed:

- (a) Matters relating to various cash payments Ms Henderson had received which she had not addressed in her response to date;
- (b) New concerns about inconsistencies in Ms Henderson's responses regarding how often she received cash payments and how she dealt with the cash she did receive and why;
- (c) New concerns about Ms Henderson's failure to comply with cash handling processes, having demonstrated that she was aware of what good cash handling processes entail;
- (d) That all of the SDHB's concerns impacted on the question of trust and confidence that the SDHB had in Ms Henderson and if that trust and confidence was lost then summary dismissal may follow.

[55] Ms Henderson responded to the 5 April letter in a letter from her lawyer dated 5 April 2018 but sent on 10 April 2018. A third meeting was then held on 11 April 2018.

The SDHB met its obligations to investigate and provide information

[56] Having reviewed the evidence I am satisfied that the SDHB carried out a full and complete investigation into the concerns it had about Ms Henderson receiving cash for accommodation.

[57] I am also satisfied that the SDHB explained its concerns, provided relevant information and explained the consequences of adverse findings in relation to its concerns, to Ms Henderson. The provision of information and explanation around concerns was updated by the SDHB as the investigation produced further information and created further concerns. This concluded with the 5 April letter from the SDHB. This letter set out clearly that the SDHB was concerned that cash given to Ms Henderson had gone missing (although there was

never an allegation that Ms Henderson stole the cash), that Ms Henderson had not followed sound cash handling procedures despite knowing what was appropriate for such a process and that Ms Henderson's answers to the SDHB concerns about her dealings with cash were inconsistent (with particulars provided).

The SDHB considers Ms Henderson's responses

[58] After the 11 April meeting the SDHB tried to reconcile the information it received from Ms Henderson about the cash she had received and what she had done with it in terms of her cash handling process.

[59] It then reached conclusions based on all of the information and explanations it had received.

[60] I am satisfied that throughout the process the SDHB considered all of the information provided to it by Ms Henderson. This is evident from the further investigations it undertook when information was received and the conclusions it articulated in its correspondence. In this regard the SDHB met its obligations in that it acted as a fair and reasonable employer could.

The SDHB provides Ms Henderson with its preliminary conclusions and decision on sanction

[61] The SDHB then sent Ms Henderson a letter dated 13 April 2018 with its conclusions from the disciplinary process and its preliminary decision on sanction. The 13 April letter recorded that the SDHB had concluded that cash collected by Ms Henderson was missing and/or had not been banked, that Ms Henderson had not followed cash handling procedures and Ms Henderson's responses throughout the process had been incorrect and misleading. The SDHB decided that this amounted to breaches of the Code of Conduct, was serious misconduct and it had lost trust and confidence in Ms Henderson. The SDHB proposed to dismiss Ms Henderson.

The SDHB considers Ms Henderson's response and confirms its decision

[62] A final meeting was then held on 17 April 2018, when Ms Henderson was given the opportunity to respond to the preliminary conclusions and decision to dismiss.

[63] The SDHB considered what Ms Henderson told it in the 17 April meeting and decided to confirm dismissal. Ms Henderson was advised of this in a letter dated 18 April 2018.

Conclusion on process

[64] Given all of the above, I am satisfied that the SDHB acted as a fair and reasonable employer could act in all the circumstances. It met its obligations under the Act and therefore it did carry out a fair disciplinary process.

Was the SDHB's decision substantively justified?

[65] In all of the circumstances a fair and reasonable employer could conclude that Ms Henderson had lost money given to her for accommodation, had not followed cash handling procedures and had been inconsistent in her explanations regarding handling of cash. And, based on this a fair and reasonable employer could conclude that it had lost trust and confidence in Ms Henderson and that summary dismissal was appropriate.

[66] In the circumstances I am satisfied that dismissal was a conclusion a fair and reasonable employer could have come to and therefore dismissal was substantively justified.

Remedies

[67] As Ms Henderson has been successful with her unjustified action personal grievance, I can award her any of the remedies provided for under s 123 of the Act.

Reimbursement

[68] I will not award any amount for reimbursement of lost wages as there was no lost wages as a result of the suspension.

Compensation

[69] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act; compensation for the humiliation, loss of dignity and injury to feelings that Ms Henderson suffered because of the suspension.

[70] Assessing this compensation involves assessing the harm caused to Ms Henderson by the suspension and the loss she suffered as a result, which I must then quantify.³

[71] Ms Henderson's evidence about the impact of the suspension was that she was upset, humiliated and dumbfounded by what occurred.

[72] I have considered the recent decisions of the Employment Court,⁴ which provide guidance on quantifying this loss and harm and with this guidance I have assessed the level of harm and loss to Ms Henderson to be \$6,500.00.

Contribution

[73] As I have awarded remedies to Ms Henderson, I must now consider whether she contributed to the situation that gave rise to her grievance.⁵

[74] I do not accept that Ms Henderson contributed to the way in which the SDHB carried out her suspension and therefore, there is no contributory behaviour and no reduction in remedies.

³ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁴ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁵ Section 124 of the Employment Relations Act 2000.

Outcome

[75] The SDHB acted in an unjustified manner causing disadvantage to Ms Henderson. In satisfaction of this grievance the SDHB must pay Ms Henderson \$6,500.00 without deduction for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[76] Ms Henderson's claim for unjustified dismissal is dismissed.

Costs

[77] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[78] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority