

Attention is drawn to paragraph 6 prohibiting publication of certain information contained in this determination.

Determination Number: CA 47/04
File Number: CEA 421/03

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Christine Le Bherz (Applicant)
AND Richmond Fellowship NZ Inc (Respondent)
REPRESENTATIVES Andrew McKenzie, Counsel for Applicant
Raewyn Gibson, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 18 February 2004
3 March 2004
DATE OF DETERMINATION 23 April 2004

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant, Christine Le Bherz, was employed as a Community Support Professional in Richmond Fellowship's Regional Intellectual Disability Supported Accommodation Service from 13 May 2002. The service is commonly known as "RIDSAS" and I shall refer to it as such in this determination.

[2] Ms Le Bherz says that she was unjustifiably dismissed from her employment on 24 November 2003 and seeks permanent reinstatement, compensation for humiliation and loss of dignity and lost wages.

[3] The respondent, Richmond Fellowship New Zealand Inc, ("Richmond Fellowship") denies that Ms Le Bherz was unjustifiably dismissed and says that she was justifiably dismissed for serious misconduct.

[4] Richmond Fellowship has a number of contracts with the Ministry of Health to provide individual care for clients who are eligible to access the services provided by RIDSAS. Services are provided by RIDSAS for a variety of clients with different needs and requirements who meet the criteria for entry to the service.

[5] There is reference within this determination to exhibits annexed to affidavits. This is because this matter was the subject of an interim application for reinstatement in December 2003.

Prohibition from publication

[6] The employment relationship problem involved the care of one of the clients of RIDSAS. I prohibit from publication under clause 10(1) of schedule 2 of the Employment Relations Act 2000 the name of the client, any details as to the client's address and location of that address, any details as to the reasons the client is eligible to access the services provided by RIDSAS and any other details whatsoever that may lead to the client's identity. I shall call the client X in my determination. I also prohibit from publication the exhibits numbered 2, 3 and 29 that are attached to the affidavit of Jacqueline Moore dated 18 December 2003. These orders are made with the consent of the representatives for the applicant and the respondent.

Background to the dismissal

[7] Ms Le Bherz was party to an individual employment agreement dated 13 May 2002 with Richmond Fellowship. She was employed on a 24 hour a day, 7 day a week roster to assist in the care of X. X had a risk management plan that required supervision by staff during the hours X was awake and a safety plan was to be completed by X with staff guidance specific to each situation by 8.30 pm the evening before X went out into the community. X did not live with other clients.

[8] On 11 September 2003 Ms Le Bherz was asked by her union representative from NUPE, John Kerr, to go and pick up some papers with respect to a complaint made by X against her. Ms Le Bherz picked up the papers from Jacqueline Moore, the Service Leader for RIDSAS. Mr Scott was also present at that time. The documents picked up consisted of a copy of X's complaint dated 11 September 2003, notes made by Cameron Scott, who was at that time Ms Le Bherz's team leader, dated 11 September 2003, an undated note by another employee, Margaret McDonnell who was also working on the roster looking after X and notes that were handwritten and typed taken by Glenda Prendergast who was Margaret McDonnell's Clinical Supervisor dated 11 September 2003.

[9] Ms Le Bherz said that after picking up the papers she was told to leave the premises immediately and described her employment as being suspended from that point until the next arranged meeting on 16 September 2003. I accept Ms Moore's evidence, supported by Mr Scott that there was agreement for Ms Le Bherz to take some paid leave to enable her to prepare for the meeting and consider the complaint rather than her being suspended. This evidence is also consistent with the email annexed as exhibit 15 to the affidavit of Ms Moore. Ms Le Bherz was not asked to make any comment with respect to the complaint at that time until she could obtain representation.

[10] The complaint was that Ms Le Bherz had been verbally abusive to X and in particular that she had said to X:

You disgust me, you are nothing but a dirty disgusting paedophile, go to your room.

[11] Prior to Ms Le Bherz's employment being terminated there were four meetings on 16 September, 10 October, 3 November and 24 November 2003 with Ms Le Bherz, Mr Kerr and representatives from Richmond Fellowship.

16 September 2003

[12] On 16 September 2003 Ms Le Bherz accompanied by Mr Kerr met with Ms Moore and Mr Scott. Ms Le Bherz denied that she had made abusive comments to X. She had prepared a written statement dated 15 September in response to the allegation and handed that statement to Ms Moore during the course of the meeting. Ms Le Bherz in her statement of a page and a half described discussions she had had with X about the possibility of her travelling to Australia about three weeks prior to the complaint being made and looking for a job there. She said that X did not want her to go. In her statement Ms Le Bherz said that whilst she did have a firm manner when dealing with X when the occasion warrants it she had never been abusive toward him in the manner he had alleged. She said that she had explained to X *what a paedophile is* in the context of television coverage of a parole matter. Ms Le Bherz denied that she had, as Ms McDonnell alleged, put X down. She said in relation to the alleged berating of X for putting cream on cake that her concern was not about the amount eaten but about the fact that the cream was sour and that she did not berate but expressed concern that X may eat cream that was off. Ms Le Bherz denied another comment and said that on the contrary Ms McDonnell had in the context of a private conversation used the exact words to her.

[13] The notes of the meeting taken by Ms Moore were accepted by Mr Kerr and Ms Le Bherz as being accurate. They reflect amongst other matters that Mr Kerr and Ms Le Bherz were advised that the complaint had not been investigated and that once Ms Le Bherz had replied then the complaint would be investigated. Mr Kerr confirmed according to the notes that the nature of the complaint *is very serious*. The notes also reflect that Mr Scott and Ms Moore took some time out from the meeting to read Ms Le Bherz's statement and then indicated that there would be discussion with the human resource advisors following which Ms Moore would contact Mr Kerr for a further meeting.

[14] On the same day following the meeting on 16 September Ms Moore emailed Mr Kerr and said that her advisors had requested that she do the following:

Interview the client.

Interview the staff member mentioned in Christine's letter.

Interview the Team Leader of the programme.

Interview the Care Manager.

Check training schedule.

Check supervision schedule.

[15] Ms Moore also noted in her email that it was unlikely that she would be able to do this before Ms Le Bherz was officially on leave but said that she would ensure all was done on her return.

Leave

[16] Ms Le Bherz took some pre-scheduled annual leave to travel to Australia. She was in Australia from approximately 22 September 2003 to 30 September 2003. Ms Le Bherz was then asked to consider whether she wanted to be placed on another programme within RIDSAS or continue on paid leave and duly commenced working at another RIDSAS programme upon her return from Australia.

New Concerns

[17] On 26 September Ms Moore advised Mr Kerr by email that during the investigation of X's complaint some other issues had come to light.

[18] By letter dated 7 October 2003 Ms Le Bherz was advised of the additional concerns Richmond Fellowship had which related to supervision of X and inappropriate visits to private addresses during work time amongst other matters. The letter and documentation accompanying the letter was copied to Mr Kerr.

[19] The additional concerns were contained in two letters from Ms McDonnell to Mr Scott dated 1 October 2003. There was also a written complaint from Peter Wilson, another employee who had been rostered to care for X. He said that Ms McDonnell had been told by Ms Le Bherz that he (Mr Wilson) had been stealing tea, coffee, soap powder and other food items during his shift and further that he had been told that Ms Le Bherz had removed his payslip. There was also a complaint in a letter from Mr Scott about matters Ms McDonnell had raised with him about Ms Le Bherz not taking X on scheduled activities because of a lack of funds. Interview notes with Ms McDonnell and X were also attached. There was reference within one of the interview notes with Ms McDonnell to alleged theft of linen and food. During the interview with Ms McDonnell, undertaken by Ms Moore with Mr Scott in attendance, the matters discussed were the new concerns about supervision of X and inappropriate visits to private addresses. There was no discussion with respect to the offending statement.

10 October 2003

[20] A further meeting was held on 10 October 2003. Ms Le Bherz attended with Mr Kerr and Ms Moore with Mr Scott. Ms Le Bherz provided a statement in explanation to the new concerns and allegations. There was also discussion about supervision, the credibility of X, safety plans and Mr Scott taking X for coffee and picking up a brazier. The notes recorded Mr Kerr wanting independent advocacy and that he was concerned about the action based on X's evidence only.

