

**Attention is drawn to the
order prohibiting publication
of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 137
5384116

BETWEEN

FIONA WALKER
Applicant

A N D

DELTA COMMUNITY
SUPPORT TRUST
Respondent

Member of Authority: Helen Doyle

Representatives: Lynda Ryder and Jeff Goldstein, Counsel for Applicant
Rick Hargreaves, Counsel for Respondent

Investigation meeting: 26, 27 and 28 March 2013 at Christchurch

Submissions Received: 12 April and 3 May 2013 from Applicant
24 April 2013 from Respondent

Date of Determination: 8 July 2013

DETERMINATION OF THE AUTHORITY

- A. Ms Walker does not have a personal grievance that she was unjustifiably disadvantaged or unjustifiably dismissed.**
- B. I have reserved the issue of costs and set a timetable.**

Prohibition from publication

[1] I prohibit from publication the names of clients of the Trust. I shall refer to them by initial only.

[2] I prohibit from publication following an unopposed application by Ms Ryder and Mr Goldstein, the details of Ms Walker's medical condition. Counsel understand that I may need to refer generally to the medical condition if the Authority gets to the point of determining remedies having heard expert evidence from two medical professionals.

Employment relationship problem

[3] Fiona Walker was employed by the Delta Community Support Trust from November 2000, initially in the role of Pet Friendship Co-ordinator and then from March 2001 in the role of Delta Friendship Link Manager. Ms Walker was party to a written individual employment agreement signed on 23 June 2010.

[4] On 21 May 2012 Ms Walker was summarily dismissed from her employment following investigation into various issues relating to cash handling and recording for the Friendship Link Groups she managed.

[5] Ms Walker says that her dismissal was unjustified and that she was not treated fairly and reasonably and/or in good faith. She further says that she was unjustifiably disadvantaged in her employment in relation to her suspension on 27 February 2012.

[6] Delta Community Support Trust, referred to as either Delta or the Trust, is a Christian community based organisation located in Richmond, Christchurch. The Trust grew out of the community ministry of the North Avon Baptist Church. It was first registered as a charitable trust in 1995 and provides a variety of social, health and community development services to disadvantaged and disabled people in Christchurch helping over 3,000 people every year.

[7] The Trust has three divisions. Ms Walker managed the Friendship Link which provides services to people with dual intellectual and psychological disabilities. The other two divisions are the Evergreen Club which runs a programme for older persons five days a week and the Community Development Service which encompasses empowerment courses, food bank, budget advice, community meal and café, cultural work and other initiatives including community gardening projects and self help groups.

[8] The Trust does not accept that the dismissal of Ms Walker was unjustified and say that Ms Walker was unable to provide a credible explanation for failing to follow

cash handling and recording procedures and after due process during which she was legally represented she was dismissed for serious misconduct. The Trust does not accept that its actions in relation to the suspension were unjustified.

[9] Ms Walker seeks the following remedies:

- (a) Lost wages for the period 13 March 2012 until 9 April 2012, when paid suspension leave was replaced by unpaid sick leave, in the sum of \$3,336.48;
- (b) Lost wages from the date of dismissal to the date of the investigation meeting in the sum of \$37,535.40;
- (c) Lost wages for the period from the date of the investigation meeting into the future for three years at \$834.12 a week from 28 March 2013;
- (d) Holiday pay and interest on the above sums;
- (e) Compensation of \$10,000 for the suspension and \$30,000 for the dismissal;
- (f) Costs.

The issues

[10] The Authority needs to determine the following issues:

- (a) Were there unjustified actions that disadvantaged Ms Walker at the time of, and during, suspension and if it is found that there were, what remedies should be awarded?
- (b) Was there a full and fair investigation undertaken by Delta at the conclusion of which it could be found by a fair and reasonable employer that misconduct was disclosed on the part of Ms Walker.
- (c) Was the decision of Delta to summarily dismiss Ms Walker what a fair and reasonable employer could have done in all the circumstances at the time?

- (d) If it is found that Ms Walker was unjustifiably dismissed then the Authority will need to consider the issue of remedies including whether there are issues of contribution and mitigation.

[11] In determining the justification of Ms Walker's suspension and dismissal, the Authority is required to do so objectively by applying the test in s.103A of the Employment Relations Act 2000. The test is whether the employer's actions and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[12] In applying the test the Authority must consider four factors specifically set out in s.103A(3) which are summarised below:

- (a) Having regard to the resources available to the Trust, whether the Trust sufficiently investigated the allegations against Ms Walker before dismissing or taking action;
- (b) Whether the Trust raised the concerns it had with Ms Walker before dismissing or taking action against her;
- (c) Whether the Trust gave Ms Walker reasonable opportunity to respond to the concerns before dismissing or taking action against her;
- (d) Whether the Trust genuinely considered Ms Walker's explanation before dismissing or taking action against her.

