

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 32/09  
5145018

BETWEEN                      DIANE DALY  
   Applicant  
  
AND                                NORTHERN AUCKLAND  
   KINDERGARTEN ASSN.  
   Respondent

Member of Authority:        James Wilson  
  
Representatives:              Garry Pollak for the applicant  
   Susan-Jane Davies for the respondent  
  
Investigation Meeting:        22 & 23 January 2009 at Auckland  
  
Submissions received        28 January 2009 from the applicant  
   28 January 2009 from the respondent  
  
Determination:                5 February 2009

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**DETERMINATION OF THE AUTHORITY**

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**Ms Daly's dismissal, suspension and interim reinstatement**

[1]     The background to this matter was set out in my determination of 22 December 2008 (AA 435/08), in which I considered Ms Daly's application for interim reinstatement pending a proper consideration of the substantive issues raised by her suspension and dismissal. However, for completeness, I have repeated the opening paragraphs of that determination.

[2]     Diane Daly was employed as Senior Teacher by the Northern Auckland Kindergarten Association (NAKA/the Association) for 13 years. On 12 November 2008 she was requested, by the General Manager of the Association Ms Paula Kearns, to attend a *disciplinary and performance management meeting* to be held on 17 November 2008. The purpose of this meeting was *to discuss allegations arising out of your behaviour observed in the Special General Meeting of members last night.*

The letter went on to set out the behaviour Ms Kearns was concerned about and finished with the statement:

*This is a serious matter and I have to tell you that a possible outcome of this disciplinary and performance management investigation is that you may be dismissed. Accordingly you are advised to bring a support person to this meeting.*

[3] Ms Daly attended the meeting as requested and was accompanied by Mr Pollak as her representative and her husband. NAKA was represented at the meeting by Ms Kearns and the Association's legal representative, Ms Davies.

[4] Near the end of this meeting Ms Daly was suspended. Shortly after the meeting Ms Kearns wrote to Ms Daly confirming that she was *suspended on full pay for a week* and that the meeting would be adjourned for approximately a week to allow Ms Kearns *to make further investigations into Ms Daly's conduct at the SGM.*

[5] On 27 November 2008 a further meeting was held. Ms Kearns put a number of concerns to Ms Daly and the meeting lasted several hours. Following a lengthy adjournment the parties reconvened and Ms Kearns advised Ms Daly that she was *not convinced that she could trust (Ms Daly) to behave appropriately and professionally in difficult circumstances.* She said she *needed to know that she had Ms Daly support* and that she *was not convinced that she had that support.* Ms Kearns concluded her remarks by saying (according to her handwritten notes made at the time):

*So from where I stand I am your GM and I don't have sufficient trust or confidence in you continuing with the Association. So I am considering dismissal but before I make a final decision I want to hear you on what I have said and what you think about dismissal.*

[6] Following further comments from Mr Pollak the meeting was adjourned to allow Ms Kearns to *sleep on it.* The next morning Ms Kearns says she made a final decision to terminate Ms Daly. She conveyed this decision by writing to Ms Daly dismissing her from her employment with immediate effect.

[7] In my earlier determination I ordered that, pending the investigation and determination of Ms Daly's claim for permanent reinstatement:

*Ms Daly is to be reinstated, on full salary, to her position as senior teacher at the Northern Auckland Kindergarten Association on an interim basis and on such conditions as the Association may wish to impose.*

### **The issues for determination**

[8] Having fully investigated Ms Daly's employment relationship problem I am now required to determine whether her suspension and dismissal were justified and, if they were not, whether she should be reinstated on a permanent basis and what, if any, other remedies she should receive.

