

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 200
5338375

BETWEEN JUSTINE DANDO MCDONALD
Applicant
AND PORSE IN-HOME CHILDCARE
(NZ) LIMITED
Respondent

Member of Authority: Philip Cheyne
Representatives: Anjela Sharma, Counsel for Applicant
Maree Kirk, Counsel for Respondent
Investigation Meeting: 10, 11 & 23 May 2011 at Nelson
Determination: 14 December 2011

SECOND DETERMINATION OF THE AUTHORITY

Introduction

[1] Justine McDonald worked for Porse In-Home Childcare (NZ) Limited (Porse) based in Nelson from February 2010 until she was dismissed in March 2011 following an investigation into alleged serious misconduct. Ms McDonald says that she was unjustifiably dismissed and she is seeking compensation and reinstatement to remedy her personal grievance.

[2] Ms McDonald earlier sought interim reinstatement which was declined: see *McDonald v Porse In-Home Childcare (NZ) Ltd* [2011] NZERA Christchurch 46. However, as explained in that determination those findings were solely for that purpose. There has since been a full investigation meeting over three days canvassing more information and allowing the opportunity to fully test all the evidence.

[3] For several reasons there is some delay in the issuing of this determination which I regret. I needed to give priority to other reserved determinations themselves

significantly delayed because those files were trapped for a long time in the Authority's Kilmore Street premises. The documentary evidence in particular did not all come before the Authority in a timely and orderly way. The matter is very important to the parties especially because it involves a claim for permanent reinstatement which is strenuously opposed. The determination has required careful thought and consideration of the significant volume of material and contested evidence, tasks which are difficult in the Authority's current working circumstances. I apologise for the delay.

Employment Relationship Problem

[4] In January 2011 while on holiday Ms McDonald went camping at Kaiteriteri with some friends and family. She used her work car which was branded in a highly visible way with the company name. There was a verbal disagreement between Ms McDonald and some other campers. Sometime later, Porse received three written complaints about Ms McDonald's behaviour at the camping ground. Following a disciplinary process about these complaints and some other matters Ms McDonald was summarily dismissed on 1 March 2011.

[5] There are several strands to Ms McDonald's personal grievance claim. She does not accept the conclusions reached by Porse about her conduct at the camping ground or that there is any validity to the other work related complaints. Nor does Ms McDonald accept that Porse investigated the incident in a fair and reasonable manner. The claim for reinstatement has led to some focus on Ms McDonald's work performance more generally and her compatibility with other employees.

[6] To resolve this problem I will explain more fully how the issue about Ms McDonald's conduct at Kaiteriteri came to Porse's attention and what was done to investigate the concerns. I will then consider whether Porse's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time. I will first say something about Porse, the people involved, and the nature of Ms McDonald's position.

Porse

[7] Porse has 42 offices nation-wide with over 250 staff. Each office comprises three roles – a Porse consultant, a programme tutor and a client services administrator. The consultants and programme tutors work closely with Porse home educators (who work in their own home) and Porse nanny educators (who work in the family's home). The educators are not Porse employees but they are supported in their early childcare work by Porse consultants and programme tutors. A consultant's role is to market Porse throughout the region, meet the families who require care of their children, register educators and match a family's needs to an educator. A programme tutor's role is to educate and school the educators supporting them in their work with children. Programme tutors regularly visit these educators and are responsible to ensure a quality education programme is delivered to the children. They are qualified early childhood professionals and must maintain their registration.

[8] Ms McDonald was employed in a combined role as both a consultant and a programme tutor.

[9] There are about 10,000 families involved with Porse and more than 4,000 educators and nannies. Porse is able to access various funding streams that support early childhood education.

The people involved

[10] Ms McDonald was camping at Kaiteriteri Motor Camp with her 8 year old son, her friends Paul Vuillermin and his partner Jan, and Jan's child. Brydie Dando is Ms McDonald's adult daughter. She visited the campers at Kaiteriteri a day or so after the incident and attended at Ms McDonald's lawyer's office shortly after the dismissal.

[11] Jenny Yule is Porse's founder and managing director. She was involved principally in employing Ms McDonald. Emma Murphy is a team coach employed by Porse. Although based in Wellington Ms Murphy's responsibilities at the time of the complaints included the Nelson office where Ms McDonald was based. She had recently taken over that role from Melissa Watts who was based in Christchurch. As

team coach Ms Murphy was involved in Porse's disciplinary process and communicated the decision to dismiss to Ms McDonald. Megan McKenzie is also a team coach for Porse based in Christchurch. Ms McKenzie received the complaints initially.

[12] Michelle Collier is employed as a consultant in Porse's Nelson office. She wrote to Ms Murphy in February 2011 setting out various complaints about Ms McDonald spanning from the commencement of her employment. Ms Collier was also interviewed by Ms Murphy as part of the disciplinary process. She opposes Ms McDonald's reinstatement. Janelle Walker is a programme tutor employed by Porse based in the Nelson office. She was interviewed by Ms Murphy as part of the disciplinary process and also opposes Ms McDonald's reinstatement.

The complaints and how they came to Porse's attention

[13] Ms McKenzie's husband is involved in a school board of trustees with one of the complainants. I infer that this complainant knew that Ms McKenzie worked for Porse. One of the complainants apparently sent a text message to Ms McKenzie's husband who called the complainant. There was then a phone discussion between Ms McKenzie and the complainant. Some days later, when Ms McKenzie was dropping her child off at school, there was apparently a discussion between Ms McKenzie and the complainant when Ms McKenzie encouraged this complainant to put her complaint in writing and gave her the email address.

[14] Ms Murphy's evidence, which there is no reason to doubt, is that she was rung by Ms McKenzie who said that she had received a tearful phone call from a woman telling her about what had happened at Kaiteriteri, that because of the incident they had moved their children's tent for the night and returned home one day early. Ms Murphy was also told by Ms McKenzie that she knew the complainants to be honest and reputable people and that she had encouraged them to put their complaints in writing.

[15] The emails to Ms McKenzie are part of the evidence. The first one is from Jane Coultas on 1 February 2011 at 9.00am and reads *Hi Megan Attached is my wee letter, let me know if you need anything further. I will let Gareth know your email*

address. Jane. The attached letter dated 29 January 2011 describes the incident of 26 January 2011 as follows:

At about 7.55pm the kids went to the back of our campsite where their tent was and they were showing my kids where they would be sleeping. The woman from the campsite behind came over and started very aggressively telling the children that her child was asleep and our kids could stop making any noise and that she didn't want to put up with them talking at 4am again. The kids were all rather frightened by her and Gareth went down to speak to her. He said it was only early and if she did have a problem she should be talking to him or his partner not the children. She got very angry and Phillippa joined Gareth and the discussion got very heated. She was adamant the kids were talking at 4 am and when Gareth said she should have come and told him and he would have dealt with it she said that she would knock on the caravan door and throw a bucket of water over him if it happened again. By this stage two of the four children were in tears and I was sitting there quite flabbergasted by camping life! The woman, who I think was called Justine, then told us we should all F... off back to Christchurch, Gareth told her there was no need for that and she said it again at which point Gareth, unfortunately, told her to F... off back to Nelson. We had a rather traumatic start to camping life and we had to move the tent and put it at the front of the site as the children were too afraid to sleep near her campsite.

...according to what my friends told me this was the first conversation they had had with her directly. There had been an incident the day before when either she or her daughter had, apparently, called one of Gareth's boys "a stupid bitch". I had earlier heard her telling her own children that they needed to get the "f...ing potatoes peeled", which shocked me.

Whilst all of this seems a bit trivial it was very upsetting at the time and we stayed for 2 nights rather than 3. Her manner, when speaking to the children (aged between 6 & 10) was, aggressive and frightening and the camp site she was on was set about a metre higher than ours so she also towered over them which added to the intimidating effect. To see that she was driving a Porse car (rego # FEJ810) was very upsetting. If this is the type of person that you employ (and advertise the fact by allowing her to use the car in personal time) then I am very disappointed as I had always held your company in high regard.

[16] The second email is from Carla Heritage dated 2 February 2011 at 7.36 pm. It reads:

Hi Megan

In January my family and myself stayed at Kaiteri Camp ground. We camped near a employee of Porse that parked her company car on her site. During this time we and another family near us witnessed the female in question loudly abusing our children aged between 6 and 11 years. She was heard to use bad language at the children and accuse them of being loud. This incident occurred roughly late afternoon. The children had been playing go home stay home and were not out of control. One would think that a person that works with children would be aware and understanding of children's playing behaviour.

My other concern is the safety practice she has for her own children. I followed her in the Porse car from the camp out to the main road with 2 children sitting in the front seat, one clearly not belted in.

I bring this to your attention as I don't feel it is good behaviour and image for your company.

Thank you for your time

[17] The third email is from Gareth Charles and Phillipa Field dated 2 February 2011 at 8.31 pm. It reads:

To whom it may concern

On Our recent Camping Holiday to Kaiteriteri we had a confrontation with one of your employees. We know this as your employee was driving a Porse car. The registration no is FEJ80. It was 8pm and she yelled at our Children to Shut Up and that they were making to much noise. When asked to come and see us if she had a problem with our Children she replied with "I will and throw a bucket of Water on You." When confronted by my Partner and myself she continued to abuse us with no reasoning at all. Ending with her telling us to F.Off back to Christchurch. While this was going on our Children and a Friends Child were in Tears. Resulting in us having to move the Children's Tent as they were to Scared to be right next to her. We also witnessed her yelling at her own Children with an abusive tongue. We feel this behaviour is not acceptable and is especially not good Advertising for your Company.

[18] On 4 February 2011 Ms McKenzie responded to the three complainants telling them that Ms Murphy would be meeting with Ms McDonald to discuss her behaviour at Kaiteriteri and apologising *that you and your family have had this terrible experience from a PORSE staff member.* She forwarded that apology and the complaints to Ms Murphy. Ms Murphy's evidence, which I accept, is that she forwarded the complaints to Ms Yule and Paul Houlahan, another company executive. She then met with Ms Yule and Mr Houlahan on or about 8 February 2011. They discussed the serious nature of the concerns and decided that there needed to be a disciplinary meeting.

[19] Ms Murphy's evidence, which I accept, is that she, Ms Yule and Mr Houlahan did not have any contact with the complainants.

[20] Having received the complaints about Kaiteriteri but before initiating a disciplinary procedure about those complaints Ms Murphy received a lengthy written complaint about Ms McDonald from Ms Collier. At least some of the aspects of the complaint were not new to Ms Murphy because she had discussed them previously with Ms Collier. It is helpful to set out these matters before turning to how Porse dealt with the Kaiteriteri complaints.

Ms Collier's complaint about Ms McDonald

[21] Ms Collier started at Porse in September 2010. Ms Collier's evidence, which I accept, is that she spoke to her coach Ms Watts soon after starting about concerns with Ms McDonald but Ms Watts did nothing about it. That supports Ms McDonald's evidence that Ms Watts never discussed concerns with her. However, it seems that

some of the topics of concern were discussed with Ms McDonald during coaching meetings without them being identified as concerns from a colleague.

[22] Later, Ms Collier spoke to Ms Murphy two or three times about her concerns with Ms McDonald. Ms Collier described it as *me ranting at Emma!* Ms Murphy told her that she had to put the concerns in writing for Ms Murphy to be able to help. Ms Murphy's evidence, which I accept, is that she spoke in person with Ms Collier about this in December 2010 as well as receiving phone calls from her. Ms Collier eventually put her written concerns and complaints to Ms Murphy on 11 February 2011. The attachment reads:

Hi Emma.

I am not very comfortable putting into writing my complaints about Justine. I realise if I want further support with my concerns then I need to do so. However, I am now putting my trust into you and PORSE. I feel this leaves me in a very vulnerable position as any fallout with Justine leaves me working in a very small office with her and no "real" support. I am not comfortable with talking behind someone's back without talking to their face. And on that note Justine is like working with a volcano, you never know when she is going to go off and that is when it has nothing to do with me!!! I am not at all confident to address complaints or concerns with her.

For the first three months of working with Justine I made a conscious decision to not confront her or go against her in any way, this was because one; I needed her to help learn certain areas of my new role, two; while learning such a lot as you do in the first three months I truly did not have the energy to have any problems, conflicts etc, with anyone! Let alone someone that I share a confined office space with.

On a subconscious level I can now see that I really wanted all the office problems of the past to have been Sue's fault. So therefore I made a huge effort to see Justine in a positive light. I experienced Justine to be very negative in nature, bitter with a lot of personal baggage. I tried hard to reflect positive behaviour and professionalism. I spent many working hours counselling her. I encouraged her to see a counsellor and she now is. I feel she would be very hurt if she knew how I now feel.

On my first day of work at PORSE Sue and I went out to the staffroom to talk about my role and induction book. Because it was quiet (Justine is very loud in the office) we stayed out there for twoish hours working away. On returning to the office (same building) Justine yelled out "where the fuck have you two been, we couldn't find you and we were supposed to be going out for lunch". Sue said "please don't yell like that" then we explained we were down the other end, Sue's car was still here and she could have looked etc etc. I at this point am gobsmacked. Sue then spent a large part of my induction telling me all about how horrible Justine was and that is why she was leaving. By the end of my first week I thought Justine was a bully. On the Friday I spoke with Melissa about this. I asked

her if PORSE had any policies about Bullies in the workplace. Melissa responded with "its how you respond/react to someone/a problem that makes it a problem". Now that is fine in theory until you have a stronger person than another. Perpetrator/victim. Then along comes a rescuer!!!! (Classic triangle of abuse, - I used to work with family violence).

Okay so then I come back from holiday this year feeling like I can now do the job well and I really want to achieve, and as the weeks have ticked by I have found it harder to cope with Justine.

Okay so that is my emotions!!! Here is a list of things that are making my work life way too hard.

Firstly I am working my butt off doing well over 40 hours a week. We have been really busy. Justine every second week picks her son up from school at 3 and claims to work from home. I see no evidence of this. She rarely starts before 9am. From now on I am keeping a written record of her times. (When I can).

Friday 4th Feb arrived at the office at 9.30 half an hour late for an appointment this held me.

Monday 7th went home at 3 and did not respond to any of the enquiry, I did not either as was at family contract signs, so I ended up dealing with them the next morning, well actually she did deal with nice family inquiry but I had to deal with the problem ones and WINZ form signs etc. This really peeves me because I was fully booked this week from the week before.

Tuesday 8th left at 2pm for a PT visit (one hour). Then did not return to office.

Wed 9th. Left at 4.30.

Thurs 10th. 9.30 start, left at 3pm.

This to me adds up to about nine hours which is close to how many overtime hours I have had to do to deliver a good service.

Justine is very objectionable to ideas (anything actually unless it involves getting out of something) it feels like we have to drag her across the "let's do a great job/service etc line". We try to delegate jobs fairly at our meetings, she says she will do something and then she doesn't, she will also lie and say she has when she hasn't. (Parent dissenter advertising). She offered to help when I was really busy three weeks ago, I asked her to enter a contract for me, later when she had gone away on leave I notice she had put her name on the contract. This one really Peees me off because it was a hard one to put together.

The way Justine is with Clients and EDs is not always great. I have heard her be rude to people on the phone, she does not give great service and always (to me) appears to do as little as possible for them. I have had to deal with some of her unhappy families, e.g. unhappy family asks me why did Justine not try and find them a new ED when she knew the old one was leaving. I end up working

overtime (and always) to please them. I place a family with a Fantastic first time home ED, I was the first one she had had contact from PORSE since she registered five mths previous, she was going to start with another company. If she was a complete dud I could expect this but she is awesome. Sue Person explained about Justine's rudeness on the phone. I heard this phone conversation and believe Justine was very rude, Melissa was aware of this.

I believe that there have been a number of complaints about Justine to Melissa. Janelle made one back (email) late last year about Justine being late to playschool when she had specifically asked her not to be late. Justine went shopping, told me all about it then lied and played it all down. Then we have to deal with backlash and all the going on from her about how people are so wrong, horrible, liars etc etc. I also talked to Melissa last year after the Laura McKenzie complaint, about Justine having no ability to see that she may upset people with her tone and the way she handles things and blames everyone else. This is one of the reasons I am not keen to address anything with her.

I asked Melissa to document (I was too busy to sit down and write it out) and pass on to you my frustrations of Justine not being at work and me feeling like I was doing all the PC work on my own, this was the week before Xmas.

I do not trust her with our visa and office stuff. At conference she was going to buy alcohol on the PT visa. Janelle stopped her. (We now wish she hadn't.) At conference she stole an unopened bottle of wine from the Sat night dinner then took it home. The Friday night before she went on annual leave (Feb) she helped herself to wine in the ATEX fridge, so had a glass of white wine then went to the Maternity ward to give them a box of our Teddy bears. She has no problem putting inappropriate things on the visa, such as the ??? costumes, we stopped fighting her on this one and gave in, and then covered for her. (Silly us). Ordering office products and then not telling us or sharing them, when I went into her drawer to see were things may be after finding a packing slip, she had a go at both of us. Drama over staples and stick its, God how embarrassing but it really winds you up after a while. There are so many little things ... like she unpacks a box then doesn't remove the rubbish, in the past I have cleaned up after her because I want the office to be professionally presented however at the moment there are two boxes there that she unpacked (one three weeks ago) and was not cleaned up. I wonder if they will still be there when you arrive.

I have just read back over this and to be honest I think it sounds a bit petty but it is really building up. There are just so many little things ongoing and they are building. Here's one more ... Sorry!!! But this one is just so crass. She comes banging through the door as usual and says loudly "oh my God have you farted in here" I say no and that I think it is her rubbish bin. She then goes off to deal with the nanny that has been waiting half an hour because Justine was late. I then go and empty her rubbish bin into the kitchen bin and sure enough she has left food in her office bin (onions of all things). Who the hell leaves onions in an office paper bin!!! I said something to her in a grumpy tone and she just laughs at me.

I believe Justine is very unprofessional, she is difficult to work with and because of this I know she is compromising the Nelson Team.

From now on I will try to email you my concerns as they happen.

Thanks for listening.

Michelle.

[23] Ms Murphy held a team meeting with the Nelson office on Thursday 17 February 2011. Later on 19 February 2011 Ms Murphy sent the Nelson staff an email mentioning matters discussed during the team meeting. There was a discussion about the use of flexi-time. Notes made by Ms McDonald of the discussion state *Working from home – not allowed*. In her email Ms Murphy referred the Nelson staff to the Porse policy. The email also referred to a *MATES agreement*. That is an agreement between staff about how they will work with one another. During the team day there was such a discussion between Ms McDonald, Ms Collier and Ms Walker. It was apparently an emotional discussion as Ms Murphy later wrote:

I thank you all for being able to share your feelings, although this is never easy, I was impressed with the professionalism that you showed in sharing your feelings so that we can move forward with the Nelson team;)

[24] Ms Collier's evidence is that she signed the *MATES agreement* despite it being *untrue* and something she did not agree with. Her evidence is that the agreement did not adequately address her concerns and complaints but she never raised that with the other Nelson staff at the time. Ms McDonald and Ms Walker also signed the *MATES agreement* and it was returned to Ms Murphy.

[25] Ms Murphy never told Ms McDonald about Ms Collier's written complaint and it was never disclosed to Ms McDonald until after her dismissal.

The disciplinary process

[26] Ms McDonald received a letter dated 15 February 2011 from Ms Murphy setting up an investigation meeting which included as attachments the text of the three complaints but excluding the names of the complainants. The covering letter advises Ms McDonald that *We are very concerned about these issues, you were using the PORSE car and clearly damaging the company's reputation – not only in the area – but in the area from where the witnessing holiday makers come from*. It mentions that

the matters are serious and could constitute serious misconduct *and therefore a potential outcome of this meeting could be the agreement for personal use of the PORSE vehicle being reconsidered, a warning or termination of employment.* The letter advises Ms McDonald that Ms Murphy will be represented and that she may bring a representative or support person.

[27] By agreement the meeting was rescheduled for Monday 28 February 2011. Before then Ms McDonald received a letter dated 23 February 2011 from Ms Murphy. This letter amplifies the earlier expressed concerns saying:

I do want to clarify for you that this matter is of concern because it not only damages the company reputation but it shows a lack of professionalism that because of the car, becomes attached to our organisation. Your conduct, as alleged, does not accord with the PORSE Vision and Mission and it cannot be said that you did anything to positively promote PORSE's Programme Philosophy. In this context we note that the requirements for the position(s) that you hold are described as:

- a. Positive, warm and approachable*
- b. Respect for self and others*
- c. Flexible and accepting of change*
- d. Professional judgment and integrity*
- e. Commitment to role model the PORSE way*
- f. Anticipating the future and carrying the culture of PORSE*

Another aspect of this matter arises from the fact that you had the PORSE car in Kaiteriteri at all. The Company Vehicle Agreement requires that you seek written authorisation before using the vehicle outside the normal regional district. It is alleged that you have acted in breach of this agreement and we request your response to this allegation at the meeting on 28 February.

In addition, we have concerns that you have been in breach of the Employment Agreement terms which require that you work 40 hours per week as a full-time employee. We understand that you have not had in place any childcare arrangements and, as a consequence, you have left the workplace early every second week of the school term over the last year.

Specifically, we understand that not only is it rare for you to start before 9.00 am but also in the week of 7 – 11 February 2011 your hours were:

- Monday, 7 February – finish at 3.00 pm.*
- Tuesday, 8 February – left at 2.00 pm for a PT visit of 1 hour and did not return to the office.*
- Wednesday, 9 February – left at 4.30 pm.*
- Thursday, 10 February – after a 9.30 start you again left the workplace at 3.00 pm.*

This above week, if it is an example of your usual practice, is totally unsatisfactory. The flexi time policy in the PORSE Staff Policies and Processes does not accommodate this type of absence. It is alleged that this was not legitimate use of the flexi time policy and did not meet the objectives for which we made flexi time available. We believe that the times set out for the week ending 10 February are an example of ongoing failure to meet your obligations in regard to hours of work. That is, you have allowed PORSE to pay you for a 40 hour week but have failed to provide services for 40 hours. If this allegation is substantiated it will be viewed as serious misconduct.

....

[28] I note that the allegations about hours of work reflect what Ms Collier had said in her letter of complaint to Ms Murphy. It has never been explained why the hours of work matter was escalated to a disciplinary allegation, having been discussed and presumably resolved during Ms Murphy's 17 February 2011 team meeting.

The first disciplinary meeting

[29] By agreement the meeting on 28 February 2011 was recorded. I have been provided with a transcript which I have read and will summarise here. Present were Ms Murphy, Porse's representative (Maree Kirk), Ms McDonald and her representative (Anjela Sharma). The meeting started with Porse summarising the three allegations: bringing Porse into disrepute by reason of events at Kaiteriteri, breach of the company vehicle agreement by not having authorisation to take it out of the region; and a failure over many weeks to work 40 hours as contractually agreed.

[30] Ms McDonald's response to the first allegation was that it was grossly inaccurate and that the friends who were camping with her would support that view. Ms McDonald said that only her son was with her and her daughter visited after the complainants had departed. Ms McDonald accepted that there was one exchange between her and some of the complainants at about 8.00pm. Her son was unwell and had been sleeping poorly. The other campers' children were running backwards and forwards and she spoke to them politely asking if they would lower their noise. One of the parents took offence, approached Ms McDonald and told her to *fuck off to a motel*. Ms McDonald denied swearing, telling the children to shut up or saying that she would throw a bucket of water over them. Ms McDonald said that there were no crying children. She could not have yelled at her own children as only one (who was sick) was present. She could not have told her child to *get the fucking potatoes peeled* because she had brought hash browns not potatoes on camp. Nor could she have driven with two children unrestrained as she only ever had one in the car and the car would have emitted a warning noise if any passengers were unrestrained. Ms McDonald denied calling one of the complainants' boys a *stupid bitch*, nor could her daughter have done this as she was not present. Ms McDonald thought that the complainants were motivated by vengeance because there had been a complaint to the camp management about them. Ms McDonald provided a letter from the camp management referring to this and a concern about the group's behaviour.

Ms McDonald pointed out that the complainants were anonymous and that there were various inconsistencies between them. Ms McDonald offered letters from various people who would say she was not aggressive or abusive, including her daughter to also confirm the timing of her visit to Kaiteriteri.

[31] Ms McDonald's response to the second allegation was that her former coach (Ms Watts) knew that she was going on holiday to Kaiteriteri and never told her that it was out of the region and that she would need authorisation to take the car. Ms McDonald noted that for two years running she had seen and spoken to another Porse employee (Ms Walker) who had her Porse car with her at Kaiteriteri. Ms McDonald also explained that if she had breached Porse's car policy she had not done so deliberately.

[32] Ms McDonald also had a response to the third allegation. It was said that her employment agreement entitled her to work at home as well as at the office, that flexibility having been discussed and agreed before she commenced work. It was also said that Ms McDonald had kept a diary of her working hours including the week referred to by Porse.

[33] Following an adjournment the meeting reconvened. For Porse it was said that Ms Murphy needed to consider the differences between Ms McDonald's and the complainants' accounts of the incident at Kaiteriteri, to speak to Ms McKenzie about her involvement with the complainants, to speak with the motor camp managers and to speak to Ms Watts and Ms Walker about the car issue. Ms McDonald's representative asked for the complainants' identities and undertook not to contact them. That became another matter for Ms Murphy to consider. Ms Murphy also needed to investigate and consider Ms McDonald's explanation about her hours of work including whether Ms McDonald was being treated differently to others about flexibility. During these exchanges Ms Murphy said that she was concerned about the hours being worked after hours.

[34] The meeting then adjourned until 1 March 2011. Meantime, by agreement, Ms McDonald continued with her normal work.

[35] Ms Murphy's evidence about this meeting generally is that she hoped that Ms McDonald would tell her what had happened at Kaiteriteri but Ms McDonald denied things so Ms Murphy was left *confused as to what did happen*.

[36] In addition to what was said during this meeting, Ms McDonald's representative also provided a letter dated 28 February 2011 setting out responses to the allegations. Of note, Ms McDonald denied *swearing in the manner alleged* but acknowledged that *The exchange became heated and While there was friction between the two groups this was by and large precipitated by the complainants*. Various inconsistencies between the complainants' versions were pointed out. There was included a letter from the Kaiteriteri motor camp confirming that they had not received any complaint about Ms McDonald who was known to them from her history of camping there; but they had received concerns from Ms McDonald and her friend about noise levels of neighbouring campers. There were also included various letters in the nature of character references for Ms McDonald. The point was made that the Porse vehicle agreement did not clearly define the geographical parameters of *Nelson*. The letter recorded that Ms McDonald had accepted employment with Porse based on flexibility over working hours and that the working hours policy that Ms McDonald had allegedly breached had never been provided to her at the time they entered into the employment relationship. It stated that Ms Watts was fully aware of Ms McDonald's flexible working hours and that Ms Murphy's recent instruction to work at the office between 8.30am and 5.00 pm represented an attempt to unilaterally vary Ms McDonald's employment agreement. Included were copies of Ms McDonald's diary for the week starting Monday 7 February 2011 to demonstrate that she conducted work for Porse from home as well as at the office.

[37] Before the meeting reconvened Ms Murphy phoned and spoke to Ms Yule who told her that there had been no agreement that Ms McDonald could work from home when she needed to be at home to look after her son after school. Ms Yule said that she had told Ms McDonald that while Porse was flexible, staff were never encouraged to work from home. Ms Murphy also spoke to Ms Watts who said that Ms McDonald knew that her 40 hour week did not include working from home except in cases of emergency. Ms Murphy spoke to Ms McKenzie who told her that the first she knew about the Kaiteriteri complaints was when she received a tearful phone call from one of the female complainants telling her what had happened and that they had

moved the children's tent and returned home a day early. Ms McKenzie also told Ms Murphy that she knew the complainants to be honest and reputable people.

[38] Also before the disciplinary meeting reconvened Ms Murphy met separately with Ms Walker and Ms Collier. Ms Walker told Ms Murphy that Ms McDonald had not been a good team player or supportive in the past and did not appear to be working 40 hours per week. The latter observation was based on Ms Walker's claim that she found it hard to get hold of Ms McDonald between 3.00 pm and 5.00 pm on either her landline or her cellphone. Ms Walker felt that Ms McDonald used her consultant role to get out of doing her tutor educator work. Ms Walker also referred to six complaints about Ms McDonald that related to her manner and professionalism. Ms Collier mentioned similar concerns to Ms Murphy. She also said that Ms McDonald is *aggressive, swears and is very short – she shouted and swore at me in my first three hours of work*. Both women observed that Ms McDonald had improved over the last few weeks.

[39] Also as part of her investigation, Ms Murphy checked Ms McDonald's work email account during the afternoon on Monday 28 February 2011. That required her to organise a password change. Ms McDonald was told about the password change sometime after it came into effect. That resulted in an exchange of emails between the representatives. Ms Murphy's review of Ms McDonald's email inbox confirmed that some emails had been sent and received by her after hours but some queries received between 3.00 pm and 5.00 pm were responded to the next day in normal working hours.

[40] Finally Ms Murphy arranged for the Kaiteriteri camping ground manager to be contacted, who confirmed the contents of the letter.

The second meeting

[41] The second disciplinary meeting, also taped and with the same participants, was on 1 March 2011. I shall summarise what happened. There was first a discussion about Ms McDonald's diary. Porse asked why Ms McDonald had tallied her work hours for a particular week and when she had done this. Ms McDonald could not give a specific answer. There was some discussion about why Ms Watts had asked

Ms McDonald to keep a record of her work. Ms Murphy said that Ms Yule had told her that she had not agreed to Ms McDonald working from home but had offered either a 30 hour or a 40 hour working week with Ms McDonald choosing the latter option; but that she should have chosen the former option if childcare was going to be an issue. Ms Yule apparently had some notes of this conversation. Ms McDonald confirmed that they had discussed the 30 hours/40 hours option. When asked if there had been discussion with Ms Yule about working from home Ms McDonald confirmed that there had not been but said there had been with Ms Walker and Ms Watts as well as her observations about the working habits of others. Ms McDonald mentioned an exchange prior to the disciplinary process where Ms Walker had told Ms Murphy about doing some of her work at home. Next, Ms Murphy said she had been told by Ms Watts that, at the job interview, Ms McDonald had said that her daughter would be caring for her son after school so she would be able to work 40 hours per week. Ms Watts thought that Ms McDonald knew very well that it was not ok to work from home but in an emergency she could with appropriate approval. Ms McDonald stated that she never saw any such policy before she started work. Ms Walker's and Ms Collier's assertions about Ms McDonald often being uncontactable between 3.00 pm and 5.00 pm were mentioned, as was the apparent lack of attention to emails during that time. Ms McDonald was told that Porse had spoken to the motor camp manager. She was also told of Ms Walker's and Ms Watts' assertions about her being *loud, aggressive and swearing* in the workplace. That was advanced to suggest that Ms McDonald had a propensity to be aggressive rather than as a separate disciplinary matter. It was also said that her manner on the phone could be *curt and rude*. Ms McDonald's response to her colleagues' assertions was that she was *No more so than anyone else on any other occasions*.

[42] The meeting adjourned briefly. When Ms Murphy and her representative returned they told Ms McDonald of Ms McKenzie's account of having been rung by one of the complainants in tears on the night of the incident saying that the children were upset and frightened, that they were moving their tent and were leaving the camp a day early because of Ms McDonald; and Ms McKenzie's opinion that the complainants were credible and trustworthy people. For Ms McDonald it was said that she and her friend had complained to the camp manager about the complainants who would have known of that before the phone call to Ms McKenzie.

[43] Without any further adjournment, Porse's representative announced the conclusions that had been reached by Ms Murphy. I shall summarise that below.

[44] Porse noted that the other employee did not have authorisation to have the car at Kaiteriteri either and accepted that the definition of region in its vehicle use policy was unclear; with the result that the allegation of breach of the agreement was not substantiated.

[45] The second matter mentioned was the allegation *relating to breach of contract and working 40 hours*. Based on Ms Yule's view that working from home was not allowed or encouraged as a practice for Porse employees, the original offer of 30 or 40 hours per week, Ms McDonald's choice of 40 hours and *statistical information and workload facts* it was determined that the allegation of breach of employment agreement was made out. However there was no determination about whether that amounted to misconduct or serious misconduct and it probably would not need to be determined.

[46] As to the allegations about Ms McDonald's conduct at Kaiteriteri, taking into account the differences and inconsistencies between the complainants, it was determined that Ms McDonald had yelled at and frightened 4 children aged between 6 – 11 and that they were crying. There had been was a further exchange between Ms McDonald and the father of one or some of the children that *encompassed references from him about you fucking off to a motel, and from you about him fucking off back to Christchurch, and that you made reference to a bucket of water over his head if – not that you would, not that you did – but if there were further problems*. This was said to be the parameter of the complaint and was likely to have occurred as described by the complainants because Ms McDonald *does have a propensity to the type of behaviour, swearing, loud and aggressive manner*. Ms Murphy was satisfied that there was a sufficient relationship between Ms McDonald's conduct at Kaiteriteri and the nature of Porse's business for it to affect the reputation of the business in a damaging way and that the conduct was incompatible with Porse's ethos and Ms McDonald's duties. Accordingly the allegation of bringing Porse's reputation into disrepute was substantiated and comprised serious misconduct. It was conveyed that Porse's *preliminary decision* was that Ms McDonald should be summarily dismissed.

Ms McDonald was offered the opportunity to make submissions on that point. Ms McDonald's representative said they wanted a letter from Porse detailing all the information so they could respond to it. She also asked for a transcript. Porse's representative asked for this all to be put in writing. Porse's representative made it clear that these were decisions that were already made and no response was being invited as to those decisions. She asked for any submissions on the narrow point about outcome to be dealt with there and then. Ms McDonald's representative referred to the inconsistency between the written complaints and asked how Porse could make a finding without speaking to the complainants. She also indicated that Ms McDonald had witnesses to support her account. Ms McDonald repeated that the other campers had been aggressive to her when she had just asked the children to keep the noise down so her son could get some sleep, a position that would be supported by her witnesses. Porse's representative discounted these comments as being submissions about substance not outcome. She asked Ms Murphy if she wanted to change her interim decision of summary dismissal and Ms Murphy confirmed that she did not want to change her decision. Porse's representative then initiated a discussion about Ms McDonald collecting her personal belongings.

[47] Later on 1 March 2011 Ms McDonald's representative sent an email to Porse's representative expressing disappointment that Porse was not prepared to further its investigation and speak to others who had been present at the time of the Kaiteriteri exchange. Porse was asked to place its decision on hold and to further its investigation by talking to those people. The response on 14 March 2011 was that Ms McDonald should have presented the material from witnesses at the 28 February 2011 meeting rather than at the conclusion of the disciplinary meeting.

Terms and policies

[48] There is a signed individual employment agreement. Clause 1.2 records the employee's agreement to abide by all notified rules and policies. Clause 2.1 states that the ordinary hours and ordinary days to be worked each Monday to Sunday week shall be as agreed from time to time by the employer. Clause 8.3 sets out a formal warning process for matters other than serious misconduct. Clause 8.3(c) requires all dismissals to be confirmed in writing. Clause 8.4 permits summary dismissal for serious misconduct defined as including (but not limited to) criminal convictions

affecting suitability for continued employment, deception such as falsifying documents, fighting or harassing another in employment, being under the influence of alcohol while working, being in possession or under the influence of illegal drugs while working, being in unauthorised possession of or causing wilful damage to Porse's property, serious or persistent breach of the employee's obligations under the agreement or failure to obey the employer's lawful directions. The agreement also says *In all cases of serious misconduct a full investigation will be undertaken*. Under clause 12.1 the employee must adopt and follow policies and procedures as advised from time to time.

[49] Included with the employment agreement is a list of *Personal and Professional Requirements*. It lists under *Attitude* things such as *Positive, warm and approachable, Respect for self and others* and *Commitment to role-model the PORSE way*.

[50] There is a signed *Company Vehicle Agreement*. Eventually Porse decided that Ms McDonald had not done anything improper by taking the vehicle to Kaiteriteri so it is not necessary to set out any of these provisions.

[51] I was provided with a 4 February 2011 printed version of the *PORSE Staff Policies and Processes*. The material is available to staff over Porse's intranet. It includes a *Flexi-Time* policy. There is an expectation that programme tutors and consultants will work outside normal office hours defined as Monday – Friday 8.30am to 5.00pm. This is not additional work but is included in contracted hours. It permits limited use of *flexi-time* which must be recorded.

[52] I was provided with a document headed *Representing our Brand*. It refers to the need when driving branded cars to *Uphold the professionalism of the brand at all times*.

Justification - the statutory test

[53] The dismissal occurred before there was a change to the statutory test for justification. Therefore, whether the decision to dismiss Ms McDonald was justifiable must be determined on an objective basis by considering whether the employer's

actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[54] The statutory duty of good faith applies when an employer is considering whether to dismiss an employee. S.4(1A)(b) provides that the duty of good faith requires parties to an employment relationship to be active and constructive in establishing and maintaining an employment relationship in which the parties are, amongst other things, responsive and communicative. S.4(1A)(c) of the Employment Relations Act 2000 provides that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment must give that employee access to relevant information and an opportunity to comment before the decision is made.

[55] It is convenient to consider first whether how the employer acted was what a fair and reasonable employer would have done in all the circumstances.

How Porse acted

[56] Ms Murphy initiated the disciplinary process solely about the Kaiteriteri incident even though she already knew of Ms Collier's complaints about Ms McDonald's behaviour and working hours. In the meantime Ms Murphy dealt with Ms Collier's written complaints (without telling Ms McDonald about them) during the 17 February 2011 team meeting by telling the staff that they could not use flexi-time to work from home and by initiating the *MATES Agreement*. Porse then wrote to Ms McDonald extending the disciplinary process to include allegations that Ms McDonald had breached her employment agreement by leaving work early every second week of the school terms over the previous year and by starting work late and/or finishing work early between Monday 7 February 2011 and Thursday 10 February 2011. These allegations came from Ms Collier's complaint. During the first disciplinary meeting Ms McDonald's representative asked who had made the allegations but was not given the answer. Ms Collier's written complaint was not mentioned during the second disciplinary meeting either. Indeed, during a discussion about Ms McDonald's alleged propensity for swearing, aggression and loudness, her representative specifically asked if there was a written complaint and received the response *It doesn't have to be in writing*. All that was disclosed was that there had

been a discussion with Ms Walker and Ms Collier following the first disciplinary meeting. Ms McDonald naturally thought that matters between her and her colleagues had been resolved as a result of the *MATES Agreement*.

[57] The allegations made in Ms Collier's written complaint informed Ms Murphy's conclusions about the hours of work allegation. They also informed her conclusion that Ms McDonald *does have a propensity to the type of behaviour, swearing, loud and aggressive manner* and behaved improperly at Kaiteriteri. Ms Collier's written complaint was *relevant information* for the purposes of s.4(1A)(c) of the Employment Relations Act 2000. I further find that Porse's failure to provide Ms McDonald with a copy of the written complaint from Ms Collier was a failure to fully investigate the allegations of serious misconduct. No fair and reasonable employer would breach their statutory and contractual obligations.

[58] There is a second important way in which Porse failed to conduct a *full investigation*. From the outset Ms McDonald made it clear that she was camping with a group who would all say that the allegations made by the complainants were grossly inaccurate. At the first disciplinary meeting Ms McDonald then denied much of the accounts set out in the complainants' emails. Near the end of the second disciplinary meeting Porse's representative told Ms McDonald that one of the complainants had rung Ms McKenzie in tears on the night and that Ms McKenzie was of the opinion that the complainants were credible and trustworthy people. Ms Murphy's evidence, which I accept, is that Ms McKenzie had told her when they first discussed the matter, that she knew the complainants to be honest and reputable people. That is something that could and should have been said to Ms McDonald from the outset rather than near the end. Neither Ms McKenzie nor the complainants gave evidence to the Authority but since the investigation meeting I have been informed by counsel for Porse that Ms McKenzie does not know Carla Heritage (one of the complainants) at all. Ms McKenzie's connection or lack of it (as the case may be) to the complainants should have been disclosed.

[59] Having mentioned Ms McKenzie's opinion about the complainants' veracity, Porse's representative dealt with an exchange about whether the complainant had reported the incident to the camp management at the time before moving on to disclosing Ms Murphy's conclusions about the incident at Kaiteriteri. In the middle

of doing that the representative disclosed (for the first time) that no-one other than Ms McKenzie had actually spoken to the complainants. Once the conclusions had been disclosed Ms McDonald's representative asked for matters to be put in writing to allow for a response. Porse's representative then explained that they were not inviting any response to the substantive conclusions. Ms McDonald's representative attempted to debate the new information about Ms McKenzie's role and the inconsistencies in the complainants' accounts before saying *There's quite a few people who will actually support Justine ...* Porse's representative interjected with *Very pleased you have kept them back.* Ms McDonald and her representative attempted to explain what these people would say and why they were not able to be present. Porse's representative checked with Ms Murphy and then confirmed that Ms McDonald was dismissed.

[60] I have set out this exchange at some length to demonstrate that Porse did not conduct a full investigation into what happened at Kaiteriteri despite the contractual obligation to do so. The submission for Porse is that it did all that was necessary by giving Ms McDonald an opportunity to present information from her supporters. However, I find that what was done was insufficient to meet the contractual obligation to investigate. Ms McDonald did not know about the first complainant's connection to Ms McKenzie or her opinion about the veracity of all of the complainants (which Ms Murphy must have relied on) until shortly before being told of Porse's conclusions about her conduct at Kaiteriteri. When first told about Ms McKenzie's view of the complainants' veracity Ms McDonald attempted to introduce corroboration of her own account but Porse declined to take it into account.

Porse's actions

[61] While Ms Murphy decided that Ms McDonald did not always work 40 hours per week she did not determine whether that amounted to misconduct or serious misconduct. Porse's failure to give Ms McDonald the written complaint from Ms Collier which was relied on by Ms Murphy for the conclusion about Ms McDonald not working 40 hours means that the conclusion cannot stand. In any event, the issue was treated as essentially a side-line to the main issue about Ms McDonald's conduct at Kaiteriteri.

[62] The conclusion reached by Porse was that Ms McDonald had yelled at four children aged between 6 and 11 causing them to be frightened and cry. That slightly overstates the complaints. The two complainants who mention it say that the children were crying during the angry exchange between Ms McDonald and the father. As to that exchange, Porse concluded that *that encompassed references from him about you fucking off to a motel, and from you about him fucking off back to Christchurch, and that you made a reference to a bucket of water over his head if – not that you would, not that you did – but if there were further problems.* Ms Murphy concluded that this did occur as described by the complainants because of Ms McDonald's *propensity to the type of behaviour, swearing, loud and aggressive.*

[63] The submission for Porse is that such conduct by Ms McDonald while on holiday was sufficiently serious to warrant summary dismissal because of the connection with Porse arising from Ms McDonald's use of the branded car. I am referred to *Dryden v The Radio Network of New Zealand Ltd* 14/1/09, V Campbell (Member), AA9/09.

