

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 211
5418010

BETWEEN MARGARET MURRAY
Applicant

A N D CNI EARLY EDUCATION
SERVICES TRUST
Respondent

Member of Authority: Rachel Larmer

Representatives: Sarah McBeath, Advocate for Applicant
Erin Burke, Counsel for Respondent

Investigation Meeting: 11 and 12 February 2014 at Tauranga

Additional information: 14 February 2014 from Respondent
17 February 2014 from Respondent
18 February 2014 from Respondent
20 February 2014 from Applicant

Submissions Received: 21 February 2014 from the Applicant
28 February 2014 from the Respondent
06 March 2014 from the Applicant

Date of Determination: 29 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Murray was employed by the Central North Island Early Education Services Trust (CNI) as the Centre Manager of Matata Early Learning Centre (MELC). She worked from 14 September 2009 until she was summarily dismissed for serious misconduct on 17 April 2012. Ms Murray claims her dismissal was unjustified.

[2] Ms Murray also claims CNI breached its good faith obligations and she seeks that a penalty be imposed with some or all of any penalty being paid to her. Ms Murray's unjustified disadvantage claim was withdrawn at the beginning of the Authority's investigation.

[3] In February 2012 the Assistant Manager Lucy Rust began sharing concerns by phone and via email about Ms Murray's behaviour with the Centre's two Professional Leaders, Wendy Gatward and Dale Campbell.¹

[4] On 27 February these concerns were drawn to the attention of Ms Jan Ballantyne the Chief Executive Officer of Central North Island Kindergarten Association which oversees the management of 56 kindergarten and childcare centres in the North Island, one of which was MELC. Ms Ballantyne decided to commence a disciplinary investigation.

[5] Ms Gatward spoke to teacher Ms Michelle Hansen by phone on 28 February. Ms Hansen apparently told Ms Gatward that Ms Murray had admitted throwing water on a child; had screamed at her son; and had roughly cleaned a child's sore toe.

[6] Ms Campbell spoke to teacher Ms Priscilla Ngowi by phone on 28 February and whilst Ms Ngowi made negative comments about Ms Murray she did not provide any information about the three incidents which resulted in Ms Murray's dismissal.

[7] Ms Ballantyne and Ms Gatward turned up unannounced at MELC on the morning of 29 February to speak to Ms Murray. They say that they told Ms Murray serious allegations had been made against her that could potentially result in dismissal, that the "*allegations were outlined.*" Ms Ballantyne says the outcome of their discussion was that Ms Murray would be on paid discretionary leave pending the outcome of CNI's investigation.

[8] There is a conflict in the evidence about what exactly was said and done at this meeting. I have resolved this conflict on the balance of probabilities in favour of Ms Ballantyne's evidence. Ms Murray was shocked and very distressed at the meeting and over the allegations which I consider has likely impacted on her memory and recall of it. Ms Murray left the workplace in an extremely distressed state without

¹ 2 February phone; 6 February email; 13 February email; 21 February email; 26 February phone; 27 February phone then email; 28 February email.

having been given any written material or specific details of the allegations against her.

[9] Ms Ballantyne and Ms Gatward then met with Ms Rust, Ms Hansen, Ms Ngowi and the administrator Ms Penny Farrance. After these meetings Ms Ballantyne sent Ms Murray an undated disciplinary letter setting out six allegations, three of which were identified as potential serious misconduct.

[10] The first disciplinary meeting was held on 12 March. Following that Ms Ballantyne visited MELC to ascertain the position of the water trough. On 15 March Ms Ballantyne interviewed Ms Hansen, Ms Ngowi and Ms Rust again. Ms Ballantyne also had first interviews (at Ms Murray's request) with teachers Ms Emma Fenwick and Ms Laura Newey.

[11] Ms Ballantyne wrote to Ms Murray on 27 March setting out her preliminary findings that serious misconduct had occurred and identifying dismissal as the proposed outcome. The notes of interviews with staff on 15 March were attached together with the notes taken by Ms Gatward and Ms Campbell of their phone conversations with staff in February.

[12] A second disciplinary meeting was held on 10 April for Ms Murray to respond to CNI's preliminary findings. Ms Murray was subsequently dismissed for serious misconduct by letter dated 17 April. CNI decided not to form a conclusion on three misconduct allegations instead concluding that the yelling incident, toe incident and water incident amounted to serious misconduct.

[13] Ms Murray denies all of the allegations against her. She claims that the process used was unfair and that the allegations, even if they had been established (which she denies), were not capable of giving rise to a finding of serious misconduct.

[14] Following Ms Murray's dismissal, CNI forwarded a report to the New Zealand Teachers Council (NZTC). The NZTC's Complaints Assessment Committee (the CAC) investigated the allegations and concluded that the required evidential standard of proof had not been reached in respect of each allegation. Accordingly there is no impediment to her continuing to work in early childcare should she wish to do so.

Alleged serious misconduct

[15] CNI's dismissal of Ms Murray is based on its conclusion that she engaged in three instances of serious misconduct.

[16] The first undated allegation is "the water incident". This refers to an incident that occurred on an unspecified date in January 2012 while Ms Murray's son² was playing outside at the water trough with another Child A. Child A splashed Ms Murray's son with water causing the latter to yell loudly which resulted in Ms Murray moving from inside the Centre to outside where the children were playing. It is alleged that Ms Murray scooped up water in a child sized bucket and threw it into Child A's face.

[17] The second allegation dated 21 February is "the toe incident". It involves concern about the manner in which Ms Murray allegedly cleaned Child B's toe. It is alleged that Ms Murray held Child B and scrubbed the wound rather than dabbing it carefully while telling the child, who was distressed, to "*stop it*" in an aggressive tone.

[18] The third undated allegation is "the yelling incident". This refers to an incident where Ms Murray's son repeatedly hit her daughter. It is alleged that Ms Murray grabbed her son and yelled loudly in his face. What she is alleged to have said is not known.

Issues

[19] The following issues are to be determined:

- (a) Did CNI breach its duty of good faith?
- (b) If so, should a penalty be imposed?
- (c) If so, should some or all of the penalty be paid to Ms Murray?
- (d) Was Ms Murray's dismissal justified?
- (e) If not, what if any remedies should be awarded?
- (f) What if any costs should be awarded?

² Ms Murray's son and daughter also attended the Centre.

Did CNI breach its duty of good faith?

[20] Section 4(1A)(c) of the Act requires an employer that is considering making a decision that may adversely impact an employee's continued employment to provide the employee with information relevant to the employer's decision before a final decision is made.

[21] Ms Murray says it was a breach of good faith for CNI not to give her written details of specific disciplinary allegations to take away when she was first spoken to on 29 February 2012. When she did finally receive the disciplinary letter on 03 March it did not include disclosure of any relevant information and did not detail what investigations CNI had undertaken.

[22] Whilst it would have been best practice to have provided Ms Murray with a written record of the allegations CNI was investigating when it met her on 29 February the failure to do so was not a breach of good faith because CNI was at the beginning of its investigation and had not at that time formulated specific disciplinary allegations.

[23] CNI should have provided Ms Murray with all relevant information when it sent her the disciplinary letter. However its failure to do so is not a breach of good faith because she was subsequently given all relevant information prior to her dismissal.

[24] Ms Murray says that when she attended the first disciplinary meeting on 12 March 2012 she had limited information. Ms Murray claims she did not have sufficient detail about the specifics of each allegation. I do not accept that. The first disciplinary meeting was initially scheduled for 06 March but CNI adjourned it at the request of her then advocate Mr Austin.

[25] Mr Austin emailed CNI on 09 March confirming receipt of information from CNI which he goes on to say "*does go a long way to provide a full and very informative view of this entire matter.*" I consider he would have sought a second adjournment if Ms Murray did not have sufficient details of the allegations she was expected to respond to at the 12 March meeting. Mr Austin subsequently requested further information which CNI provided on 22 March.

[26] I am satisfied CNI provided Ms Murray with the new information it obtained subsequent to the first disciplinary meeting. This included the handwritten notes from the interviews with staff on 15 March, notes of Ms Murray's explanations at the first disciplinary meeting, staff meeting minutes which had been requested by Mr Austin, emails between the Centre staff and management, and a point by point response to Mr Austin's letter of 14 March.

[27] I am satisfied on the balance of probabilities that CNI provided Mr Austin with all relevant information and that the information requests Mr Austin subsequently claimed CNI had not responded to involved information that did not exist.

[28] Accordingly I consider CNI provided Ms Murray with all information relevant to its decision about her ongoing employment before it decided to dismiss her. I find CNI complied with its good faith obligations under s.4(1A) of the Act.

Was Ms Murray's dismissal justified?

[29] Justification is to be determined in accordance with the justification test set out in s.103A of the Act. This requires the Authority to consider "*whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal [...] occurred*"³.

[30] In applying the justification test the Authority must consider the four procedural tests set out in s.103A(3) of the Act, namely whether:

- (a) having regard to the employer's resources sufficient investigation was undertaken;
- (b) the employer raised its concerns with the employee;
- (c) the employee was provided with a reasonable opportunity to respond;
and
- (d) the employer genuinely considered the employee's explanation.

³ Section 103A(2) of the Act

[31] The Authority may also consider other relevant factors it thinks are appropriate.⁴ However s.103A(5) prevents the Authority from determining that a dismissal is unjustified solely because of minor procedural defects that do not result in unfairness to the employee.

[32] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith obligations in s.4 and the four procedural fairness tests in s.103A(3) of the Act. Failure to do so is likely to undermine an employer's ability to justify a dismissal or other action.

[33] The Employment Court recognised in *Lewis v. Howick College Board of Trustees*⁵ that employers of teachers must take special care when taking action against employees because the effect of the dismissal of a teacher is especially significant because allegations of misconduct or incompetence place teachers in double jeopardy of their livelihoods. Chief Judge Colgan in *Lewis* reminds the employment institutions to be conscious of that consequence and to examine such cases with care.

Did CNI sufficiently investigate the allegations against Ms Murray?

[34] It is trite law that consideration of whether there has been a full and fair investigation does not involve minute or pedantic scrutiny of individual elements of an employer's disciplinary process, but rather a broad assessment of fairness in light of the seriousness of the allegations and potential consequences.

[35] I have a number of concerns about the adequacy of CNI's investigation in light of the potentially serious consequences not just to Ms Murray's employment at MELC but also in terms of her ability to continue in her chosen career.⁶ I therefore expect a fair and reasonable employer to have conducted its disciplinary investigation with appropriate rigor. I consider CNI let itself down in this regard.

[36] I find that CNI's note taking was seriously deficient. Of particular concern is the inappropriate manner in which interviews with staff appear to have been conducted. The interviews with witnesses seem to be more focused on confirming the witnesses' previous information rather than exploring or testing the information that has been given.

⁴ Section 103A(4) of the Act.

⁵ [2010] NZEmpC 4

⁶ The NZTC mandatory investigation potentially put her ability to continue working in childcare at risk.

[37] The notes are poorly recorded so it is difficult to ascertain who said what or even what certain parts of the conversation recorded in the notes specifically relate to. Ms Murray raised concern prior to her dismissal that the notes of the meetings with her were not accurate but CNI did not address that before dismissing her.

[38] It is evident that leading questions were asked about key issues and that appropriate basic inquiries were not made in response to information provided by the witness. Below are extracts of the notes on which CNI based its findings that serious misconduct had occurred.

[39] Notes of the two interviews Ms Ballantyne had with Ms Hansen regarding the water incident say:

- a. *“Margie came back in and told her about it.”*
- b. *“I did not witness but Margie told me what she did.”*
- c. *”Quite proud of it – smiling – used a cup and put water.”*
- d. *“How did you become aware – telling me quiet. Proud – smiling”*

[40] Ms Murray’s explanation was that she had told Ms Hansen that her [Ms Murray’s] son was wet and crying because another child had tipped water on him. Ms Murray denies saying she had thrown water in Child A’s face.

[41] I consider that CNI’s investigation into the limited and unclear information provided by Ms Hansen (see above for the totality of her evidence) was inadequate. A fair and reasonable employer could not have concluded, as CNI did, that Ms Murray had admitted splashing water in a child’s face to Ms Hansen. The evidence is simply not there to sustain such a conclusion.

[42] Even if Ms Hansen had given Ms Ballantyne more detailed information (note recorded in the notes) that would still have been unfair to Ms Murray. Ms Murray was solely reliant on the notes to understand what evidence there was against her. Ms Murray could not be expected to respond to information which she knew nothing about.

[43] It was CNI's responsibility to accurately record the information it was relying on regarding the water incident so Ms Murray had a genuine opportunity to respond to it. It appears that did not occur.

[44] It also seems odd behaviour for Ms Murray as the Centre Manager to proudly tell a subordinate she had deliberately splashed water in a child's face. I am not satisfied CNI turned its mind to that because it did not obtain sufficient details from Ms Hansen about Ms Murray's alleged admission to enable it to fairly or reasonably form a view about what was more likely than not to have occurred. Instead CNI seems to have just accepted Ms Hansen's allegation at face value without fully or properly inquiring into what her allegation was specifically based on.

[45] The notes about the toe allegation from Ms Ballantyne's first interview with Ms Hansen say:

"Margie held his foot with pressure so he would not move it while she cleaned the toe. The child asked her to stop however Margie continued despite his visible distress. Margie was using gauze to clean the wound – Michelle described her actions as scrubbing the wound."

[46] Ms Murray's explanation to the toe allegation is that the mother had specifically asked that the child's toe plaster be kept clean. Ms Murray says the child got it dirty while playing in the sandpit so she got out the first aid kit and used a saline solution to wash away the sand and dirt and clean around the wound before putting a fresh plaster over it.

[47] Ms Murray says she was holding the child so he didn't bump her and make the cleaning difficult. The child was apparently apprehensive because the child's father had cleaned the toe over the weekend and it had stung. Ms Murray says the child was grizzling but there were no tears.

[48] Ms Ballantyne's notes about the toe allegation from her follow up interview with Ms Hansen after receiving Ms Murray's explanation say:

"Margie was cleaning not sure if alcohol swab or not. Rubbing on actual sore. Telling him it is absolutely filthy. Did not need cleaning – was infected. Not sticky plaster."

[49] Ms Ballantyne does not discuss the toe incident with Ms Rust at their first interview. During their second interview the notes relating to the toe incident say:

“Toe incident – sitting at kai table. Tried to keep attention at kai table, Michelle went to try and comfort him.”

[50] Ms Rust’s original email about the toe issue refers to another teacher F being present. However F was never interviewed.

[51] I do not consider there was an adequate investigation into the information CNI had been given regarding the toe issue particularly in light of the potentially very serious consequences for Ms Murray.

[52] The notes of Ms Ballantyne’s first interview with Ms Hansen on the yelling allegations say:

“Margie screamed at her son, getting down and grabbing him by both arms, yelling in his face. This was very distressing for her to witness but she felt unable to intervene because of the level of anger shown.”

[53] Ms Murray’s explanation was that her son had hit her daughter on the head three times with a mallet so she intervened. Ms Murray says that when her son raised the mallet again she took hold of his arms and said “No stop” in Maori in a stern voice.

[54] The notes of Ms Ballantyne’s follow up interview with Ms Hansen after receiving Ms Murray’s explanation say:

a. *“Margie – holding and screaming at [son]. By couch sitting with [daughter] came over – got down grabbed him and yelling – happened quick.”*

[55] The notes of Ms Ballantyne’s interview with teacher Laura Newey (who Ms Murray had identified as a witness) say:

“F and Michelle in kitchen. Marge yelled really loud in his face. Really loud shouted in his face. Everyone stopped.”

[56] There was no questioning about who the reference to “everyone” referred to and no other people were interviewed. F was not spoken to and no consideration was

given to the fact that Ms Newey placed Ms Hansen in the kitchen at the time of the incident whilst Ms Hansen claims she was at the opposite end of the room on the couch. These deficiencies undermine the fairness of the investigation.

[57] I do not consider that a finding of serious misconduct in relation to the yelling allegation was a conclusion a fair and reasonable employer could have reached based on the limited information it had obtained during its investigation.

[58] I have formed the view that it is more likely than not that the various complaints Ms Rust made in her emails to management appear to have been accepted at face value. The sort of testing I expect a fair and reasonable employer to have engaged in after receiving Ms Rust's complaints did not occur.

[59] For a start serious questions needed to be asked about the timing of Ms Rust's allegations. The water incident occurred at some unspecified date in early January but was not raised by Ms Rust until six or seven weeks later. Interestingly Ms Rust had by that stage already raised numerous other complaints and concerns about Ms Murray with the Professional Leaders but had not mentioned the more serious water incident. A fair and reasonable employer would have paid attention to that omission.

[60] The water incident was also not raised until after the relationship between Ms Murray and Ms Rust (who were previously friends) had deteriorated. That is something CNI should have explored in more detail given Ms Murray's stated view that the complaints against her were motivated by Ms Rust's ill will towards her.

[61] Probing questions should have been asked of Ms Rust about why she not only stood by and did nothing during the alleged water incident but why the incident was not recorded anywhere at the time and why she had elected to raise many other concerns during February before she raised the water incident for the first time. I consider CNI did not adequately investigate these key aspects arising from Ms Rust's complaint.