### **Was Ms Daly's suspension justified?**

[9] Ms Daly is a member of the NZEI and her conditions of employment are set out in the Kindergarten Teachers Head Teachers and Senior Teachers collective agreement (the CEA). That agreement, at clause 6.5, **Suspension**, provides:

*(a) If an allegation is deemed sufficiently serious a teacher may be either suspended with or without pay, or transferred temporarily to other duties.*

*(b) The employer shall not suspend a teacher without first allowing the teacher a reasonable opportunity to make submissions about the allegations and whether suspension is appropriate. However, where the employer is satisfied the welfare and safety of any kindergarten child or other kindergarten employees warrants it, immediate suspension may occur.*

[10] There is conflicting evidence regarding whether or not Ms Daly was given a reasonable opportunity to make submissions about ... whether suspension (was) appropriate. Ms Daly says:

*I was not given any opportunity to make submissions about suspension before I was actually suspended and I was suspended in the context of (Ms Kearns) and her representative excepting my explanation, Mr Pollak's explanation and (my partner's) explanation.*

Ms Kearns, on the other hand, says that she believed that Ms Daly had deliberately lied to her during the course of the disciplinary meeting and that this had destroyed what faith and confidence she may have had in Ms Daly. In her written statement she says:

*I checked the suspension provision in the kindergarten CEA, and then considered my strongly held apprehension about trusting (Ms Daly) in these circumstances was a sufficiently serious reason to suspend, but decided to put it to (Ms Daly) and her lawyer for comment first. Their response was immediate -- it was unlawful and unjustified. They didn't elaborate.*

*This did nothing to shake my doubts about being able to trust (Ms Daly) while I was out and about in a very tense week ahead. I resolved to keep the suspension as short as possible and as confidential as possible.*

*I did not trust her to support me.*

[11] Based on the balance of probabilities I find that Ms Daly was given an opportunity to make submissions on her suspension as required by the provisions of the CEA. I accept Ms Kearns believed that Ms Daly had lied to her during the disciplinary meeting and that Ms Daly could not be trusted to support Ms Kearns, at least in the short term and until something could be done to repair that relationship (assuming that that was possible). As is often the case in emotionally charged situations such as this, what is said is often not what is heard. I believe that what probably occurred is that Ms Kearns advised Ms Daly and her lawyer that she was considering suspension and seeking their reaction. The reaction was, predictably, that Mr Pollak considered suspension to be *unjustified and illegal* (it appears he may have also suggested that suspension was *over the top*.) This reaction was a submission, albeit short and succinct.

[12] My finding in respect to what occurred at this meeting is reinforced by the wording of the letter sent to Ms Daly by Ms Kearns the following day confirming the suspension in the following terms:

*You were suspended on full pay for a week. The reason I gave for the suspension, following your lawyer's representation that suspension would be unlawful and inappropriate, was that this was appropriate given my ongoing issues about trust and confidence in you as an employee. I explained that this*

*week there were a series of important events concerning the Association. In the meeting you admitted that you didn't seek prior permission to take any photos, you didn't see anything wrong with taking photos and your U-turn in the meeting about whether or not you took photos did not reassure me that I could have trust and confidence that you would act professionally and in the best interests of the Association during this important week for the Association.*

[13] Ms Kearns believed that she could no longer trust Ms Daly and that, given the circumstances, suspension was appropriate. She asked Ms Daly for her reaction to that possibility and, having heard the reaction, suspended her on full pay. On balance I find that Ms Daly's suspension was justified.

### **Was Ms Daly's dismissal justified?**

*The reasons for Ms Daly's dismissal*

[14] The reasons given to Ms Daly for termination of employment was set out in a letter dated 28 November 2008. In particular in that letter said:

*The reason for your dismissal is your serious breach of your implied duty to act in such a way as to not undermine my trust and confidence in you as an employee. (Emphasis added) This has been manifested by you in a number of ways, but broadly as a continuing state of affairs where your demeanour is erratic and you show a repeated unwillingness to take responsibility and ownership of a series of actions and professionally inappropriate behaviours which have been discussed with you at the relevant time or times over a lengthy period. We discussed recent examples during the two-part investigation process concluded yesterday which included, but were not limited to:*

- a. Vehement denial for most of the part one investigation meeting on 17 November that you took any photos, and then your belated acceptance that you had taken one photo, but not until I adjourned the meeting to consider how best to respond to your persistent denials.*
- b. Your serious lack of professional judgement in being very visually prominent taking a photo or photos (or at least behaving in such a way*

*as appearing to others to be taking photos) of people at the highly charged and emotive SGM on 11 November and your subsequent and sustained lack of appreciation that this was inappropriate for you as a senior NAKA employee.*

