

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 223
5140642

BETWEEN

KAREN PIVOTT
First Applicant

PATRICK O'SULLIVAN
Second Applicant

A N D

SOUTHERN ADULT
LITERACY INCORPORATED
Respondent

Member of Authority: David Appleton

Representatives: Patrick O'Sullivan, Advocate for Applicants
Mary-Jane Thomas, Counsel for Respondent

Investigation Meeting: 13, 14 and 15 June 2012 at Invercargill

Submissions Received: 20 August (two separate sets), 27 August, 21 September
2012, from Applicant
21 August, 19 September 2012 from Respondent

Date of Determination: 17 October 2012

DETERMINATION OF THE AUTHORITY

- A. Ms Pivott was not constructively dismissed but was unjustifiably disadvantaged in her employment. Accordingly, she is awarded compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000**
- B. Mr O'Sullivan was unjustifiably constructively dismissed and suffered an unjustified disadvantage in his employment. Accordingly, he is awarded compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.**
- C. Costs are reserved in both matters.**

Prohibition from publication

[1] There was mentioned during the course of the Authority's investigation the name of a third party who took no part in the proceedings. I do not believe that it is appropriate or necessary for her name to be disclosed and therefore I prohibit from publication any information that may lead to her identification. She will be referred to as EO in this determination.

[2] **Employment relationship problem**

[3] Both the first and second applicant claim that they were unjustifiably constructively dismissed and unjustifiably disadvantaged in their employment. The claims are denied by the respondent.

[4] The applicants' personal grievances have been investigated together because they arise out of a set of underlying facts that are either shared by the applicants' respective histories with the respondent, or which are closely related. This approach has resulted in a saving of costs for both parties. I shall deal with Ms Pivott's claims in the first part of this determination, and Mr O'Sullivan's in the second part.

[5] The events referred to below took place in 2008. The reason that the personal grievances took four years to come before the Authority involves a concatenation of events including, but not limited to, a prolonged skirmish over discovery between the parties, a foray into the Employment Court, the February 2011 Christchurch earthquake and the transfer to another registry of the Member originally dealing with the matter. Inevitably, because of the passage of time, the memories of some of the witnesses of key events had faded significantly. Remarkably, however, the memories of the key witnesses (the two applicants and Ms Garthwaite, the effective manager of the respondent) were still very sharp in relation to the key issues. This is possibly because the key issues have been in contention almost continually since the events described below arose. The Authority was also assisted by a substantial amount of documentation (contained in three full lever arch files) and submissions from the representatives which, in total, amounted to 859 paragraphs.

Brief account of the events leading to the resignations of the applicants

[6] The respondent provided adult literacy services to the Southland area and was governed by a committee of volunteers (called in this determination the Committee), which employed a small number of office staff and some tutors, including Ms Pivott and Mr O'Sullivan. The respondent is a member of a group of similar organisations

operating throughout New Zealand which comes under the umbrella of Literacy Aotearoa. The member organisations are known as *nga poupou*.

[7] The genesis of the personal grievances of both the applicants is the events which took place in the first half of 2008 when both Ms Pivott and Mr O'Sullivan served on the Committee of the respondent (as well as being employed by it). Ms Pivott was the Chairperson and Mr O'Sullivan a member of the Committee. It is not necessary for me to recount the detail of the disagreements that arose within the Committee, although it involved, among other things, an issue of a perceived conflict of interest which led to Ms Pivott reluctantly standing down as Chairperson; alleged actions by Ms Garthwaite which were said by the applicants to be *ultra vires* and a disagreement between most members of the Committee and Mr O'Sullivan as to whether he had been formally appointed to carry out staff appraisals or not. This disagreement also led to Mr O'Sullivan standing down from the Committee.

MS PIVOTT'S CLAIMS

[8] As well as being Chairperson, Ms Pivott also held the paid positions of workplace coordinator at the respondent and lead tutor of the Foundation Learning Programme (the FLP). The workplace coordinator position involved her developing and implementing a programme to sell basic literacy and numeracy services to businesses whose staff needed assistance in those areas.

[9] Ms Pivott claims that her constructive dismissal was caused by a number of breaches by the respondent. These alleged breaches, some of which are interconnected and overlap, may be conveniently summarised as follows:

- (a) That Ms Garthwaite deliberately attempted to undermine Ms Pivott's position through a number of alleged actions;
- (b) That Ms Pivott was stopped from attending *huis*, which she said she needed to attend for professional development reasons;
- (c) That Ms Pivott was blocked from having direct contact with the Committee;
- (d) That Ms Pivott's role of workplace coordinator was being significantly eroded by changes that were being proposed to her job description;

[10] Ms Pivott claims that these alleged breaches also amounted to an unjustified disadvantage in her employment.

Did Ms Garthwaite attempt to undermine Ms Pivott's position?

Proposal to reduce Ms Pivott's hours

[11] Ms Pivott's concerns about her position within the respondent organisation first arose in February 2008 when Ms Garthwaite put forward a proposal to the Committee to reduce Ms Pivott's hours as workplace coordinator from 15 to 10 hours a week, which would have impacted on her pay. However, the proposal to reduce Ms Pivott's hours was rejected by the Committee. Ms Pivott's evidence was that her main objection had been that Ms Garthwaite had not discussed her proposals with Ms Pivott prior to submitting her proposals to the Committee. Up until then, Ms Pivott asserted, Ms Garthwaite and Ms Pivott had acted as equals in decision – making. Ms Garthwaite told the Authority, however, that she had discussed the proposal with Ms Pivott.

[12] I note that Ms Pivott's original contract of employment stated that she *would be responsible to the SALP committee represented by the Programme Coordinator*. The Programme Coordinator was Ms Garthwaite. Whilst s 4 (1A) of the Employment Relations Act 2000 requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative, I do not believe that this duty required Ms Garthwaite to have consulted with Ms Pivott before she put forward her proposal, as it could have been rejected by the Committee (as, indeed, it was) and so have been raised prematurely. That duty would have arisen after the Committee had considered the proposal, if it had agreed that it was to be progressed.

[13] It so happens that Ms Pivott learned of the proposal early because she was also the Chairperson of the Committee. I can appreciate that it would have caused her some embarrassment in her position as Chairperson not to have been forewarned of the proposal, if that was the case. However, in my view, that difficulty arose from Ms Pivott being a Committee member, rather than as an employee. If it had been discourteous of Ms Garthwaite to have not forewarned Ms Pivott of the proposal, it was discourteous to her as Chairperson, rather than as an employee.

[14] Interestingly, this is a good example of why the respondent and Literacy Aotearoa had probably been correct in having concerns about the conflict of interest that arose from Ms Pivott holding both Chairperson and employed roles. (The conflict of interest related to Ms Pivott holding both the Chairperson role and a paid position in the respondent organisation. This meant that she was effectively both reporting to Ms Garthwaite and the Committee in her capacity as an employee and also having Ms Garthwaite report to her in the capacity as the employer.)

[15] I do not find, therefore, that this making of a proposal to the Committee by Ms Garthwaite to reduce Ms Pivott's hours was an act that breached any duty towards Ms Pivott as an employee, even if Ms Garthwaite had not told Ms Pivott that she was going to raise it. I also do not find that it was a disadvantage in her employment, for the same reasons.

Instruction to transfer less money to the workplace account

[16] Another cause for concern for Ms Pivott arose when Ms Garthwaite told the treasurer to reduce the amount of money being transferred to the workplace funding account by \$1,500. Ms Pivott's evidence is that, although the treasurer had told Ms Pivott that Ms Garthwaite had said that Ms Pivott knew about this, it was not true, as Ms Garthwaite had never mentioned it to her. Ms Garthwaite's evidence was that she may have had a discussion with the treasurer but, in the end, \$10,000 was transferred to the workplace account. I am not convinced that this action of reducing the workplace account by \$1,500, if it took place, was one aimed at undermining Ms Pivott. There was no evidence put to me that Ms Pivott's wages were not paid in full, nor that the workplace programme actually suffered as a result of the attempted reduction in the amount of money transferred. I do not find, therefore, that there is any cogent evidence that this event was deliberately aimed at undermining Ms Pivott's position nor constituted a disadvantage in Ms Pivott's employment.

Removal of Ms Pivott's cheque signing rights

[17] Ms Pivott resigned as Chairperson of the Committee on 29 April 2008 following pressure put on her by Ms Garthwaite and the Committee. The following day, Ms Garthwaite removed Ms Pivott as a signatory from the two accounts that related to Ms Pivott's work as workplace coordinator. Ms Pivott's evidence is that this hindered her doing her job because, whereas previously she had only needed to

get one further signature to spend money, she now needed to get two signatures, which was more difficult because of the general unavailability of Committee members.

[18] Ms Garthwaite's evidence was that all programme expenditure came through her, and she would approve it if satisfied that it was legitimate. She said that Ms Pivott had never been compromised by the signatory change, which was purely a function of Ms Pivott ceasing to hold office on the Committee. She said that she had no memory of Ms Pivott complaining to her about being compromised by the change.

[19] In my view, it was entirely reasonable for Ms Pivott to have been removed as a signatory as she was no longer a member of the Committee. I do not believe that this made her job materially more difficult, and I do not believe that this action was taken by Ms Garthwaite in order to spite or prejudice Ms Pivott. In any event, this change arose directly and solely from her no longer being a Committee member, and cannot be seen as a disadvantage in her employment.

The "interrogation" of Ms Pivott by Ms Garthwaite and Ms Maniapoto

[20] On 4 June 2008, Ms Maniapoto, a senior manager from Literacy Aotearoa, and Ms Garthwaite met with Ms Pivott. Initially, the purpose of the meeting had been to appraise Ms Pivott but, instead, they *interrogated* (in Ms Pivott's words) Ms Pivott about her relationship with Mr O'Sullivan, and an allegation that had been raised by the Committee since she had resigned as Chairperson that she had breached the confidentiality of a student by putting his name in her report. The Committee had spoken amongst themselves about disciplining her for this.

[21] Ms Pivott's evidence was that she explained to Ms Maniapoto and Ms Garthwaite that the only relationship between her and Mr O'Sullivan at that time was that he was a grammar tutor for the programme which she managed. With respect to the student, Ms Pivott said that she explained to Ms Garthwaite and Ms Maniapoto that the student had expressly asked for his name to be put into the report.

[22] Ms Garthwaite's evidence was that the purpose of the meeting was to try to find out why Ms Pivott was so unhappy at that time. Ms Garthwaite said that Ms Pivott had generally become uncommunicative, which was a marked change to how she used to be. The meeting was a chance to *sort things out*, but Ms Pivott was so

uncommunicative during the meeting that did not occur. Ms Garthwaite said that she saw the meeting as *an opportunity lost*.

[23] Ms Garthwaite's evidence was that, the first thing Ms Pivott said was that she *mustn't mention the P word*, meaning Patrick O'Sullivan. Ms Garthwaite said that they were not meeting to discuss Mr O'Sullivan. She also said that she did ask Ms Pivott about the issue relating to the student, but completely accepted Ms Pivott's explanation.

[24] It is my finding, on a balance of probabilities, that Ms Pivott had become so negative about Ms Garthwaite by June 2008, and so coloured by her experience of being made to step down as Chairperson of the Committee, that Ms Garthwaite's evidence of the purpose and tenor of the 4 June meeting is more likely to represent the true picture. I do not doubt at all that Ms Pivott was entirely truthful in her evidence to the Authority throughout the investigation meeting, but I believe that her interpretation of matters as they unfolded during 2008 tended to be more negative than was objectively warranted.

[25] I also do not find that Ms Pivott had been disadvantaged specifically by Ms Garthwaite asking her about the student confidentiality issue. Ms Garthwaite had no choice but to do so once it had been raised by the Committee as a matter for concern. She accepted Ms Pivott's explanation without demur. Ms Pivott seems to have been upset about this because, if she had had access to the Committee, she would have been able to have put the Committee's mind at rest immediately. I will deal with the issue of access to the Committee separately.

[26] As to whether she had been disadvantaged by having been asked about Mr O'Sullivan, I do not regard that as a disadvantage. Around that time Ms Garthwaite and Ms Maniapoto were having concerns about Mr O'Sullivan's conduct (dealt with below) and, as Mr O'Sullivan reported to Ms Pivott (she described him during the Investigation Meeting as *her grammar tutor*) they were entitled to ask her about him, if they indeed did.

The appraisal and the late provision of the employment agreement and job description

[27] The issue of being appraised by Ms Maniapoto and Ms Garthwaite also caused alarm to Ms Pivott because she had already been appraised by Mr O’Sullivan and did not think it was necessary to be appraised again. In addition, by this time, she was aware that there was an objective to give her a new employment agreement and a new job description, which she had not seen. Ms Pivott wrote a note, which she gave to Ms Garthwaite to give to the Committee protesting that she had to undergo another appraisal. Ms Garthwaite said she did not recall this document. Ms Garthwaite said that Ms Pivott was being appraised because she could not find any evidence of an appraisal having been carried out before by Mr O’Sullivan.

[28] On 20 June 2008, Ms Pivott was appraised by Ms Garthwaite and Mr Chalmers, another member of the Committee. Ms Pivott was told that she would not be going to the next National *hui*. (I will deal with the issue of Ms Pivott’s attendance at *huis* separately). In addition, the new employment agreement and proposed job description were not available. Ms Pivott raised concerns about the fact that she had not been given copies of these documents as she did not know under which agreement she was being appraised. She was, according to her evidence, accused by Ms Garthwaite of “*having a problem with process*”.

[29] Ms Garthwaite stated in evidence that she had been advised that the then current employment documentation was out of date, and so had asked for template employment agreements and job descriptions from Literacy Aotearoa. She had been working on the new documents but that the process had been time consuming, and she was doing it for all staff while also doing her normal job. Also, as Ms Pivott’s position was more complex, having two roles, work place co-ordinator and FLP co-ordinator, her documents were taking longer. I accept this evidence and do not find that the delay in giving Ms Pivott the documents was deliberate. In any event, by the time of the appraisal, Ms Pivott had already seen the first draft of the job description, and had asked Ms Garthwaite to make changes to it, which she was considering. Ms Pivott was waiting for the second draft to be made available at the time of the appraisal.

[30] It seems slightly strange that Ms Garthwaite decided to appraise Ms Pivott when neither the latest version of the job description, nor the proposed new

employment agreement for her were available and when she had already been appraised by Mr O'Sullivan. However, Ms Pivott did not say that the appraisal itself was unfair or that she was given unfair feedback on her performance. Furthermore, Ms Pivott was eventually given the new employment agreement, which she signed. There was disagreement about whether the final job description was ever given to her. This will be examined further below.

[31] Overall, I believe that no material prejudice was done to Ms Pivott by having been appraised by Ms Garthwaite and Mr Chalmers, even without the employment agreement and the job description, and cannot find that the appraisal contributed in any objective way to the undermining of her position. There was no breach of duty towards Ms Pivott therefore by the respondent and I also do not find that Ms Pivott suffered any unjustifiable disadvantage in her employment as a result.

Missing cell phone

[32] On 23 June 2008, Ms Pivott's personal cellphone went missing from her desk. This did not turn up until 27 June, when it appeared in the handle of the front door of her home. She said that none of the students knew where she lived, as far as she knew, inviting the Authority to infer that it had been taken from her desk by someone from the office.

[33] Ms Garthwaite said that she had no idea about who had taken the phone, but did recall an offensive message having been sent to one of the Committee members from her telephone around that time. Ms Garthwaite was careful to emphasise that she did not in any way believe that Ms Pivott had been responsible for it.

[34] As there is no hard evidence that the respondent was in anyway responsible for the missing telephone, I am unable to conclude that it had been taken by anyone acting on behalf of the respondent.

Workbase course

[35] Ms Pivott asserts that, on 26 June 2008, Ms Garthwaite refused to allow Ms Pivott to attend a work base course. Ms Pivott found out later that Ms Garthwaite had told the work base organisers that Ms Pivott had been too ill to attend. Ms Pivott's evidence is that this was completely untrue.

[36] Ms Garthwaite's evidence was that the work base course was part of a programme co-ordinator's meeting being run and paid for by Literacy Aotearoa. As she was the programme co-ordinator and only one place for the respondent was available, it was she, Ms Garthwaite, who had to attend. That was why Ms Pivott was not able to go. Ms Garthwaite was unable to remember telling anyone that Ms Pivott had been ill, but believed that if she had told anyone that, it would have been because she had believed that Ms Pivott had been ill.

[37] On balance, I accept Ms Garthwaite's evidence that Ms Pivott had not been able to attend the course because it was part of a programme co-ordinator's event. I am also unable to come to the conclusion that Ms Garthwaite had deliberately told the organisers of the course an untruth about the reason for Ms Pivott's non attendance as I do not believe Ms Garthwaite needed to do so. Ms Garthwaite was the manager of the office and was Ms Pivott's superior and had the power to decide who attended such events. She did not need to fabricate a reason for Ms Pivott's non attendance.

[38] I therefore cannot find that these matters constituted breaches of duty by the respondent towards Ms Pivott, nor that she had suffered an unjustifiable disadvantage as a result of them.

Locked filing cabinet

[39] On 10 July 2008, Ms Pivott found that the office filing cabinet was locked when Ms Garthwaite and the secretary, Ms Mawdsley, were out of the office. Whilst this did not prevent her from doing her work in particular, it meant that she was unable to give forms or other documents to tutors when they came into the office if Ms Garthwaite and Ms Mawdsley were not around. In addition, Ms Pivott overheard Ms Garthwaite say to Ms Mawdsley that she would take the key with her when she went out as "*she didn't know who she could trust around here*". Ms Pivott inferred that this was a reference to her.

[40] Ms Garthwaite and Ms Mawdsley were reasonably scathing about this allegation in their evidence to the Authority, and said that a spare key had always been kept in the rubber band box in the office, which Ms Pivott could have used to open the cabinet she was referring to. If Ms Pivott had overheard Ms Garthwaite say anything about not being able to trust people, it was not reasonable for Ms Pivott to have believed it had referred to her, Ms Garthwaite said.

[41] It is clear that Ms Pivott never complained to Ms Garthwaite or Ms Mawdsley about being locked out of the cabinet, and I do not find that she was in fact locked out of it. Ideally, Ms Garthwaite should have told Ms Pivott that she was going to start locking the cabinet and reminded her of the presence of the spare key, but the failing in communication was on both sides in this respect, as Ms Pivott did not complain about it. Overall, I cannot find that there was a deliberate attempt to undermine Ms Pivott's position, and do not believe that any duty was materially breached by the respondent in respect of this allegation. I also do not believe that there was any unjustified disadvantage in Ms Pivott's employment as a result.

Failure to pass on messages

[42] Ms Pivott stated that, on 21 July 2008, Ms Pivott found that two messages relating to her workplace coordinator role had not been passed on to her by Ms Mawdsley. She asked the Authority to infer that this had been a deliberate act by the respondent. The respondent's evidence was that the office computer was accessible to everyone and that messages came into a generic email address, so that Ms Pivott could have accessed them herself.

[43] As only two messages had not been passed on, and there was no evidence that this was a campaign of withholding messages, I do not believe that there is sufficient evidence that Ms Garthwaite or Ms Boyles had deliberately withheld information from Ms Pivott. It is more likely to have been a simple oversight. Therefore, I do not believe that this issue constitutes a breach of duty by the respondent, nor an unjustified disadvantage in Ms Pivott's employment.

Chinese whispers

[44] Ms Pivott asserts that she was the victim of a *campaign of Chinese whispers*. As a term, given its meaning, (see below) it is potentially offensive to the Chinese people and I repeat it here only because it was used by Ms Pivott and her advocate. This term was explained by Ms Pivott to refer to the alleged comment by Ms Garthwaite that *she didn't know who she could trust*. The phrase *campaign of Chinese whispers* suggests, however, a concerted and ongoing series of acts of distorted or exaggerated gossip or scandal. No cogent evidence was adduced that Ms Pivott was the victim of such a campaign and I cannot find that she was. Therefore, I

do not accept that there was any breach of duty by the respondent in this respect, nor that Ms Pivott suffered an unjustified disadvantage in her employment.

The appointment of EO

[45] Ms Pivott complains that Ms Garthwaite decided to appoint an individual (referred to as *EO* in this determination) as a tutor on the workplace programme, without taking into account Ms Pivott's objections. Mr O'Sullivan asserts that Ms Garthwaite did not have the authority to do so. Ms Garthwaite's evidence was that she knew *EO* better than Ms Pivott did and so was in a better position than Ms Pivott to judge her suitability.

[46] However, during cross examination Ms Pivott conceded that it was Ms Garthwaite's decision who to appoint. Ms Pivott stated that she had the obligation to deliver on the workplace programme contract and that she had had a bad experience in the past with a poor tutor. However, she also conceded that she did not know *EO* and that Ms Garthwaite did.

[47] In light of these facts, I do not believe that the respondent treated Ms Pivott in anyway unreasonably in respect of *EO*'s appointment. Therefore, I do not accept that the circumstances of *EO*'s appointment can in any way contribute to a successful constructive dismissal claim, nor that they caused an unjustified disadvantage in Ms Pivott's employment.

Was Ms Pivott unjustifiably prevented from attending *huis*?

[48] Ms Pivott asserts that she was told at her appraisal on 20 June that she would not be going to the national *hui*. Ms Pivott's then current job description stated:

Attendance at 1 2 day Regional Hui and 1 2 day national Hui is required.

[49] Ms Pivott asserts, which is not contested by the respondent, that attendance at *huis* was an important means of keeping up her professional development. Her then current job description stated:

The Workplace Coordinator will be encouraged to develop personal and professional skills that will enhance their ability to carry out the position.

[50] Ms Garthwaite admitted in her evidence to the Authority that this issue could have been handled better by her, but explained that she had decided that she and three other people on the Committee should go to the National Hui that year. Ms Garthwaite also said that it was not the intention that Ms Pivott would no longer attend *huis*, and had arranged for her to go to a professional development event in Dunedin, but Ms Pivott had resigned by the time it took place.

[51] The wording of Ms Pivott's original job description did not give Ms Pivott a right to attend regional and national *huis*, imposing instead a requirement to do so. Her habitual attendance of them in the past may have been as a function of her membership of the Committee rather than her role as Workplace Co-ordinator. However, on balance I accept that, in practice, she had a legitimate expectation of attending them as Workplace Co-ordinator, and Ms Garthwaite should have consulted with her prior to forbidding her from attending the National Hui in 2008. This failure was a breach of s 4 of the Act.

[52] However, as the attendance at the National Hui was a small part of her role, and not the only means for her to develop knowledge in her field, I do not find that it was a sufficient breach in itself to constitute a repudiation of her employment relationship, giving her the right to resign and claim unjustifiable constructive dismissal. I do however find that the way this issue was handled by Ms Garthwaite constituted an unjustified disadvantage in Ms Pivott's employment, and I deal with that in more detail below.

Was Ms Pivott unjustifiably blocked from having direct contact with the Committee?

[53] Ms Pivott states that she was told by Ms Garthwaite in early June that she could not talk to the Committee directly, and that Ms Pivott could only do so through her. Ms Pivott states that she was the only co-ordinator who was not allowed to attend Committee meetings or talk to them directly. She wanted to attend the meetings in order to deliver her monthly reports personally.

[54] Ms Pivott makes the point that her employment agreement makes clear that the Committee was her employer and that she was therefore being singled out as being the only co-ordinator not allowed to speak directly to her employer.

[55] Ms Garthwaite gave evidence that she was acting under instruction from the Committee itself in refusing to allow Ms Pivott access to the Committee. One of the witnesses from the Committee, Ms Boyles, who became its Chairperson a short time after Ms Pivott had stood down, stated in evidence that she had asked the Committee if Ms Pivott could attend meetings to deliver her co-ordinator's reports, and she had been greeted with *a chorus of no's*. Ms Boyles did not know why, but assumed that it had been because of Ms Pivott's assumed support of Mr O'Sullivan during a Committee meeting in April 2008 when Mr O'Sullivan had been seen to have publically bullied Ms Garthwaite.

[56] Ms Pivott's employment agreement at that time states that she was to *provide a monthly report to [the respondent's] management committee and attend committee meetings as scheduled*. Mr O'Sullivan points out that this is an unconditional sentence, and that there is no imputation of discretion. That is true, although the lack of discretion lies with Ms Pivott, in that the clause requires her to attend. Her claim relies upon a right to attend, and I do not interpret the clause to impart a right upon Ms Pivott to attend Committee meetings in her capacity as an employee.

[57] However, whilst the wording of this clause is couched in terms of an obligation rather than a right, I accept that direct access to the Committee was seen by Ms Pivott as a positive honour and a recognition of her status as workplace programme co-ordinator. I do not accept, though, that Ms Pivott needed to attend in order to do her job, or to answer questions about her report. Ms Garthwaite gave evidence that she had been tasked by the Committee to gather together all the monthly reports and deliver them to the Committee Meetings. Whilst it appears that Ms Pivott was the only co-ordinator who was no longer allowed to attend the meetings, the other three staff members who did attend were Ms Garthwaite, who attended as the manager, Ms Mawdsley, who was the Minute Secretary and Ms King, who was an ex officio member from Gore. It is therefore strongly arguable that they all attended in different capacities to Ms Pivott.

[58] However, Ms Boyles apparently did nothing to explore further why the Committee was so adamant that Ms Pivott should not have access to them or why Ms Pivott wanted that access. Although Ms Pivott had no contractual right to access the Committee directly, the Committee was her employer and I believe that the Committee was acting in breach of s. 4(1A)(b) of the Act by simply refusing to

countenance the possibility, without even asking why she wanted access. Furthermore, the Committee should have kept Ms Pivott better informed about the reasons of the refusal, rather than to have Ms Garthwaite tell her baldly that she was no longer allowed access to the Committee. This failure to communicate with Ms Pivott more fully about the edict from the Committee was, in my view, a further breach of s. 4(1A)(b) the Act.

[59] However, these breaches are not, in my view, sufficiently serious to amount to a repudiation of Ms Pivott's employment agreement, which is a necessary ingredient of a constructive dismissal. Ms Pivott was able to continue to do her day to day job, and was able to communicate with the Committee through Ms Garthwaite. She did not need to be at the Committee meetings to *speak to her reports* (as Mr O'Sullivan put it) and, if the Committee had found that they needed clarity in respect of something written in one of Ms Pivott's reports, they (and Ms Garthwaite) would have been the ones more inconvenienced.

[60] Furthermore, and significantly, Ms Garthwaite had accepted a suggested change to Ms Pivott's new job description which allowed her to *make an appointment to attend committee meetings unless requested*. Ms Pivott denied that she had been given a copy of the job description with that change, but I am satisfied that the change had been made at the time (rather than later, for the purposes of the Authority's investigation, which is implied by Mr O'Sullivan) because it matched a hand written change made by Ms Garthwaite in an earlier draft. This change persuades me that, by the time of Ms Pivott's resignation, the respondent was not treating Ms Pivott in bad faith in respect of her wish to access the Committee.

[61] I do accept the evidence of Ms Pivott that she had not seen the amended job description with the handwritten phrase *make an appointment to attend committee meetings unless requested*. I also accept the argument of Mr O'Sullivan that Ms Pivott had not accepted the change to her job description when she signed the new employment agreement on 1 August 2008. Whilst she had accepted the terms of that agreement with the new job title *Workplace project Coordinator*, the details of that role were still being negotiated.

[62] However, Ms Pivott resigned 14 days after signing the agreement. No-one had told her that her requests for changes to the draft job description for the new role had been refused. The respondent did nothing that legitimately gave Ms Pivott the

right to resign as far as the job description was concerned, as she was still awaiting feed back on it.

[63] For this reason, I cannot accept that her being blocked from direct access to the Committee was a legitimate cause for a claim for constructive dismissal when Ms Garthwaite intended to allow her access to the Committee by appointment and Ms Pivott was still awaiting news of the respondent's position on this issue. In other words, Ms Pivott's resignation was too hasty in this respect.

[64] I do accept that the way the issue was handled by the Committee and Ms Garthwaite amounted to an unjustified disadvantage in Ms Pivott's employment. I say more about this below.

Was Ms Pivott's role of workplace coordinator significantly eroded by changes that were being proposed to her job description?

[65] Ms Pivott had been very alarmed when she saw the draft job description as it had changed her role from being workplace coordinator to Workplace *Project* Coordinator. Ms Pivott understood that Literacy Aotearoa was working to roll out a national workplace programme involving the larger companies in New Zealand and that projects would be given to the different *poupons* but it was completely unclear to her and to Ms Garthwaite as to when the projects would be available. Therefore, from what Ms Pivott could see, there might well be times when she would have no work to do at all.

[66] Ms Garthwaite's evidence on this was that funding for the workplace programme was running out around this time, and uncertain in the future. The changes involving Literacy Aotearoa were intended to address this, although exactly how they would affect the respondent's activities was uncertain, as they were evolving. This meant that there was uncertainty about how Ms Pivott's role would develop. Ms Garthwaite said that she saw that Ms Pivott's role was becoming more uncertain, and had wanted to protect Ms Pivott's role. To do this, she made Ms Pivott project co-ordinator, as she believed that this approach created a wider set of possibilities for Ms Pivott. She said that Ms Pivott was very knowledgeable about workplace literacy and she did not intend to lose that knowledge.

[67] No other witness recalled any detail about proposed changes to Ms Pivott's role but there is one fact that persuades me that Ms Pivott cannot rely on the proposed

changes to argue that they constituted a breach of her employment agreement. This fact is that Ms Pivott signed the new agreement incorporating the new role on 1 August 2008. Ms Pivott's explanation is that she was advised to do so by her legal adviser (not Mr O'Sullivan) so that she could *continue the fight from inside*.

[68] In my view, Ms Pivott knew the effect of signing the agreement; namely that she was accepting it, and the new job title of Workplace Project Co-ordinator which it covered. I do not accept that she followed blindly the advice of her legal adviser against her will, as Ms Pivott is an intelligent and switched on individual, as is manifested by the positions she held within the respondent. I also do not accept that the respondent *rushed* [Ms Pivott] *into getting advice from second rate advisors* (as was submitted by Mr O'Sullivan) nor that it can be in anyway blamed for Ms Pivott's choice of adviser.

[69] Ms Pivott accepts that she made no protests about signing the agreement, although did say in evidence that she felt she was signing it under duress, essentially because Ms Garthwaite was asking her to hurry up with it.

[70] Insofar as Ms Pivott argues that she was forced to sign the new employment agreement, and that it should be void under the doctrine of duress, it is necessary to examine what is meant by *duress* in this context. This has been defined as *coercion of will, which vitiates consent*. *Pao On v Lau Yiu Long* [1980] AC 614 (PC) at 636; *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 at 345, cited with approval in *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (CA) at [89]. The burden is on the party seeking to avoid the agreement. Once the fact of duress of some kind has been established, the burden is on the party resisting the claim of duress to show that it did not in fact induce the contract.

[71] There are seven elements that must be established, as set out by the Court of Appeal in *Pharmacy Care Systems Ltd v Attorney-General*:

- a. There must be a threat or pressure;
- b. That threat or pressure must be improper;
- c. The victim's will must have been overborne by the improper pressure so that his or her free will and judgment are displaced;

- d. The threat or pressure must actually induce the victim's manifestation of assent;
- e. The threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative;
- f. Duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action or affirmatively by applying to a Court for the avoidance of the agreement;
- g. The victim may be precluded from avoiding the agreement by affirmation.

[72] Ms Garthwaite's evidence was that she might have said *let's get it* [the new agreement] *signed and sorted*. Whilst I am satisfied that Ms Pivott probably felt under pressure to sign the agreement, I do not find that the pressure was improper, nor that her will was overborne so that her free will and judgement were displaced. I therefore reject the argument that Ms Pivott signed the agreement under duress.

[73] In any event, even if Ms Pivott's signing of the agreement was in some way not an acceptance of the new terms, I do not believe that the respondent acted in breach of its duties towards Ms Pivott in terms of the changes to her role. It was not the author of such changes (as they originated from changes being made by Literacy Aotearoa) and Ms Garthwaite consulted with Ms Pivott about them, and gave her the opportunity to make representations. The respondent was not in a position to materially change what was happening.

Unfair bargaining

[74] Mr O'Sullivan argues that the respondent was acting in breach of ss. 60A, 63A(2), 66 and 68 of the Act in the way it dealt with Ms Pivott in respect of the new employment agreement.

[75] Section 63A(2) states as follows:

The employer must do at least the following things:

(a) provide to the employee a copy of the intended agreement under discussion; and

- (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and*
- (c) give the employee a reasonable opportunity to seek that advice; and*
- (d) consider any issues that the employee raises and respond to them.*

[76] Mr O’Sullivan asserts that Ms Pivott was not given a reasonable opportunity to seek independent advice, in breach of s. 63A(2)(c). (He cites s.60(2)(c) but I infer he means s.63A(2)(c)). However, I do not accept that. I heard no evidence to suggest that Ms Garthwaite had given Ms Pivott a very short timeframe within which to seek advice, not that Ms Pivott asked for more time and was refused it.

[77] Mr O’Sullivan also asserts that the respondent acted in breach of s. 63A(2)(d) by not considering any issues that Ms Pivott raised and not responding to them. (Again I infer Mr O’Sullivan means this section when he refers to s. 60(2)(d)). (Contrary to Mr O’Sullivan’s suggestion in his submission, it is the employer who must respond, not Ms Pivott – I assume this was an inadvertent error on his part as the meaning of the Subclause is plain). It is clear that Ms Garthwaite considered the issues that Ms Pivott raised, as she annotated the job description to take some of Ms Pivott’s concerns into account. Those annotations also indicate a response to the concerns. (It is to be noted that the obligation under s.63A(2)(d) is to respond to the issues, not to the employee).

[78] In conclusion, I do not accept that the respondent breached s.63A(2) of the Act.

[79] Mr O’Sullivan asserts that the respondent acted in breach of s.68 of the Act, relying on the grounds at s68(2)(c) and s.68(2)(d). Section 68 states as follows:

68 Unfair bargaining for individual employment agreements

- (1) Bargaining for an individual employment agreement is unfair if—*
 - (a) 1 or more of paragraphs (a) to (d) of subsection (2) apply to a party to the agreement (**person A**); and*
 - (b) the other party to the agreement (**person B**) or another person who is acting on person B's behalf—*
 - (i) knows of the circumstances described in the paragraph or paragraphs that apply to person A; or*
 - (ii) ought to know of the circumstances in the paragraph or paragraphs that apply to person A because person B or the other person is aware of facts or other circumstances from which it can be reasonably inferred that the paragraph or paragraphs apply to person A.*

(2) *The circumstances are that person A, at the time of bargaining for or entering into the agreement,—*

(a) is unable to understand adequately the provisions or implications of the agreement by reason of diminished capacity due (for example) to—

- (i) age; or*
- (ii) sickness; or*
- (iii) mental or educational disability; or*
- (iv) a disability relating to communication; or*
- (v) emotional distress; or*

(b) reasonably relies on the skill, care, or advice of person B or a person acting on person B's behalf; or

(c) is induced to enter into the agreement by oppressive means, undue influence, or duress; or

(d) where section 63A applied, did not have the information or the opportunity to seek advice as required by that section.

(3) *In this section, **individual employment agreement** includes a term or condition of an individual employment agreement.*

(4) *Except as provided in this section, a party to an individual employment agreement must not challenge or question the agreement on the ground that it is unfair or unconscionable.*

[80] I have already rejected the assertion that Ms Pivott was induced to sign the agreement, so I do not accept that the ground at s.68(2)(c) applies. I also reject the suggestion that Ms Pivott did not have the information or opportunity to seek advice as required by s.63A for the reasons already stated above.

[81] Mr O'Sullivan asserts that the provisions of s. 60A of the Act are relevant. Section 60A states as follows:

60A Good faith in bargaining for individual employment agreement

(1) The matters that are relevant to whether an employee and employer bargaining for an individual employment agreement are dealing with each other in good faith include the circumstances of the employee and employer.

*(2) For the purposes of subsection (1), **circumstances**, in relation to an employee and an employer, include—*

- (a) the operational environment of the employee and employer; and*
- (b) the resources available to the employee and employer*

[82] Mr O'Sullivan states that the operational environment in which the parties operated were oppressive, which includes the support by Literacy Aotearoa of Ms Garthwaite. I do not accept that the environment was such that Ms Pivott was unable to hold her own in the bargaining between the parties in respect of the proposed new employment agreement. This is witnessed by the fact that Ms Pivott met with Ms Garthwaite and gave her feed back on the proposed new job description and also

sought and obtained legal advice and followed that advice by signing the new employment agreement.

[83] Mr O’Sullivan asserts that the respondent acted in breach of s 66 of the Act. This section states as follows:

66 Fixed term employment

(1) An employee and an employer may agree that the employment of the employee will end—

- (a) at the close of a specified date or period; or*
- (b) on the occurrence of a specified event; or*
- (c) at the conclusion of a specified project.*

(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—

- (a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
- (b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*

(3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):

- (a) to exclude or limit the rights of the employee under this Act;*
- (b) to establish the suitability of the employee for permanent employment;*
- (c) to exclude or limit the rights of an employee under the Holidays Act 2003.*

(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—

- (a) the way in which the employment will end; and*
- (b) the reasons for ending the employment in that way.*

(5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.