[62] Ms Rust's explanation that the delay was due to her being "*frightened*" seems to lack credibility when she had no qualms raising many other adverse issues about Ms Murray with CNI. I also note that Ms Rust's complaints about Ms Murray were well received by CNI in that Ms Rust was given support and encouraged to keep reporting concerns. Ms Ballantyne did not adequately investigate the apparent conflict

between Ms Rust's claim the water incident "*frightened*" her and her subsequent actions which are at odds with that.

[63] Ms Rust gave varying accounts about where she was situated at the time of the water incident. I consider a fair and reasonable employer would have paid regard to that particularly when Ms Murray's explanation was that Ms Rust was inside at the time of the incident and could not have seen what had occurred. Ms Murray says that if Ms Rust had been outside by the trough she would not have had to go out when her son started crying. I am not satisfied CNI fully or fairly assessed these inconsistencies in accounts given by witnesses.

[64] Also troubling is Ms Rust's claim that Ms Hansen had witnessed the water incident when Ms Hansen's evidence was that she was inside so had not seen it. Investigation into that key conflict in Ms Rust's complaint was also clearly inadequate.

[65] I consider that a fair and reasonable employer would have carefully and specifically weighed these issues because they went to credibility. I am not satisfied CNI did so which undermines the fairness of its investigation.

[66] I also consider it unfair that Ms Ballantyne accepted Ms Rust's version of where the water trough was situated without first giving Ms Murray a chance to respond to that information. That was a basic part of the investigation that a fair and reasonable employer would have ensured had occurred before accepting Ms Rust's version of events.

[67] CNI's view appears to have been that such inconsistencies about where Ms Rust was standing and who else had viewed the incident were minor errors which did not affect her credibility. I do not consider a fair and reasonable employer could have formed that view without first undertaking more rigorous inquiries into such matters.

[68] I consider a fair and reasonable employer would also have carefully reflected on why the toe incident was not the opening concern or issue raised by Ms Rust in her email of 21 February. The major concern in Ms Rust's email appears to relate to relationships. Ms Murray's explanation was that the complaints against her were motivated by a relationship breakdown with Ms Rust. The relationship between Ms Murray and Ms Rust is something a fair and reasonable employer would have

carefully assessed before forming a conclusion about Ms Rust's allegation. I am not satisfied CNI did so.

[69] CNI also failed to investigate Ms Murray's concerns that the notes of her explanation were inaccurate. A fair and reasonable employer is expected to at least ascertain what exactly from the notes was in dispute with a view to resolving any issues before making a final decision based on the content of the notes. CNI failed to take any steps to identify what parts of the notes were disputed and why.

[70] I consider it was unfair to Ms Murray that the notes of Ms Ballantyne's interviews with witnesses did not record what questions had been asked or record the answers in the witnesses own words when the outcome of the allegations had such potentially serious consequences. Given the seriousness of the allegations, I do not consider CNI sufficiently investigated the allegations against Ms Murray before dismissing her.

Section 103A(5) of the Act

[71] Having identified that CNI did not sufficiently investigate its concerns before dismissing Ms Murray I must now consider under s.103A(5) of the Act whether that failure was a minor procedural defect that did not result in unfairness to Ms Murray.

[72] I consider that CNI's failure to:

- a. interview all potential witnesses;
- b. conduct adequate or appropriate interviews with witnesses;
- c. ask open questions instead of leading witnesses in relation to critical conflicts in the evidence;
- d. take adequate notes;
- e. explore inconsistencies in accounts given by different witnesses;
- f. adequately inquire into behaviour by witnesses that appeared to be at odds with the information they had provided;
- g. investigate Ms Murray's concerns about the inaccuracy of the notes taken during the disciplinary meetings;

cannot objectively be categorised as minor process defects.

[73] These are all key aspects of a fair investigation. It follows that I consider the inadequacies in CNI's investigation did result in actual unfairness to Ms Murray. CNI concluded Ms Murray had engaged in serious misconduct before it had obtained and properly considered all relevant information. That is clearly very unfair to Ms Murray.

[74] I consider these deficiencies in CNI's investigation so fundamentally undermine the fairness of the conclusions it reached that it is unnecessary to go on to consider the other procedural fairness tests in s.103A(3)(b)-(d) of the Act. CNI's serious breaches of its obligations under s.103A(3)(a) of the Act means it is unable to procedurally justify its decision to dismiss Ms Murray for serious misconduct.