- c. Mishandling of the meeting between you, me and the President and Vice President of Oaktree kindergarten committee on 17 September 2008 in which, amongst other unprofessional actions you made inappropriate comments, requests and behaviours which resulted in written complaints. At a lengthy meeting to discuss this on 13 October 2008 you agreed to write to the complainants. You have not done so, and told me yesterday that you did not believe an apology was appropriate.*
- d. Failure to adequately support and supervise (an Head Teacher's) performance .....*
- e. Your failure to do what you had agreed with me you would do, namely to spend more time in Oaktree kindergarten during (the head teacher's) absence, and your failure to tell me that you had not done so. ....*
- f. Periodic actions such as above which undermined me and previous GM's such as Chris Pynenburg and Cherryll Wilson.*

#### *Legal considerations*

[15] The parties agree that the test to be used in deciding whether or not Ms Daly's dismissal was justified is that set out in section 103A of the Employment Relations Act (the Act). I.e.

*... the question of whether a dismissal... 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 ... occurred.*

[16] Since this test was introduced in 2004 the Employment Court has applied it to a number of circumstances. Ms Davies drew my attention to Judge Shaw's judgement in *Arthur D Reilly & Co Ltd v. Jessica Wood* (WC 18/08; 8 October 2008, unpublished) where the Judge said:

[51] Mr Vincent submitted that in the light of *Air New Zealand Ltd v Hudson* [2006] ERNZ 415, and *X v. Auckland District Health Board* [2007] ERNZ 66, the approach was to consider the dismissal from the point of view of an impartial observer and compare the approach such a person would have taken the approach actually taken by the employer....

[52] Section 103A obliges the Court to take an objective approach to determining justification for dismissal. The process is essentially to review the employer's decision to dismiss. It is not for the Court to find whether the e-mail was objectionable. The question is whether the employer was justified in his decision.

[53] Section 103A also provides a standard by which the dismissal is to be reviewed: what would a fair and reasonable employer have done in all circumstances?

[54] The test is not that the dismissal is judged according to the standards of an impartial observer. Section 103A recognises that the circumstances of an employment environment are a factor to be considered. This means that the standards of what is fair and reasonable may be variable according to the circumstances and a fair and reasonable employer may not necessarily be totally impartial or neutral. Of necessity employers bring to their decisions the values, culture and expectations of the specific workplace. They must weigh the impact of the behaviour of an employee under investigation on other employees and the work environment generally.

[55] This does not give employers unbridled licence to impose their personal prejudices or values on employees. The concept of fairness implies an open-minded approach and reasonableness implies rationality.

[17] Another helpful judgement is that of Judge Travis in *Julian Blaker v. B & D Doors (NZ) Ltd*, (AC8B/07 21 September 2007), :

[8] Bearing the obligations imposed on the Court by s.103A in mind, it is helpful to first approach the matter from the defendant's (the employer's)

*point of view, to analyse whether its investigation, the way it acted and the conclusion it reached, were what a fair and reasonable employer would have done in all the circumstances, at the time of the dismissal. In doing so I accept Mr Bevan's formulation of the issues the Court will have to resolve in determining whether (the employer) has discharged the burden of justifying the dismissal, namely:*

*(i) was (the employer) justified in concluding that (the employee) could not reasonably have believed he was authorised to remove the offcuts?*

*(ii) was (employer) justified in concluding that (the employee) had lied during the disciplinary investigation?*

*(iii) did the employer follow a fair process?*

*(iv) was the decision to dismiss (the employee) one which a fair and reasonable employer would have made in all circumstances?*

[18] Adapting the formulation adopted by the judge in *B & D Doors* the questions to be addressed in determining whether or not Ms Daly was justifiably dismissed are:

(i) Was Ms Kearns justified in concluding that Ms Daly had seriously breached her implied duty to act in such a way as not to undermine Ms Kearns trust and confidence in her as an employee?

(ii) Was Ms Kearns justified in concluding that Ms Daly had behaved in the specific ways which, according to Ms Kearns had undermined the trust and confidence in Ms Daly. In particular was she justified in believing that Ms Daly had lied to her during the investigation meeting on 17 November 2008.

(iii) Did Ms Kearns follow a fair process; and

(iv) was the decision to dismiss Ms Daly one which are fair and reasonable employer would have made in all circumstances?