[64] In that case the employment agreement included as serious misconduct bringing the company into disrepute. The high profile employee attended a community meeting in his personal capacity where he behaved towards the local mayor in a manner that was *inappropriate, disrespectful, and brought [the employer] into disrepute.* The circumstances were such that the public perception was that he was attending in his capacity as a representative of the employer. The Mayor, a valued client of the radio station, wrote a letter of complaint in which he described the conduct as having the potential to destroy the previous good relationship between his office and the radio station. In addition the employee refused to obey lawful and reasonable instructions from his manager, conduct also included in the definition of serious misconduct. The Authority upheld this dismissal as justified. There are important differences between *Dryden* and the present case, the most significant of which is the second limb to the dismissal, conduct that has usually justified dismissal. *Dryden*, however, referred to several other cases where an employee's conduct out of working hours was found to provide justification for a dismissal.

[65] In *Mussen v NZ Clerical Workers Union* the union dismissed an organiser for bringing the union into disrepute and loss of trust and confidence. The organiser had

been involved in spray painting graffiti against impending statutory changes to labour law and had used a union car while doing so. This occurred outside her normal working hours and she was entitled to private use of the vehicle. The Employment Court found as a fact that the organiser's conduct had brought the union into disrepute. The out of work conduct was found to seriously impact on and undermine her employment relationship because it called into question her suitability for employment as an organiser and because it brought her employer into disrepute. Ms McDonald's conduct, even accepting for present purposes Porse's conclusions, was far less serious than that of Ms Mussen.

[66] Counsel for Ms McDonald referred me to *DB Breweries Limited v Hodgson*, 14/10/96, Travis J, AEC68/96. In that case a delivery driver, while off duty, abused and assaulted the manager of a Tavern that was a client of the employer. That precipitated other problems and the intervention of the Police. Prior to the assault the employee told the manager that he worked in the industry. Word of the assault spread throughout the area. It affected the employer's trade because the Tavern switched to kegs as a protest and there was the possibility of further effects on the business as the matter was to be discussed by the local Hotel Association. At the time of the incident the employee was wearing a jacket that carried his employer's branding. The employee accepted that he had been given the jacket for use in his employment and that he should not do anything while wearing it to tarnish his employer's image. The Court found the dismissal justified. Again, even on Porse's conclusions, Ms McDonald's conduct fell far short of the conduct in the *Hodgson* case.

[67] Although not specifically referred to here *Swann & Ors v ACI NZ Ltd* [1990] 3 NZILR 263 is often mentioned in cases of dismissal for bringing an employer into disrepute. In *Swann* there had been a long history of employees gathering after work in public and other places nearby their workplace to drink, gamble and socialise. The employer took various steps to end this practice, ultimately without success. There were eventually three written complaints from nearby businesses. One business complained of littering and use of the area as a toilet. A second business complained to the police about theft of an expensive tarpaulin and was directed to make a complaint to the employer which they did. The third business complained about increasing rubbish, drinking and gambling and the loss of some scrap metal. Several weeks later the grievants were located drinking and socialising after work in a nearby

street and were dismissed after some investigation. There was a code of conduct that included as a circumstance rendering an employee liable to summary dismissal *Any conduct outside of the Company premises or outside of working hours which brings disrepute upon the Company, its products or its employees.* The Court agreed with counsel's submissions that to justify dismissal such misconduct must be serious and must strike at the root of the employment contract so that the employer is entitled to regard the contract as at an end. The Court went on to accept that the matters complained of in the three letters were sufficiently serious, if identified with the employer, to have the effect of bringing the employer into disrepute if it did not control its workers. The Court found that the grievants had not actually brought the employer into disrepute and that their proven conduct of drinking and socialising on a particular occasion (if amounting to misconduct) was not sufficiently serious to justify dismissal without warning. Again, even on Porse's conclusions, Ms McDonald's conduct was less serious than described by the complainants in the *Swann* case.

[68] What *Swann* demonstrates is the need to carefully inquire into the facts of each case including the proven disrepute. That last aspect is precisely what did not happen in the present case. As Ms Murphy put it in her affidavit:

Also I was not prepared to challenge them [the complainants] about the truthfulness of their complaints.

I accepted their complaints at face value. They had stated their view of events and I understood that they had formed a very unfavourable view of the applicant and PORSE.

[69] One complainant wrote *I bring this to your attention as I don't feel it is good behaviour and image for your company.* That person's complaint included an allegation that Ms McDonald drove with two children sitting in the front car seat one of whom was clearly not wearing a seat belt. Porse accepted Ms McDonald's denial of this part of the complaint but Ms Murphy did not similarly discount any of the person's alleged negative view of Porse and Ms McDonald. The second complaint claimed to have witnessed Ms McDonald *yelling at her own Children with an abusive tongue.* That was part of the behaviour said to be *not acceptable and is especially not good advertising for your Company.* That part of the complaint was not accepted by Porse but without Ms Murphy having a lesser view of their opinion about Porse. The third complainant referred to Ms McDonald or her daughter (who was not actually

there) calling one of the complainants' boys *a stupid bitch* and being shocked hearing Ms McDonald telling her own children to get the *fucking potatoes peeled* as part of her reason for being very disappointed in Porse employing that type of person and advertising the fact by allowing the use of the company car in personal time. These aspects of the complaint were not accepted by Porse but again Ms Murphy simply accepted at face value the stated disappointment.

[70] On balance I do not accept that a fair and reasonable employer would have dismissed Ms McDonald in all the circumstances, even disregarding the problems with how Porse investigated matters. The most important aspects are as follows. Ms McDonald was on leave. The complainants knew she was on leave. There was an angry exchange between her and another camper or campers after she had remonstrated loudly with their children for being too noisy and disturbing the sleep of her own child who had been sick. The children were frightened as a result of the exchanges. Significant parts of each of the written complaints in which the complainants expressed disapproval of Porse for employing Ms McDonald were not accepted as accurate.

[71] Ms McDonald has a personal grievance of unjustified dismissal.

Remedies - contribution

[72] I must assess the extent to which Ms McDonald contributed in a blameworthy way to the circumstances giving rise to the grievance.

[73] There is a submission for Porse that Ms McDonald's contribution was at the level of 100% so as to disentitle her to any remedies. I am referred to *Radius Residential Care Ltd v McLeay* [2010] NZEmpC 149, 2010 ERNZ 371 where the Employment Court found that an employee's refusal to answer questions or communicate during the disciplinary process except in writing was in breach of s.4(1A)(b) of the Employment Relations Act 2000 and in the circumstances of that case comprised blameworthy behaviour for the purposes of s.124 of the Act. Earlier in counsel's submissions there is reference to the way that Ms McDonald and her representative responded during the disciplinary meetings. The submission for

present purposes as I understand it is that Ms McDonald breached s.4(1A)(b) of the Act in the way she or her representative responded during the disciplinary meetings.

[74] The submission is misdirected. During the disciplinary investigation, through her representative, Ms McDonald admitted to a heated exchange with an adult but denied swearing *in the manner alleged*. It was twice later said that she denied swearing. The denial was not accepted by Porse. During the Authority's investigation Ms McDonald accepted as accurate her friend's evidence that she had sworn at the adult in response to him swearing at her. That does not establish that Ms McDonald was not responsive and communicative with Porse during the disciplinary investigation in the way described in *McLeay*. All that it establishes is that Porse was probably right to reject Ms McDonald's denial of swearing during the heated exchange with the adult.

[75] There is also mention about Ms McDonald's explanations regarding the allegation of working fewer than 40 hours per week. To a significant extent both sides were at cross purposes in the exchanges over this issue. Ms McDonald used flexi-time from early in her employment to finish at the office early or start late to accommodate her periodic childcare commitments. By dint of the way that was described for Ms McDonald, Porse thought that she was saying that she had specifically and personally contracted with Ms Yule to that effect. However, that was a misunderstanding of what was being said. As I perceive the exchanges it was probably a failure to listen carefully enough on both sides. In the end Porse concluded that Mr McDonald had not worked her required 40 hours per week but that conclusion cannot survive the failure to properly disclose the basis of the allegation in the first place. Ms McDonald bore no responsibility for the decision not to properly disclose those materials.

[76] For these reasons I do not accept that there was any blameworthy contribution by Ms McDonald arising out of the way she responded during the disciplinary investigation.

[77] The only direct evidence before me about the Kaiteriteri incident is from Ms McDonald and Mr Vuillermin. Mr Vuillermin impressed as a reliable witness. His evidence is that there was a large group of people known to one another

occupying camping sites on either side of his group (which included Ms McDonald). Over the two nights prior to the incident with Ms McDonald he and others in his group had been kept awake by noise from this large group. That led to his partner and Ms McDonald complaining to the camp management about the noise. This preceded the incident involving Ms McDonald. As to the incident itself, he was nearby and first heard a man saying *If you can't cope with the noise then fuck off to a motel* or something similar. He then heard Ms McDonald respond saying *Why don't you fuck off to Christchurch*. He did not hear Ms McDonald speak to the children, nor did he hear the children. Mr Vuillermin did not hear Ms McDonald make a comment about throwing a bucket of water anywhere. Mr Vuillermin says that the incident was a *flash in a pan* and the sort of friction that can develop between campers in crowded conditions. He also says that the complainants' in their account have embellished the incident to make it appear far worse than what took place. Shortly after this exchange the man approached Mr Vuillermin asking if he was Ms McDonald's partner. Mr Vuillermin said he was not and suggested that the children move away for an hour or so to allow Ms McDonald's child to get to sleep. The man was agreeable to that. During this exchange a woman from the man's group yelled out to say that the children were crying. I infer that it was the angry exchange between the man and Ms McDonald that caused the children to cry. I accept Mr Vuillermin's evidence.

[78] As to the exchange between Ms McDonald and the children the only direct evidence is from Ms McDonald. Her evidence is that she came out of the tent, there was a bunch of children running back and forth as children do, she approached the children and asked them in a reasonable voice (without swearing or yelling) to keep the noise down as her son was trying to get to sleep. A man then emerged from his camp site, came striding towards her and told her not to tell his children off or what to do. Ms McDonald tried to explain about her son being unwell and the interruption to her group's sleep from the noise previously. She also said that when you get woken early in the morning you feel like throwing a bucket of water on the offender's tent. The man then told her to *fuck off to a motel* and she told him to *fuck off back to Christchurch*. The man stormed off but a woman who was standing behind him made some comment. The incident then ended. I accept Ms McDonald's evidence about her exchanges with the children.

[79] In all this I do not find any blameworthy conduct so as to require a reduction in remedies for the unjustified dismissal.

Post dismissal & later discovered issues

[80] There are a number of such points raised by Porse that merit mention.

[81] Following the dismissal a photo of Ms McDonald was printed alongside a newspaper story. Ms McDonald thought that Porse must have supplied the photo to the newspaper since her profile and photo had earlier been taken down from the Porse website. The material available to the Authority indicates that the journalist sourced the photo independently of Porse. It is not necessary to take the matter further other than to say that Ms McDonald's concern was understandable.

[82] There is some criticism about the bona fides of a diary provided by Ms McDonald in connection with the dispute about her hours of work. The difficulty for Porse is that the source of the allegations about her working fewer hours than required was never disclosed to Ms McDonald. The allegation of misconduct failed from the outset. It is not necessary for the Authority to the record of hours Ms McDonald says she worked away from the office.

[83] There was some attention on whether or not Ms McDonald deleted anything from her work laptop. The evidence for Porse is that there was no work data files on the laptop. It seems that Ms McDonald routinely saved work to a flash drive which was eventually returned to Porse and deleted personal emails from her laptop local drive. Ms McDonald's evidence about this was somewhat confused and contradictory. However, Porse could have had the computer forensically examined but did not. I am left to think that Ms McDonald's contradictory evidence arose from her confusion rather than anything bad.

[84] Some issues were raised about the propriety of some spending. I do not accept that there is anything in the evidence to call into question Ms McDonald's integrity with regard to these issues.

Remedies - reinstatement

[85] There is a claim for reinstatement but it is strenuously resisted.

[86] First there is a sustained attack on Ms McDonald's credibility by reference to evidence given in the Authority's investigation meeting and things said by or on her behalf previously. To the extent it has been necessary to deal with such conflicts my conclusions have been set out above.

[87] More importantly, there is a dispute about the correct statutory approach to the question of reinstatement. From 1 April 2011 the law was amended so that reinstatement where sought was no longer expressed by s.125 to be the primary remedy. In addition s.101 was amended to remove as an object of Part 9 of the Act the recognition of the importance of reinstatement as a remedy. Counsel for Porse's submission is that the new statutory provisions apply even though the dismissal predated the effective date of the amendment. I am referred to *Kahn v Oracle New Zealand Limited* [2011] NZERA Auckland 177 where the Authority, in an interim reinstatement application, determined in similar circumstances that it was appropriate to apply the new law rather than the old law. This was said not to be giving retrospective effect to the new s.125 because the power to order reinstatement only arises when the Authority determines that a personal has a personal grievance. I am also referred to a subtle change in the wording of the new s.125(1)(a) (...*it is determined that the employee did have a personal grievance*) compared to the old s.125(1)(b) (...*it is determined that the employee has a personal grievance*) (emphasis added).

[88] With respect, I disagree. The starting point is the Interpretation Act 1999. S.7 declares that an enactment does not have retrospective effect; although that is subject to s.4 which allows a statute expressly or impliedly to have retrospective effect. The combined effect is often described as a presumption against retrospective application. The Employment Relations Amendment Act 2010 relevantly came into force on 1 April 2011. It repealed the existing s.125 and enacted a new s.125. There is nothing in the amending statute to expressly or impliedly rebut the presumption. In my view the subtle change in language mentioned above is a change in drafting style from which no change in meaning can be inferred.

[89] I am referred to *Art Deco Society (Auckland) Inc v Auckland City Council* [2006] NZRMA 49. In that case the High Court canvassed the law about retrospective application of statutes. The Court explained the purpose of the presumption against retrospective application as being based on the assumption that the legislature does not intend to be unjust. The Court referred to *Foodstuffs (Auckland) Limited v Commerce Commission* [2002] 1 NZLR 353 where the Court of Appeal distinguished between legislative change that affects existing rights and accrued interests as distinct from something that has prospective effect and does not affect vested rights in any negative way. In *Art Deco Society (Auckland) Inc* the High Court specifically noted that there was no cause of action available to any party at the time of the amendment. The Court did not regard the possible future ability of a party to bring proceedings as a *right* or *interest* in the sense used in s.17 and s.18 of the Interpretation Act 1999.

[90] The effect of any repeal is specified in s.17 and s.18 of the Interpretation Act 1999. Materially, pursuant to s.17 a repeal does not affect an existing right. Under s.18(1) a repeal does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right. Under s.18(2) a repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the proceedings that relate to the existing right.

[91] Ms McDonald's right to pursue a personal grievance claiming remedies under the Employment Relations Act 2000 arose upon her dismissal in March 2011. She complied with s.114 of the Act by raising her personal grievance with her employer in time. She properly lodged proceedings with the Authority pursuant to s.158 of the Act. All that occurred prior to 1 April 2011. Her *existing right* for the purposes of s.18 of the Interpretation Act 1999 was her personal grievance claim including her claim for remedies. For that reason, the repealed s.125 continues to apply to the determination of her personal grievance.

[92] The absurdity and potential injustice arising from the meaning argued by the respondent is apparent in these proceedings. There was a phone conference with the parties on 22 March 2011 and the interim reinstatement investigation meeting was on 31 March 2011. If it had been determined that day, it unarguably would have been

based on the law supporting reinstatement as the primary remedy. However, some time was allowed for the respondent to lodge its affidavits following 22 March and then several days were needed to consider the material following the interim meeting. If the respondent was right about the law, the Authority would have been obliged to apply a different test even at the interim stage.

[93] I have determined that I must apply the law prior to the 1 April 2011 amendment. The starting point is the practicability of reinstatement.

Practicability of reinstatement

[94] If reinstated Ms McDonald would have to work closely with Ms Walker in her programme tutor role and Ms Collier in her consultant role and both of them as colleagues in a small office. To an extent Ms Collier and Ms Walker were reserved about their views of working with Ms McDonald until shortly before her dismissal when Ms Murphy had to speak to them as part of the disciplinary investigation. They are now more forthright about those views. There is evidence from Ms Walker in which she criticises Ms McDonald for not carrying her share of the combined programme tutor work and for her work ethic generally. There is also evidence from Ms Walker where she criticises Ms McDonald's loud and aggressive manner in the office. On Ms Walker's evidence the office has returned to a normal working environment after Ms McDonald's dismissal. She is concerned about the repercussions for herself and her work should Ms McDonald be reinstated. In general Ms Walker impressed as a reliable witness concerned to give a balanced account of the situation. The evidence from Ms Collier opposing Ms McDonald's reinstatement is more negative reflecting the tenor of the letter she sent to Ms Murphy on 11 February 2011. I should record that there is no suggestion that Ms Collier knew about the Kaiteriteri complaints at the time. Like Ms Walker, Ms Collier is concerned for herself and her work if Ms McDonald was reinstated. They both express doubts about whether they would remain with Porse. They also express some concerns on a trust basis about Ms McDonald.

[95] Balanced against this evidence given in light of Ms McDonald's dismissal, there is documentary evidence, particularly from Ms Walker, that demonstrates that there existed a positive and supportive working environment prior to the dismissal.

Overall, both women impressed as people with experience and skill in managing working relationships and resolving disputes that can arise between individuals. I consider that a positive working relationship can be re-established with good will from all sides.

[96] There is hearsay evidence about previous issues between Ms McDonald and Sue Lowe who had worked in the Nelson office, but then left. Ms Lowe has returned since Ms McDonald's dismissal. It is not suggested that Ms Lowe's return would assist with Ms McDonald's reinstatement being practicable. I put it no more strongly than that since there was no direct evidence of any of the issues referred to.

[97] There is evidence from Ms Murphy opposing reinstatement. For example, Ms Murphy says, knowing what she knows now about Ms McDonald, she would not employ her. To the extent that the evidence is based on a purported loss of trust and confidence I discount it. The difficulty with giving any credence to that evidence is that Porse unjustifiably dismissed Ms McDonald in circumstances where there was insufficient reason to dismiss her so it cannot be said that there is any sustainable basis for a loss of trust and confidence.

[98] Ms McDonald is a registered teacher and must periodically apply for a practicing certificate. Ms Murphy's evidence is that Ms Yule would not be able to provide the appropriate certification to support an application by Ms McDonald. However, it appears that no actual complaint has been made to the New Zealand Teachers Council. Indeed it appears that Ms Yule did nothing about her alleged concerns over Ms McDonald's fitness to be a teacher until just before the Authority's investigation meeting. The way this evidence has come before the Authority is unsatisfactory. It is also based on an uncritical acceptance of the complainants' written accounts of the Kaiteriteri incident given that Ms Yule apparently neither spoke to the complainants nor made the decision to dismiss Ms McDonald. At this point I see no impediment to Ms McDonald's reinstatement arising from this aspect of the evidence.

[99] The evidence is also that Ms McDonald's coaching sessions had generally been focused on supportive guidance of her as she developed greater experience and skill in her work. To some extent there was an attempt in Porse's case to recast the

tenor of those interactions so as to paint Ms McDonald in a negative light and as someone who was performing poorly in her role. Reflecting the actual tenor of the exchanges over time, Ms McDonald never understood from her coaching sessions and other dealings with her managers that her employer was dissatisfied with her work. I do not accept that there is anything in the history of the performance by Ms McDonald of her work for Porse that creates an impediment to reinstatement.

[100] I should record that a number of the Porse contractors who Ms McDonald worked with gave evidence that was very supportive of her. Ms McDonald's principal work involved supporting the work of these contractors. It is clear that she is well regarded by them.

[101] On balance, the factors that count most strongly in favour of reinstatement are that Ms McDonald was unjustifiably dismissed and from the outset has claimed reinstatement, a claim that she has maintained in the face of Porse's strenuous opposition. The law requires her to be reinstated unless such an order is not practicable. Despite Porse's opposition, I am not persuaded that reinstatement would not be practicable. Porse is a large organisation with sufficient resources and experience to manage the reintegration of Ms McDonald into the Nelson office, including re-establishing working relationships with the other staff. I am confident that Ms Murphy will be able to look past her objections to reinstatement and work positively with Ms McDonald and the other Nelson team members to resolve any interpersonal issues.

Compensation

[102] There is a claim for distress of \$15,000.00. There is ample evidence that Ms McDonald has been significantly affected by her unjustified dismissal. Ms Dando gave evidence about how distressed her mother was at the time and subsequently. It is not necessary to recite her evidence here but there is no reason to doubt any of it.

[103] There is evidence from Ms McDonald's GP which I accept and which is worth repeating. Dr Brooke told me that he assessed Ms McDonald as eight out of ten with ten representing the worst case of this sort that he had seen. In his written statement Dr Brooke said:

*In my professional view I observed Justine to be suffering from severe emotional distress arising from the summary loss of her employment ...
My observation was that Justine was totally destabilised ...*

[104] Dr Brooke referred Ms McDonald for counselling with a clinical psychologist. There is a report from the psychologist that also describes the effects suffered by Ms McDonald. The report describes the development of Ms McDonald's reaction to her dismissal. It is clear from the psychologist's report that Ms McDonald was still significantly affected even a month or so after her dismissal. That remained apparent during the Authority's investigation meeting.

[105] I consider the award of the sum claimed (\$15,000.00) is required to restore Ms McDonald to the position she was in prior to her dismissal.

[106] There is also a claim for lost benefits and lost remuneration. S.213(1)(c)(ii) permits the Authority to order the payment of compensation for lost benefits, whether or not of a monetary kind, that the employee might reasonably have been expected to obtain if the personal grievance had not arisen. S.123(1)(b) of the Act provides that the Authority may, in settling the grievance, provide for the reimbursement to the employee of the whole or any part of the wages or other money lost as a result of the grievance. S.128(1) says that s.128 applies if there is a finding that the employee has lost remuneration as a result of an established personal grievance. S128(2) then requires the Authority to order the employer to pay to the employee the lesser of the remuneration lost or three month's ordinary time remuneration. Finally s.128(3) permits the Authority to order the employer to pay the employee by way of compensation for lost remuneration a sum greater than provided for in s.128(2).

[107] Here, Ms McDonald lost benefits as a result of her grievance. Ms McDonald's claim based on her statement of problem is for the recovery of the whole of her lost benefits. Ms McDonald was entitled under her employment agreement to full personal use of the Porse vehicle subject to a maximum yearly mileage under Porse's lease arrangement. The employer values full personal use at \$2,000.00 per annum, which is the salary differential between someone entitled to work use and someone entitled to full use. Other than that, the only indication of the value is Ms McDonald's assertion that values full use of the vehicle at \$15,000.00 per annum, having been told that by a friend. In the absence of better evidence I will adopt the

value ascribed by the employer (\$2,000.00 per annum). The evidence of Ms Murphy is that Ms McDonald would have received a bonus payment of \$600.00 but for the dismissal. Ms McDonald is entitled to compensation of that amount.

[108] Ms McDonald also lost remuneration of a result of her grievance. In her statement of problem Ms McDonald claims the whole of her lost remuneration. The claim as described in counsel's submissions seems to be limited to that recoverable under s.128(2) for the three months following the dismissal while in her evidence Ms McDonald referred to her loss up to the beginning of the investigation meeting.

[109] The argument for Porse is that Ms McDonald failed to adequately mitigate her loss. In particular there is evidence of four advertised positions matching Ms McDonald's qualifications which she did not apply for. Counsel also submits that there are credibility issues arising from Ms McDonald's evidence about the end of her temporary position. I am referred to *Argosy Imports Limited v Lineham* [1998] 3 ERNZ 976 as an example of the consequences of a failure to mitigate. In that case, as the Court noted at 981, the evidence was that the employee made a conscious effort not to seek employment. The present situation is different in that Ms McDonald searched for other work initially and obtained some relieving or temporary work that later came to an end. I am satisfied that Ms McDonald did sufficient to mitigate her loss so that she is entitled to an order pursuant to s.128(2) of the Act. I am not satisfied that Ms McDonald did sufficient by way of mitigation for the Authority to make an order under s.128(3).

Summary and orders

[110] Ms McDonald was unjustifiably dismissed and has a personal grievance as a result.

[111] Porse In-Home Childcare (NZ) Limited must reinstate Ms McDonald to her former position. Commencing with the date of this determination, Ms McDonald must be reinstated to the payroll and treated as if she was working for salary purposes. It would be helpful to allow some time for mediation or any other process to assist with Ms McDonald's reintegration into the Nelson office. Ms McDonald must resume her active duties within 14 days of the date of this determination. If the

Nelson office is closed for the Christmas period the time by which Ms McDonald must resume active duties is one week after the office reopens following the closure. Ms McDonald may resume active duties earlier by agreement.

[112] Porse In-Home Childcare (NZ) Limited is to pay Ms McDonald compensation of \$15,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[113] Porse In-Home Childcare (NZ) Limited is to pay Ms McDonald compensation for lost benefits pursuant to s.123(1)(c)(ii) of the Employment Relations Act 2000 as follows: \$600.00 (gross) for a lost bonus; and \$2,000.00 per annum (gross) pro-rata for the period from the date of dismissal until Ms McDonald resumes active duties.

[114] Porse In-Home Childcare (NZ) Limited is to pay Ms McDonald reimbursement for lost remuneration pursuant to s.123(1)(b) and s.128(2) of the Employment Relations Act 2000 for the period of three months from the date of dismissal. Any earnings by Ms McDonald from employment during this period are to be deducted from the sum payable. Leave is reserved in case of any difficulty with quantum.

[115] I am asked to order interest payable on the sums awarded for lost remuneration and benefits. I agree that interest should be paid as Ms McDonald has been deprived of the use of this money or benefit. But for the dismissal Ms McDonald would have received the payments periodically. For ease of calculation I shall treat 1 May 2011 as the starting date for interest. It is payable at the rate prescribed under the Judicature Act 108, currently 5% per annum, until the awards have been paid in full.

[116] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum no later than 31 January 2012. The other party may have a further 14 days to lodge and serve any reply. This timeframe is set to accommodate the Christmas break.

Philip Cheyne
Member of the Employment Relations Authority