

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 151  
5286967

BETWEEN           ALICIA MOXON  
Applicant

AND                 PATHWAYS HEALTH LIMITED  
t/a PATHWAYS  
Respondent

Member of Authority:     Philip Cheyne

Representatives:         Barbara Buckett, Counsel for Applicant  
Simon Menzies, Counsel for Respondent

Investigation Meeting:   8, 9 & 10 December 2010 at Christchurch

Submissions received:   11 February 2011 and 28 March 2011 from Applicant  
17 March 2011 from Respondent

Determination:           6 October 2011

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] This problem was the subject of an investigation meeting over three days in December 2010 at the end of which it was agreed the parties would provide submissions on a timetable finishing in late February 2011. By agreement in early February 2011 the original timetable was enlarged by a week. The Christchurch earthquake on 22 February 2011 resulted in the file including my hearing notes being trapped in the Authority's office until recently. Because of the passage of time I have had to start from scratch with the work of preparing this determination so I have reread all the substantial volume of material provided before and during the investigation meeting, considered the parties' submissions which were filed in accordance with the amended timetable and reread all my hearing notes.

[2] Before this file was retrieved from the Authority's office the parties provided a duplicate file. I gather there was some disagreement about whether the duplicate materials were all produced or filed during the Authority's investigation. I record that I have not referred to this duplicate file in the preparation of this determination.

### **Employment Relationship Problem**

[3] Pathways Health Limited is a charitable company registered with the Charities Commission. The company is the successor to Pathways Trust. Ms Moxon was originally employed by the Trust and was offered and accepted employment with the company on the same terms and conditions when it assumed responsibility for the Trust's work known as Pathways. Pathways is a provider of community based mental health services. In this determination I will generally refer to the respondent as Pathways.

[4] Pathways employed Ms Moxon as a registered health professional (RHP) in about September 2005. At that time Ms Moxon held the qualifications B.A. and M.A. in psychology and a Post Graduate Certificate of Clinical Supervision (Social Work). In 2009 Ms Moxon completed the degree Ph.D. in psychology. According to the job description Ms Moxon's work at Pathways involves her assisting service users to reach and maintain optimum physical, emotional and spiritual wellness; providing oversight and education to support workers; and developing networks that ensure that the service user pathway is seamless.

[5] In August 2009 Ms Moxon received a letter from Pathways raising allegations of bullying behaviour by her towards other staff and behaviour by her causing unreasonable distress to another staff member. Ms Moxon was asked to attend a meeting as part of an initial investigation. From that beginning there followed a series of interactions which culminated in a letter dated 28 April 2010 by which Ms Moxon was given a first written warning expressed to remain active for the following 6 months. Ms Moxon challenges the fairness of virtually every part of the process by which Pathways came to that decision. The position for Ms Moxon is also that the allegations were baseless.

[6] In her statement of problem Ms Moxon describes her problem as *unjustifiable action causing disadvantage, particularly ...Disparity of treatment [and] Breach of*

*contract by virtue of unfair treatment and Unjustifiable disciplinary action, being a course of conduct (constructive dismissal) with the deliberate and dominant purpose of coercing [her] to resign.*

[7] Despite the problem partly being described in language normally associated with a claim for unjustified dismissal following a resignation, here Ms Moxon had neither resigned nor been dismissed as at the date of the Authority's investigation meeting. Rather, she remained an employee of Pathways and (by that time) no longer subject to a current first written warning. There can be no constructive dismissal unless the employment has ended so it is not necessary to address that element. In this determination I will focus on whether Ms Moxon has a personal grievance by reason of her employment or one of the terms of her employment having been affected to her disadvantage by an unjustified action by Pathways; and whether any terms of Ms Moxon's employment were breached by Pathways in its decision to issue her a first written warning. These are related but not identical problems. Materially, Pathways must prove justification for its decision to warn Ms Moxon while Ms Moxon must prove that Pathways breached a term of her employment. However, the starting point for both is a consideration of what happened.

[8] To resolve these problems Ms Moxon seeks retraction of the first written warning, compensation of \$50,000.00 for distress, special damages of \$29,833.83 being her legal fees for representation during the disciplinary process and costs on a solicitor/client basis for these proceedings.

[9] Pathways says that it justifiably issued Ms Moxon a first written warning but it is now prepared to remove it from Ms Moxon's file because it had the desired effect and it has expired.

[10] Despite mediation the problem was not resolved.

### **The people involved**

[11] Robyn Craw is the regional manager for Pathways. She wrote the 9 August 2009 letter to Ms Moxon containing the original allegations. Lyndsay Fortune is the general manager for Pathways and at relevant times was Ms Craw's manager.

Ms Fortune became directly involved in the disciplinary process and signed the 28 April 2010 first written warning letter. Keith Knight is a team leader for Pathways covering several facilities including Ward Street where Ms Moxon was principally based. Melanie Weir is employed as an advisor by Wise Management Services Limited, a firm that provides human resource advice and other corporate services to Pathways. Pathways is one of the charitable entities behind WMSL. Ms Weir conducted interviews with Ms Moxon and other staff. She produced a full report and an abridged report. Her reports were used by Pathways in its decision to warn Ms Moxon.

[12] A number of current or former staff members also gave evidence: Gemma Burrowes, Melanie Elder, Jennifer Manson and Aaron Mooney gave evidence for Ms Moxon; Lynda Gervasi, Barbara Burridge and Steven Quirk gave evidence for Pathways.

### **The initial context**

[13] There were various interpersonal and other difficulties within the Ward Street team. For example, a staff member's employment was ended after an incident with a resident. Ms Moxon was seen by some staff as partly to blame for this outcome. Mr Quirk (a CSW) denied holding this view but I do not accept that evidence. Mr Quirk admitted being angry with Ms Moxon. On one occasion when given a work instruction Mr Quirk became angry and swore at Ms Moxon. Not directly related to the matters just mentioned, Mr Knight and the RHPs were concerned about tasks not being completed. In December 2008 Mr Knight told the RHPs (including Ms Moxon) to set tasks during shifts, negotiate with the CSWs over who was to do what, to check tasks at the end of the shift and to email staff members if there was any default. At a further meeting on 16 March 2009 between Mr Knight and the RHPs there was agreement that there were still problems. Mr Knight told the RHPs to be stricter about these directions. As part of that follow up he also sent an email dated 31 March 2009 to relevant staff to the effect that *Not all staff are working equally*. He advised staff that the clinical co-ordinators (RHPs) would remind them of tasks during shifts. If tasks were not completed the RHPs would send an email to the relevant staff member and copy it to Mr Knight.

[14] Lynda Gervasi is employed by Pathways and was a community support worker (CSW) at its Ward Street Christchurch facility at relevant times. At first Ms Gervasi had a positive working relationship with Ms Moxon. However, in about January 2009 she raised with her team leader (Keith Knight) a concern about Ms Moxon's conduct towards her. Nothing happened about that. On 27 March 2009 Ms Moxon sent Ms Gervasi and another CSW an email (copied to Mr Knight) asking for an explanation about why certain tasks had not been completed. Ms Gervasi responded on 29 March 2009. On or about 30 March 2009 Ms Gervasi spoke to Mr Knight telling him that she felt bullied by Ms Moxon and that she would leave if things were not sorted out. Mr Knight agreed to organise a meeting for himself, Ms Moxon and Ms Gervasi to discuss matters.

[15] Mr Knight's evidence is that Ms Gervasi did not raise such matters with him in March but did so shortly before he went on leave in early June 2009. It is common ground that Mr Knight did not arrange any meeting at this stage (whether in March or June) and Mr Knight attributes that to confusion between him and Ms Gervasi over who was to initiate the meeting. While I accept that there might have been some confusion between them I prefer Ms Gervasi's evidence about the timing.

[16] In early June 2009 there were exchanges involving Ms Moxon, Mr Quirk and Robyn Craw the regional manager. Ms Moxon was expressing dissatisfaction with Mr Quirk's work performance and Mr Quirk with Ms Moxon's conduct and attitude in several respects. Ms Craw conveyed her exchanges to Mr Knight who later reported to her that meetings with Ms Moxon and Mr Quirk about these issues had been productive. During her involvement with these exchanges Ms Craw also spoke to her manager (Lyndsay Fortune) and Pathways' HR advisor (Melanie Weir). Mr Knight was on leave in early June, hence Ms Craw's initial involvement.

[17] Mr Knight held a meeting with Steve Quirk, Gemma Burrowes and Aaron Mooney on 30 July 2009. These three were CSWs at Ward Street at relevant times. The meeting concerned several threads of workplace dissatisfaction and disharmony which need not be detailed but which, at the time, they attributed partly or wholly to Ms Moxon. During this meeting the three CSWs voiced their criticisms of Ms Moxon. It is not necessary to detail those criticisms at this stage. The gist of Ms Burrowes' and Mr Mooney's evidence now is that they were not making formal

complaints about Ms Moxon and had no idea that their concerns would be used against her or outside the team. Mr Quirk's evidence is that he wanted something done about Ms Moxon's behaviour. I will return later to this issue. Mr Knight also discussed matters with Ms Gervasi on or about 31 July 2009 although there is some uncertainty in the evidence whether by phone or in person or both. Whichever, Ms Gervasi's evidence, which I accept, is that she expected her concerns to be taken further and investigated. Ms Gervasi also told Mr Knight that she had been in touch with a union about her concerns over Ms Moxon, that she had kept a record of her concerns, that she was thinking of resigning because of them and that Ms Moxon made her feel bullied and humiliated. Mr Knight made some typed notes of these exchanges.

[18] Mr Knight communicated these exchanges to Ms Craw. He drafted a letter for Ms Moxon dated 31 July 2009 which was sent to Ms Craw but not Ms Moxon. I accept it accurately conveys in a general way the gist of what had been said to him by Mr Quirk, Ms Burrowes, Mr Mooney and Ms Gervasi. To summarise, they accused Ms Moxon of causing them significant stress, making them feel bullied and shamed, gossiping to staff about other staff and continuously leaving work early. Before sending the draft to Ms Craw, Mr Knight met with Ms Moxon on 4 August 2009 and told her without disclosing any specifics that staff had made some serious allegations which Pathways had an obligation to investigate and about which he would be talking to Ms Craw.

[19] Mr Knight's typed notes and draft letter were not provided to Ms Moxon until after the conclusion of the disciplinary process.

### **Ms Weir's investigation**

[20] Although part of earlier discussions about these issues, Ms Weir's first documented involvement was a phone discussion with Ms Craw. Ms Weir made the following hand-written notes:

*13/8/9 Alicia Moxin – RHP*

- a. intimidating staff to stage of resign.*
  - b. Talk about staff behind their back.*
  - c. Rebuking/dictatorial*
  - d. Monitoring this behaviour – low key, coaching.*
- # 3-4 staff comment.                    ?*

*IAC's/formal – not in IAC form due to intimidation level.*  
*e. management responsibility*  
*f. name dropping*  
*Thoughts of next steps ?*  
*Presented serious allegations to Alicia*  
*g. Now Alicia away. (1 Wk.) doctorate*  
*Review when returns.*  
*No detail of items – ‘complaints from staff’*  
*Timeframes: Returns 22 August. Sat. – first week invites out.*  
*→Draft letters investigation meeting.*

[21] Ms Weir’s evidence, which I accept, is that she made these notes during a conversation with Ms Craw. I take it from the note that this was on 13 August 2009. I should also record that this note was first seen by Ms Moxon during the Authority’s investigation meeting. It refers to Mr Knight having spoken to Ms Moxon about the serious allegations and absence of an IAC *due to intimidation level*.

[22] On 18 August 2009 Ms Craw emailed Mr Knight asking him to prepare *an IAC that is confidential*. IAC stands for *INCIDENT/ACCIDENT/COMPLAINT REPORT*. Rather than set out in full the IAC I will summarise it. It records Mr Quirk describing Ms Moxon as a *troublemaker ...talking to staff about other staff*, saying that he feels uncomfortable around Ms Moxon *at times feel[ing] as thou there are some sexual overtones. (Mixed messages)*, feeling that *at times she is seeking attention ...inform[ing] him* about being followed home by a previous male employee and a violent incident with a service user, and complaining about her leaving work early some days. The form records Ms Burrowes giving examples of Ms Moxon gossiping about staff and saying that she (Ms Burrowes) was contemplating leaving Pathways. It also records Ms Gervasi saying that she had contacted the union, was thinking of leaving, felt shamed and bullied and dreaded coming to work, felt that there was at times a dishonest approach by Ms Moxon to the reporting of facts. I should note that Mr Knight’s evidence, which I accept, is that he drafted the IAC based on what had been said to him by these others, rather than from his direct knowledge. I should also note that I accept the evidence of Ms Gervasi and others to the effect that they did not see the IAC until Ms Weir showed it to them later.

[23] Pathways tasked Melanie Weir from WMSL with preparing an investigation report into these concerns expressed by Ms Burrowes, Ms Gervasi, Mr Mooney, Mr Quirk and Mr Knight. Ms Weir wrote to these five staff members on 18 August 2009 inviting them to individual meetings with her on 25 August 2009 to discuss

concerns *relative to alleged bullying behaviour from ...Alicia Moxon*. The letter says *Pathways considers this type of allegation serious and it is our responsibility to thoroughly investigate any such alleged actions*. The invitees were offered the opportunity to bring a support person to the meeting. Anyone reading the letter of invite would have understood, as I find the invitees did, that Pathways was acting on the various concerns expressed by the recipients in late July 2009.

[24] Ms Craw wrote to Ms Moxon on 19 August 2009 inviting her to a meeting with Ms Weir on 28 August 2009. The letter refers to *Concerns of bullying behaviour shown by you towards other staff in the service* and *Behaviour that causes unreasonable distress to another staff member*. It advises that Pathways will be investigating the matters with other employees, that the initial investigation might result in a formal disciplinary investigation, that Ms Moxon was welcome to attend with an appropriate representative or support person, that Ms Moxon should not discuss the matters with other employees and so forth and that Ms Moxon would have a further opportunity to be heard and receive information if the matter became a disciplinary investigation.

[25] Ms Weir interviewed Ms Burrowes, Ms Gervasi, Mr Mooney, Mr Quirk and Mr Knight separately on 25 August 2009. Hand-written notes were made of each interview and a typed version was produced. Several weeks later Ms Weir forwarded to each interviewee the typed notes made of their own interview with a request for them to make any comments, amendments or additions.

[26] Ms Gervasi responded with changes to clarify and correct the minutes of her exchanges with Ms Weir. Later, on 11 December 2009, Ms Gervasi confirmed to Ms Fortune the accuracy of her minutes as corrected and approved their release to Ms Moxon. In evidence she does not challenge the accuracy of the minutes as amended. Mr Quirk edited the notes as sent to him and returned them although in a subsequent email he expressed some regret about how things had developed. Later, on 11 December 2009, Mr Quirk confirmed to Ms Fortune the accuracy of his minutes as corrected and approved their release to Ms Moxon. He also noted one aspect that he no longer stood by. His evidence is that *I made the changes that I wanted to the notes and I sent them back*. The amended notes of these interviews with Ms Gervasi

and Mr Quirk can be taken as accurate as to what they told Ms Weir. I am also sure that the notes reflect their genuine views at that time.

[27] In email exchanges with Ms Weir following the interview Mr Mooney responded with the changes he saw as appropriate. Later, on 11 December 2009, Mr Mooney told Ms Fortune that some parts of the minutes were the opposite of what he had said. He also told Ms Fortune that, while these issues were accurate at the time, things were now different. Mr Mooney authorised the release of his interview notes to Ms Moxon. Mr Mooney's evidence now is that he was very unhappy with the minutes and how they represented him, saying *I advised Melanie that I had made some changes because I was concerned about the manipulation of what I said was used to unfairly and wrongly target Alicia*. However, his email exchanges with Ms Weir at the time do not record him conveying that view. What he said was *I have been through the minutes this morning and made a few changes/comments*. He also provided some further information relevant to comments made by him during the interview. Despite Mr Mooney's evidence I find that the minutes as amended reflect the views that he expressed and genuinely held at the time of the interview. The other point to note is that sometime shortly before 17 March 2010 Mr Mooney told Ms Fortune that he wanted to withdraw his complaint of 25 August 2009 regarding Ms Moxon. Ms Fortune noted that in an email dated 23 March 2010.

[28] Ms Burrowes at the time indicated some reservations with the way that the minutes recorded what had been said by her and her evidence is to similar effect. Ms Burrowes also told Ms Fortune on 11 December 2009 that she had sorted things out with Ms Moxon and did not approve the release of her interview notes to Ms Moxon.

[29] There is some evidence critical of the way in which Ms Weir conducted the interviews with these staff members. I will return to that point later.

[30] After these interviews but before the process of confirming the accuracy of the interview notes or their release to Ms Moxon, Ms Weir met with Ms Moxon. I have already mentioned part of Ms Craw's letter setting up this interview. Ms Weir sent Ms Moxon an email on 26 August 2009 which included a copy of the IAC and some notes made by Ms Gervasi. The documents were apparently hand delivered.

Ms Moxon prepared some written responses based on what she knew of the matters to be investigated.

[31] At the start of the meeting Ms Weir explained that its purpose was to address allegations by some staff of bullying behaviour by Ms Moxon. Ms Weir explained that it might take some time and if during the meeting Ms Moxon wanted to adjourn or break the meeting then Ms Weir would do so. It was agreed that Ms Weir would send minutes of their meeting to Ms Moxon's personal email address after the meeting. It was agreed that Ms Moxon would first provide an overview and her perceptions of what had been going on and would then address the details in the IAC and the notes from Ms Gervasi. There was then an exchange that took approximately 5 hours between Ms Weir and Ms Moxon about the substance of the allegations.

[32] In her evidence Ms Moxon says that she felt unprepared for what transpired at the meeting, that she was subjected to a 5 hour interrogation, that she was required to respond to allegations which were not adequately detailed, that her reasonable explanations were challenged and rejected out of hand and that she was targeted with the matter already decided. Ms Moxon says *This meeting only served to be accused of the crime, weighed on it and certainly judged on it. Ms Weir's actions at the meeting made me feel isolated at work and worthless as a human being.* The evidence reflects an email dated 31 August 2009 that Ms Moxon sent to Ms Craw which conveys similar criticisms.

[33] Ms Weir's evidence differs from Ms Moxon's. She denies there was an interrogation. She points out that she offered breaks and adjournments during the meeting. She says that she had no particular interest in the outcome of the investigation other than to ensure that it was thorough and fair. Ms Weir denies accusing Ms Moxon or judging her.

[34] I accept that Ms Moxon found the experience gruelling. She was closely questioned about her interactions with other staff and her responses were no doubt challenged. Ms Weir was in a position to do this because she had interviewed the other staff whereas Ms Moxon did not know the detail of their allegations. That left Ms Moxon with the impression summarised above and set out more fully in her 31 August 2009 email. However, I do not accept that Ms Weir intended to accuse,

weigh and judge Ms Moxon. I am assisted in this conclusion by considering the evidence about the notes of the interview. Ms Weir sent the notes to Ms Moxon on 11 September 2009 for comments, amendments and additions. Ms Moxon replied with a number of corrections and additions and asked for a further opportunity to check the notes because of her concern about their accuracy, which Ms Weir agreed to. Ms Moxon provided a further version of the notes which were mostly accepted and used as the basis for Ms Weir's report.

[35] It took Ms Weir some while to finalise the meeting notes with the various interviewees. Ms Weir also produced two reports, the more detailed of which included her recommendations for resolving matters. The reports are both dated 29 September 2009. There is an email from Ms Weir to Ms Craw indicating that a copy of Ms Weir's report was provided to Ms Craw on 1 October 2009.

[36] I should also note that Ms Craw responded to Ms Moxon's email dated 31 August 2009 by speaking directly to her. Ms Craw explained that she had forwarded the email to Ms Weir for comment, acknowledged the feelings expressed by Ms Moxon in her email and reached agreement with Ms Moxon about discretionary leave for a particular shift that Ms Moxon preferred not to work.

[37] When Ms Moxon had not heard anything further she sent an email to Ms Craw on 4 October 2009 asking *if there was any possibility of a timeline for resolution*. That led to some exchanges between Ms Craw and Ms Weir, partly documented in emails. Ms Weir forwarded an abridged version of her investigation report to Ms Craw on 8 October 2009 and a draft letter of invitation to a disciplinary meeting. That draft indicates an intention to provide Ms Moxon with the notes of Ms Weir's interviews with other staff and a email exchange on 12 October 2009 has Ms Craw saying that she would *ensure that the four staff involved in the investigation will be notified that their interview report will be made available to Alicia so that she has every opportunity to respond to these at the disciplinary investigation meeting*. However, it is apparent from emails dated 12 October 2009 from Ms Fortune to Ms Craw and Ms Weir and 15 October 2009 from Ms Weir to Ms Craw that Ms Fortune and Ms Craw decided not to provide the notes. The 12 October 2009 email reads (in part) *having reviewed the notes and initial report, I am reluctant to have the information provided by individual staff provided to Alicia. The report*

*provides a robust overview of the issues identified, and given the previous investigation experience, providing the full report would open up the potential for going through line by line, refuting and rebutting each issue. The 15 October 2009 email also says if Gemma wants to adjust or retract information that we have taken as crucial to the findings of our investigation we will certainly need to understand this further as it may very well impact on the outcome of the current process.*

## **Investigation Reports**

[38] Neither counsel provided a detailed analysis of the differences in these two reports but I should summarise the differences. The abridged version excludes most of the material said to be direct quotes from the interviews with other staff. The abridged report records *having little or no trust or confidence in Alicia* as one of Ms Gervasi's concerns but that is not stated as a theme in the unabridged report. The abridged report excludes a passage identifying a longstanding environment in the workplace of gossiping. Finally, the abridged report excludes a passage setting out recommendations for resolution apart from disciplinary action.

[39] Both reports record the following:

*On balance the initial findings from this investigation show that Alicia has behaved in a way that has brought into question her ethical and professional manner in the workplace.*

*Four employees have raised their concerns and allegations of gossiping and bullying behaviour shown by Alicia. These concerns were raised to the Team Leader, Keith Knight and as a result of his concern about the impact he has seen this behaviour have on the employees a formal investigation was required.*

*Furthermore within the investigation Alicia commented that she has 'winged or vented in frustration' to employees about individuals who have not completed task on their shift. Alicia acknowledged that this type of comment or whinge may be seen by others as gossip, or inappropriate from a senior staff manager.*

*Alicia also reflected that she has been aware on the past of how her comments and actions have upset staff, specifically Lynda Gervasi. Alicia commented that she sought the advice of her team leader and has reflected that she needed to change her approach.*

*There are a number of possible outcome, which might arise from a complaint of harassment, bullying and /or discrimination. These include (but are not limited to):*

- i. Apology*
- ii. Undertaking that the behaviour will cease*
- iii. Formal warning*
- iv. Disciplinary action e.g. dismissal, transfer, probationary period*
- v. Awareness raising educational sessions*
- vi. Formal counselling of the alleged harasser*

- vii. *Compensation for any financial loss*
- viii. *Reimbursement of costs incurred e.g. medical or counselling fees*
- ix. *Complaint dismissed*

*Pathways have a no tolerance policy for bullying behaviour, and as such any substantiated bullying behaviour will constitute serious misconduct and may result in sanctions up to and including a final written warning or dismissal. Additionally Pathways General Policy Document outlines behaviour that causes unreasonable distress to another person as misconduct.*

*I am concerned that the allegations may indicate a lack of trust and confidence between Pathways and Alicia Moxon as an employee. Notwithstanding this the relationship of trust and confidence between the key employees involved within this investigation may also have been damaged.*

*Alicia has recognised that behaviour such as speaking of other staff faults or errors in front of employees is not appropriate, particularly as a senior staff member. Alicia also reflected that if she was to address concerns with staff, then she would now take the individual aside to discuss this with them, rather than approach them in front of others. Also, Alicia confirmed that she has changed her method of sending emails to staff when they have not completed tasks, that this was something she now tried to do in a one on one meeting. Her reflection on these situations, allegations and concerns raised by other staff showed an understanding that her behaviour has seriously effected others.*

[40] Ms Weir's evidence is that it is usual to produce two investigation reports. I do not accept that as the reason for the two versions in this particular case. The abridged version was produced so that Ms Moxon would see fewer specific comments made by identifiable staff members with a view to protecting those staff from what Pathways thought might be Ms Moxon's reaction. That indicates an element of pre-judgement at an early stage about the validity of the allegations.

### **Convening the disciplinary meeting**

[41] Ms Fortune's evidence is that it was ultimately her decision, but in consultation with Ms Craw, to initiate a disciplinary process following Ms Weir's reports. When questioned, Ms Fortune said that she took Ms Craw's view on this point rather than looking to make the assessment herself. She was told by Ms Craw about a July 2007 issue involving Ms Moxon that was similar to some of the current allegations. It was Ms Craw's knowledge of this earlier issue and her connection over some months with the 2009 complaints that caused her to see the 2009 issues as disciplinary matters from the outset. It is also clear from Ms Fortune's 12 October 2009 email to Ms Craw and Ms Weir that she was not prepared to allow Ms Moxon the opportunity to go *through line by line, refuting and rebutting each issue*. Ms Fortune thought that Ms Moxon had already had that opportunity during

Ms Weir's interview which indicates that Pathways saw Ms Weir's interview of Ms Moxon as disciplinary in nature from the outset.

[42] Ms Craw wrote to Ms Moxon on 14 October 2009 advising that the *investigation report does raise some serious concerns in respect to your conduct... and it is alleged your conduct constitutes bullying and is contrary to various policies referred to with the investigation report.* The letter requires Ms Moxon to attend a formal disciplinary meeting scheduled for 21 October 2009, cautions her that she might be subject to disciplinary action and encourages her to be represented. The letter included a copy of Ms Weir's investigation report and the meeting notes as finalised. Ms Craw had intended to give Ms Moxon the abridged report rather than the unabridged report but an administrative error resulted in the unabridged report being included with the letter to Ms Moxon. Contrary to the original draft, this letter made no mention of Ms Weir's notes of her interviews with other staff.

[43] Ms Moxon instructed counsel to represent her. Her lawyer wrote to Ms Craw on 19 October 2009. The letter raises a grievance, asserts that no issue of misconduct has been raised given the *baseless allegations*, and states that any instruction to Ms Moxon to attend a disciplinary meeting would be unlawful and that a failure to stop *this fundamentally flawed process ...would confirm that Pathways are in breach of [good faith]*. The letter includes a request for all information about the investigation and asks for confirmation that the scheduled meeting would not proceed in the meantime.

[44] Pathways responded by letter dated 21 October 2009 rejecting the criticisms of its process to date, advising that it would take some time to compile the requested information, proposing new dates for a meeting and offering Ms Moxon paid discretionary leave in the meantime. That drew a response dated 29 October 2009 from the lawyer declining the leave, seeking specified documents and information and asking that any meetings be deferred until after receipt of the information. Pathways forwarded material by email on 3 November 2009 and required Ms Moxon to meet. The lawyer responded by letter dated 3 November 2009 criticising Pathways for its failure to supply all the requested information and its insistence on meeting meantime. Pathways responded by letter dated 6 November 2009 saying that the interviews with the complainants was confidential and they did not have consent to release these

records, that the key elements were nonetheless incorporated into Ms Weir's report and requested a meeting on 11 November 2009.

[45] There was no meeting. Ms Moxon's lawyer wrote again on 16 November 2009 pointing out Pathways' obligations under s.4(1A)(c) concerning relevant information, referring to recommendations in Ms Weir's report and suggesting mediation rather than a disciplinary process. There was mediation on 3 December 2009 but matters were not resolved.

[46] There ensued further correspondence. Pathways instructed counsel who wrote to Ms Moxon's lawyer on 4 December 2009 explaining the reason for the two investigation reports, proposing a meeting for 11 December 2009 or alternatively seeking Ms Moxon's response in writing, assuring Ms Moxon that it would investigate and consider her responses before determining matters and repeating the offer of discretionary leave. Ms Moxon's lawyer responded by letter dated 7 December 2009 saying *the report ...on which the disciplinary process is predicated is an absolute fabrication, fundamentally flawed and constructed with the sole intent to conduct a "witch hunt" ...against Ms Moxon ...* There are also complaints about the minutes of the interviews with staff and the failure to disclose information, an offer to settle matters on specified terms, criticism of *the systemic dysfunctionality of the organisation* and a repeat of the request for Ms Moxon's personal information under the Privacy Act. In a response dated 8 December 2009 Pathways' lawyer notes the markedly different views of their respective clients, takes issue with the assertion of a legal onus on Pathways to provide sufficient proof to substantively justify a disciplinary process and explains that Pathways would review matters and revert before taking things any further.

[47] With its letter dated 15 January 2010 Pathways' lawyer provided copies of the typed interview minutes from the other staff with the exception of Ms Burrowes. The letter requires Ms Moxon to meet with Pathways on 27 January 2010 (or respond in writing), failing which Pathways would conclude its disciplinary process based on the information available to it at that time. By agreement 18 February 2010 was set as the date for meeting. Before that date, acting on a request from Ms Burrowes, Pathways confirmed that it would no longer base its disciplinary investigation on her statement.

### **The disciplinary meeting**

[48] Present at the meeting on 18 February 2010 were Ms Moxon and her lawyer (Ms Buckett), Ms Burrowes, Ms Craw and Ms Fortune and a note-taker (Louise Taylor). The meeting was also recorded. I have listened to the recording and read the notes. It is not necessary to describe in detail what happened at the meeting other than to say that Ms Moxon was given ample opportunity to respond to the materials that had been provided to her beforehand but her solicitor required Pathways to specify the allegations (other than as was apparent from the materials provided) beforehand. In general matters did not progress much beyond that stalemate but there are some other aspects that I will refer to later.

[49] The meeting ended when Ms Moxon's lawyer attempted to have Mr Mooney come into the room but the Pathways' managers were not prepared to allow that.

### **Subsequent events**

[50] Ms Moxon's lawyer wrote to Pathways' lawyer on 18 February 2010. As a prelude to proposing settlement terms the letter complains about *Pathways' outrageous behaviour towards [Ms Moxon] at the meeting today* and states that *Pathways' abandonment of the meeting is absolutely disgraceful and clearly indicates that they have no intent to act in good faith*. It goes on to say:

*It seems the whole process is devised to victimise our client in a totally biased process and cause her to suffer undue stress and harassment in the workplace. Pathways are not entitled to unfairly single out our client for the formal investigation proceedings which threaten her job security, particularly in a situation where complainants have withdrawn complaints and are actively supporting the abandonment of the investigation.*

[51] In a response dated 22 February 2010 Pathway's lawyer declined the settlement proposal. This letter refutes the foregoing criticisms and offers the opportunity for a further response by Ms Moxon in writing and a meeting for the decision to be conveyed. The letter sets 24 February 2010 as the date for any written response and the week commencing 1 March 2010 for any meeting. Ms Moxon's lawyer wrote again on 24 February 2010 saying that Pathways was repeatedly asked to identify allegations and issues requiring a response but refused and then abandoned the meeting. There is more invective about Pathways' process to that point and a

specific rejection of Pathways' accusation of an orchestrated campaign of disruption and obstruction on Ms Moxon's part. Perhaps the material part of the response is the contention of an absence of substance in the allegations warranting investigation, especially since the purported complainants never intended to lodge any formal complaint and had subsequently asked that the process be stopped. The letter also signalled Ms Moxon's willingness to provide a fulsome response *subject to Pathways identifying the issues and behaviour that might amount to misconduct that could substantiate a formal investigation process* and confirms that *Ms Moxon is entitled and willing to meet to discuss the outcome of the investigation process* but after 11 March 2010.

[52] By letter dated 1 March 2010 Pathway's lawyer responded to the criticisms of its process. The letter also notes that Ms Moxon declined the invitation to supply additional material by the specified date but wanted to meet to hear the decision about the complaints. This drew a further response from Ms Moxon's lawyer. The letter largely repeats the earlier criticisms. There was some other correspondence that need not be described.

### **Pathways' preliminary view**

[53] Ms Craw's (not Ms Fortune's) evidence is that she reviewed the materials, decided there was some justification for the complaints and *prepared the conclusions that I reached in a preliminary outcome* that was sent to Ms Moxon. On 17 March 2010 Pathways' lawyer provided in writing the preliminary views as to the outcome of the disciplinary process (under Ms Fortune's signature) and invited any written response by 30 March 2010 or a meeting that day. I will briefly summarise Pathways' preliminary view.

[54] First, the letter records that issues and allegations had been raised and discussed. They were concerns of bullying behaviour shown by Ms Moxon towards other staff and behaviour that caused unreasonable distress to another staff member. There were said to be the following recurring themes: (1) employees being subjected to gossip by Ms Moxon about others' work performance; (2) employees being the attention of gossip by Ms Moxon; (3) concerns about how Ms Moxon treated others in the workplace; (4) fault finding, correcting staff members in front of others and

making false allegations against staff; (5) difficulties working with Ms Moxon and a named resident; and (6) a lack of trust and confidence between staff and Ms Moxon. The letter states that Pathways had unsuccessfully attempted to elicit a full response from Ms Moxon. It notes that Ms Burrowes and Mr Mooney had both withdrawn their complaints while acknowledging that their interview notes reflected how they felt at the time. As to (1) and (2) the letter noted that there appeared to be a *culture of gossiping* which Ms Moxon contributed to by *engaging in and initiating "gossip" about others*. The letter noted as to (3) and (4) that there was substance to the allegation in that staff members who raised the allegations were clearly distressed by the documented incidents; and that Ms Moxon had accepted that she had behaved this way in the past but now recognised that it was inappropriate. As to (5) the investigation was unable to determine the validity of the allegation. As to (6) the investigation concluded there was substance to the allegation but acknowledged that three of the team members had reported an improvement. The letter went on to say that these actions individually and collectively amounted to misconduct but not serious misconduct.

[55] There was further correspondence by Ms Moxon's lawyer criticising Pathway's disciplinary process, asserting an absence of any misconduct and requiring examples from the material provided that would constitute misconduct. The response from Pathway's lawyer was to the effect that Pathway's would not be engaging in a debate as to the merits of the preliminary view but was giving Ms Moxon an opportunity to comment on the preliminary views. That drew further criticism from Ms Moxon's lawyer.

[56] Following this further opportunity for Ms Moxon's comments, there were apparently some without prejudice exchanges between the parties which did not resolve matters. I infer this from correspondence dated 21 April 2010 from Pathway's solicitor that is marked *WITHOUT PREJUDICE EXCEPT AS TO COSTS* but which was included in material provided by Ms Moxon. Thereafter, Pathways proceeded to finalise its decision but not before providing a further opportunity for Ms Moxon to advance any information in writing that she wanted Pathways to have regard to in its decision making. That drew nothing of relevance.

## **Warning**

[57] Ms Craw's (again, not Ms Fortune's) evidence is that she considered matters again and came to the conclusion that there had been some misconduct for which Ms Moxon should receive a warning. Ms Fortune wrote to Ms Moxon on 28 April 2010 confirming the previously advised preliminary view that Ms Moxon would receive a first written warning effective for 6 months. In her letter Ms Fortune also confirmed the previously discussed point that there had been no complaint from Mr Knight, merely the notes of his interview during the investigation process.

## **Justification**

[58] Whether the decision to warn Ms Moxon 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. Despite that legal burden resting on Pathways it is convenient to first turn to aspects of the various challenges identified in the comprehensive submissions made on Ms Moxon's behalf.

## **Aspects of the applicant's submissions**

[59] A major theme for Ms Moxon is that there was no justifiable reason for Pathways to formally investigate her conduct and that Mr Knight's and Ms Craw's *purpose and intent of [the IAC] was to put in train a process with a pre-determined outcome to dismiss the Applicant*. That is said to be why Pathways misrepresented interview notes, wrongly blamed Ms Moxon for the actions of other staff, did not disclose pertinent information, was in default of fair process, withheld information, held secret meetings, was not honest about who was involved and what discussions were being held, misrepresented the nature of the IAC, had two versions of Ms Weir's report, did not give Ms Moxon the opportunity to comment on the final version of the report, reneged on an invitation to return to the investigation, wrote an ambiguous final report, the duplicity of Mr Knight, gave contradictory evidence about who was the final decision maker, and apologised (Ms Fortune) for getting it wrong.

[60] Pathways did not misrepresent interview notes. Ms Weir accommodated the changes required by the interviewees. The typed documents as finalised speak for themselves. I will return to the point about wrongly blaming Ms Moxon. Pathways took the position that it needed to obtain the consent of each employee to release their interview notes to Ms Moxon. In the end the typed interview notes of Mr Mooney, Mr Quirk and Ms Gervasi (who all gave this permission) were released to Ms Moxon. Pathways' position is that it relied on only the released interview notes. I will return to that point. The broad allegation about default of fair process does not on its own take matters anywhere. I will deal later with the point about withholding relevant information. There is no evidence of secret meetings or dishonesty about who was involved and what discussions were being had. I do not accept that there was any misrepresentation about the nature of the IAC. There were two versions of Ms Weir's report and Ms Moxon initially received the fuller version at the outset. I accept that Ms Moxon had no input into Ms Weir's report other than during her interview and the subsequent exchanges over the notes. I will return to the point about her lack of opportunity to comment about its content and conclusions during Pathway's disciplinary process. There is no evidence that Pathways reneged on any invitation. Rather Pathways looked to constrain the later engagements to try and bring the disciplinary process to an end. I take the submission about ambiguity as a reference to the warning letter. Read in context with the earlier written preliminary view there was nothing ambiguous about the relevant content. I do not accept that Mr Knight's evidence could fairly be described as duplicitous, although that is not to say that I necessarily accept his evidence as correct. In evidence both Ms Craw and Ms Fortune claimed to have greater responsibility for the final decision than could be the case if both were giving accurate evidence. I will return to this point later. Quite properly Ms Fortune acknowledged an error prior to the final decision.