### ***A fair process?***

[19] It is logical to consider first of all whether or not Ms Kearns followed a fair process in reaching the decision to dismiss Ms Daly. The first step in this process was Ms Kearns letter to Ms Daly dated 12 November 2008 inviting her *to attend a disciplinary and performance management meeting* on 17 November. This letter said specifically that the meeting was to discuss allegations arising out of Ms Daly's behaviour observed at the special general meeting on 11 November 2008 and in particular said that Ms Daly was not authorised to bring a partner to the meeting and

that Ms Daly and her partner were not authorised to take photographs during the meeting. The letter also said that it was inappropriate for photographs to be taken in the circumstances and that complaints had been received from association members. The letter went on to say that NAKA believed that this behaviour was potentially serious misconduct and in direct breach of Ms Daly's professional obligations to NAKA under the national professional standards for Senior Teachers. It also suggested that this behaviour was contrary to Ms Daly's previous assurances in which she had agreed to take a leadership role within the organisation and the behaviour seriously undermined NAKA's trust and confidence in her as an employee. The letter concluded:

*This is a serious matter and I have to tell you that a possible outcome of this disciplinary and performance management investigation is that you may be dismissed. Accordingly you are advised to bring a support person to this meeting.*

[20] At the meeting on 17 November much of the discussion centred on whether or not Ms Daly and/or her partner had taken photographs at the special general meeting. There is no dispute that Ms Daly denied having taken any photographs. In her evidence to the Authority Ms Kearns said:

*Because of what I had seen with my own eyes at the SGM, (in holding up the camera and taking photos), I was quite frankly incredulous that (Ms Daly) was now utterly denying to me that she and (her partner) had taken any photos.*

.....

...

*while I was in a separate room talking to my lawyer, completely contrary to what she had been saying resolutely moments before, (Mr Pollak) knocked on the door to say that (Ms Daly) had "remembered" that she may have taken a photo of the general crowd at the beginning of the meeting, but that she hadn't kept the photo.*

*With this, (Ms Daly's) credibility plummeted in my book.*

[21] At the conclusion of the meeting on 17 November Ms Daly was suspended on full pay and the meeting adjourned for approximately one week to allow Ms Kearns *to make further investigations* into Ms Daly's conduct at the SGM.

[22] Over the next few days there was an exchange of correspondence between Mr Pollak and Ms Davies regarding the ongoing disciplinary investigation. In an e-mail to Mr Pollak on 24 November 2008, Ms Davies said:

*The employer does not see this as simply serious misconduct for taking a photo at a public meeting. The serious misconduct limb of the original allegation has now, in any event being withdrawn. The other limbs have now been severed so that each forms a separate stand-alone allegation.*

In other words while the serious misconduct element of the letter of 12 November 2008 had been withdrawn the other components set out in the letter remained. The intention appears to have been to leave in place the allegation that Ms Daly *was in direct breach of professional obligations to NAKA and the national professional standards for Senior Teachers*, that she had *contravened her assurances that she would take a leadership role within the organisation in support of the Board* and that she had *seriously undermined NAKA's trust and confidence in her as an employee*. If Ms Davies' e-mail had stopped at that point it would have been defective in that it failed to spell out how NAKA believed Ms Daly had breached her professional obligations, contravened her assurances or undermined NAKA's trust and confidence. However e-mail then went on to say:

*There are still a number of unresolved issues of significance in this matter. One is the conflict of evidence between Ms Daly and those who complained to Ms Kearns at the meeting and afterwards (as now reflected in the additional statements supplied to you on Friday last), namely that initially and for the bulk of the investigation meeting Ms Daly emphatically denying taking any photographs at all, then belatedly, during the adjournment admitting through you that she may have taken one photo at the beginning of the meeting to then admitting in a resumption of the meeting that she took one photo only, but that she didn't keep it. The second is that (Ms Daly) did not see anything inappropriate about taking photos in the circumstances. The third is that this*

*incident followed shortly after a long and protracted informal coaching meeting between (Ms Kearns) and your client following recent complaints from two committee members/parents from Oaktree kindergarten about (Ms Daly's) inappropriate comments and behaviour in an earlier professional context. A copy of those complaints will follow by separate e-mail, because they are symptomatic of an ongoing lack of professional leadership and behaviour on behalf of your client which was in the employer's mind when deciding whether she could trust (Ms Daly) in her post during an extremely sensitive period or whether to suspend.*