(6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—

- (a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or*
- (b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective*

[84] Whilst the agreement signed by Ms Pivott on 1 August 2008 does not comply with s. 66 in my view, it is not thereby invalidated, as is made clear by s.66(5). However, Mr O’Sullivan’s reference to s66.(6) in his submissions leads me to conclude that he is arguing that any remedies awarded under s. 123(1)(b) of the Act should not be curtailed by the terms stated in the employment agreement.

The duration of the new agreement

[85] The employment agreement Ms Pivott had been working under prior to her signing the new agreement was a fixed term one that had expired but which had been *rolled over*. (The fixed term nature of the employment agreement was due to the limited funding that was available for the literacy programmes that Ms Pivott was involved in.)

[86] Upon seeing the new employment agreement, which dealt with her role as *Workplace Project Coordinator* and her other role as lead tutor of the FLP course, Ms Pivott saw that the term for both roles was only until 31 December 2008, only five months away. She had expected that it would be for a year from the date it was given to her, July 2008. Ms Pivott's evidence was that, while she understood that the funding for the workplace project coordinator role was uncertain, the funding for the FLP course was secured until July 2009. There was, therefore, no reason why the agreement could not run until that date.

[87] Ms Garthwaite was unsure as to why the term in Ms Pivott's new contract was for only five months, but believed that the FLP funding may have been secured only until December 2008 as well. However, as with the issue of the new Workplace Project Co-ordinator role, Ms Pivott knew that this was the term in the agreement for both roles, but signed the agreement nonetheless, without making any protest. She must, therefore be taken as having accepted the terms and cannot rely on its terms (including its purported limited duration, even if such duration is not valid pursuant to s.66(6) of the Act) to assert a breach of duty by the respondent entitling her to resign and claim constructive dismissal.

Was Ms Pivott constructively dismissed?

[88] Ms Pivott gave evidence that she had been looking for new employment from May 2008 when she had begun to feel strongly that her position was being undermined and when she heard about the proposed new job description. She learned that she had secured a new position with the YMCA in early August 2008 and resigned from her role as workplace coordinator and Lead FLP tutor on 14 August 2008. Her advice from the Community Law Centre was that she should not state the reasons for her resignation in the resignation letter. It is not clear why this advice was given. Accordingly, it states as follows:

Dear Nelly,

I am resigning from my positions of Workplace Coordinator and FLP Lead Tutor and hereby give the required two weeks notice as of 14 August 2008.

My last day of employment with the Southland Adult Learning Programme Inc, will be 28 August 2008.

I am still available for Tutor Training and all ongoing Professional Development related to that.

I am also available for ongoing professional development with the Southland Adult Learning Programme Inc, in my role as Volunteer Tutor.

Yours sincerely

[89] Ms Pivott stated that one issue that had led to her deciding to resign was the receipt of a letter from *Te Tumuaki* of Literacy Aotearoa, (Bronwyn Yates) dated 5 August 2008, which was in response to a letter from Ms Pivott dated 30 April 2008 raising concerns about having been pressurised into resigning as Chairperson. Ms Yates' answer to Ms Pivott set out that the manager (Ms Garthwaite) was accountable to the Committee, and that the Committee should appraise the performance of the manager, and that the tutors were accountable to the manager and that that manager should appraise the performance of the tutors. Ms Pivott found this response particularly upsetting (and became upset at the investigation meeting at its memory) as it did not acknowledge at all that she had been the workplace coordinator, on an equal footing to Ms Garthwaite in her mind, and that her role as workplace coordinator had seemingly been reduced to that of a tutor.

[90] The issue that the Authority must determine in relation to Ms Pivott's claim of constructive dismissal is whether there had been a course of conduct by the respondent which either had the dominant purpose of forcing Ms Pivott to resign or which cumulatively amounted to a breach of duty sufficiently serious that it would be reasonably foreseeable that the employee would have no choice but to resign. *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW* [1994] 2 NZLR 415; [1994] ERNZ 168 (CA). The breach by the respondent must amount to a repudiation of the employment agreement which entitles the employee to resign.

[91] I do not accept that the respondent deliberately set out to force Ms Pivott to resign. I accept the evidence of Ms Garthwaite that she wanted Ms Pivott to remain

with the respondent because she had skills and knowledge that were required by the organisation. Furthermore, I heard no evidence from the four Committee members who gave evidence, nor from Ms Mawdsley, who was minute secretary, that led me to believe that there was any plan from the Committee to force Ms Pivott to resign. Their collective memories were much more focussed on Mr O'Sullivan and his actions.

[92] I have found that the respondent failed to communicate sufficiently with Ms Pivott over her attendance at the National Hui and her access to the Committee. I have also found that these failures were breaches of the duty of good faith imposed by s 4 of the Act. However, I did not find that either were, on their own, enough to constitute a repudiation of Ms Pivott's contract of employment. I also do not find that they were sufficient, when taken together, to have done so. In my view, the fundamental underlying duties of good faith and trust and confidence were still preserved as between the parties at the point when Ms Pivott resigned.

[93] As for the letter from Ms Yates which upset Ms Pivott so much, this was not from her employer, and so cannot be relied upon by her to argue that it amounted to a breach by her employer.

[94] When I step back and view the development of the relationship between Ms Pivott and the respondent as a whole, there is no doubt that it became tainted by suspicion and mistrust on both sides. The Committee, and to a certain extent Ms Garthwaite, mistrusted Ms Pivott's workplace relationship with Mr O'Sullivan, who had effectively become *persona non grata* by mid 2008. In return, Ms Pivott became convinced that she was the target of deliberate attempts to undermine her and devalue her work and role. This led to a withdrawal into herself which the respondent saw as a disengagement.

[95] However, despite this deterioration in the relationship, my overall impression is of an employer, through Ms Garthwaite, who was trying to preserve Ms Pivott's position in the face of changes beyond their control and an increasingly uncommunicative employee. I believe that Ms Garthwaite did genuinely intend to allow Ms Pivott to attend future *huis*, and that she did genuinely want to put in place a mechanism to enable Ms Pivott to attend Committee meetings. Mr O'Sullivan is scathing of Ms Garthwaite in general, and, *inter alia*, of her veracity as a witness in particular. However, her evidence appeared to me to be very largely credible, and less

defensive than one would expect, given the barrage of criticisms and invective that had been levelled at her over the years by Mr O'Sullivan both before the proceedings started, and afterwards.

[96] Ms Garthwaite stated that she believed that Ms Pivott had been upset at having to resign as Chairperson of the Committee. I concur that this is probably correct, and whilst the means by which she was persuaded to resign as a Committee member may have been heavy handed, the Authority has no jurisdiction to consider any complaint in respect of that, as it does not arise from an employment relationship. For what it is worth, though, I agree that the conflict that was caused by Ms Pivott holding the Chairperson's role of a Committee which also employed her was unsustainable in the long term.

[97] To summarise, whilst the respondent did not handle Ms Pivott's situation as well as it might have done, I am not convinced that, at the point when Ms Pivott resigned, the respondent had breached its duties to her to such an extent as to amount to a repudiation of her employment agreement. Accordingly, I do not find that Ms Pivott was unjustifiably constructively dismissed by the respondent.

Did Ms Pivott suffer an unjustifiable disadvantage in her employment?

[98] Section 103(1)(b) of the Act provides that, for the purposes of the Act, a personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim that her employment, or one or more conditions of her employment, is or are or was (during employment that has since been terminated), affected to the employee's disadvantage by some unjustifiable action by the employer.

[99] In deciding whether the employer's action was unjustified, the Authority must apply the test in s. 103A. This stated, in 2008 when the alleged actions occurred:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action 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 the dismissal or action occurred.

[100] Ms Pivott raised her personal grievance by way of a letter from her advocate, Mr O'Sullivan, on 12 October 2008. Neither of the issues had been resolved to Ms

Pivott's satisfaction when she had resigned and, as the issues were failures whose effects were ongoing, they continued to be live when the grievance was raised. I therefore accept that personal grievances were raised in time in respect of these two issues.

[101] I have already found that the respondent failed to communicate sufficiently with Ms Pivott over her attendance at the National Hui and her access to the Committee. The latter issue, in particular, seems to have troubled Ms Pivott significantly, and I accept that, given that Ms Pivott was employed by the Committee, it should have explored why she wanted direct access to it and given her an explanation as to why it did not want her to have direct access to it.

[102] I believe that the lack of clear communication with Ms Pivott about the attendance at *huia* and about her having access to the Committee caused her a disadvantage in her employment and that the lack of communication was unjustified, as no fair and reasonable employer would have failed to communicate with her about these two issues in all the circumstances. Therefore, I find that Ms Pivott's personal grievance in this respect is proven.

[103] Turning to the appropriate remedy for these disadvantages, no direct losses flowed from them, as I do not find that they justified Ms Pivott's resignation. Therefore, I must consider remedies under s. 123(10)(c)(i) (compensation for humiliation, loss of dignity, and injury to the feelings of the employee).

[104] Ms Pivott was distressed by the way that the issues of the attendance at *huia* and her access to the Committee were handled, and I believe that the distress was moderately severe. Accordingly, I assess that an appropriate sum to award under this heading is \$7,500.

[105] Next, I must consider the effect of s.124 of the Act, which states that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[106] In assessing contribution, I should consider the fact that Ms Pivott was herself uncommunicative by this stage, which stemmed I believe, at least in part, from her disappointment at having been made to step down as Chairperson of the Committee. That, no doubt, led in part to the failure by the respondent to communicate with Ms Pivott as openly as it should have done. However, there is no evidence that Ms Pivott refused to talk to Ms Garthwaite, just that she was less engaged than she used to be. In such circumstances, I believe that Ms Pivott did not contribute to the respondent's failure to communicate effectively about attendance at the national *hui* and about her access to the Committee, as the respondent's duty was not undermined by such conduct by Ms Pivott. I therefore decline to reduce the award.

