

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2014] NZERA Christchurch 15
5425102

BETWEEN NGAPARE JAY
 Applicant

AND MANUKA COMMUNITY HOUSE
 INCORPORATED
 Respondent

Member of Authority: Helen Doyle

Representatives: Luke Acland, Counsel for Applicant
 Kay Chapman, Advocate for Respondent

Investigation Meeting: 22 October and 22 November 2013 at Nelson

Submissions received: 29 November and 18 December 2013 from Applicant
 12 December 2013 from Respondent

Determination: 5 February 2014

DETERMINATION OF THE AUTHORITY

- A I have found that the applicant was unjustifiably dismissed from her employment with the respondent.**
- B Taking 10% contribution found into account I have ordered payment of lost wages in the sum of \$16,875 gross and compensation in the sum of \$10,800 without deduction.**
- C the claim for holiday pay and KiwiSaver was made for the first time in final submissions. No award is made for these claims.**
- D I have reserved the issue of costs and timetabled for an exchange.**

Prohibition from publication

[1] With the agreement of both parties, I prohibit from publication under clause 10.1 of Schedule 2 of the Employment Relations Act 2000 (the Act) the names of any children who attend or attended at the early childhood centre run by the respondent.

Employment relationship problem

[2] Manuka Community House Incorporated (Manuka) is a duly incorporated society under the Incorporated Societies Act 1908. It is licensed as an early childhood education centre under the Education Act 1989 and its 1998 Regulations. Manuka operates an early childhood education centre in Nelson called The Manuka Early Learning Centre (the Centre).

[3] Ngapare Jay commenced working for Manuka as the Head Teacher and Centre Manager on 14 June 2010. Mrs Jay was party to a written independent employment agreement with Manuka dated 2 July 2010 (the employment agreement). For completeness, she had previously worked at Manuka in 2004.

[4] Manuka is governed by a body of at least seven appointed members known as the Collective as provided in clause 5 of Manuka's constitution. Manuka is required to nominate a person to hold the Centre's licence. That person is known as the licensee. At the material time, that the Authority is concerned with, the licensee was Nadia Packer. She has been the licensee for Manuka since 28 March 2013. The previous licensee of Manuka was David Borcovsky. Clause 1.1 of the employment agreement refers to Mrs Jay's employer as Manuka Community House Inc. as represented by the management collective.

[5] In early April 2013 Ms Packer in her capacity as licensee of Manuka commenced a disciplinary process following a complaint received from Nicola Gardiner, a teacher at the Centre, and from Jordan Christian, teacher-in-training at the Centre, about Mrs Jay.

[6] At the conclusion of the disciplinary process, Ms Packer on 5 July 2013 terminated Mrs Jay's employment. Mrs Jay says that this was unjustifiable. Manuka does not accept that the dismissal was unjustified. Mrs Jay applied unsuccessfully for interim reinstatement.

[7] It was clarified at the substantive investigation meeting that Mrs Jay no longer seeks reinstatement to her former position at Manuka. The remedies that Mrs Jay seeks were clarified in final submissions as follows:

- (a) Reimbursement of three months' lost wages in the sum of \$18,750 based on an annual salary of \$75,000;
- (b) Holiday pay on reimbursement of lost wages and KiwiSaver employer contribution at 4%; and
- (c) Compensation for hurt and humiliation in the sum of \$15,000.

Issues

[8] The Authority needs to determine the following issues in this employment relationship problem:

- (a) Was the dismissal justifiable;
- (b) If the dismissal was not justifiable, then the Authority needs to consider what remedies Mrs Jay is entitled to and whether there are issues of contribution and/or mitigation.

Test in s.103A of the Act

[9] There is a statutory test of justification contained in s.103A of the Act.

[10] It provides that the Authority must determine whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[11] The Authority must consider the procedural factors set out in s.103A(3)(a)-(d) of the Act and any other factors that it thinks appropriate. It must not determine that a dismissal is unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

The employment agreement

[12] Clause 11.1 of the employment agreement provided for termination of employment as follows:

11.1 Four weeks notice of resignation or dismissal shall be given by the Employee or Employer except in the case of serious misconduct where an Employee shall be subject to instant dismissal. Where the required notice is not given by either party then the corresponding number of weeks' salary shall be paid or forfeited by the party improperly terminating the employment. A shorter period of notice may be accepted when agreed between Employer and Employee.

[13] There was no description in the employment agreement or any policies about what constituted serious misconduct. It did, however, come to light during the first day of the investigation meeting that there was some documentation/policies about staff/families and complaints. Subsequently, and before the resumption of the second day of the investigation meeting, the Authority and Mr Acland were provided with copies of a complaints chart, complaints policy for whanau and families, child protection policy and personnel policy. The complaints chart supported that there was an emphasis on resolution of any conflict involving either a parent or a staff member.

Background against which issues are to be assessed

[14] Although Mrs Jay was employed as both Head Teacher and Centre Manager at Manuka, she only worked as Centre Manager for a period from in or about mid 2012 until February 2013. During this time, Ms Packer's sister, Mandi Packer, was appointed as Head Teacher.

[15] In October and November 2012 the Collective discovered that there were additional wage costs for October. They discovered that this was because Mrs Jay had essentially been working 40 hours per week in the office and not as the Collective expected 20 hours on the floor and 20 hours in the office. Temporary employees were being hired instead of Mrs Jay working on the floor and this accounted for the wage increase. This was brought to Mrs Jay's attention at the Collective meeting and Mrs Jay was advised that the Collective did not need her to be full time on administration and that she must work 20 hours on the floor herself. She was advised that budgeting would be done on that basis.

[16] On 4 March 2013 Mrs Jay had again resumed responsibilities for both her roles. Ms Gardiner emailed the then licensee, Mr Borcovsky, and copied in four other members of the Collective. In her email, Ms Gardiner listed areas of concern that she wished to discuss about Mrs Jay. An objective assessment of the email supports that Ms Gardiner's main concern was about Mrs Jay's interactions with children at the

Centre. Ms Gardiner requested a meeting with Mr Borcovsky and other members of the Collective on 7 March 2013 to discuss her complaint.

[17] Materially to the disciplinary allegations Mrs Jay subsequently faced there was a paragraph in the email about staffing/ hours which provided:

The hours that Ngapare is stating that she is on the floor are incorrect and don't marry up with the roster. I find it hard to understand that a centre that we are told is limited on resources/payrise's due to budgets can afford to overstaff the centre. Eg, on Wednesday 27th we had 13 children with 4 staff, 3 of whom are qualified, and one whom is Kindergarten reliever on high rate. In addition the teacher aide/ support person was available.

On Friday 1st March, there were 20 children in the morning, 17 in the afternoon. There were 5 teachers plus the teacher-aide, rostered for the whole day. The manager was rostered on the floor for these days.

[18] Not all of the members of the Collective received the complaint from Ms Gardiner. On Thursday, 7 March 2013, Mr Borcovsky and two members of the Collective, Noleen Harper and Ms Packer, met with Ms Gardiner to discuss her concerns. Although Ms Gardiner had recorded at that time that on four days on 25 February, 27 February, 28 February and 5 March 2013 there were some variations between Mrs Jay's recorded rostered hours on the floor or student time (with Ms Gardiner) and the rosters, Mr Borcovsky asked her to continue to monitor Mrs Jay's hours.

[19] On 14 March 2013, a staff member at Manuka made a telephone complaint to the Ministry of Education about Mrs Jay. Mr Acland was able to obtain a copy of the note taken at the time of the telephone call when it was made to the Ministry of Education as Official Information however the name of the person making the complaint was redacted.

[20] On 19 March 2013 the minutes of a Collective meeting recorded Mr Borcovsky's resignation and Ms Packer's election to the position of Licensee.

[21] On 20 March 2013, Jordan Christian telephoned Ms Packer upset at a conversation she had had with Mrs Jay that day. Ms Packer encouraged Ms Christian to email her the concerns in writing so that she could formally take the concerns to Mrs Jay.

[22] On 21 March 2013, Ms Gardiner emailed a second complaint to Ms Packer in which she alleged Mrs Jay had treated a child contrary to Regulations 33 and 34 of the Education (Early Childhood Centres) Regulations 1998. Ms Gardiner said that Mrs Jay had left a boy in solitary confinement, contrary to Regulation 34.

[23] On 25 March 2013 Ms Gardiner emailed a further complaint about Mrs Jay allegedly isolating a child.

[24] Ms Packer did not talk to Mrs Jay about the complaints she received on 20, 21 or 25 March 2013. There had not been any discussion with Mrs Jay about the 4 March 2013 complaint or the monitoring that had taken place. Ms Packer recalled that on 25 March 2013 Helen Robinson, Manager Early Childhood Nelson, telephoned her to inform her to advise that the Ministry had received a telephone complaint on 14 March 2013. Ms Packer then provided all three of Ms Gardiner's email complaints to the Ministry of Education. This included as part of the first complaint detail of monitoring of hours spent on floor.

[25] Ms Robinson then telephoned Ms Packer and asked her to attend a meeting with the Ministry of Education on Thursday, 28 March 2013. She asked her to ask Mrs Jay to attend as well. Viv Ruth, who is the Senior Manager of the Early Childhood Education Southern Region Ministry of Education, was also to be present at the meeting. Ms Packer was asked by Mrs Jay what the purpose of the meeting was but advised her that she was unsure. Mr Acland's submission that was unlikely is persuasive because only the day or so before the meeting was arranged Ms Packer had forwarded to the Ministry of Education Ms Gardiner's three email complaints. The evidence supported that Ms Packer may well have felt constrained about what she could say because of advice from the Ministry of Education.

[26] On 28 March 2013, Mrs Jay met with the Ministry of Education representatives and Ms Packer. Mrs Jay attended the meeting with her husband Tony Jay. This meeting was not the main focus of the Authority's investigation but it is necessary to have regard to what occurred because Mrs Jay after that meeting was advised of three allegations including one that she thought had been discussed and dealt with at that meeting. Two documents provided as part of the agreed bundle do provide some insight into the meeting of 28 March 2013 and outcomes. The first is the minutes of the meeting provided by the Ministry of Education and the second is a letter from the Ministry of Education to Ms Packer dated 9 April 2013 which amongst

other matters referred to a course Incredible Years for Teachers Programme and the cost of that course of \$200.00 that the Ministry had said it would look into for Mrs Jay. There was no suggestion of ongoing involvement of the Ministry.

[27] On 30 March 2013, Ms Gardiner emailed Ms Packer a typed document titled *Staff Register Inconsistencies – February/March 2013*. Ms Gardiner sent this as a record of time between 25 February 2013 and 15 March 2013 that Mrs Jay had not been on the floor teaching when she was rostered to be. This record had been compiled from covert observation of Mrs Jay by Ms Gardiner as suggested by Mr Borcovsky as at the 7 March meeting for a period from 25 February 2013 to 15 March 2013.