[23] These *unresolved issues* were further clarified in a e-mail the following day (25 November) from Ms Davies to Mr Pollak, saying:

*I should make it clear that while the allegation of serious misconduct has been withdrawn, (Ms Daly's) job is still at risk because the other three allegations are still standing. There remain serious doubts in the employer's mind about it's trust and confidence in (Ms Daly). This is not an issue about personality conflicts between (Ms Kearns) and (Ms Daly). This is about a pattern of (Ms Daly's) behaviour tending towards an undermining (of) the professional relationship between herself and (Ms Kearns). Taking photos at the heated SGM is but one example, Ms Daly's vehement denial of taking any photos for most of the initial part of the investigation meeting on 17 November which goes against (Ms Kearns) own recollection and the recollection of a number of witnesses (as shown in the statements forwarded to you) is another. This is against the backdrop of other inappropriate behaviours such as the inappropriate outburst towards the two Oaktree committee members on 17 September. This matter has not been dealt with so far as the employer is concerned. While there was a lengthy informal meeting on 10 October at which the NZEI represented (Ms Daly), no outcome agreement has been reached nor the agreed action on (Ms Daly's) part has been taken to date. This is another matter going to trust and confidence in (Ms Daly) which the employer wishes to discuss at the resumption of the investigation meeting on Thursday morning.*

[24] As arranged a second disciplinary meeting was held on 27 November 2008. The first part of this meeting lasted several hours. The meeting canvassed at some length the evidence produced by the respective parties regarding taking photos at the SGM. Ms Kearns says that she also put a number of other concerns to Ms Daly including:

- a. Her general lack of trust in Ms Daly
- b. Ms Daly carrying on with supervision coaching after the previous general manager had asked her to stop.
- c. The undermining of the previous general manager by not cancelling a head teacher's meeting.
- d. Ms Daly's refusal to allow a teacher to return to full-time duties.
- e. Ms Daly's flat denial that she had taken photos at the SGM
- f. this Daly's failure to sign a memorandum of understanding and her failure to apologise to the Oaktree kindergarten committee.

Ms Kearns says that during the meeting she also asked Ms Daly why she had not attended Oaktree kindergarten while the head teacher was on leave as she had agreed to do. Ms Kearns says she was *startled* to hear Ms Daly say that she didn't go into the kindergarten because the NZEI had told her not to. She says this was once again an incident where Ms Daly had not done what she had said she would do and hadn't even discussed it with her as her general manager.

[25] Ms Kearns says that during this meeting Ms Daly said nothing to give her any comfort *that Ms Daly knew how, or was even willing to do things differently*. Ms Kearns said she was left with the feeling that Ms Daly didn't see her as her manager at all and was biding her time until Ms Kearns moved on.

[26] The meeting adjourned around the middle of the day for several hours during which Ms Kearns says she considered all of the circumstances. The meeting reconvened in the early evening and Ms Kearns made a lengthy statement from notes prepared during the adjournment. Ms Kearns said that she had not been convinced by Ms Daly that she could restore the necessary confidence and trust she needed to have in her senior teacher. After listing the reasons why she was not convinced she said in summary (as recorded in her notes):

*So from where I stand I am your GM and I don't have sufficient trust and confidence in you continuing with the association. So I am considering dismissal but before I make a final decision I want to hear you on what I've said and what you think about dismissal.*

[27] After a further adjournment Ms Daly did not return to the meeting as she was extremely distressed. However Mr Pollak advised Ms Kearns that Ms Daly would do *whatever it took to keep her job* and reiterated that she was prepared apologise, to accept a warning and have further coaching. Ms Daly says that she believes that she was summarily dismissed at this point. Ms Kearns however says that:

*It is true that by this time the writing was on the wall. I hadn't actually thought through all the details like notice but I could not see Ms Daly's lawyer's proposal of a warning and more coaching as being a viable alternative to dismissal in the circumstances because I just didn't have the trust that (Ms Daly) wanted to change let alone the confidence that she would. Nevertheless I did sleep on it. When I woke up the next day I mulled it over again and felt I just couldn't trust (Ms Daly)*