[21] Ms Le Bherz's statement provided amongst other matters with respect to the issues of supervision of X and appropriateness of visits:

- In relation to the visit to the movies that she did leave X in the theatre whilst she visited the toilet but that it was her understanding that it was agreed that could occur.
- In relation to first of three visits to her mother's house with X that she understood Pauline Crowe, currently Care Manager at RIDSAS but in August 2002 team leader in the RIDSAS service, had given consent to one visit to collect bedding and clothing as Ms Le Bherz had a sleepover. Ms Le Bherz said that she parked the car in her mothers drive and the car was visible to her for the whole time she was in the house. She said that she was in the house for no longer than 5 minutes.
- With respect to the second visit Ms Le Bherz said she was required to close up her mother's house at short notice as her mother had been admitted to hospital unexpectedly. She said X helped Ms Le Bherz to close the blinds as she could not reach them.
- Ms Le Bherz said that the third visit X accompanied her into the house to examine a large tortoise shell and some leather work her mother had been doing. She said that she thought at that time X may have been interested in learning about leather craft.
- In relation to a visit to another house Ms Le Bherz said that she took X with her with Toby Stocks' approval when she went to a caravan park where Peter Wilson lived as he was needed for a shift and she said X was never out of her sight.

- Ms Le Bherz said that a visit to a flatmate had only happened on one occasion and that was after discussion with the vocational worker. X had gone with the vocational worker to pick up a fridge and a washing machine from a former flatmate's house. On another occasion Ms Le Bherz said that after discussion with the vocational worker X chopped some wood at an acquaintance's house. She said in her statement that at no time was anyone present who could be at risk.

[22] In relation to Mr Wilson Ms Le Bherz said in her statement that she had never accused Mr Wilson of stealing items although she said that Ms McDonnell had commented on the amount of tea Mr Wilson drinks and she agreed with her that it seemed to be a lot. Ms Le Bherz denied stealing any items belonging to Mr Wilson including mail.

[23] With respect to the failure to take X on activities Ms Le Bherz said that she did not go to ten-pin bowling with X because X expressed a desire not to go.

[24] Ms Le Bherz also responded to allegations contained in the other letter dated 1 October from Ms McDonnell. She denied setting out to manipulate X. She said that she had taken X for walks and had done other things to boost self esteem. She said that she could not ride a bicycle.

Letter of 20 October 2003

[25] Following the meeting of 10 October Ms Le Bherz received a further letter with documents attached from Ms Moore. The attached documents were:

- The Richmond Fellowship supervision policy
- A letter from Ms Crowe stating that supervision and training was offered to all staff during the period of employment.
- Copies of the code of ethics and organisation rules from Ms Le Bherz's employment agreement.
- The original complaints that Ms Le Bherz had been given on 11 September 2003.
- A letter from Dr Michael Reid, Clinical Director Richmond Fellowship. He stated in his letter that:
Further to our conversation relating to a comment made by a staff member to a client. Richmond Fellowship considers the statement "Dirty Little Paedophile" to be abusive behaviour by the staff member and therefore is considered serious misconduct.
- A letter from Ms Crowe that said she did not remember any occasion when she gave support for Ms Le Bherz to visit her mother's home.
- An email from Toby Stocks that confirmed that he had had a conversation with Ms Le Bherz about finding cover for the shift and that she suggested several staff that might be available and that she could give them a call.
- A letter attached from Ms Prendergast about her meeting on 11 September with Ms McDonnell. Ms Prendergast said in her letter:

During a recent meeting with key worker Margaret MacDonald (11th September 2003), I was informed of conversations between a staff person and client. Margaret said that the client, X had disclosed to her about conversations X had with Christine Le Bherz, that X found upsetting. Margaret informed me that X said Christine Le Bherz was telling X "you are nothing but a dirty, filthy, paedophile that makes me sick, go to your room". X told Margaret that this had been happening since Christine first began working with X. I am writing to express my concern about this alleged behaviour. I consider behaviour such as this to be extremely unethical and abusive.

It was noted in the letter that the complaint by Mr Wilson would be examined in a separate investigation and in terms of the visits to a flatmates property Ms Moore asked Ms Le Bherz to confirm which line manager gave her permission during work hours to pick up a fridge and take X to chop wood. Ms Moore also stated in the letter:

Please find attached statements and interviews from both X (client) and Margaret McDonnell that state that they were present whilst the statement was being said.

3 November 2003

[26] There was a further meeting on 3 November 2003. Ms Le Bherz attended the meeting with Mr Kerr. Ms Moore was present for Richmond Fellowship. Ms Le Bherz had prior to that meeting prepared a further statement which was handed to Ms Moore. Mr Kerr raised with Ms Moore the fact that he had been unable to find the statement referred to in Ms Moore's letter of 20 October from Ms McDonnell that stated she was present when the alleged abusive statement was made by Ms Le Bherz to X. There was a conflict in the evidence about Ms Moore's response. Mr Kerr said that Ms Moore went away during the meeting to read the statement Ms Le Bherz presented to her and that when she came back in to the room she apologised and said she had made a mistake about that. Mr Kerr said that Ms Moore did not say that Ms McDonnell had confirmed that she overheard Christine make the statement and he took it that there was no statement from Ms McDonnell to the effect that she had overheard the offending statement. Ms Le Bherz confirmed that her recollection of the discussion concurred with Mr Kerr.

[27] Ms Moore says that she telephoned Ms McDonnell during the course of the meeting to ask her about the alleged inconsistency and that Ms McDonnell confirmed to her verbally that she had overheard Ms Le Bherz make the offending statement. Ms Moore said that she reported this back to Ms Le Bherz and Mr Kerr and Ms Le Bherz responded by saying that she did not make the statement.

[28] The matter was not really made any clearer by Ms McDonnell's evidence. Ms McDonnell told me that she did overhear the statement. Ms McDonnell said that Ms Moore telephoned her to ask her whether the allegations written by X were true and that she replied yes. It is not clear when the call took place. Ms McDonnell accepted that the interview she had had with Ms Moore and Mr Scott had focused on the alleged visits undertaken with X and Ms Le Bherz and that she was never shown a copy of Ms Le Bherz's first statement or subsequent statements.

[29] I accept Mr Kerr's evidence that he left the meeting on the understanding that contrary to the statement in Ms Moore's letter of 20 October there was no written statement from Ms McDonnell to the effect that she was present when the alleged statement was made. This is confirmed by Mr Kerr's notes that he took of the meeting where he writes, *inappropriate statement allegations – RF letter of 20 October 2003 - ? no MM statement*. Ms Moore's notes refer to – *confirming of statement by X & MM. Providing statement to my letter*.

[30] Ms Moore then discussed the matter with a panel. This was in accordance with the Richmond Fellowship protocol. The panel members were Ms Moore, Penny Shaw Human Resource lawyer, Christine Kalin who was the General Manager of Southern Services for Richmond Fellowship and Ms Crowe. I accept that Ms Crowe's role was to clarify in relation to X the risk management plan, crisis plan and safety plan and the philosophy of Richmond Fellowship to the panel. Ms Crowe then left the meeting. Ms Crowe was at that time also an advocate for X. The panel considered the matters relating to Ms Le Bherz and reached a preliminary finding to dismiss her.

24 November 2003

[31] There was a final meeting on 24 November 2003. Ms Le Bherz attended with Mr Kerr and Ms Moore with Mike Prattley as note taker. Ms Moore outlined the format of the meeting which was to present the preliminary findings and give Ms Le Bherz an opportunity to respond. The issues which are recorded in minutes of the meeting are those of abusive behaviour, breach of policy procedure and failure to remain with X at all times. Ms Moore delivered the finding that two individuals heard the abusive statement being made. It is also referred to in the minutes of the meeting that *there is written confirmation that Margaret heard the statement*. Mr Kerr said during the meeting that he and Ms Le Bherz had been working from the understanding that the comment had not been witnessed and I find that he said words to the effect *this is news to us*. There was then a short adjournment and upon resumption a discussion about discrepancies between Ms McDonnell's statements. Mr Kerr noted in handwriting on the notes taken by Mr Scott on 11 September 2003 the passage which Ms Moore indicated confirmed that Ms McDonnell had overheard the statement. Mr Kerr wrote *Margaret said this JK 24/11/03* alongside the passage. The responses by Mr Kerr as reflected in the minutes of the meeting indicate *Today was first indication that Margaret had actually heard the statement. Christine denies making the statement and has all along*. The minutes then reflect that Ms Le Bherz and Mr Kerr were informed that based on the information there were no options other than to dismiss Ms Le Bherz immediately and that a formal letter would be sent. Mr Kerr also requested a written statement outlining the reasons for dismissal so that they could respond in due course.

[32] The letter of dismissal dated 24 November 2003 provided the reasons for dismissal as:

Dear Christine,

Further to our meeting this afternoon, this letter is to confirm that you have been dismissed from your role as Community Support Professional at Richmond Fellowship – RIDSAS for the following serious misconduct:

- 1. Behaviour of an abusive nature towards a Richmond Fellowship Client.*
- 2. Breach in Richmond Fellowship Policy and Procedures, Risk Management Plans and Crisis Plans for a client. Failure to achieve appropriate supervision of a client putting at risk the client, general public and Richmond staff.*
- 3. Breach in Health and Safety Policy and Occupational Safety Health requirement of following the Risk Management and Crisis Plans. Failure to follow plans that are a part of Richmond Fellowships Occupational Safety and Health policies putting at risk the client, general public and Richmond staff.*

...

Yours sincerely,

(signed)

*Jackie Moore
Service Leader – RIDSAS
Richmond Fellowship NZ Inc.*

[33] Mr Scott who no longer works for Richmond Fellowship told me that the part that Mr Kerr had written beside was what X had told Ms McDonnell. I concluded from Mr Scott's evidence that he was quite unclear as to whether Ms McDonnell had overheard the statement or not. His evidence was that he believed that Ms McDonnell was relaying things said to her by Ms Le Bherz or X. He was clear that Ms McDonnell had said that she overheard some things about X going out on a bicycle but not the abusive statement relied on. I referred the particular passage that Mr Kerr had written beside in the statement to Ms McDonnell. Ms McDonnell said that that was what she was told by X. Ms Moore said that it was always her understanding from the time X made the complaint to her that Ms McDonnell had overheard the statement.

The legal position

[34] In this case what I am required to consider is whether the decision to dismiss Ms Le Bherz was one that was open to a fair and reasonable employer to do in the particular circumstances.

[35] In *Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd* (1990) ERNZ Sel Cas 985; [1990] NZILR 584; [1990] 3 NZLR 549 the Court of Appeal held:

The employer must have more than mere suspicion but need not have proof beyond reasonable doubt of an actual offence by the employee. Good working relations depend on loyalty and confidence, both ways as between employer and employee. Once the employee destroys that relationship to the extent that the employer has reasonable grounds to believe there has been misconduct by the employee then, depending on the gravity of the situation, dismissal may be justifiable. Similarly, if an employer destroys that relationship by dismissing the employee without reasonable grounds for believing there has been misconduct by the employee, then the employee's dismissal is not justifiable and the employee has a remedy in the personal grievance provisions of the Act.

What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault. Obviously, the employer who has a business to run cannot be expected to conduct a formal hearing in the nature of a trial but equally obviously the employer has not made reasonable enquiries if the employee has not had a sufficient opportunity to answer the employer's complaint.

[36] The fundamental elements of a fair inquiry into alleged misconduct are set out in NZ (*with exceptions*) *Food Processing etc IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35; (1990) ERNZ Sel Cas 582 Goddard CJ:

The minimum requirements can be said to be:

- (1) notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
- (2) an opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
- (3) an unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*

Submissions

[37] Mr McKenzie submits on behalf of the applicant that the true reasons for dismissal are unclear and that a request for further particulars by Mr Kerr including the nature of the behaviour of an abusive nature was refused. It was clarified at the investigation meeting that the movie outing when Ms Le Bherz went to the toilet leaving X in the theatre was not relied on in reaching a decision to dismiss. This was because Ms Le Bherz was correct in her statement that there had been agreement if there was a need for emergency toileting at the movies. Mr McKenzie further submitted that the reasons relied on in paragraphs (b) and (c) of the dismissal letter involve a process of 'double counting'.

[38] Mr McKenzie also submits that there is a significant amount of doubt whether Ms McDonnell overheard the alleged statement to X and that such evidence could not discharge the required burden with respect to its reliability. Mr McKenzie submits that the investigation was deficient in that X was not reinterviewed in response to Ms Le Bherz's denials and that the person who informed Ms McDonnell of the visits undertaken by Ms Le Bherz was not interviewed.

[39] Ms Gibson submits that a view was reached that there had been abusive language directed at X. This view was reached she submitted on X's written complaint and Ms McDonnell's statement that she had overheard the abusive statement being made to X. Ms Gibson submitted that the statement clearly constituted abusive language in terms of Dr Reid's letter and Ms Le Bherz did not dispute Dr Reid's judgement that such a statement is abusive however did deny making the statement. Ms Gibson also referred to the organisational rules attached to Ms Le Bherz's employment agreement that provided that the use of obscene, abusive or threatening language constituted serious misconduct.

[40] Ms Gibson also submitted that the respondent reached the view that Ms Le Bherz had acted contrary to a number of Richmond Fellowship policies and procedures in that she:

- Breached the client's risk management plan by leaving the client unsupervised at her mother's house.
- Failed to obtain permission from the Team Leader or Case Manager to take X to private residences;
- Failed to incorporate the visits into X's written safety plan;
- Make reference to the visits in the clients program notes; and
- Advise other staff that these visits had occurred in team meetings.

[41] Ms Gibson submitted that this conduct viewed separately from the abusive statement also substantively justified the applicant's dismissal and further Ms Gibson submitted that the process which was followed was procedurally fair in all respects.

Determination

[42] I turn firstly to the reasons for Ms Le Bherz's dismissal. I find that the first reason for the dismissal was the use of abusive language to X as described in X's complaint – *you disgust me, you are nothing but a dirty disgusting paedophile, go to your room.*

[43] The additional reasons for dismissal provided in paragraphs (b) and (c) of the letter of 24 November 2003 are unclear. The facts relied on for each breach are not referred to. Ms Le Bherz had provided explanations with respect to the separate visits with X. There was an opportunity for Richmond Fellowship to clarify its reasons. No further particulars of the reasons were forthcoming despite a request from Mr Kerr because, as Ms Moore said in her email of

5 December 2003, *Our legal team are satisfied with the explanation for dismissal, given the other associated documents, for Christine Le Bherz*. Subsequently it became apparent that the movie visit was not relied upon. There was no advice to Ms Le Bherz during the disciplinary process or when further particulars were sought of the reason for dismissal that her explanation had been accepted.

Goddard CJ said in *Ashton v Shoreline Hotel* [1994] 1 ERNZ at pg 427

It is therefore important for the employer, when asked, to state accurately and comprehensively the reasons for the dismissal. This is no imposition upon the employer for it must know why it dismissed the employee.

...

There is a risk that an employer, on receiving professional advice that the reasons relied upon were inadequate, might be tempted to supplement or embroider them.

[44] In the circumstances the most reliable evidence that I can find in terms of what was put to Ms Le Bherz about the other reasons for dismissal is contained within the minutes of the meeting of 24 November 2003 as taken by Mr Prattley from Richmond Fellowship. That meeting followed the meeting of the panel where preliminary views had been reached and fairness required that they be put to Ms Le Bherz. As recorded at the meeting the breaches relied on as issues at the time of dismissal by the employer were:

Leaving client unattended at times – in breach of risk management and crisis plans – serious misconduct.

Failure to remain with client at all times:

- *breach of our funding contract* *serious misconduct*
- *Community safety*
- *Health and Safety issues.*

Explanations were given by Ms Le Bherz about the time when she left X in the car at her mother's home at the meeting on 24 November 2003. She said that she could see X at all times. This was the only occasion when X was left unattended aside from the movie incident. Some of the additional matters that were put forward in Ms Gibson's submissions and expanded on for the first time in evidence in relation to the breaches relied on by Richmond Fellowship were not specifically put to Ms Le Bherz for her explanation prior to her dismissal and that was procedurally unfair. There were a number of allegations for Ms Le Bherz to provide explanation for as the disciplinary process took its course. For the process to be fair it was essential that Ms Le Bherz knew each specific allegation of misconduct relied on in order to provide explanation. I do not find that it was clear enough to Ms Le Bherz and Mr Kerr what breaches of policy, procedures and plans were being relied upon in terms of the concerns about supervision of X and inappropriate visits. The nature of the breaches was only clarified in evidence for the investigation meeting.

[45] There is an obligation on an employer to inquire into allegations of misconduct in a fair and reasonable way. It was not an easy situation for Ms Moore. X has an assessed intellectual disability. Ms Moore said that had she believed the statement had not been overheard then she probably would not have continued the investigation. I am satisfied that Ms Moore did believe that the statement was overheard from an early point in the process although I am somewhat unclear as to the basis for that belief. I am not satisfied that this belief was clearly put to Mr Kerr and Ms Le Bherz until the final meeting on 24 November 2003. Whilst I accept Ms Gibson's submission that there was a brief adjournment during the meeting on 24 November I am not satisfied that Ms Le Bherz had a real opportunity to respond and in any event Ms Moore had

already formed a preliminary view on the basis that the statement had been overheard and that view was unlikely to be changed.

[46] The process was initially satisfactory prior to and including the first meeting on 16 September 2003 but the process was unfair to the applicant from that point onward. It seemed to me that Ms Moore was distracted from the process that she initially intended to follow as outlined in her email of 16 September by the large number of later allegations that followed shortly thereafter.

[47] Ms Moore set out in an email following the first meeting of 16 September to Mr Kerr that her advisers had requested she interview amongst others the client and staff member mentioned in Ms Le Bherz's letter who was Ms McDonnell. I am not satisfied that in relation to the allegation of abusive language there was any further adequate inquiry. In the face of a denial that Ms Le Bherz had used abusive language toward X and given her statement including attributing a statement to Ms McDonnell a fair employer would have carried out further investigation into that allegation.

[48] Ms Moore did not show Ms McDonnell Ms Le Bherz's first statement or ask her to comment on it. She did not through X's advocate Ms Crowe discuss the contents of Ms Le Bherz's statement with X. Ms Moore did not have any further interview or discussion with Ms McDonnell about the allegation with respect to the abusive statement except I find to the extent of confirming with her by telephone that she had overheard the statement and/or was clear that what X said was true. I am not satisfied that this was adequate investigation enabling Ms Moore to prefer Ms McDonnell's evidence over Ms Le Bherz in the circumstances where documentary evidence supports that Ms McDonnell had not told her supervisor Ms Prendergast that she had overheard the statement X complained of but rather that X or Ms Le Bherz had told her what had been said. Mr Scott was not clear that Ms McDonnell had overheard the statement. Ms Prendergast later confirmed to Ms Moore by letter that Ms McDonnell told her about X's disclosures not what she had overheard. Ms Le Bherz also said in her own statement of 29 October in response to Ms Prendergast's letter attached to Ms Moore's letter of 20 October – *Further to Glenda Prendergast's letter, I do not dispute that the behaviour Margaret McDonnell has alleged is unethical and abusive. However, I have never engaged in such behaviour and I note that Glenda Prendergast offers no evidence that I have, other than hearsay comments via Margaret McDonnell, to which I have already responded.* This should have alerted Ms Moore to the need to undertake further investigation.

[49] There was also I find inadequate investigation into the explanations for the alleged visits Ms Le Bherz undertook with X. Mr Halliday the vocational worker at Richmond Fellowship was not interviewed by Ms Moore although Ms Le Bherz provided his name in her third statement to Ms Moore. He confirmed at the investigation meeting what Ms Le Bherz had said in her statement. He said that the two visits to pick up a washing machine and fridge and the chopping of firewood took place during X's vocational time. He confirmed that Ms Le Bherz had talked through the activities with him prior to them occurring although he made it clear that it was Ms Le Bherz's role to deal with the safety plan side of things. Mr Halliday also confirmed that no-one who may have been at risk was present at those times and the washing machine and fridge was picked up at an empty house. He confirmed X was always supervised closely. Ms Moore largely relied on Ms McDonnell in terms of whether the safety plans had been completed. I do not find that this was adequate in the circumstances. I asked Ms McDonnell whether any of the visits Ms Le Bherz had undertaken with X were vocational in nature and she very quickly said that they were not. Clearly two of the visits occurred during vocational time and X was accompanied by Mr Halliday. It is difficult to see in those circumstances how Ms McDonnell could be relied on to check the safety plans. The evidence I heard also suggested that the filling out of the safety plans in terms of vocational time had changed recently and had become more specific. Had Ms Moore properly investigated the breaches then she may have been able to more clearly articulate the issues of concern to Ms Le Bherz and Ms Le Bherz would have had an opportunity to provide further

explanation. Ms Moore would have then been able to assess if a breach had occurred and if so the nature and seriousness of the breach.

[50] I also find that there was an element of pre-determination in the respondent's inquiry. This comes through particularly in the letter to Ms Le Bherz from Ms Moore dated 20 October 2003. The wording in that letter indicates that Ms Moore may not have had an open mind. It strongly suggests that Ms Moore concluded that the statement was made and overheard and has then proceeded to obtain advice from Dr Reid that the statement was abusive. Also in terms of attached letters from Pauline Crowe and Toby Stocks, Ms Moore extends what is actually said in their letters to make it appear more conclusive that permission was not given. Although Ms Moore said that she discussed the movie visit with Ms Crowe at or about that time and concluded Ms Le Bherz was correct there is no mention of that in her letter which would be expected if Ms Moore had approached the inquiry with an open mind.

[51] For all these reasons I find that the process adopted by the respondent was unfair to Ms Le Bherz. Where there has not been a fair and reasonable investigation it is not helpful to draw a sharp distinction between the procedural fairness and the substantive fairness. In terms of the allegation of abusive language I am not satisfied that reasonable enquiries were carried out which would enable a fair and reasonable employer to believe on the balance of probabilities that Ms Le Bherz had made an abusive statement to X. I do not find that it was open to a fair and reasonable employer to dismiss Ms Le Bherz in these particular circumstances for that allegation. I accept that there has to be strict compliance with Richmond Fellowship policies and procedures and risk management plans in the RIDSAS service. In terms of the allegations of breach of those policies and procedures I am not satisfied that those were clearly put to Ms Le Bherz or that fair and reasonable enquiries were carried out. Whilst Ms Le Bherz leaving X in the car whilst she visited her mothers home was unwise, and taking X to personal addresses was unwise, I do not find that it was open to the employer in this case, acting fairly and reasonably, to have seen dismissal as the appropriate response to Ms Le Bherz's conduct in these circumstances.

[52] Ms Le Bherz has a personal grievance that she was unjustifiably dismissed and is entitled to remedies.

Remedies

[53] Ms Le Bherz seeks permanent reinstatement. Section 125(2) of the Employment Relations Act 2000 provides that the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement. I am satisfied that it is practicable for Ms Le Bherz to be reinstated. I am not however persuaded that it would be practicable or appropriate to reinstate Ms Le Bherz back into X's programme. I listened carefully to the evidence of Sharon, a friend of X's family who has a lot of contact with X. Sharon said that she thought Ms Le Bherz and X got on well and that X talks about her even now. I am satisfied however that there are other programmes within RIDSAS that Ms Le Bherz can be permanently reinstated into. Ms Moore said that Ms Le Bherz could never be permanently reinstated back in RIDSAS. I do not share that view. I make the interim order for reinstatement permanent and order that Ms Le Bherz be reinstated to a position no less advantageous to her within RIDSAS or, by agreement, within the wider service of Richmond Fellowship. To enable such a position to be found I order such permanent reinstatement be effective from Monday 3 May 2004.

[54] I do consider that Ms Le Bherz did contribute to her dismissal to a degree by her unwise conduct in taking X to personal addresses and leaving X in the car during one visit. In all the circumstances I consider a reduction to the monetary remedies is called for. I consider that a 20% reduction is appropriate.

[55] Mr McKenzie and Ms Gibson agreed at the investigation meeting that they were in a position to determine lost wages. Contribution will also have to be taken into account as well as the wages earned during the period of interim reinstatement from 22 December 2003. If agreement cannot be reached then leave is reserved for either party to come back to the Authority.

[56] I accept that Ms Le Bherz did suffer considerable distress when she was dismissed. The permanent reinstatement I have ordered will substantially reduce the stress and anxiety that I accept she has suffered. I therefore consider it appropriate to award a lesser amount for humiliation, loss of dignity and injury to feelings. I am of the view that an appropriate award would be \$4,000.00.

[57] Taking contribution into account I order Richmond Fellowship New Zealand Inc to pay to Christine Le Bherz the sum of \$3,200.00 without deduction under section 123 (c) (i) of the Employment Relations Act 2000.

Costs

[58] I reserve the issue of costs. I would encourage the parties to attempt to reach agreement on this matter in the first instance. If agreement cannot be reached and the applicant wishes to file memorandum with respect to costs then memorandum is to be filed and served within 14 days after receipt of this determination and the respondent is to have a further 14 days to reply to any such application.

Helen Doyle
Member of Employment Relations Authority