[28] On 1 April 2013, Ms Christian emailed Ms Packer a written complaint of a conversation she had had with Mrs Jay on 20 March 2013 as Ms Packer had requested.

[29] On 5 April 2013, Ms Packer wrote to Mrs Jay raising issues about unprofessional behaviour. The allegations set out in that letter were as follows:

- *That a child has been left in Solitary Confinement on two separate occasions (21 March 2013 and 25 March 2013);*
- *That on 20 March 2013 you interacted with Jordan Christian resulting in her feeling bullied and that she was unwanted at the Centre;*
- *That there are discrepancies between times you have been rostered to be on the floor and when you have actually been present on the floor.*

[30] The letter invited Mrs Jay to an investigation meeting on Tuesday, 9 April 2013 and advised that if the allegations were made out and constituted misconduct or serious misconduct then disciplinary steps may follow. These were outlined to range from warnings through to summary dismissal for serious misconduct. Mrs Jay took a period of sick leave from 9 April 2013 to 6 May 2013.

[31] The email complaints of Ms Gardiner and Ms Christian were not enclosed with the letter. It is common ground that additional information including the email complaints were given to Mrs Jay on 15 April 2013 when her daughter went to the Centre and collected copies of them from Ms Gardiner and Ms Christian including the

on the floor discrepancy summary prepared by Ms Gardiner. A dispute arose at the substantive investigation meeting as to whether Mrs Jay was ever provided with staff registers and staff rosters with respect to the discrepancy allegations. Ms Packer says that the information was forwarded on and Mrs Jay says that she did not receive the information.

[32] The Authority had earlier noted that the relevant staff registers and rosters for the material period attached to the statement in reply were incomplete. On raising this with the representatives Mr Acland then said that Mrs Jay had not been supplied with any of the supporting records but Ms Packer maintained that they had been provided to Mrs Jay's daughter along with the other documents on 15 April 2013. The full records were subsequently provided to the Authority and Mr Acland.

[33] Having carefully considered this matter, I could not be satisfied that the information provided to Mrs Jay's daughter on 15 April 2013, included copies of the relevant rosters and registers against which Ms Gardiner's summary of inconsistencies with times on and off the floor could be considered. It does appear from document 68 that Ms Gardiner supplied photocopies of the staff records to Ms Packer but I conclude it seems more likely than not that these were not forwarded on to Mrs Jay. The notes taken at the disciplinary meeting on 14 May 2013 do not reflect consideration being given to any such records and an earlier email from Ms Packer to Mr Acland dated 7 May 2013 sets out what documents Mrs Jay had in her possession and there is no description of staff registers, staff rosters or staff signature forms. In conclusion, therefore, I find that Mrs Jay only had Ms Gardiner's summary of times of Mrs Jay whilst rostered on/off the floor and not any supporting documentation at the time of the disciplinary process.

[34] Mrs Jay was represented by her Union representative from NZEI, Una McNair until her return from sick leave. Ms McNair wrote to Ms Packer on 18 April 2013 expressing some concerns. She wrote that Mrs Jay had been effectively ambushed at the 28 March meeting with the Ministry of Education as she had no information about what was to be discussed. Further that the copies of the actual complaints made were withheld from Mrs Jay from 21 March onwards until provided on 15 April 2013, leaving Mrs Jay vulnerable as she was unaware of the perception about her professional behaviour held by her colleagues. Finally Ms McNair wrote that NZEI did not believe based on the flawed process to date and because there may be a

favourable bias towards the complainants that Mrs Jay can rely on the members of the current committee to carry out a fair and transparent investigation. Ms McNair requested that an impartial investigator be appointed.

[35] Mrs Jay then instructed Mr Acland. She was cleared medically fit to return to work on 6 May 2013 and continued to work with Ms Christian. The disciplinary meeting was scheduled for 14 May 2013.

[36] Ms Packer had emailed Mr Acland about an hour before the meeting on 14 May 2013 to advise that Glenda Haren would be sitting in on the meeting because she thought it would support her final report. She explained that Ms Haren had been asked to see through the investigation after she had heard Mrs Jay's side of events. She described Ms Haren as completely unbiased and that she would be attending in a neutral position.

[37] Ms Haren was summoned to give evidence at the Authority investigation. I found her to be a knowledgeable and sensible witness with historical experience in the early childhood area. Ms Haren said that she was telephoned by Ms Packer sometime in March 2013 who explained that she had received complaints and had been advised that Ms Haren was a good person to undertake the investigation. Ms Haren said that she agreed to undertake an investigation but then went away for two weeks. On her return she heard again from Ms Packer who indicated that she still wanted her to undertake the investigation. Ms Haren said that she attended the meeting on 14 May as an observer and as a first step in the investigation process. She took notes that were provided as did Mr Acland. Both sets of notes were full and there was no real dispute about what was said at the disciplinary meeting.

[38] Mrs Jay denied the allegation of leaving a child in solitary confinement on two occasions.

[39] The next allegation concerned bullying Ms Christian and making her feel unwanted. Ms Christian had set out in her written complaint dated 1 April 2013 that her lecturer from Te Tari Puna Ora O Aotearoa had come to the Centre to visit her and do an observation on 20 March 2013. She spoke to the lecturer about how she was feeling and that she was experiencing stress at Manuka. At the end of what she described in the complaint as a two hour discussion with her lecturer she was advised to take sick leave from the Centre immediately.