[28] On 28 November 2008 Ms Kearns wrote to Ms Daly formally dismissing her. The reason for the dismissal set out in the letter was Ms Daly's *serious breach of your implied duty to act in such a way as not to undermine my trust and confidence in you as an employee*. The letter, as set out in full at paragraph 14 above, went on to list recent examples *discussed during the two-part investigation process* including but not limited to:

- a. Vehement denial for most of the part one investigation meeting on 17 November that you took any photos ...*
- b. Your serious lack of professional judgement in being visually prominent taking a photo or photos (or at least behaving in such a way as appearing to others to be taking photos) of people at the highly charged and emotive SGM ...*
- c. Mishandling of the meeting between you, me and the President and Vice president of Oaktree kindergarten committee on 17 September 2008 ...*

- d. *Failure to adequately support and supervise (the head teacher's) performance as Head Teacher at Oaktree ...*
- e. *Your failure to do what you had agreed with me you would do, mainly to spend more time in Oaktree kindergarten during (the head teachers) absence, and your failure to tell me that you had not done so. ...*
- f. *Periodic actions such as the above which undermined me and previous GM's ...*

[29] In the determining whether or not the process followed by NAKA in deciding to dismiss Ms Daly was fair it is necessary to consider whether or not Ms Daly had been fully advised of the issues which her employer was taking into account and that her employment was in jeopardy. In this regard the evidence is that Ms Daly was certainly aware that her job was in jeopardy. In her statement of evidence she acknowledges that she had *received an e-mail confirming the allegation of serious misconduct had been withdrawn but my job was still at risk because of three allegations ...* However she then goes on to list the three allegations as:

- (a) taking photos;*
- (b) the backdrop of alleged inappropriate behaviours ...; and*
- (c) the issue of (Ms Kearns) stated lack of trust and confidence in me as an employee.*

[30] This summary of the three allegations suggests that Ms Daly either misunderstood Ms Kearns concerns or she, in hindsight, wishes to reframe those concerns to support her contention that her dismissal was unjustified. Whichever of these options is true I am satisfied that NAKA did advise Ms Daly of its concerns on more than one occasion. These concerns were clearly spelt out in Ms Davies e-mails to Mr Pollak of 24 and 25 November 2008. These e-mails emphasised the loss of trust. In particular they emphasised that Ms Kearns main concern was not *taking photos* but rather Ms Daly's *emphatically denying taking any photographs*. Ms Kearns saw this as a deliberate lie in the face of her own observations. The reason given for dismissing Ms Daly in the letter 28 November 2008 was Ms Daly's *serious breach of (Ms Daly's) implied duty to act in such a way as not to undermine (Ms Kearns) trust and confidence in you as an employee*. This is entirely consistent with the reasons given to Ms Daly before the second disciplinary meeting. While a number

of examples of why Ms Kearns had lost confidence and trust in Ms Daly were discussed and subsequently listed in the dismissal letter these were examples of what Ms Kearns regarded as breaches of Ms Daly's duty not themselves or individually the reasons for dismissal.

[31] Ms Daly was advised both that her continued employment was in jeopardy and the reasons why her employer was considering her dismissal. She was properly represented and given adequate opportunity both to refute her employer's concerns and put forward arguments against her impending dismissal. The process used by NAKA in deciding to dismiss Ms Daly was fair.

*Was Ms Kearns justified in concluding that Ms Daly had seriously breached her implied duty not to undermine the trust and confidence of her employer?*

[32] Ms Kearns herself says that she had lost trust and confidence in Ms Daly. She makes the statement based on her own experience of a number of incidents to which she had been a party and/or had personally observed. She gave Ms Daly proper opportunity to explain the actions which had led her to this conclusion. Ms Kearns had lost trust and confidence in Ms Daly. This is a matter of fact. The more important question perhaps is whether that lack of trust and confidence is justified based on the evidence before her.