[61] There are other broad submissions under the heading *The Applicant's position*. The overwhelming conclusion from the evidence is not that the respondent was dishonest and concealed the true purpose of the investigation. Pathways' managers became aware of concerns about Ms Moxon's behaviour being expressed by several staff and endeavoured to investigate those concerns. Several (but not all) of the staff came to regret what developed from those expressed concerns. Mr Quirk for example in an email to Ms Weir on 29 September 2009 wrote *I feel these things are witch hunts. I feel horrible about it all... Things just seemed to have got out of hand ...*

However, despite that, Pathways was entitled and probably obliged to investigate the matters raised by Mr Quirk and others. There was no ulterior purpose. The allegations were not baseless. They were founded initially on what had been said by other staff but after various matters had been discussed by different groups of them at different times over the preceding months. The submission that Pathways conducted a biased investigation with the single minded aim of taking disciplinary action against Ms Moxon is about predetermination, a point to which I will return. There was no breach of Ms Moxon's confidentiality by Pathways management. Minutes were not deliberately recorded inaccurately and (with the exception of Ms Burrowes) were confirmed as accurate in exchanges with both Ms Weir and Ms Fortune. Through the disciplinary process several staff asked that their statements be retracted. That did not mean that they had not said the things recorded in the interview notes. Pathways refused to allow Mr Mooney to speak at the meeting on 18 February 2010. This was a difficult meeting, principally because of the stance taken on Ms Moxon's behalf. I do not accept that Pathways' refusal to allow Mr Mooney to participate in the meeting demonstrates bias. It was an attempt to exercise some control over a process that was bordering on being out of control. I will return to whether Ms Moxon was provided with all the details about the allegations that she was eventually called upon to answer and whether she had a fair opportunity to respond. There are then several submissions directed at the way in which Ms Moxon has been allegedly disadvantaged (including by reference to legal costs) and I will return to this later.

[62] There are submissions about credibility to support the view that Ms Moxon's evidence should be preferred in the event of any conflict. Much of this problem is about personal relationships and perceptions of conduct. The relationships changed during the process. For the most part the differences in evidence cannot be resolved by identifying one person's evidence as truthful and another person's evidence as untruthful. I also note that s.174(b)(iii) of the Act means that the Authority does not need to indicate why it makes specific findings as to credibility. I am mindful of the submissions made about credibility but for the most part it will not be necessary to directly respond to them.

[63] Counsel has set out what are described as the *Salient Facts*. I have already given an overview of what happened which does not necessarily accord with

counsel's account. However, there are some aspects of counsel's account which should be specifically mentioned.

[64] Prior to meeting with Ms Weir, Ms Moxon received the IAC and Ms Gervasi's notes. It is not correct to say that Ms Moxon had *no accompanying documents or information indicating the source or veracity of the allegations*. At the beginning of the meeting Ms Weir asked if Ms Moxon was happy to proceed without a support person and Ms Moxon agreed to do so. It is therefore not correct to say that Ms Moxon *was unable to have a support person or representative because of the unreasonable time frame provided*. Indeed, Ms Moxon's evidence, in response to questions was that she felt she had prepared an adequate response to the IAC. Ms Weir's report (both versions) reflected what had been said to her by the interviewees and her assessment of the situation overall. It is not correct to say that it had been *edited by Lyndsay Fortune*. I will return to the point about whether it had been *influenced by Robyn Craw*. To an extent it is correct to say that the report contained material that Ms Moxon had not had an opportunity to respond to since she had not seen the notes of the other interviews.

[65] There are some assertions of fact in subsequent sections of counsel's submissions that merit specific mention.

[66] As noted, Mr Knight was Ms Moxon's supervisor but he had no power to hire or fire her. His view about what should have happened was not significantly influential. I do not accept that Ms Craw had any pre-determined intent to dismiss Ms Moxon. Quite properly she encouraged Ms Moxon to get advice because of the disciplinary nature of the investigation. Ms Craw did not create the IAC in conjunction with Mr Knight. Ms Craw asked that the allegations and concerns be recorded in an IAC to document them. Ms Weir's interviews were not *disguised as informal meetings to discuss general staff relationships*. The written invitation to the other staff made it clear that it was about *concerns you have raised ...relative to alleged bullying behaviour from ...Alicia Moxon* and that *Pathways consider this type of allegation serious...* The staff members were not interviewed collectively. Over some months there had been various discussions between various of the staff about Ms Moxon. Concerns of some staff were aired to Mr Knight in a group situation. Ms Weir then interviewed staff individually.

**Pathways' actions and how it acted**

[67] By her employment agreement Ms Moxon agreed to make herself familiar with and to comply with Pathways' policies. Ms Weir's report (both versions) referred to extracts from Pathways' policies concerning bullying, harassment and discrimination, and professionalism in the workplace. It also included extracts from Pathways' induction book concerning gossiping & unprofessional exchanges, boundaries and ethics and team work. I will refrain from setting out these extracts in this determination as nothing turns on the specific words.

[68] Over a period of time Mr Knight received complaints and/or expressions of concern about Ms Moxon's behaviour from four employees. Mr Knight was also instrumental in these employees sharing their own views with one another. Ms Craw, Ms Fortune and Ms Weir were also made aware of these matters. These complaints and concerns raised the possibility of behaviour by Ms Moxon that was inconsistent to varying degrees with the policies and expectations later referred to by Ms Weir in her report. Ms Craw decided that there should be an investigation and engaged Ms Weir to investigate the matters. Ms Craw also asked for the complaints and concerns to be condensed into an IAC, which had not happened to that stage apparently because of the level of intimidation, or at least so Ms Weir was told. In the face of this information any fair and reasonable employer would have initiated an investigation.

[69] While there are complaints by some of the other employees about Ms Weir's manner and process with them, none of that can create unfairness as to process for Ms Moxon. Mr Quirk, Mr Mooney and Ms Gervasi confirmed in their exchanges with Ms Weir that the typed notes reflected what they had said. What they said reflected their genuine views at the time. Ms Burrowes never confirmed the notes of her interview but Pathways eventually told Ms Moxon that it was not relying on Ms Burrowes' views as recorded in the notes of her interview because she was not prepared to have the notes released to Ms Moxon. There were elements of unfairness in the way that Ms Weir conducted her interview with Ms Moxon but I will return to that point below.

[70] To some extent there is a suggestion that Pathways did not take its investigation far enough in that Ms Moxon worked with other people who were not interviewed. This was an investigation into concerns expressed by specific employees as to Ms Moxon's conduct towards them. A fair and reasonable employer would not have extended its investigation to others who had not expressed any concern or complaint about their interactions with Ms Moxon.

[71] Ms Weir's report to Pathways (the full version) summarised the concerns that had been expressed. I will refrain from recording all the content of the report. Ms Gervasi summarised her concerns as follows: constant fault finding, sometimes very petty; making false accusations; not presenting all the information so painting a very different picture from what actually occurred; being corrected in front of other staff members; and gossiping about other staff members. Some examples were given. Ms Burrowes' concerns were summarised and some examples given. Mr Quirk canvassed the following themes: feeling uncomfortable around Ms Moxon; concern that she was acting in a sexually suggestive manner around him; difficulties in working with Ms Moxon regarding a particular service user; being subjected to gossip about others and their performance at work; concerns about how Ms Moxon treats other staff in the workplace; Ms Moxon leaving work early; recent improvement in Ms Moxon's behaviour; and having little or no trust and confidence in Ms Moxon. Some examples were given. Mr Mooney mentioned the following themes: being subjected to gossip about others and their performance at work; concerns about Ms Moxon's treatment of others at work; that there may be trust and confidence issues between staff; and difficulties when working with Ms Moxon and a particular service user. Some examples were given. Mr Knight mentioned various similar concerns. Faced with these assertions any fair and reasonable employer was entitled to escalate matters into a formal disciplinary investigation, as Pathways purported to do.

[72] Following Ms Weir's report Pathways' offered Ms Moxon a number of opportunities to respond to the allegations set out in the letter dated 14 October 2009, the IAC, Ms Gervasi's notes, the typed interview notes (except Ms Burrowes') and Ms Weir's report. However, I accept that Ms Moxon was entitled to see Ms Weir's interview notes before she could fairly be required to respond to the allegations. Those notes after all comprised most of the detail about the concerns and complaints.

They were eventually provided (or the relevant allegations expressed to be withdrawn as no longer material), following which Pathways again sought Ms Moxon's response. Ms Moxon's response was conveyed in writing and during the meeting of 18 February 2010. To summarise, she was not prepared to provide a substantive response (beyond what had been said by her to Ms Weir) until Pathways did more to specify the allegations.