Order

[107] I order that the respondent pay Ms Pivott the sum of \$7,500 pursuant to s. 123(1)(c)(i) of the Act.

Costs

[108] I reserve the issue of costs. The parties should seek to agree between themselves how costs are to be dealt with. If the parties cannot agree, any claim for costs should be made by lodging and serving a memorandum within 28 days of the date of this determination. Any reply in opposition should be lodged and served within a further 28 days.

MR O'SULLIVAN'S CLAIM

[109] Mr O'Sullivan worked for the respondent as a grammar tutor for 80 minutes a week on a fixed term arrangement. He claims that he was constructively dismissed by the respondent when:

- (a) an allegation was made that his conduct at a Committee meeting amounted to a health and safety hazard in the workplace;
- (b) When the respondent refused to engage with him with respect to that allegation;
- (c) When he was accused of deliberately and wrongfully withholding materials pertinent to training which he had been carrying out on behalf of the respondent's umbrella organisation, Literacy Aotearoa;

- (d) When he was instructed to hand back the key to the building which he needed to access in order to prepare his lessons as a grammar tutor; and
- (e) That the programme manager, Ms Garthwaite, refused to allow teaching opportunities to be given to him.

Jurisdictional objections to Mr O'Sullivan's claims

[110] Apart from generally denying the allegations, the respondent also specifically denies that Mr O'Sullivan has the standing to rely on two of his claims. The first is that Mr O'Sullivan did not raise a personal grievance within 90 days of him learning that Ms Garthwaite was deliberately withholding teaching opportunities from him and, furthermore, that he did not bring proceedings in the Employment Relations Authority within three years after the date on which a personal grievance was raised, in accordance with s.114(6) of the Employment Relations Act 2000 (the Act). Mr O'Sullivan states that he did raise a personal grievance but that he did so prior to learning about Ms Garthwaite's decision to withhold teaching opportunities from him because he had anticipated that such an action would be taken.

[111] The respondent also asserts that Mr O'Sullivan did not raise a personal grievance in relation to the constructive dismissal. The respondent accepts that the letter of resignation of Mr O'Sullivan makes express what issues he was complaining about (save the allegation of the withholding of teaching opportunities), but asserts that Mr O'Sullivan stated in his resignation letter that he had not resigned his membership of the respondent, and so would pursue his claims *from that vantage*. The respondent submits that Mr O'Sullivan was therefore not making clear what he wanted the respondent to do in response to the allegations contained in the resignation letter. Again, I shall consider this submission below.

Did Mr O'Sullivan raise a personal grievance in respect of the allegation that Ms Garthwaite had withheld work from him?

[112] Section 114 (1) and (2) provide as follows:

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[113] The specificity required by a grievant to satisfy s.114(2) was examined in the Employment Court case of *Creedy v Commissioner of Police* [2006] ERNZ 517, in which it stated:

[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[114] On 11 May 2008 Mr O’Sullivan sent a memorandum to Ms Yates of Literacy Aotearoa seeking further information about the alleged health and safety risk that he represented. In it he states:

My career at SALP is already dead in the water as Nellie [Ms Garthwaite] resists any suggestion of my involvement in tutoring opportunities.

[115] This statement appears to be a clear reference to Ms Garthwaite’s decision not to allow Mr O’Sullivan to carry out any further tutoring on behalf of the respondent. However, it has been made to an organisation which is not Mr O’Sullivan’s employer. Whilst there is ample case law allowing a grievance to be raised through a third party, there is no evidence that Ms Yates passed this memorandum to the respondent, nor that Mr O’Sullivan asked her to. This reference does not, therefore, satisfy the requirements of s.114.

[116] In late May 2008 Mr O’Sullivan sent a document to the Committee entitled *Notice of request to discuss a personal grievance relating to an allegation by the Committee that the prospective plaintiff constituted a safety threat in the workplace.* The copy of the document that was put before the Authority was undated.

[117] In this document Mr O'Sullivan stated that the allegation that he was a health and safety risk, which he characterised as dishonest conduct by the Committee, was an unjustified disadvantage and that, *such an allegation, unresolved, will shadow any prospects of employment for [Mr O'Sullivan] in the education sector*. No mention is made of Ms Garthwaite resisting any suggestion of his involvement in tutoring opportunities. Mr O'Sullivan sought a hearing with the Committee to discuss the matter and stated reason for it being a matter that was urgent.

[118] Mr O'Sullivan contended at the investigation meeting that it was in this document that he raised a personal grievance about not being given work as a result of the allegation of him being a health and safety risk. However, nowhere in this grievance does Mr O'Sullivan make reference to Ms Garthwaite having decided not to give him any further work. The words cited above about *shadowing any prospects of employment in the education sector* do not refer to his employer not giving him further work in my view, but much more likely refer to Mr O'Sullivan fearing that his reputation within the sector as a whole would be sullied by the allegation.

[119] Whilst Mr O'Sullivan wrote several times to various individuals pursuing his grievance about the health and safety allegation, there is no evidence that Mr O'Sullivan mentioned Ms Garthwaite's decision to withhold further work. The terms of s 114 of the Act, as elucidated in *Creedy*, are clear; namely that the employee must make the employer aware what it is that the former wants the latter to address. Mr O'Sullivan knew before he resigned (on 7 May 2008 when Ms Pivott told him) that Ms Garthwaite was withholding work from him (which Ms Garthwaite admitted in evidence) but did not say so expressly because he did not want to get Ms Pivott into trouble.

[120] Despite Mr O'Sullivan's best intentions not to get Ms Pivott into trouble, he cannot assume his employer would somehow infer he had a personal grievance with respect to the withholding of work opportunities from documents he sent which were silent on the matter.

[121] In summary, I find that Mr O'Sullivan did not raise within the time limit required by s 114 his personal grievance about having work withheld, and so the Authority has no jurisdiction to consider his unjustified disadvantage claim in respect of it.

Did Mr O’Sullivan raise a personal grievance with respect to his constructive dismissal claim?

[122] Mr O’Sullivan argues that he raised the personal grievance in the resignation letter itself. The full wording of the resignation letter reads as follows:

RESIGNATION

I am obliged to resign from my position as FLP tutor. The position is no longer tenable for the following reasons:

- *Nelly has removed the keys to the centre from me. As Nelly knows, I must travel a considerable distance to the centre and it has been necessary for me to have access to the centre to select and photocopy resources and the like. As I have alternative commitments at the prison and elsewhere it has been necessary for me to have access early in the morning. Without this access my position is compromised.*
- *Members of the committee are engaged in a smear campaign against me wherein I am declared a threat to the programme, the health of my colleagues and more recently, by implication, a thief. This makes my position even less tolerable.*

Clearly, the relationship is now devoid of the mutual confidence and trust that must underpin it. Moreover, officers of the society complicit with the committee have acted against the best interests of the society, some of its members and the wider membership, in respect of which I am engaged in the serious contention which will inevitably be litigated. I record in that respect, that the committee and the society’s officers have engaged in serious wrongdoing which constitutes a threat to the programme and the public interest and that I intend to pursue that.

I shall forward, under separate cover, my time sheet for the first term of the FLP contract under which I was employed.

I shall advise, for the record, that I have not resigned my membership of the SALP and shall pursue these claims from that vantage.

Yours faithfully,

[123] Counsel for the respondent argues that Mr O’Sullivan did not raise a personal grievance, citing three reasons:

- a. He did not state he had a personal grievance;
- b. He did not give the employer a chance to remedy any perceived defect before he gave effect to his resignation; and

- c. by stating that he would pursue these claims from the vantage of his membership of the SALP precluded him from arguing that he had raised a personal grievance.

Mr O'Sullivan did not state he had a personal grievance

[124] Ms Thomas, on behalf of the respondent, cites the Employment Court case of *Hawkins v Commissioner of Police* [2007] ERNZ 762, which held that the test set out in s.114(2) as to how a grievance must be raised is *objective and requires a communication sufficient to enable the employer to address and remedy the grievance or for the parties to settle it in discussion*. This is consonant with the dictum cited in *Creedy* but does not, in my view, demand that a grievant must state expressly that he or she has a personal grievance, in those terms. *Creedy* emphasises that no *particular formula of words needs to be used*, and the Act does not require, in my view, that the employee must state expressly that he is raising *a personal grievance*. What is sufficient is that the employee makes clear what the grievance is that he wants the employer to address. I am satisfied that the letter of resignation makes that sufficiently clear.

Mr O'Sullivan did not give the employer a chance to remedy any perceived defect before he gave effect to his resignation

[125] Mr O'Sullivan certainly gave the respondent ample opportunity to address and remedy his concerns about being labelled a health and safety risk in the workplace. With respect to the actual resignation, I do not accept that Mr O'Sullivan was obliged to give the employer a chance to persuade him not to resign before he actually took that step. A constructive dismissal typically occurs when an employer has conducted itself in such a way that it breaches its duties of good faith and the implied duty not to do anything to destroy the trust and confidence between the parties. Once breached, the employee has a time limited opportunity to accept the breach (and treat the contract as at an end, by resigning) or to ignore it and continue to work. Section 4 of the Act imposed on Mr O'Sullivan (and on the respondent) a duty to be active and constructive in establishing and maintaining a productive employment relationship. However, given that Mr O'Sullivan had tried to address his concerns with the respondent, once he had concluded that the relationship with the respondent was beyond repair and that it had repudiated his contract of employment, he was not

obliged, in my view, to take further steps to resolve the matter before electing to resign.

[126] Furthermore, I believe that it is permissible for a resignation letter to constitute a personal grievance. In reaching this conclusion, I am mindful of the judgement of the Employment Court in *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 in which the Court held that an employee can raise a personal grievance by lodging a statement of problem in the Authority which outlines the grievance. The Court stated, at [12]:

Interpreting s 114 in this way might seem to permit a party to short circuit the normal process of dispute resolution which the Act envisages will occur in most cases. That is, a grievance is raised first with the employer and then there is an opportunity for negotiation and discussion so that a resolution may occur before the matter is lodged with the Authority. Such an approach is to be encouraged. But there will remain ample opportunity for the employer to address the grievance and, perhaps, resolve that grievance through discussion and/or mediation between the parties even after the matter is officially before the Authority.

[127] In light of this, it would be a bizarre outcome if the sending to his employer of a letter of resignation does not amount to the raising of a personal grievance when the lodging of a statement of problem in the Authority does.

Pursuing his claims from the vantage of his membership of the SALP

[128] When an employee is dismissed, the only way open to him to challenge that dismissal is by way of a personal grievance (s113 of the Act). Clearly, such a person is no longer an employee of the employer (by dint of having been dismissed) and so the grievant is not required to hold any particular status or take any particular *vantage*, provided he raises the grievance in accordance with the Act. Whilst Mr O'Sullivan stated he would pursue his claims from the vantage of his membership of the SALP, that statement is not material in my view, provided that he made clear to the respondent that he alleged a personal grievance related to his employment, and which that he wanted the respondent to address. In my view the resignation letter makes it clear what his grievances were.

[129] Accordingly, I do not agree that Mr O'Sullivan's resignation letter did not constitute a valid personal grievance. Therefore, the Authority has the jurisdiction to consider the claim of constructive dismissal.

Brief account of events leading to Mr O'Sullivan's resignation

[130] Mr O'Sullivan's problems essentially stem from what transpired during a meeting of the Committee in April 2008. Mr O'Sullivan had been concerned that Ms Garthwaite, who was not a member of the Committee, had effectively sought to depose Ms Pivott as Chairperson (because of Ms Garthwaite's concerns at the conflict of interest issue) and had approached another Committee member asking her to stand in Ms Pivott's place. Ms Garthwaite's evidence was that she had been abused by Mr O'Sullivan during this April 2008 meeting. Other Committee members who attended the Authority to give evidence supported this view. One of the Committee members became quite upset during her evidence at the memory of the incident.

[131] Mr O'Sullivan is adamant that he did not abuse Ms Garthwaite but concedes that he was dogged in his questioning of her, until she had conceded that she had exceeded her role and had apologised. I take from Ms Garthwaite's evidence on the point that she had, effectively, apologised. Mr O'Sullivan's actions at that meeting were in the capacity of a Committee member, not an employee, and so are referred to here as background only.

[132] Mr O'Sullivan had also been concerned that there was a proposal for a member of Literacy Aotearoa (Mr Isaacs) to attend the next Committee meeting (in May 2008) because of concerns that Ms Garthwaite had raised regarding the conflict of interest issue. This had prompted Mr O'Sullivan to write a number of emails and memoranda to Ms Garthwaite and Ms Mawdsley which were quite strong in their tone. (More will be said about this below.) As these communications from Mr O'Sullivan caused concern to Ms Garthwaite and Ms Mawdsley, they expressed some concern to Ms Boyles.

[133] Ms Boyles, who had been concerned at Mr O'Sullivan's approach towards Ms Garthwaite at the April 2008 Committee meeting, now grew concerned at what she saw as a member of the Committee harassing or bullying members of staff. She characterised this as a *health and safety hazard* and invited Ms Yates from Literacy Aotearoa to attend the next meeting in May, because of this concern. This was not explained to Mr O'Sullivan until he attended the May 2008 Committee meeting.

[134] Mr O'Sullivan had been very concerned that he, or his behaviour, had been characterised as a health and safety hazard as he believed that this would impact on

his standing within the literacy community as well as within the respondent. Given that he tutors vulnerable people, that concern was reasonable in my view. He made several attempts over the coming months to engage with Ms Garthwaite (whom he had initially believed had been the source of the complaint to Literacy Aotearoa about his conduct) and to the Committee, attempting, effectively, to clear his name.

[135] Mr O'Sullivan's resignation from the Committee, which took place during the same May 2008 meeting, occurred because the Committee had refused to accept that he had been asked to carry out appraisals of the staff on the basis that no motion had been recorded that he would do so. (Although this issue is not directly relevant to the employment relationship problem before the Authority, it seemed clear to me that Mr O'Sullivan had been asked to carry out these appraisals and that the seeming *volte face* by the Committee was justifiably galling to him after he had put in a considerable amount of work preparing for and carrying out the appraisals).

[136] Mr O'Sullivan pursued his concerns in respect of the allegations about him being a health and safety hazard on several occasions, and eventually raised a personal grievance in late May 2008. Ms Garthwaite and Ms Boyles had by now already asked Ms Yates to become involved. In one email to her, Ms Garthwaite stated that *this man is bordering on the edge of harassment of me* and in another, signed by Ms Garthwaite and Ms Boyles, they called Mr O'Sullivan a *venomous and crossed man*.

[137] On 13 May 2008, Mr O'Sullivan found that he could not access his work files because the cabinet in which they were kept had been locked by Ms Garthwaite. Around this time, Mr O'Sullivan had also received his draft employment agreement (he had been working for the respondent for some weeks but, up until that point, had not been given an employment agreement). Mr O'Sullivan took issue with the intellectual property clause but was told that he must deal with the respondent's legal advisers over it rather than speaking to Ms Garthwaite. Mr O'Sullivan also took issue with this. The respondent's legal representatives later replied to Mr O'Sullivan's personal grievance about the health and safety allegation suggesting that mediation would be a better way of resolving the issue than him meeting with the Committee (as he had requested). The mediation did not get off the ground, however, because the respondent's representative characterised the issue solely as related to Mr O'Sullivan's position on the Committee, and not an employment one.

[138] In June 2008, Mr O’Sullivan’s work at Invercargill Prison, which he did under an agreement with Literacy Aotearoa, came to an end but a dispute then arose between Mr O’Sullivan, Ms Garthwaite and Ms Maniapoto regarding the return of resources belonging to Literacy Aotearoa. It emerged that concerns about Mr O’Sullivan wrongfully retaining documents were based on a misunderstanding, but bad tempered and sarcastic (on Mr O’Sullivan’s part) exchanges between Mr O’Sullivan on the one hand and Ms Garthwaite and Ms Maniapoto in particular ensued. In one of the emails between Ms Maniapoto and Ms Garthwaite, Mr O’Sullivan was referred to as a *gnome*, although Mr O’Sullivan did not become aware of that until the disclosure process that took place as part of these proceedings.

[139] On 29 June 2008, Mr O’Sullivan was asked by Ms Garthwaite to leave his key to the Centre, together with a stapler, on her desk the following day. Mr O’Sullivan did this, as requested, but this meant that he could no longer access the resources of the Centre to prepare for his tutoring outside of office hours. Mr O’Sullivan states that, as he was still carrying out work at Invercargill Prison, for a different provider, he was unable to attend the Centre during working hours and the removal of his key meant that he, in practice, had no access to the Centre or his resources at all. Ms Garthwaite’s evidence is that this is not true and he was often in town during office hours when he could have accessed the materials he needed.

[140] Mr O’Sullivan had also been told by Ms Pivott in May 2008 that Ms Garthwaite had told her that she had no intention of giving Mr O’Sullivan any further teaching opportunities.

[141] Mr O’Sullivan wrote his letter of resignation as an employee on 4 July 2008.

Issues relating to Mr O’Sullivan’s claim

[142] The Authority must consider the following issues:

- (a) Was there a course of conduct by the respondent which either had the dominant purpose of forcing Mr O’Sullivan to resign or which cumulatively amounted to a breach of duty sufficiently serious that it would be reasonably foreseeable that the employee would have no choice but to resign;

- (b) Was Mr O'Sullivan's employment, or one or more conditions of his employment ... (during employment that has since been terminated) affected to Mr O'Sullivan's disadvantage by some unjustifiable action by the employer;

Was Mr O'Sullivan constructively dismissed?

The health and safety matter

[143] It is uncontested that Ms Boyles characterised Mr O'Sullivan's conduct (and Mr O'Sullivan himself) as a health and safety hazard or risk. She first raised this in an email exchange to Mr O'Sullivan in which she had asked him if he objected to Ms Yates and another member of Literacy Aotearoa attending the May 2008 Committee meeting. When Mr O'Sullivan objected to being told that it *was a straight question needing a yes and no answer* and asking what their attendance was for, Ms Boyles answered *Oops sorry did the email in a hurry and left out health and safety issues safety reasons* [sic]. Ms Boyles did not explain what the issues were. Mr O'Sullivan found out that it was his behaviour that constituted the health and safety risk when he attended the May 2008 Committee meeting, although no details were given.

[144] Ms Boyles explained at the investigation meeting that the health and safety issue arose from the effect that Mr O'Sullivan's written communications were having on Ms Garthwaite and Ms Mawdsley, both of whom she had found in tears on at least one occasion.

[145] It is also clear to me that, although the behaviours of Mr O'Sullivan that the respondent saw as comprising a health and safety risk stemmed from issues relating to the operation of the Committee, that allegation impacted upon him as an employee as well. The allegation was made by Ms Boyles, who was a member of the Committee at the time, and who later became its Chairperson. The Committee was the effective employer of Mr O'Sullivan. It is wholly artificial to separate Mr O'Sullivan into two roles, when the allegation against him was about his behaviour towards people whom he dealt with as an employee, as well as a Committee member. This is supported by the way that the respondent treated Mr O'Sullivan after the concern was raised, such treatment not being limited to his capacity as a Committee member. In short, whilst I do not accept that it was this characterising of Mr O'Sullivan as a health and safety risk itself that constituted a breach of an employment duty to Mr O'Sullivan, I believe

that it was the way that the respondent dealt with Mr O'Sullivan's concerns about being so characterised that constituted the breach.

[146] Mr O'Sullivan sent several communications in respect of the allegations. These communications included:

- a. A memo to Ms Garthwaite dated 9 May 2008;
- b. A memo to Ms Garthwaite dated 11 May 2008;
- c. A memo to Ms Yates dated 11 May 2008;
- d. A memo to Ms Garthwaite dated 12 May 2008;
- e. A letter to Ms Boyles dated 14 May 2008;
- f. A memo to Ms Yates dated 21 May 2008;
- g. A memo to Ms Boyles dated 23 May 2008;
- h. His personal grievance sent around 29 May 2008;
- i. A letter to Ms Yates dated 15 June 2008;

[147] Mr O'Sullivan also agreed to enter into a mediation to discuss his personal grievance, but this was aborted when the respondent decided that the issues were not employment ones.

[148] There is no evidence that the respondent ever met with Mr O'Sullivan in good faith, either before or after his raising of the personal grievance, to explain to him why his conduct had been regarded as a health and safety risk or to give him an opportunity to address those concerns. No conclusion was ever reached about the issue. Even if the respondent disagreed that the issue was an employment one, Mr O'Sullivan did so regard it and the respondent's duty of good faith to him required it to meet with him and discuss his concerns.

[149] It is my view that this failure was a fundamental failing by the respondent to deal with Mr O'Sullivan in good faith. I have no doubt whatsoever that the Committee and Ms Garthwaite found Mr O'Sullivan very difficult to deal with and that Ms Boyles had a genuine concern when she saw the effect upon two staff

members of Mr O'Sullivan's communications. Mr O'Sullivan's written style, whilst highly articulate, was often also strident, acerbic and demanding and I believe that the recipients of his communications were genuinely upset by them. I will address this in more detail when I consider contribution.

[150] However, in my view, the complete failure to engage with Mr O'Sullivan in his capacity as an employee with regard to his concerns about the allegation amounted to a fundamental breach of good faith by the respondent and undermined Mr O'Sullivan's trust and confidence in the respondent as a fair and reasonable employer. This is all the more so given that the respondent had engaged legal advisers to assist them in dealing with his personal grievance. If the individuals from the respondent had felt too intimidated to meet with Mr O'Sullivan, the respondent's lawyers could have done so to attempt to resolve his personal grievance.

[151] In my view, by the time Mr O'Sullivan resigned, it had become clear to him that the respondent was not going to allow him to address his concerns about the health and safety allegations. This was enough to constitute a fundamental breach of the respondent's duties towards Mr O'Sullivan, which entitled him to resign. In my view, it would be foreseeable to any fair and reasonable employer that an employee in a teaching capacity who was accused of displaying behaviour amounting to a *health and safety risk* but who was not afforded the chance to defend himself, would be likely to resign.

[152] I am therefore satisfied that this issue alone was sufficiently serious to amount to a constructive dismissal. I am also satisfied that the constructive dismissal was unjustified, as no fair and reasonable employer would have acted in the way it did that led Mr O'Sullivan to resign, in all the circumstances (s.103A, pre amendment).

[153] I also am satisfied that the same failing constituted an unjustifiable disadvantage in Mr O'Sullivan's employment. The fact that he saw himself as labelled by the Committee as a health and safety risk which he was unable to address with them because of their refusal to engage with him created a disadvantage in his employment. The fact that no fair and reasonable employer would have refused to have engaged with an employee in such circumstances makes the disadvantage unjustified. Even if the respondent found Mr O'Sullivan's approach in advancing his grievances upsetting, that was not enough to excuse them simply turning a blind eye to their obligations.

The withholding of work opportunities

[154] Whilst I cannot consider whether the issue of Ms Garthwaite deciding not to present any further tutoring opportunities to Mr O’Sullivan was a disadvantage in his employment, as he did not raise a personal grievance about that matter, I consider that I may take it into account when deciding whether Mr O’Sullivan was constructively dismissed from his employment (about which I have found that he did raise a valid personal grievance). Otherwise, it would be wholly artificial to ignore it, as it was, I am satisfied, that knowledge of Ms Garthwaite’s intention which formed one of the reasons that led Mr O’Sullivan to conclude that he has been constructively dismissed.

[155] This is the case even though Mr O’Sullivan did not mention the fact of Ms Garthwaite’s decision in his resignation letter. That absence of reference goes to credibility, and Mr O’Sullivan has explained it by saying that he did not want to make Ms Pivott’s position worse than he perceived it already was. I accept that evidence.

[156] I accept Ms Thomas’s submission that Mr O’Sullivan had no contractual right to have been offered additional tutoring hours. However, in my view, the decision of Ms Garthwaite not to give Mr O’Sullivan any more teaching opportunities without giving him any chance to address her concerns that he may be unable to *control and conduct himself as a tutor in a civil manner*, was another fundamental failing of communication by the respondent, amounting to a fundamental breach of the duty of good faith. Mr O’Sullivan’s knowledge that a decision had been taken by Ms Garthwaite based on a perception of him being unsuitable to teach because of his temperament, without having first raised her concerns, also entitled Mr O’Sullivan to resign in my view.

[157] As for the other issues complained of by Mr O’Sullivan (the taking away of the key and the communications about him apparently withholding teaching materials and files) I do not find that these were sufficiently serious on their own to constitute a breach of contract by the respondent. However, they may have been the catalyst or final straw for Mr O’Sullivan, triggering his resignation.

Remedies

[158] Mr O’Sullivan does not seek lost wages but does seek compensation in the sum of \$10,000 for humiliation, loss of dignity and injury to his feelings pursuant to s.123(1)(c)(i) of the Act.

[159] Mr O'Sullivan states that, whilst he is robust, he has suffered extreme distress. Mr O'Sullivan's communications certainly show that he was provoked by the events that unfolded and I accept him not being able to address the allegation regarding his behaviour being a health and safety risk caused him genuine concern as to how that may impact on his teaching career.

[160] However, I also take into account that his employment with the respondent amounted to only 80 minutes a week, that he had other employment, and that he had not been a tutor with the respondent very long. He states that he was provoked to *scorn and acerbity* by the respondent's actions, but that reaction does not, in my mind, justify the award of \$10,000. I believe that a more reasonable amount is \$5,000.

[161] S 124 of the Act requires me to consider next the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[162] It is clear to me that the reason that the respondent failed to deal with Mr O'Sullivan fairly was because it was blinded by his manner of communicating with them. Whilst Mr O'Sullivan characterises the manner as *scornful*, it was also often extremely forceful, haranguing and belittling. A handful of examples will suffice:

- a. A 15 page report to the Committee dated April 2008 examining Ms Garthwaite's wrongdoing, which recommended that she be *censured*, *educated* on governance and *rehabilitated* to the needs of the programme;
- b. A dogged questioning of Ms Garthwaite at a meeting in April 2008 which resulted in her admitting she had made an error in asking someone else to be chairperson and agreeing not to overstep the boundaries again. However, she stated that Mr O'Sullivan's approach had made her feel like *an errant school girl* and all of the Committee members who gave evidence effectively stated that his approach to Ms Garthwaite had been too harsh;
- c. An email to Ms Boyles on 2 May 2008 in which he stated that *any attempt to pursue the speculative objectives....will grossly compound*

your folly and constitute a gross breach of your fiduciary obligations which lays you open to serious consequences;

- d. A letter to Ms Yates on 7 May 2008 in which he describes Ms Garthwaite as *so much weed around the keel of the SALP vessel* and the Committee (his employer, it is to be remembered) as *collectively generating less neural power than a pickled walnut;*
- e. References to Ms Garthwaite *scuttling* and the Committee being her *subverted cronies*.

Many more examples could be cited, some very insulting.

[163] Whilst many of Mr O’Sullivan’s communications that led to his behaviour being characterised as a health and safety hazard were about happenings on the Committee, and were sent in his capacity as a Committee member, I do not believe that he can hide behind this fact to argue that they have no impact on his personal grievance. Just as the health and safety allegation, which arose from his acts as a Committee member, had an adverse effect on his employment, so does his conduct towards his employers and Ms Garthwaite.

[164] In light of the fact that Mr O’Sullivan essentially alienated his employers by his communication style, which led them directly to disregard his employment law rights, I see it as entirely appropriate, and correct, to reduce the award of compensation. I believe that reduction of 50% is appropriate.

Order

[165] I order the respondent to pay Mr O’Sullivan the sum of \$2,500 under s.123(1)(c)(i) of the Act.

Costs

[166] I reserve the issue of costs. The parties should seek to agree between themselves how costs are to be dealt with. If the parties cannot agree, any claim for costs by Mr O'Sullivan should be made by lodging and serving a memorandum within 28 days of the date of this determination, and the respondent shall have a further 28 days to lodge and serve any reply.

David Appleton
Member of the Employment Relations Authority