*Was Ms Kearns justified in concluding that Ms Daly had behaved in the specific ways that had undermined her trust and confidence?*

[33] Ms Kearns observed some of Ms Daly's behaviours herself. She believed she had been lied to during the investigation meeting on 17 November. Under the circumstances this was not an unreasonable conclusion. In evidence before the Authority Ms Daly acknowledged that she had *panicked* and had persisted in denying taking any photographs in the belief that she was going to be dismissed. Ms Daly, in Ms Kearns view, failed to acknowledge that her behaviour, on a number of occasions, had been inappropriate and when challenged Ms Daly failed to accept any responsibility. Ms Kearns raised several examples with Ms Daly and these were canvassed at the Authority's investigation meeting. (Examples included the failure to cease undertaking NAKA funded counselling when requested to do so; the *inappropriate outburst* towards the two Oaktree committee members and the failure, despite having agreed to do so, to spend time at the Oaktree kindergarten in the

absence of the head teacher.) I am satisfied that Ms Kearns was justified in concluding that Ms Daly had behaved in the specific ways which have led to the undermining of her trust and confidence in Ms Daly as an employee.

[34] Although some of the behaviours raised by Ms Kearns during the investigation meeting had not specifically been put to Ms Daly during the disciplinary process I am satisfied that these matters were not relied on by Ms Kearns as part of her decision to dismiss. Rather they were raised with the Authority to support NAKA's contention that, should Ms Daly be found to have a personal grievance, her application for reinstatement would be impracticable.

***Was the decision to dismiss one which a fair and reasonable employer would have made in all circumstances?***

[35] It is apparent that Ms Kearns conclusion that Ms Daly had lied to her regarding whether or not she had taken photographs of the SGM weighed heavily in her decision to dismiss. In addition she was faced with an employee who appeared not to accept that her behaviour was inappropriate and at times directly contrary to what had been agreed (e.g. the failure to spend time at Oaktree kindergarten and the failure to stop attending counselling). As set out in *Arthur D Riley* (see above) I am required to consider Ms Kearns conclusions not as an impartial observer but taking into account the specific circumstances with which Ms Kearns was faced. Despite Mr Pollak's submissions to the contrary I do not accept that Ms Kearns set about a deliberate strategy to dismiss Ms Daly. There is no evidence to support this contention. In reality it is probable that Ms Kearns did not actively contemplate dismissing Ms Daly until the meeting of 17 November i.e. when she was confronted with what she considered to be a barefaced lie. Even then Ms Kearns did not make a rushed decision but, as evidenced in the notes she made at the time, considered all of the surrounding circumstances, including Ms Daly's responses, and came to the conclusion that her trust and confidence in Ms Daly was irretrievably lost

[36] Under all the circumstances I find that the decision to dismiss this Daly was one which a fair and reasonable employer would have made.

**Determination**

[37] I have found that having undertaken a fair process NAKA reached the fair and reasonable conclusion that Ms Daly should be dismissed. **Ms Daly's dismissal was justified and she does not have a personal grievance against her former employer the Northern Auckland Kindergarten Association.**

**Concluding comments**

[38] This is a particularly difficult case not least because of the strength of feeling on both sides and because of the major consequences for the parties whatever the final determination. I have been presented with a wide range of evidence, particularly by Ms Kearns and the other witnesses for NAKA. While I acknowledge that the points raised are important to those concerned much of the evidence presented was by way of background and is not directly relevant to the resolution of Ms Daly's employment relationship problem. In the interests of delivering my determination as quickly as possible I have not canvassed the full extent of that evidence in this determination. However I wish to reassure the parties that I have carefully considered all of the documents and information put in front of me both in the written statements and orally at the investigation meeting.

**Termination of employment**

[39] As a result of my earlier order that Ms Daly be reinstated to her position on an interim basis I understand that she is currently on full pay but on garden leave. Given the outcome of this determination her employment with NAKA is to be terminated with immediate effect. The question of whether or not Ms Daly should repay any or all of the salary she has received since her interim reinstatement is a matter in the first instance for discussion between the parties. Should they be unable to reach agreement on this matter NAKA may file and serve submissions within 28 days of the date of this determination. Ms Daly will then have 14 days in which to file and serve a response.

**Costs**

[40] Costs are reserved and parties are urged to attempt to reach agreement on this matter between themselves in the first instance. If they are unable to do so NAKA may file and serve submissions in respect of costs within 28 days of the date of this determination. Ms Daly will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority