



[5] About two weeks after starting work Mrs Conrad was approached by Ms Henry who showed her a written individual employment agreement. Ms Henry went through the terms of the agreement, which included some handwritten alterations. One of those, under the heading *Terms of Agreement*, stated;

2.3 *Whilst employed the employee agrees not to become a Kiwisave member.*

[6] Mrs Conrad told the Authority that when she queried this term Ms Henry told her the reason for it was that the Kohanga could not afford KiwiSaver and that if she wished to be in the scheme “*we don’t want you.*” Mrs Conrad initialled the alteration at sub-clause 2.3 and signed the entire agreement on 24 June 2008.

[7] A few days later Mrs Conrad obtained advice from Ms Karen Ngatai of the Taumaranui Community Law Centre that her employer could not legally prevent her from joining KiwiSaver.

[8] With that advice Mrs Conrad approached Ms Henry at the start of work on 2 July 2008. She had in her hand a copy of her employment agreement and a WINZ booklet about joining KiwiSaver.

[9] Mrs Conrad’s approach to Ms Henry sparked a fracas between the two which went on for some minutes. There were no witnesses present to see what happened, although staff and children were nearby in other rooms of the kohanga.

[10] The fracas included shouting or yelling abuse, pushing, throwing objects including the employment agreement document and some shoes, and the placing by Ms Henry of her hands on the neck of Mrs Conrad.

[11] It is agreed that when the confrontation ended after a few minutes and Mrs Conrad left the Kohanga, she had been told by Ms Henry she was dismissed.

[12] Mrs Conrad went immediately to the Police Station where she laid a complaint of assault against Ms Henry. Ms Henry arrived a short time later and was told by the Police that she was to be arrested. She protested and said she wished to lay a complaint against Mrs Conrad and to also serve a trespass notice on her.

[13] In their formal statements made to the Police a very short time after the altercation, each woman accused the other of initiating it and of being the aggressor.

They have given the Authority the same accounts of what happened as are in their statements.

[14] Although no charges were laid against Ms Henry or Mrs Conrad both were formally warned by the Police not to disturb the peace.

[15] Mrs Conrad was served by the Kōhanga with a trespass notice warning her to stay away for 2 years from its premises which included the marae where it was located.

[16] Ms Henry sent a letter to Mrs Conrad confirming her dismissal with immediate effect from 2 July. A cheque was enclosed and there is no dispute that it represented all amounts due and owing including holiday pay for the work Mrs Conrad had performed up to that date. The letter concluded with;

*Ko koehe Wahine Kuare and quite frankly we don't need your kind of nature and intimidations here thank you very much.*

[17] After going to the Police Station on 2 July straight after being dismissed, Mrs Conrad consulted Ms Ngatai who immediately wrote a letter to the Chairperson of the Kohanga. She outlined in the letter what Mrs Conrad had told her had taken place that morning, concluding with the following;

*We believe that you, as an employer, have failed in your duty to provide a safe working environment for your employee and as a manager we believe that Lynda has failed to act fairly and in good faith and has not been honest, open or shown any mutual respect towards Christine.*

*Christine was in her right to ask to be enrolled in the KiwiSaver scheme.*

*There has been no justification to dismiss Christine from her position at the Te Kohanga Reo and a fair process has not been followed.*

[18] Ms Ngatai also requested a meeting with the employer to discuss the matter further.

[19] Ms Henry replied to Ms Ngatai's letter with a denial that there was any grounds for a personal grievance or claim of unjustified dismissal, and stated;

*We have no desire to enter into any arbitration or personal grievance with Mrs Conrad or on her behalf*

[20] The rejection by Ms Henry of the request for a meeting was a breach of the employment agreement which, at clause 13, contained a Code of Conduct giving Mrs Conrad the right to request time to have “*a joint informal meeting*” with the employer “*in which a grievance is given and listened to.*” She also had the right to call for and have another joint meeting with or without the presence of a whanau member or fellow worker, or a manager or person jointly agreed to be an independent arbitrator.

[21] In the circumstances Mrs Conrad had no choice but to lodge her application to the Authority, which she did promptly on 21 July 2008.

[22] The Kohanga through Ms Henry duly lodged a statement in reply expressing among other things a continued rejection of mediation. Directions were therefore issued by the Authority for the parties to attend mediation. These were ignored by Ms Henry and consequently the employer has made no attempt to reciprocate the wish of Mrs Conrad to discuss her dismissal and try to resolve it consensually, as she had the right to do under her employment agreement and as she was required to do in good faith under the Employment Relations Act 2000.

[23] The unreasonable failure of the employer in this regard and its lack of co-operation have impeded the resolution of this personal grievance.

[24] At the investigation meeting on 28 October 2008 Mrs Conrad and Ms Henry gave sworn evidence. In the course of that evidence they confirmed as correct the contents of the signed statement each had given to the Police on 2 July. In many respects those statements are directly opposite accounts of the skirmish between them earlier that day.

[25] Ms Henry admitted that she had placed her hands on Mrs Conrad’s neck and also that she had even said she would “*kill*” Mrs Conrad, but she has explained that her actions and threat were in self-defence to make Mrs Conrad stop handling her.

[26] The Authority viewed a photograph taken at the Police Station when Mrs Conrad made her complaint. It shows her head and shoulders. Ms Ngatai, who saw Mrs Conrad a short time later, said that contusions to her neck were plainly visible.

[27] The Authority heard the evidence of Mrs Conrad first. This was mainly because Ms Henry was not at the investigation meeting by the time it had started

shortly after the notified time. After she arrived she chose not to stay and hear Mrs Conrad's evidence but she returned later.

[28] My overall assessment of the account of what happened given in evidence by Mrs Conrad was that it was fully plausible and also that Mrs Conrad was a believable witness. I felt that she was telling the truth in giving her version of events.

[29] Mrs Conrad did not appear to me to have the physical build or to have the nature of one who could become physically aggressive to the extent that she needed to be physically restrained and threatened with extreme harm if she did not stop pushing Ms Henry. Appearances can of course be deceptive and the Authority does not rely to any great extent on its assessment of the stature and demeanour of Mrs Conrad in determining that she was truthful in her evidence.

[30] Ms Henry is a stronger, fitter looking woman than Mrs Conrad, although they are apparently about the same age. Ms Henry is not so softly spoken as Ms Conrad and at times she became quite excitable, although that might have been due to the stress of the investigation she was taking part in. Anger and volatility from her surfaced during the investigation meeting, with a demonstration by Ms Henry of how the employment contract document was thrown during the fracas. Leaving aside her appearance and demeanour I found Ms Henry's account implausible and regrettably must say that I disbelieved her.

[31] I find that the fracas that resulted in the dismissal of Mrs Conrad was not initiated by her and that she did not push Ms Henry. Mrs Conrad took hold of Ms Henry briefly and only to steady herself from falling over, after being pushed out the door of the kōhanga by Ms Henry who admits that she told Mrs Conrad several times to "*get.*"

[32] The employer made no inquiry into what happened on 2 July and rejected any consideration of the grievance raised by Mrs Conrad. That is not surprising since it appears that Ms Henry, who had complained that she was the victim of physical aggression, regards herself as the employer. That is how it seems from the invisibility in this investigation of any other members of the Kohanga board, or any supporters of Ms Henry, and from the correspondence all of which has been written by Ms Henry.

[33] The employer could not fairly or reasonably conclude that there had been serious misconduct by Mrs Conrad until it had sought from her an explanation of what

had taken place on 2 July. While the employer had the benefit of Ms Henry's explanation, that was only one side of the picture from only one of the participants in the fracas.

[34] There was therefore no opportunity given to Mrs Conrad at all to have her grievance considered by anyone other than Ms Henry, who had obviously been too close to the action to be objective.

### **Determination**

[35] I find that in her conduct responding to Mrs Conrad's approach and then in dismissing her, Ms Henry on behalf of the Kohanga did not act as a fair and reasonable employer would have done in all the circumstances as they were at the time. The actions of the employer including the dismissal do not meet the legal test of justification set out at s 103A of the Employment Relations Act. Therefore the determination of the Authority must be that the dismissal of Mrs Conrad was unjustified.

[36] I find that Mrs Conrad by her own actions did not contribute to the situation that gave rise to her personal grievance. She cannot be blamed for merely wanting to discuss her employment agreement with her employer. When she attempted to do so she was abused by Ms Henry for daring to question the agreement. Ms Henry launched into a tirade and delivered in quick succession formal warnings under the employment agreement, going from the first stage through to the third stage of dismissal in the short time the fracas lasted. I find that she used words of abuse to Mrs Conrad and threw the contract and her shoes at Mrs Conrad.

[37] Mrs Conrad is entitled to the monetary remedies of reimbursement and compensation that she seeks. As explained to her, the Authority cannot order an employer to give an apology.

[38] Mrs Conrad had no work for 5 weeks after her dismissal. Pursuant to s 128 of the Act the Authority therefore orders Taumata Poihipi Te Kohanga Reo to pay to Mrs Conrad \$1,464 gross to reimburse her for the pay lost during that period.

[39] I am quite satisfied from the evidence that Mrs Conrad was considerably distressed by what happened and that this was exacerbated by the trespass notice

banning her from a local marae. In the circumstances that notice was unreasonably issued.

[40] In assessing compensation I take it into account that Mrs Conrad is naturally sympathetic to the cause of Kohanga Reo. She worked in one for some 15 years and has again recently become employed in another. She appreciates that Taumata Poihipi Te Kōhanga Reo is unlikely to have any spare funding for the purpose of paying awards made by the Authority and that ultimately it may be the children who will suffer if there is unplanned for expense.

[41] In the circumstances \$800 awarded under s 123(1)(c)(i) of the Act is a relatively small amount for the harm suffered but takes into account the nature of the employer and limited resources available to it. The Authority orders the employer to pay Mrs Conrad that sum of \$800, as well as the lost wages of \$1,464.

A Dumbleton  
**Member of the Employment Relations Authority**