[13] The Authority may also, as provided under s.103A(4), consider any other factors it thinks appropriate and under s.103A(5) must not determine a dismissal or an action to be unjustifiable because of defects in the process followed if they were minor and did not result in the employee being treated unfairly.

Suspension on 27 February 2012

[14] On 27 February 2012, Ms Walker was asked to attend a meeting with Timothy Weir and Helen Slot-Brand. Mr Weir holds an executive management role at the Trust as its Service Co-ordinator. Ms Slot-Brand is the Chair of the Trust Board.

[15] Ms Walker was given a letter signed by Mr Weir and Ms Slot-Brand which referred to concerns having been raised by an employee Ms Walker managed, Jeanette

Allison. Ms Allison's two statements that she had provided were also given to Ms Walker at this time.

[16] The letter from Mr Weir and Ms Slot-Brand provided the nature of the concerns in the first and second paragraphs as:

Last Friday 26 February 2012 (this must be a mistake as Friday was 24 February 2012) Jeanette Allison came to me with concerns that there have been discrepancies in the receipt and recording of income from clients attending the Friendship Link Programme. Specifically, she has provided evidence from the group attendance record book that on the 14th and 21st of February 2012 a donation from client J received by you as a pre-payment contribution to groups from February-April 2012, was missing. I have since spoken with Justine, J's support worker at C, who confirmed that she had paid money to you, Fiona, on J's behalf. This money does not appear to have been recorded nor handed in to the Administration Office as client income.

Jeanette has observed that at various times in 2011 the Friendship Link \$50 cash float unexplainably did not balance. She has stated that you have taken money from the \$50 cash float to pay third parties without her and Christine knowing whether you had permission to do so. I understand from Jeanette that you replaced the money using future client income. Besides not having permission to do so, I have expressly forbidden the practice of spending cash float money or client income received and communicated this clearly to you on more than one occasion. I have checked with Christine Lawn who has given an initial general confirmation that there were inconsistencies in the balancing of the \$50 cash float and client income received at times during 2011. Christine also confirmed that there appeared to be an oddity in the collection and counting of client income during the Disco last Thursday night.

[17] Ms Walker was asked in the letter to attend a meeting on 29 February 2012 at 10am. It was recommended to her in the letter that she brings a legal representative to the meeting and she was advised that due to the seriousness of the allegations disciplinary action could include a written warning or dismissal.

[18] The penultimate paragraph of the letter provided:

Due to the serious nature of these allegations we consider it appropriate to suspend you immediately on full pay in order to further investigate these matters and to give you time to prepare your response and explanation, however we will not do so until we have heard your views on the proposed suspension.

[19] There was some dispute about what was said at the meeting itself. Mr Weir said that shortly after the meeting he made a file note which was provided as part of a

bundle of documents to the Authority. He relies on that as an accurate record of what was said.

[20] Ms Walker complains about two of the actions of the Trust at the time of, and following, the suspension. The first is that Ms Walker says that she did not have an opportunity to comment on the proposed suspension. The second is that, during the suspension period, after advice that Ms Walker was too unwell to attend a disciplinary meeting; the suspension leave was replaced by sick leave from 12 March 2012. Ms Walker did not have any available sick leave and so was without income until she provided a medical certificate that said she was again fit for work from 8 April 2012, at which time she was again suspended on pay until the outcome of the investigation was known.

Did Ms Walker have an opportunity to comment on the suspension?

[21] Clause 18.3 of the employment agreement deals with serious misconduct/summary dismissal. Clause 18.3.3 provides that:

The employer may suspend the employee with or without pay for serious misconduct at any time after an incident of misconduct. Such action may be taken to enable an appropriate "cooling down" period prior to explanation, or for the purposes of conducting an investigation. Any suspension without pay shall not exceed 48 hours.

[22] There was an express contractual provision for suspension.

[23] In the Employment Court judgment in *Graham v Airways Corp of New Zealand* [2005] ERNZ 587 it was held at [104] that there is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. Ultimately, the test is the fairness and reasonableness in each case of the employer's conduct.

[24] Ms Walker in her oral evidence said that initially during the meeting on 27 February 2012 she advised Mr Weir and Ms Slot-Brand that she did not want to be suspended. She said in her oral evidence that she then said at a point in the meeting "*I suppose I will be anyway*". Ms Walker said that she advised that she could explain about the substantive allegations but was told by Mr Weir that the time for talking was

at the disciplinary meeting. That accords with Mr Weir's recollection set out in his file note that he made it clear the meeting was to hear any views on suspension only.

[25] Mr Weir recorded in his file note that Ms Walker accepted the suspension and made a comment "*well it will be at least a week*". Ms Walker said in her evidence that any such comment was about needing to get a support person/legal advice and that she would probably need a week to organise that. Ms Walker said that when she was asked by Ms Slot-Brand for keys and books she was very agitated and could not think where anything was.

[26] I find it less likely that Ms Walker advised Mr Weir and Ms Slot-Brand that she did not want to be suspended or that she opposed the suspension. I find that Mr Weir and Ms Slot-Brand reasonably concluded that Ms Walker had accepted the suspension by her words at the time. I am strengthened in my view about this by an email disclosed during the Authority's investigation process from Mr Weir to the Board on 28 February 2012 in which he states, amongst other matters:

We got her view on that decision to suspend on full pay, which was to accept it.

[27] The substantive reason for the suspension was set out in the letter of 29 February 2012 to give Ms Walker time to prepare her response and explanation. The allegations she was facing were serious ones. There had been an adequate preliminary investigation I find under s.103(3)(a) with Ms Allison and Ms Lawn so that a fair and reasonable employer could have an initial view on whether there should be suspension. It would have been difficult for Ms Walker to continue in employment with Ms Allison and Ms Lawn in circumstances where she managed both employees whilst an investigation was undertaken. This was highlighted by a comment made by Ms Walker to Ms Allison as she left the suspension meeting that caused Ms Allison to cry – *thank you Jeanette, I'm going home on full pay.*

[28] The first disciplinary meeting was scheduled for two days after suspension although the time for responding was subsequently extended. There was no suggestion that the suspension was to be open-ended without any clear timeframe. It was to be on full pay.

[29] The allegations were set out in a letter dated 27 February 2012 that Ms Walker was invited to read in the meeting. That met the requirements of s.103(3) (b).

[30] I have found that Ms Walker did have a reasonable opportunity to respond to the suspension before it took place under s.103 (3) (c). She gave the impression to Mr Weir and Ms Slot-Brand that she had accepted the suspension and would use the time to obtain advice. I find it was appropriate that Ms Walker was told any explanation (to the substantive issues) should be given at a later time and that the meeting was therefore to hear any views on the suspension action only.

[31] To the extent that there were imperfections in the process I find under s.103A (5) they were minor and did not result in Ms Walker being treated unfairly. I find that the process and the suspension itself were what a fair and reasonable employer could have done in all the circumstances at the time the suspension took place. A personal grievance is not made out about the suspension.

Replacement of paid suspension with sick leave

[32] The Trust's legal representative during its investigation was solicitor Gareth Abdinor. By email dated 1 March 2012, Ms Ryder advised Mr Abdinor that she had received instructions to act for Ms Walker. Ms Ryder said in her email that she was unable to attend the disciplinary meeting which had, in the meantime, been extended to 6 March 2012 and she asked for alternative dates for a disciplinary meeting.

[33] Ms Ryder advised Mr Abdinor that Ms Walker's medical condition had arisen as a result of the allegations. She then provided a medical certificate dated 8 March 2012 that provided Ms Walker had been examined by a doctor and was medically unfit for work (the reason was provided in the certificate but has been withheld in accordance with the non-publication order) and that she should be fit to return to work on 8 April 2012.

[34] There were other exchanges between counsel but materially by email dated 12 March 2012, Mr Abdinor advised that as Ms Walker had been certified as medically unfit to attend work and participate in the investigation process, Delta confirmed that it had lifted her suspension and that it appeared appropriate to place Ms Walker on sick leave. After receipt of this email, Ms Ryder raised a personal grievance in relation to the suspension saying, amongst other matters, *My client is to remain on paid suspension until the investigation is completed.*

[35] By letter dated 14 March 2012, Mr Abdinor questioned the basis of Ms Walker remaining on paid suspension until the completion of the investigation.

By email dated 4 April 2012, Ms Ryder attached her written response to the Trust's allegations and asked for immediate restoration to Ms Walker's paid suspension status and back pay to 13 March 2012. She advised that if the Trust was not prepared to pay Ms Walker then she would advise her to return to work on 9 April 2012 after the medical certificate expired.

[36] By email dated 5 April 2012, Mr Abdinor stated that the Trust required confirmation that Ms Walker was fit to return to work and that, if that confirmation was provided, then paid suspension would resume from that day. It was agreed that Delta would pay for the medical consultation.

[37] Under cover of an email dated 12 April 2012, Ms Ryder provided to Mr Abdinor a medical certificate stating that Ms Walker was seen and examined by her doctor and was in her doctor's opinion medically fit to return to work on 8 April 2012. Paid suspension then continued on the basis set out in Mr Abdinor's letter of 5 April 2012 and was not challenged by Ms Ryder.

[38] Ms Walker was medically unfit to return to work from 8 March until 8 April 2012 and this was confirmed by a medical certificate. Ms Walker was too unwell to attend a disciplinary investigation meeting.

[39] When an employee is medically unfit to attend work it is not an unjustified action for an employer to put that employee on sick leave. The only difference in this case was that Ms Walker was unwell whilst an employee but on paid suspension. What disadvantaged Ms Walker was not the action of substituting paid suspension for sick leave when she was unwell but the fact that her sick leave was exhausted. I could not be satisfied that unjustified motives existed.

[40] I find that a fair and reasonable employer could have put Ms Walker on sick leave rather than have her remain on paid suspension leave until she was medically cleared as fit to return to work. As soon as Delta was provided with a medical certificate that cleared Ms Walker as such, paid suspension was reinstated.

[41] No personal grievance is made out about the replacement of paid suspension with sick leave until Ms Walker was cleared by a medical certificate. I record that the Trust paid the sum of \$150 toward counselling during the suspension period for Ms Walker as well as for the cost of the medical consultation that cleared Ms Walker to return to work.

Leading up to the disciplinary investigation

[42] Matters commenced with Ms Allison advising Mr Weir verbally about her concerns about Ms Walker. It is likely at that time Ms Allison focused on the most recent concern she had that Ms Walker had received money but had not paid it into the Trust for client J.

[43] On Saturday, 25 February 2012, Mr Weir telephoned Ms Allison and asked her if she could put her concerns in writing. Ms Allison did so, writing two separate statements. She explained in her oral evidence that she was prepared to write about J, the more recent matter, as there was clear information. I shall call the statement that largely dealt with payment relating to J the first statement. In that statement, Ms Allison set out in some detail interactions between herself and Ms Walker about payments made by or on behalf of J. Ms Allison referred in that letter to her suspicion that dishonesty was occurring. Ms Allison also provided a second statement in which she set out what she described as some of the difficulties that she had experienced regarding financial anomalies as well as unprofessional conduct by Ms Walker during her employment. In her oral evidence before the Authority, Ms Allison described that statement as containing more generalised concerns.

[44] Mr Weir also spoke to Christine Lawn during the weekend. Ms Lawn was an employee of Delta and was also managed by Ms Walker. Ms Lawn was also a very close friend of Ms Walker and she felt uncomfortable being asked to comment on the situation as outlined by Ms Allison. Mr Weir concluded from his discussions with Ms Lawn, I find not unreasonably, that Ms Lawn could not disagree with the concerns as raised by Ms Allison.

[45] The applicant submits that the process undertaken to investigate concerns was unfair, that Mr Weir should not have conducted the investigation and that the outcome was predetermined. It was also alleged that the Board did not actually make the decision to dismiss as stated by Delta.

[46] Before I move to objectively assess the fairness and reasonableness of the process including the justification of the findings and the decision, I shall set out the process. One of the unique factors in this case was that no disciplinary meeting was ever held. All communication was in writing between Ms Ryder and Mr Abdinor.

The process

[47] Mr Abdinor provided Ms Ryder in a letter dated 6 March 2012 with further particulars of the allegations and a number of supporting documents which also included a statement from Ms Lawn.

[48] On receipt of that material, and before an explanation was provided, Ms Ryder asked in an email dated 19 March 2012 that Mr Abdinor clarify exactly what the allegations against her client were. She said, amongst other matters:

I note that the letter inviting her to a meeting refers to breach of cash handling procedures. Jeanette's statement refers to dishonesty and untrustworthy behaviour. Is that what is being investigated as well?

[49] By letter dated 21 March 2012, Mr Abdinor was stating that the Trust believed it had already clearly set out its concerns and went on to record them again.

[50] At the time that Ms Walker provided her explanations, she had the following documents in which allegations were set out:

- The letter of suspension and Ms Allison's two statements;
- The letter of 6 March 2012 with various supporting documentation and Ms Lawn's statement; and
- The letter of 21 March 2012.