[40] The nub of the complaint about Mrs Jay then followed in the written complaint. Ms Christian's lecturer and Mrs Jay spoke together in Te reo Maori and Mrs Jay pointed towards her during this conversation between Mrs Jay and her lecturer. She was then asked by Mrs Jay to come outside and talk to her. Mrs Jay asked what was going on and Ms Christian explained her stress and that she needed to take two weeks off to focus on sleep and study. She wrote that Mrs Jay said words to the effect what is going on is about *Mandi*. Ms Christian confirmed that it was about lack of sleep and study load. She wrote that she explained she was to see a doctor and that Mrs Jay said *You don't need a doctor to tell you what is wrong with you, he won't be able to help you at all, this is [corrected by me] about your wairua*. Ms Christian wrote that again Mrs Jay asked *if Mandi was to go to another centre would you follow her?* Ms Christian again explained it had nothing to do with Mandi. Mrs Jay then made the following statements *The wairua of Manuka and your own personal wairua are not fitting together at this time, you both don't fit together anymore. I feel that you no longer benefit from being at Manuka, your wairua does not fit the wairua of Manuka and I think that you need to not be here anymore*. Ms Christian wrote that she stated to Mrs Jay she did not want to leave Manuka and then Mrs Jay said *I think you need to leave Manuka*.

[41] Mrs Jay accepted at the disciplinary meeting on 14 May 2013 having a conversation with Ms Christian on 20 March 2013 and referring to Ms Christian's wairua (spirit). She said that she had concerns for Ms Christian but did not bully her and did not know that Ms Christian felt that way until a copy of her complaint was received. The notes record Mrs Jay explaining *Her wairua here is not the same- her bubbiness. She's tired. I said she's not the same. I was talking to her about it- I can see you are tired-supportive capacity. I was hurt when I read that – totally hurt. This one was the one that hurt*. She said at the disciplinary meeting that Ms Christian's behaviour had changed after the then Head Teacher Mandi Packer had resigned in February 2013 and that she thought they had a good relationship. She did not agree that she was speaking secretly in Te reo to the lecturer and denied saying that Ms Christian should no longer be in her position. She said that Mandi was not discussed.

[42] The final allegation was the time discrepancies. Before I turn to the explanation about those from Mrs Jay it is useful to set out what the recorded discrepancies were. The Ministry of Education only funds the Centre for on floor

teaching and not for administration. Each week Mrs Jay signed as manager that the staff records for the week were a true and correct record of the hours worked. For completeness there was no suggestion that there were issues whilst Mrs Jay was off floor with the ratio of children to teachers. For completeness this was not the same situation to that raised with Mrs Jay in October 2012.

[43] For the first week of surveillance it was recorded Mrs Jay was not on the floor for half an hour on 25 February and half an hour on 27 February when she was rostered to be. Ms Gardiner noted further that the half hour rostered student time that was to take place between her and Mrs Jay on 28 February 2013 was not undertaken.

[44] For the following week Mrs Jay was recorded as having taken a differently timed lunch break to that rostered on 5 March 2013 although still only took half an hour break. She was also recorded as being off floor for one hour on 5 March 2013 when rostered on floor.

[45] For the final week of surveillance the record provides that Mrs Jay was out of the building 9.10am on Monday 11 March 2013. That was during a time when Mrs Jay was rostered as undertaking administration so the concern with respect to that entry could only have been Mrs Jay's whereabouts not that she claimed funding. On that same day Mrs Jay was rostered for non-contact time between 2.00pm and 3.00pm but Ms Gardiner recorded that she was off the floor until the end of the day at 4.30pm.

[46] For 13 March 2013 Ms Gardiner recorded that Mrs Jay was in the office between 8.00am to 9.00am although was rostered on floor. Ms Gardiner described the Centre that day as overstaffed. She recorded that Mrs Jay was rostered on 10.00am to 1.30pm but in the office 11.10am and did not return until 12.00pm. She recorded that Mrs Jay was rostered that same day from 2.00pm to 4.30pm but in office from 2.40pm and still off at 3.50pm when she finished recording.

[47] On Thursday 14 March it is recorded that Mrs Jay was rostered on 8.00am to 9.00am but was off the floor in her office from 8.25am to 8.40am. Finally on Friday 15 March it is noted that the Centre was overstaffed and that Mrs Jay was rostered on from 8.00am to 1.30pm but was off floor in the office from after morning tea, the exact time was not recorded but it was put down approximately 11.00am, and then back at 12.00pm to release teachers for lunches. It was then recorded that Mrs Jay was off the floor at 1.20pm before rostered lunch at 1.30pm and then was written "*Out*

to a meeting” at 3.00pm. The 3pm meeting was during the period when Mrs Jay was rostered as *on administration* not *on floor* so the recording and the way it is recorded could suggest that Mrs Jay was not where she said she would be.

[48] Mrs Jay explained at the disciplinary meeting that she had two positions [Head Teacher and Centre Manager] and could not recall exactly why she was off floor as recorded – *can't give a real clearance on what I was doing*. As I have already set out I am not satisfied that Mrs Jay was supplied with the supporting documentation to consider alongside Ms Gardiner's own records.

[49] The meeting on 14 March 2013 was the only meeting held in the disciplinary process. Mr Acland at the end of the meeting identified issues around staff relations and tensions within the Centre and suggested obtaining clear policies and procedures, making clear the roles, boundaries, expectations, monitoring and providing professional support.

[50] Ms Packer sent two letters to Mr Acland on 4 June 2013. One of the letters advised that the solitary confinement issue would no longer be investigated but rather that Mrs Jay was to undergo performance management compliance training. Ms Packer did advise that the Centre wanted to complete the investigation into the second and third allegations [interactions with Ms Christian and discrepancies with rostered times on floor] and asked to be provided with any final responses to these allegations. Ms Packer advised that these allegations could constitute serious misconduct and if substantiated could result in termination of employment. Ms Packer asked for any final responses in regards to the two remaining allegations in writing by 4pm 12 June 2013 and then a preliminary decision would be made on 14 June 2013 and there would be a meeting that same day to discuss that. There was, however, a new allegation in the letter that Mrs Jay had hired a staff member without authorisation and Ms Packer wrote that she wanted to meet on 17 June 2013 to hear Mrs Jay's response to this new allegation. Ms Packer said that this separate allegation could constitute serious misconduct and grounds for dismissal.

[51] The second 4 June letter to Mr Acland asked for answers to two questions. One was whether Mrs Jay had in her possession a pen drive containing the Centre's information and the second was whether while on a period of sick leave Mrs Jay had topped up her work phone twice on the Centre's account. Ms Packer wrote that while the questions did not form the basis of any current disciplinary investigation

allegations, questions may be raised in the future following consideration of the response.

[52] Mr Acland responded to Ms Packer by email dated 10 June 2013. He raised some surprise in his email that Ms Haren was not corresponding and asked if she was still carrying out the investigation. The further response made was that Mrs Jay's position remained the same as at the disciplinary meeting in respect of both remaining allegations. He raised an issue that Ms Packer said that the investigation was into the feelings Ms Christain had reported and not the words used and set out a concern about covert evidence gathering. He advised in the email that the appropriate time for any final response from Mrs Jay would be after Ms Packer had considered the preliminary decision and said 2 working days would be needed before a meeting but wrote *that would be a good meeting and something Mrs Jay would be pleased to attend in order to give her final response*. He raised concerns that a fourth allegation had been newly introduced and the pressure on Mrs Jay and that Ms Packer as Licensee was raising the allegations and not Mrs Jay's employer, the Collective. Mr Acland suggested Ms Haren conducting the investigation was prudent as an independent person. He answered the questions set out in the second 4 June letter.

[53] Ms Packer responded by letter dated 11 June 2013 to Mr Acland. She advised that the process needed to continue without Ms Haren's assistance. She did not accept that the process has in any way been insufficient. She did not agree with Mr Acland's interpretation regarding Ms Christian's complaint and denied saying that the investigation was not about the words Mrs Jay used. She agreed that she did say she would double check the dates and roster information again but did not accept as Mr Acland suggested that this was in regards to any gaps existing or in regards to the date of the March collective meeting. There is no dispute that no further information was actually provided with the letter. Ms Packer wrote that she was now in a position to conclude the investigation and make a decision about whether the allegations are substantiated and consider a preliminary decision regarding the proposed action, if any. She asked for any further information by 9am 14 June 2013. Ms Packer wrote that once the investigation as completed she would communicate the preliminary decision in writing and then provide a further two days for any response about that. She asked for this in writing saying that a meeting on 14 June 2013 was not required as earlier planned. She did not agree that a Licensee was not able to make management decisions.

[54] By letter dated 21 June 2013 to Mr Acland, Ms Packer confirmed that both allegations were substantiated and her preliminary decision about the outcome of the investigation was that Mrs Jay be dismissed. By letter dated 21 June 2013, Ms Packer advised Mr Acland of her preliminary view that the two grounds of complaint were substantiated and that it was her preliminary decision that Mrs Jay be dismissed. Mr Acland was asked to provide feedback or comments by 5pm 25 June 2013.

[55] Mr Acland wrote to the Collective by letter dated 3 July 2013 for the attention of Ms Packer. He made three comments. The first was that the two allegations are denied and unsubstantiated. The second was the disciplinary process has been unfair and prejudicial to Mrs Jay and the third was that even if the two allegations are true which was denied then they are not so serious to warrant termination. Mr Acland invited Manuka to review the preliminary decision and not dismiss Mrs Jay. He suggested in his letter that instead they clearly set out her role, work criteria and expectations and then monitor Mrs Jay's performance against those criteria and expectations for future review. He also suggested Manuka may be assisted by engaging a suitably qualified independent person to identify, examine and resolve Mrs Jay's role and her employer's expectations of her; workplace conflicts between staff and with management; and workplace policies for stress and pressure as a health and safety concern.

[56] On 5 July 2013, Ms Packer gave Mr Acland a letter that terminated Mrs Jay's employment with immediate effect. Although asked not to tell Mrs Jay until the end of the day as she was working, Mr Acland explained he was obliged to inform his client and did so. Mrs Jay finished her shift and left the centre subsequently raising a personal grievance and making an application for interim reinstatement.

Was dismissal justifiable?

[57] There is no dispute in this case that there was a summary dismissal. Manuka must establish that the dismissal was justified. The Authority in applying the test of justification in s.103A of the Act has had regard to the full Court of the Employment Court judgment in *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160. The Court considered in *Angus* the recently amended s.103A test of justification. As well as a fair process leading to dismissal there must also be *good cause* for the dismissal.

[58] Ms Packer made the decision to dismiss. Her position as Licensee of Manuka is a voluntary one and this was the first disciplinary investigation she had undertaken.

The reasons for the dismissal

[59] There was no dispute about the reasons for dismissal. The first is that on 20 March 2013 Mrs Jay's interactions with Ms Christian resulted in Ms Christian feeling bullied and that she was unwanted at the Centre. The second is that there were discrepancies between Mrs Jay's rostered time on the floor and when she had actually been on the floor.

Analysis and conclusions

[60] I will start with consideration of the process and whether the investigation was carried out in a fair and reasonable manner that satisfied the requirements of s.103A of the Act.

[61] Ms Chapman in her submission submits that Manuka carried out a full and thorough formal investigation between 5 April and 21 June 2013 that entitled a conclusion that there had been serious misconduct on the part of Mrs Jay.

[62] One of the issues raised by Mr Acland is that Mrs Jay's employer, the Collective, did not make the decision to dismiss rather it was Ms Packer in her role as Licensee. He submits that was unfair and prejudicial to Mrs Jay who wanted to be heard by the Collective, her employer. Ms Chapman correctly submits that the licensee is the person responsible for ensuring all requirements of the Ministry of Education are met and that the licensee had previously undertaken disciplinary processes.

[63] Ms Packer acted with the knowledge and approval of many of the Collective members to both investigate and make a decision about Mrs Jay's employment. She kept most of the Collective members updated as to progress. It appears the Collective simply took it for granted that the licensee would take those steps. Mr Acland focused in asking the question what a fair and reasonable employer could have done on whether or not the Collective had delegated its decision making function and/or whether it could.

[64] I find the question to be asked is what a fair and reasonable employer could do in all the circumstances with knowledge that Mrs Jay had raised concerns about Ms Packer investigating and making the decision as to any disciplinary outcome. Initially Ms McNair had expressed concerns in her letter that the current committee could not carry out a fair and transparent investigation. Having carefully read the letters and the disciplinary meeting notes, the focus was then more about whether Ms Packer had the authority from the Collective to investigate and make a decision. I am satisfied though that it would have been clear to Ms Packer from Mr Acland's letters when it became known that Ms Haren was not to be involved further that Mrs Jay wanted an opportunity to be heard by the Collective as her employer rather than by Ms Packer.

[65] It was surprising in my view that Ms Haren was not tasked with carrying out an investigation. It is clear from her evidence that Ms Haren intended to undertake an investigation and compile a report. Her evidence was that she had a date in mind after the 14 May 2013 meeting to go into the Centre and talk to the staff and Mrs Jay. A fair and reasonable employer could have then provided the report to the Collective and Mrs Jay could have been heard by the Collective both on the investigation findings and any disciplinary outcome without too much difficulty. There was no suggestion from the evidence that cost was one of the reason Ms Haren was not asked to complete an investigation.

[66] I accept Mr Acland's submission that there were people on the Collective with different views of Mrs Jay some favourable and some not. I find that there was good reason for her to want the opportunity to be heard by the Collective about her employment. I find that Mrs Jay was deprived of the ability to persuade the Collective that her employment should continue and that was unfair and not what a fair and reasonable employer could do in all the circumstances.

[67] I accept Ms Chapman's submission that covert surveillance of employees sometimes takes place. In this case it took place to record time on and off the floor against the rosters and was in the form of a written record. It was common ground that Mrs Jay was not going to benefit from any incorrect recording of on/off floor time as she was on a salary. Ms Chapman referred the Authority to a Teachers Disciplinary Tribunal decision to demonstrate the seriousness of the matter. I find it distinguishable from the facts of the current situation. In that case the licensee of a

preschool had falsified staff attendance records and had gained an advantage in receiving funding from doing so. That was not the situation with Mrs Jay. Manuka deliberately decided not to raise its concerns with Mrs Jay immediately. It brings into question why Manuka would want to do that rather than to immediately ensure that claims to the Ministry of Education were accurate and correct as a main priority. Objectively assessed I find the surveillance was in all likelihood an attempt to demonstrate that by virtue of repeated activity the matter was more serious. I do not find that the covert surveillance of Mrs Jay in this case was in accordance with the obligations of good faith including those to be communicative and responsive.

[68] I find further that the allegation about time keeping was unclear and that this in turn led to a failure to properly focus on and investigate the actual allegation. It was expressed in the initial letter inviting Mrs Jay to a disciplinary meeting as being discrepancies between times rostered on the floor and being present on the floor. That was the allegation that was found to be substantiated. It was stated at the disciplinary meeting that the concern was about inaccurate claims for funding to the Ministry of Education as a result of the discrepancies rather than why Mrs Jay was off the floor. Mrs Jay had signed off the records as true and accurate when they were not but there was no evidence that inaccurate records had actually been set to the Ministry for the time that there was covert surveillance.

[69] I do not find the evidence or notes of the disciplinary meeting support that Mrs Jay was actually asked about why the records were not changed to reflect off floor time and/or why she signed them as accurate before the decision to dismiss for serious misconduct was made. There was no clear line of investigation into that matter. In her evidence to the Authority Ms Packer said that she concluded filling in the forms unconsciously was *hard to fathom* and she found it *hard to work out how the forms were unconsciously signed off*. Her conclusion was that Mrs Jay had consciously thought to sign the forms which did not reflect the correct on floor hours although did not conclude that she was dishonest in doing so.

[70] I do not conclude, objectively assessed, that knowledge of this requirement on the part of Mrs Jay could simply be taken for granted in the circumstances of this case without any investigation at all. Further I do not find that the allegation was clear enough for Mrs Jay to explain her action in signing the records without being asked such a question. Mrs Jay said in evidence at the Authority investigation meeting she

did not historically break down on the roster time, spent on administration and, on the floor. She simply wrote 9am – 4.30pm and lunch. From February 2013 Mrs Jay said in evidence that she was filling in the roster on the basis she understood that was what the Collective wanted her to do [with more detail]. Her evidence was that she was wearing two hats [Centre Manager and Head Teacher] and did take time off the floor to attend to visitors and take telephone calls. She said that she never adjusted the rosters for that situation but did make sure student/ teacher ratios were not affected.

[71] There was evidence from Wendy Logan who is a member of the Collective and others that Mrs Jay did understand about funding and staff rations as submitted by Ms Chapman. None of that was however put to Mrs Jay at the time of the disciplinary investigation for her to comment on. That was unfair. Ms Haren under questioning from Mr Acland confirmed that Mrs Jay was not asked at the disciplinary meeting on 14 March 2013 if she deliberately filled out the records/rosters incorrectly.

[72] I asked several questions of Ms Packer to try to ascertain how she had reached a view about the seriousness of this allegation. Ms Packer said that Mrs Jay provided no reason for her to dismiss the allegation and that Manuka was receiving funds it should not have been receiving which was serious and Mrs Jay should know to do that correctly. There was no conclusion available I find that funds had been received for the period in question.

[73] Manuka is not a large organisation with its own human resource advisors but I do not find that any failure to properly investigate this matter was due to resource issues. It arose, I find, in all likelihood because of some lack of clarity about the proper focus of the allegation. I find that had the investigation been a full and proper one then a fair and reasonable employer could have viewed the failure to correct the records to show off floor time as other than serious misconduct. The investigation into this allegation I find does not satisfy the requirements of s.103A(3)(a) of the Act and does demonstrate a close minded approach.

[74] I am not satisfied that Mrs Jay had a reasonable opportunity to respond to the funding concern as required under s.103A(3)(c). The main concern did not appear to be what Mrs Jay was doing off the floor rather discrepancies in the funding claimed from the Ministry of Education. The answers for example from Mrs Jay were about what she may have been off the floor for and Mr Acland's contribution focused on monitoring or evidence gathering. The investigation into this allegation was also not

assisted by what I have found in all probability was the absence of the supporting documents at the only disciplinary meeting held.

[75] In respect of both allegations although Mr Acland wanted to meet to discuss the preliminary decision Ms Packer decided that would be done in writing. Although perhaps unintentional on the part of Ms Packer I find it deprived Mrs Jay of another opportunity to persuade Ms Packer face to face that her employment should continue.

[76] Mrs Jay's explanation about Ms Christian's complaint was that the context of the conversation was different. A fair and reasonable employer could and should have undertaken further investigation into this by talking to Ms Christian and noting her responses to Mrs Jay's explanation and given the explanation about the context considered talking to the lecturer.

[77] I am not satisfied having regard to the resources available there was sufficient investigation of this allegation before dismissal took place under s.103A(3)(a). I am not satisfied that Ms Packer in the absence of further investigation genuinely considered Mrs Jay's explanation before finding that there was serious misconduct and the allegation substantiated as required by s.103A(3)(d).

[78] A dismissal must be carried out in a procedurally fair way but there must be a good reason for a summary dismissal. The kind of conduct that will justify summary dismissal was stated by the Court of Appeal in *Northern Distribution Union v BP Oil New Zealand Limited* [1992] 3 ERNZS 483 as:

*For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look further than this Court's judgment in **BP Oil NZ Ltd v Northern Distribution Workers Union** [1989] 3 NZLR 580. Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*

[79] There was no attempt at mediation by the Collective between Ms Christian and Mrs Jay as proposed in the Manuka complaints chart. That was Ms Packer said because Ms Christian would not agree to that. The refusal or reluctance to engage in conflict resolution by Ms Christian does not change the complaint from one that required some form of resolution to one that justified summary dismissal. Mrs Jay and Ms Christian had previously had a good relationship and there had been no earlier

complaint by Ms Christian about conduct of this nature. It was a one off incident. Ms Christian and Mrs Jay continued to work together after the complaint although Ms Packer had regular contact with Ms Christian to check on her.

[80] The fact that Ms Christian thought she had been dismissed by Mrs Jay was viewed seriously by Ms Packer but that view seems to have come more from the initial telephone call between Ms Packer and Ms Christian rather than the written complaint. In the written complaint whilst Ms Christian does express feeling of uncertainty about her place in the Centre she writes of returning to Manuka after her stress leave and wanting Ms Packer's guidance on how to go about dealing with Mrs Jay in a professional manner.

[81] In answer to a question from the Authority at the investigation meeting Ms Christian was surprised that her complaint was so serious and one of the reasons of Mrs Jay's dismissal.

[82] Objectively assessed I do not consider that a fair and reasonable employer could have concluded that the interaction between Ms Christian and Mrs Jay was serious misconduct of a nature that was destructive of basic confidence and trust essential in an employment relationship.

[83] In respect of the allegation about discrepancies in timekeeping I am not satisfied that there was sufficient clarity about what the misconduct was. The subsequent investigation was inadequate and unfair. Insufficient regard was had to mitigating factors such as Mrs Jay had not been dishonest but rather it would appear careless and that whilst funding could have been incorrectly claimed from the Ministry of Education which is undoubtedly serious there was no suggestion that it had been for the time in question. A full and fair investigation could have led to a conclusion that Mrs Jay did not know and/or was careless about signing off the records to reflect any period off floor. Objectively assessed I do not conclude that the conduct in relation to the time keeping discrepancies was conduct that a fair and reasonable employer could in all the circumstances conclude amounted to serious misconduct.

[84] The dismissal I find for all the above reasons was both procedurally and substantively unjustified. It was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal took place.

[85] Mrs Jay has a personal grievance that she was unjustifiably dismissed and is entitled to remedies.

Remedies

[86] Mrs Jay is no longer seeking reinstatement. She has concluded that the employment relationship is irreparable. The other remedies sought are lost wages and humiliation. The claim for the employer KiwiSaver contribution and holiday pay on lost wages was only made in final submissions and not in the statement of problem. I do not intend to consider those remedies for that reason. The Authority has not heard any evidence on the KiwiSaver issue.

[87] After Mrs Jay's dismissal and before the application for interim reinstatement was to be investigated by the Authority on 13 August a page and a half length flyer was sent to parents of children at the Centre in or about late July 2013. It made very damaging statements about Mrs Jay, although not referring to her by name it was obviously about her, and suggested that if Mrs Jay was reinstated children may not be safe. It did not make any reference curiously to the actual reasons for dismissal. It was recorded to have been sent on behalf of a collective of past and present teachers.

[88] Mr Acland was advised by Ms Chapman that the Collective members universally condemned the document and did not support its publication and distribution and would be distributing a notice to parents the next day distancing themselves from the document. Mr Acland in an email dated 30 July 2013 stated that he trusted the notice will expressly state the correct position that the information in the document is false, that Mrs Jay was dismissed for two reasons that have nothing to do with child safety and that she denies the reasons she was dismissed and has taken her dismissal to the Employment Relations Authority. Mr Acland also asked for a copy of the notice to be sent to parents.

[89] A notice was sent signed by those at the Centre that distanced itself from the flyer. It did not state the reasons for Mrs Jay's dismissal were not issues to do with child safety and I accept Mr Acland's submission that the response did implicitly confirm the accuracy of the information in the flyer itself.

Lost Wages

[90] I am satisfied that Mrs Jay did attempt to find other work after her dismissal on 5 July 2013. She was undertaking some voluntary work at the time of the Authority investigation meeting and was hopeful that it may evolve into work.

[91] Mrs Jay gave evidence of applying for three positions in early childcare after her dismissal but said it was hurtful when she was asked why she left her previous role. Nelson is a small community and I accept that rumours may well have impacted on

Mrs Jay's ability to find other employment. Subject to any findings of contribution Mrs Jay is entitled to reimbursement of three months lost wages claimed and based on an annual salary of \$75,000 of \$18,750.

Compensation

[92] Mrs Jay said in her evidence in support of this claim that she had confidentiality broken and was humiliated in public. She spoke of the loss of a job she loved and loss of involvement with the community for what she described as allegations that were *wrong*.

[93] The evidence supports that the dismissal had a severe impact on Mrs Jay. Mrs Jay impressed me as a quiet and dignified person however it is clear that she was devastated at the loss of her job and what was said about her in the flyer. There is insufficient evidence for me to conclude that someone from Manuka was responsible for the flyer however Mr Acland's requests to reduce its damaging impact were not included in the subsequent notice to parents. It therefore left an impression that Mrs Jay had been dismissed for issues to do with children's safety which was not correct and caused Mrs Jay considerable distress. I take that into account.

[94] Subject to any findings as to contribution Mrs Jay is entitled to the sum of \$12,000 being compensation for loss of dignity and humiliation.

Contribution

[95] The Authority is required to under s.124 of the Act in deciding the nature and extent of the remedies consider the extent to which the actions of the employee

contributed towards the situation that gave rise to the personal grievance and if required reduce awards that would otherwise be awarded.

[96] Mrs Jay's interaction with Ms Christian was conduct bearing on the situation giving rise to the grievance. Ms Christian was upset by what was said but I am not satisfied from the evidence that Mrs Jay's actions were blameworthy because it was I find more likely than not that Mrs Jay was surprised that her words had the effect on Ms Christian that she stated they did. I am not satisfied that subsequent issues that came to light about additional time at the Centre for Ms Christian being refused or the correct completion of necessary documentation for Ms Christian were causative of the dismissal outcome and I do not take them into account.

[97] I have also considered the signing off by Mrs Jay of the staff records as Manager that they are a true and correct record of the hours worked. I think it more likely than not that Mrs Jay did not realise that she should change the staff register and roster to reflect off floor time. There was no evidence to suggest that Mrs Jay was not off the floor for genuine reasons in her role as Manager of the Centre. I do however find that there was some carelessness and blameworthy conduct in signing a record as Centre Manager, to be sent to the Ministry of Education that is not a true and correct reflection of hours worked. A deduction I find of 10 % is called for to recognise this contribution.

[98] To the extent that there was reference to other possible allegations during the disciplinary process there was no evidence about them and they do not therefore impact on extent or nature of the remedies. Mrs Jay did have an earlier warning although not for similar matters, and I do not take that into account.

Orders

[99] Applying contribution to the entitlement for lost wages I order Manuka Community House Incorporated to pay to Ngapare Jay the sum of \$16,875 gross being reimbursement of lost wages under s.123(1)(b) of the Employment Relations Act 2000.

[100] Applying the 10% contribution to the compensatory award I order Manuka Community House Incorporated to pay to Ngapare Jay the sum of \$10,800 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[101] I reserve the issue of costs. Mr Acland has until 26 February 2014 to lodge and serve submission as to costs and Ms Chapman has until 12 March 2014 to lodge and serve submission in reply.

Helen Doyle

Member of the Employment Relations Authority