[73] S.4(1A)(c) of the Employment Relations Act 2000 requires an employer who is proposing to make a decision that might have an adverse effect on the continuation of employment of an employee to provide them with access to information, relevant to the continuation of their employment, about the decision and an opportunity to comment before making the decision.

[74] Ms Moxon gave evidence, which I accept, that a number of documents, relevant to the continuation of her employment, were not provided to her prior to the decision to issue her with a warning. I will mention the most significant documents. Mr Quirk sent Ms Craw emails on 1 June 2009 and 8 June 2009 with the subject lines *Resignation* and *difficulties* respectively regarding Ms Moxon's alleged behaviour and its effect on him. It appears that Ms Craw spoke to Ms Fortune about what she described as *grumbling staff issues*. Ms Craw's evidence is that she *felt quite concerned at the depth of feeling that Steven displayed* and that he was *truly frightened and distressed* when she met with him on 11 June 2009. Given that these emails appear to be the starting point of Ms Craw's concerns they should have been disclosed to Ms Moxon. I have already mentioned Mr Knight's notes and draft letter. There are also the notes made by Ms Weir during her phone conversation with Ms Craw on 13 August 2009. The latter notes indicate that Ms Craw conveyed conclusions rather than allegations to Ms Weir, including the view that the issues were *not in IAC form due to intimidation level*. All this material should have been provided to Ms Moxon. There were handwritten notes of all Ms Weir's interviews. They too should have been provided. Pathways' took the view that it needed Ms Burrowes' permission to release the typed notes of her interview. However, the absence of permission could not override Pathways' statutory obligations under s.4(1A)(c) of the Employment Relations Act 2000. Pathways' assertion late in the disciplinary process that Ms Burrowes' comments would not be taken into account did not cure this problem. Ms Moxon was entitled to the material as it was relevant to

the decision to launch the disciplinary investigation. There were a number of communications between Ms Weir and the other employees about the accuracy of their notes which should also have been disclosed to Ms Moxon. She came to learn bits of these exchanges directly from some of the interviewees but that gave her only a partial picture. As an example I will mention the email from Ms Gervasi to Ms Weir dated 22 September 2009 where she gives for the first time the five themes referred to in Ms Weir's full report. Ms Gervasi's allegations could not have been put to Ms Moxon in that way by Ms Weir because their interview occurred before the date of this email.

[75] There is established jurisprudence about the minimum requirements of fairness when considering whether to warn or dismiss an employee. In *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35, the Labour Court said:

*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 the likely consequences if the allegation is established;*
2. *An opportunity, which must be 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 predetermination and uninfluenced by irrelevant considerations.*

*Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair minded but not overindulgent person.*

[76] On a careful analysis of the sequence of events I have also formed the view that Ms Moxon should have been provided with all existing material prior to her interview with Ms Weir, not just the IAC and some material from Ms Gervasi. The specific allegations that Ms Moxon was being called upon to answer included what the other employees had told Ms Weir some days before the interview with Ms Moxon. The text of Ms Moxon's interview makes this clear, it is why she was interviewed last and why the interview took so long. The typed up notes might not have been available at that time but the handwritten notes were. Alternatively, the

interview with Ms Moxon could have been deferred until the notes of the other interviews were available.

[77] I do not accept the contention that Ms Weir's interview of Ms Moxon was not part of Pathways' formal disciplinary investigation. First the views expressed by Ms Craw to Ms Weir on 13 August 2009 make it clear that Pathways already had *serious allegations* which it required Ms Moxon to respond to. That mirrored what had been said to Ms Moxon by Mr Knight. The development of the IAC and Ms Weir's interviews with the other employees were about documenting the concerns for the purpose of a disciplinary investigation with Ms Moxon. Put another way, the Authority could not assess whether Pathways' actions were those of a fair and reasonable employer without considering Ms Weir's interview as a significant part of the circumstances. The relevance of Ms Weir's interview to Pathways' disciplinary process is underlined by reference to the fact that the invitations to the others employees were by letter signed by Ms Weir whereas the invitation to Ms Moxon was by letter signed by Ms Craw.

[78] I find that there was an element of pre-determination in Pathways' decision, contrary to the actions of a fair and reasonable employer. The evidence indicates and I find that Ms Craw had formed firm views about Ms Moxon's conduct and how it should be addressed prior to her discussion with Ms Weir on 13 August 2009. That coloured the nature of the investigation from then on. For example, as early as her 12 October 2009 email Ms Fortune expressed her unwillingness to allow Ms Moxon an opportunity to refute and rebut the various allegations. I have already mentioned the reason for the production of an abridged report. There was never an unbiased consideration of Ms Moxon's explanation even as given to Ms Weir.

[79] For the foregoing reasons I find that the warning was issued to Ms Moxon in an unjustified manner.

[80] Ms Moxon's employment was disadvantageously affected because it made it less secure, at least for the duration of the warning. Although the warning is now expired, Ms Moxon remains at risk of the fact of the warning being referred to in any later disciplinary processes, just as Pathways referred to the 2007 letter (without alerting Ms Moxon to that) in deciding to deal with the 2009 matters as disciplinary in

nature. The same risk would arise if there was a subsequent employment relations problem.

### **Remedies for the grievance**

[81] Ms Moxon seeks retraction of the warning. I agree that for all purposes she should be regarded as having never received this warning. That is in effect reinstating her to the position she was in prior to being issued with the warning.

[82] \$50,000.00 compensation is claimed for distress. There is evidence, which I accept, of serious effects on Ms Moxon arising from the unfair warning. Ms Moxon described her interview with Ms Weir as *horrific* leaving her feeling *quite worthless as a human being* having *lost my confidence*. There is also evidence of her distress during this interview. These effects could have been avoided if Pathways had provided Ms Moxon with the materials available prior to the interview. Ms Moxon had to obtain medical advice because of her extreme anxiety and panic attacks. She was diagnosed as suffering from anxiety and depression attributable to these events at work and prescribed anti-depressant medication. While I do not accept as proven to a state of probability that the warning will have a deleterious effect on Ms Moxon's career, her anxiety about that possibility especially at this stage of her professional career, is relevant to the assessment of compensation for distress.

[83] All this leads me to the conclusion that Ms Moxon is entitled to compensation of \$10,000.00 to remedy these effects, subject to what is said below about contribution.

[84] Although in the statement of problem there was no specific claim for reimbursement of lost remuneration, there is a submission to the effect that Ms Moxon lost earnings between August 2009 and December 2009 because she was not offered extra work and that she used and therefore lost future sick leave and holiday entitlements. I agree with the respondent's submission that there was no evidence given of these losses. There can be no award.

[85] I am required to consider the extent to which Ms Moxon's actions contributed in a blameworthy way to the situation giving rise to her grievance. There is a

submission for Pathways that Ms Moxon contributed to a significant extent both because of her behaviour that resulted in the complaints and the manner in which she responded to Pathways' investigation process. I will deal first with the latter point.

[86] In this determination I have not fully detailed the evidence comprising correspondence from Ms Moxon's solicitor and the exchanges principally involving the solicitor during the disciplinary meeting on 18 February 2010 but I have considered all this material. Ms Moxon's position as conveyed in these exchanges could fairly be described as obdurate – she would not provide a substantive response without first being provided with specified information about the allegations. This was in marked contrast to her willing involvement at first in Ms Weir's interview. The difficulty with treating Ms Moxon's obduracy as blameworthy contribution is that significant unfairness by Pathways occurred before Ms Moxon adopted that approach. I cannot say to a standard of probability that Ms Moxon's approach following the interview with Ms Weir made any difference to the outcome of Pathways' disciplinary process.

[87] Nor am I satisfied to a standard of probability that there was any blameworthy conduct by Ms Moxon with respect to her dealings with the other employees. Mr Knight's evidence of events was hearsay and I will put it to one side for present purposes. By the time of Pathways' decision both Ms Burrowes and Mr Mooney had made it clear that there was no complaint from them. During the Authority's investigation they both said that issues between themselves and Ms Moxon had been resolved through discussion with Ms Moxon. It is difficult to see from their evidence, whatever the original cause of the issues between themselves and Ms Moxon, that there could be a finding of blameworthy conduct by Ms Moxon warranting a reduction in remedies for her established grievance. Mr Quirk did not impress as a reliable witness and I prefer Ms Moxon's evidence to his with the result that there can be no finding of blameworthy conduct by her with respect to Mr Quirk. More must be said about Ms Gervasi's issues.

[88] I accept that Ms Gervasi's expressed concerns about Ms Moxon's conduct towards her were genuine. There was an accumulation of minor incidents where Ms Gervasi felt that she was unfairly criticised by Ms Moxon. With some of the incidents Ms Gervasi had at least partly failed to adhere to her work requirements.

Ms Moxon's approach to this was driven by Mr Knight as team leader. At the same time Mr Knight heard several times from Ms Gervasi about her view that Ms Moxon was treating her in an unfair manner. Mr Knight did nothing effective to resolve Ms Gervasi's expressed concerns. The essence of the concerns was the manner of Ms Moxon's communications which had the unintended result of Ms Gervasi feeling unfairly singled out, and Ms Moxon's habit of discussing the shortcomings of various staff with other staff. This latter conduct was part of the workplace culture but it is not suggested that Ms Moxon initiated that culture. On my assessment, Ms Gervasi's concern about communication style should be treated the same as the similar concerns expressed by Ms Burrowes and Mr Mooney and not regarded as blameworthy conduct by her. To the extent that Ms Moxon participated in a culture of discussing staff with other staff, her conduct must be regarded as a blameworthy contribution to the circumstances giving rise to her grievance. That contribution is of a minor nature when assessed against Pathways' failures and I assess it at 10%.

### **Special damages**

[89] The finding that Ms Moxon has a personal grievance also means that Pathways breached at least the implied contractual term requiring it to treat Ms Moxon in a fair and reasonable manner. Ms Moxon says that she has suffered loss as a result of this breach and she seeks damages being the legal costs incurred by her through Pathways' disciplinary process. I am referred to *Binnie v Pacific Health Ltd* [2004] 1 ERNZ 438 (CA), *Allan v Ogilvy* WA50/09 24 April 2009, *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433 and several sections of the Employment Relations Act 2000.

[90] I should start with the statutory provisions. I am first referred to s.123(1)(b) which provides that the Authority may in settling a personal grievance provide for the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. I do not read the phrase *other money lost* as including the legal costs incurred by an employee arising from instructing their lawyer to represent them during a disciplinary investigation. If it included legal costs there would be no need for the separate statutory provision empowering the Authority to award costs. At a late stage in the preparation of this determination my attention was drawn to *Smith v Air2There.com (2008) Ltd* 2011

NZERA Wellington 98. I agree with the view expressed in that determination that legal costs are not a compensatable loss for the purposes of s.123(1) of the Act. Next I am referred to s.162 which empowers the Authority, in any matter related to an employment agreement, to make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts. The submission is that the present loss is recoverable under the normal rules relating to the assessment of damages following a proven breach of contract, a point discussed in the cases mentioned above.

[91] *Binnie* was an appeal and cross-appeal to the Court of Appeal against the judgment of the Employment Court on costs following the employee's success in a common law breach of contract action in that Court under the Employment Contracts Act 1991. In the Employment Court there had been an award of special damages but this did not include the employee's pre-litigation legal costs, no claim for such loss having been made. In this context, while deciding the matter on the basis of a principled approach to the discretionary power to award legal costs, the Court of Appeal also said:

*[17] We offer an additional observation on this aspect of the present case. Legal expenses properly incurred in relation to issues such as wrongful suspension of employees and investigations into their conduct might well be classified as special damages rather than as party and party costs. The latter generally have as their focus the issue of proceedings, preparation for hearing and the hearing itself.*

*[18] ...In addition, of course, as special damages the costs in question would be recoverable in full as opposed to being recoverable only to the extent of a reasonable contribution. The line between special damages on this footing and party and party costs will often be blurred at the margins, but the point is valid as a general proposition. We do not wish to encourage unduly precise apportionments in this area. Use of the special damages approach should be reserved for cases in which a proper line can be drawn, albeit only in broad terms.*

[92] These passages from *Binnie* were referred to in *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433. In *Harwood* the Employment Court was dealing with a de novo challenge from an Employment Relations Authority determination on costs. Counsel for the plaintiff made submissions to the Court based on categorising some of the legal costs incurred as special damages so as to increase the overall award of costs. In dismissing the challenge the Employment Court said:

*[37] The matter of special damages was not developed by the plaintiff before the Authority or the Court in such a way as to permit a proper assessment of a distinction between such damages and party and party costs. ...Furthermore, I am not persuaded that in dealing with the resolution of an employment relationship problem, as opposed to an action for damages such as in *Binnie* that it would be appropriate to classify costs incurred prior to the filing of the statement of problem as special*

*damages to enable them to be recovered in full and not be subject to any restraint as party and party costs clearly are in the Authority.*

[93] Counsel submits that the caution evident in this passage from *Harwood* is obiter and that it has not prevented the Authority from treating legal costs as special damages. I am referred to *Allan v Ogilvy* as an example. In that case it appears that special damages were raised for the first time when the Authority was determining costs following a successful personal grievance. Although commenting (without any citation) that *there are decisions of the Authority where special damages have been awarded* the Authority dealt with the claim on the basis of a party and party costs award.

[94] On analysis, none of these cases are examples where the Court or the Authority has treated pre-litigation legal costs as special damages. This is for the very good reason referred to in *Harwood*. Special damages are recoverable in full on proof of the relevant elements whereas party and party costs are dealt with in a principled way and subject to judicial restraint. Addressing the substance of this dispute, it is a personal grievance like many others that come before the Authority. Pathways was entitled and probably obliged to investigate the concerns that came to its attention but it did so in a manner that was unfair to a significant extent to Ms Moxon. The conclusions reached by Pathways are therefore unsustainable. These circumstances differ markedly from those in *Binnie* where Dr Binnie was unlawfully suspended, ostensibly for patient safety reasons, in a manner found at the time to merit an award of exemplary damages; but if the matter had been handled properly basic inquiries would have shown no patient safety issue and there would have been no suspension or consequent damage to Mr Binnie. Because there is nothing to distinguish the present case from many that come before the Authority, if there was an award of special damages to cover Ms Moxon's pre-litigation legal costs, that same entitlement would arise in every case where an employee instructed counsel or a representative before the conclusion of the employer's disciplinary process. Similarly, an employer who instructed counsel or a representative in the face of an employee's breach of contract would also be entitled to special damages to cover those legal costs.

[95] Not treating pre-litigation legal costs as special damages sits more comfortably with the objects of the Employment Relations Act 2000 described in s.3(a)(v) and (vi), s.101 (ab), and s143(b) and (f). The Authority must, in carrying out its role,

further the objects of the Act: see s157(d). I also note that the Authority is not bound to treat a matter as being of the type described by the parties and may concentrate on resolving the employment relationship problem. Finally, I am guided by s.157(3) of the Act which requires the Authority to act as it thinks fit in equity and good conscience subject only to the fetter that it may not do anything that is inconsistent with the Act, its regulations and the relevant employment agreement.

[96] In accordance with the provisions of the Act just mentioned and for the reason explained above I decline to deal with this matter as a breach of contract and will concentrate on resolving the personal grievance claim which is the substance of the employment relationship problem. Legal costs will be dealt with in the usual way.

### **Summary and orders**

[97] Ms Moxon has a personal grievance in that her employment was affected to her disadvantage by an unjustified action on the part of Pathways.

[98] To remedy Ms Moxon's grievance, Ms Moxon must be regarded as never having received the warning dated 28 April 2010.

[99] Pathways is to pay Ms Moxon compensation of \$9,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[100] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne  
Member of the Employment Relations Authority