[75] I therefore find that s.103A(5) does not prevent me from finding that Ms Murray's dismissal was unjustified.

Substantive justification

[76] I consider that the deficiencies in CNI's investigation also fundamentally undermine its ability to substantively justify its decision that Ms Murray had engaged in serious misconduct. I do not consider this is a case in which a fair process would have resulted in Ms Murray's dismissal anyway. It is not clear what the outcome would have been had a full and fair investigation been conducted. I therefore find that CNI is unable to substantively justify Ms Murray's dismissal.

What if any remedies should be awarded?

[77] CNI did not provide any submissions on remedies.

Mitigation

[78] Ms Murray was under a duty to mitigate her loss. I accept her evidence that the nature of allegations made against her and her summary dismissal in the early childcare industry made securing comparative alternative employment difficult for her. Ms Murray lives in a small community that had limited suitable options for alternative employment for her.

[79] An additional hurdle Ms Murray faced was the investigation by the New Zealand Teachers Council into the issues that gave rise to her dismissal because it put her ability to continue working in early childcare in potential jeopardy.

[80] Ms Murray was fortunate to have the support of a friend and former colleague who offered her employment on 28 April 2012 and she worked there until she relocated to Australia on 30 September 2012. This new job required Ms Murray to commute an hour and a half each way to and from work. She worked less hours and received considerably less pay in her new job.

[81] I am satisfied that Ms Murray adequately mitigated her loss.

Notice pay

[82] Ms Murray claims two weeks' notice pay. I do not make a separate award for this because it is covered in the total lost remuneration awarded.

Annual leave

[83] Ms Murray claims she had two days pre-approved annual leave deducted whilst she was effectively suspended. Ms Ballantyne agreed during the Authority's investigation to reimburse this amount to Ms Murray if CNI had not already done it. If that has still not yet occurred then Ms Murray has leave to apply within 7 days to the Authority to fix the amount she is owed.

Lost remuneration

[84] Ms Murray's annual income when employed by CNI was \$72,000 and her income with the new employment she obtained on 28 April was \$42,000. She seeks more than two years' ongoing loss arising from her dismissal on 17 April 2012 to the date of this determination.

[85] I do not consider it appropriate to award Ms Murray lost remuneration in excess of 12 months.

[86] CNI is ordered under s.128(3) of the Act to pay Ms Murray lost remuneration consisting of the difference between what she would have earned from CNI had she remained employed until 17 April 2013 and what she did actually earn in her new employment.

[87] If agreement is not reached on that amount then either party has 14 days to apply to the Authority to fix that amount.

Distress compensation

[88] I accept Ms Murray's evidence that she suffered considerable hurt and humiliation as a result of her unjustified dismissal. Ms Murray was still visibly upset at the Authority's investigation meeting almost two years after her dismissal. She consulted a doctor subsequent to her dismissal and explained the stress and distress these events had on her.

[89] Ms Murray gave emotional evidence about the adverse affects her dismissal had on her and her family. I also accept her evidence that she has suffered as a result of speculation amongst the small community within which she lived which was a factor which led her to relocate to Australia. Ms Murray was publicly abused over the circumstances of her dismissal.

[90] I order CNI to pay Ms Murray \$8,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity and injury to feelings she has suffered as a result of her unjustified dismissal.

Contribution

[91] Having determined that Ms Murray has a personal grievance, s.124 of the Act requires me to determine whether or not Ms Murray contributed to the situation that gave rise to her grievance and if so to reduce remedies accordingly.

[92] Contribution requires blameworthy conduct that must be established on the balance of probabilities. I am simply not satisfied that any of the incidents I heard about have met that required standard. I therefore find that Ms Murray's remedies are not to be reduced on the grounds of contribution.

What if any costs should be awarded?

[93] The parties are encouraged to resolve costs by agreement. If that is not possible then Ms Murray has 14 days within which to file a costs memorandum, CNI have 14 days within which to respond with Ms Murray having a further 7 days within which to reply. This timetable will be strictly enforced and departure from it requires the prior leave of the Authority.

[94] The Authority will adopt its usual notional daily tariff based approach to costs which will then be adjusted to reflect the particular circumstances of this case. The parties are invited to identify any factors they say should result in adjustments to the notional daily tariff which is currently \$3,500.

Rachel Larmer
Member of the Employment Relations Authority