[51] The allegations from the three sources will be set out in more detail when there is objective consideration of the justification for the findings. I am satisfied that the allegations could be discerned from one of the three sources above. There was some criticism of the piecemeal way the allegations were forwarded to Ms Walker. I am satisfied there was no explanation provided until after all the allegations from the three sources had been provided.

Explanation provided 4 April 2012

[52] Ms Walker provided her explanations in writing under cover of an email from Ms Ryder dated 4 April 2012. The first part of her explanations were directed at Ms Allison's statements and the allegations described in the letter of suspension and the second part of the explanations dealt with the allegations referred to in the letter of

6 March 2012. Some of the issues referred to in Ms Allison's letter were not actually treated as allegations by the Trust and when I go on to examine the allegations and Ms Walker's explanations in depth so I can consider the justification of the findings I will not refer to those matters.

Further investigation after explanations provided

[53] On 18 April 2012 Ms Ryder wrote to Mr Abdinor and advised that she looked forward to receiving the Trust's further investigation reports following the response that had been provided. She put Mr Abdinor on notice that she may wish to interview Ms Allison, Ms Lawn and Mr McCahon.

[54] By email dated 2 May 2012 Mr Abdinor attached a report of further investigation undertaken by Delta and pointed out two questions that he wished Ms Walker to answer on the final page. The document provided set out the date and time that Ms Allison and Ms Lawn were interviewed and that Mr McCahon was interviewed at two points between 18 and 26 April 2012. The administrator Janet was also asked some questions and these and the responses to them were set out in the report.

[55] The 16 page report of further investigation set out the concerns, response (explanation), comment, further investigations and conclusions for 14 concerns. There was also a section of the report that dealt with allegations made by Ms Walker about Mr Weir at various times in her explanation. It was found that these allegations were groundless. Two questions were set out. They were; whether Ms Walker continues to have trust and confidence in the Trust and how she believes the Trust can continue to have trust and confidence in her in light of the statements and allegations she has made.

[56] Ms Ryder responded to the report on 7 May 2012 to Mr Abdinor noting that the Trust had not completed its investigations of a couple of issues and said that she looked forward to receiving the further information when it is to hand. She wrote in answer to the questions that Ms Walker does not believe that she has been treated fairly in relation to the investigation and as such this has eroded her trust and confidence in the Trust.

[57] On 10 May 2012 Mr Abdinor enclosed *the completed report* which contains the Trust's findings. He stated in paragraph two of the letter that:

The Trust will now consider whether Fiona's conduct constitutes misconduct and if so, if the misconduct is serious or not. Before it does so it wishes to provide Fiona with an opportunity to put forward any further information or submissions that she would like the Trust to consider before it reaches a decision. The Trust would like to receive any further information by the close of business on Tuesday 15 May 2012.

Mr Abdinor also asked that Ms Walker confirm if she continues to have trust and faith in the Trust.

[58] By email dated 10 May 2012 Ms Ryder asked Mr Abdinor to re-send the investigation report highlighting the additional information that has been inserted into the report since it was last sent. Ms Ryder advised that it was not appropriate or relevant for Ms Walker to answer the question Mr Abdinor asked be answered. Ms Ryder said that she would take instructions in relation to the findings the Trust has made following completion of the investigation.

[59] On the same day Mr Abdinor forwarded to Ms Ryder a further copy of the investigation report with the additional information inserted and highlighted as requested. Of the 14 concerns/allegations in the investigation report 13 were upheld. The Trust no longer had any concerns about the donation.

[60] On 14 May 2012 Mr Abdinor advised Ms Ryder that J had unexpectedly visited the Trust on 10 May and that J stated Ms Walker had not given her any money to pay for groups – this was in response to an explanation from Ms Walker that she may have given \$4 to J to put in the tin.

[61] By email dated 16 May 2012 Mr Abdinor wrote to Ms Ryder and stated *other than your email of 10 May 2012 we have not received any further information or submissions from you in response to our letter of 10 May 2012. Could you please urgently confirm that you don't intend to provide anything further on behalf of your client?*

The disciplinary outcome

[62] By letter dated 21 May 2012 Mr Abdinor advised that there had been no further information or submission in response to his letter of 10 May 2012 and email of 16 May 2012. He went on to say that the Trust had concluded that Ms Walker's actions constitute serious misconduct which have caused the Trust to lose trust and

confidence in Ms Walker and that her employment was terminated effective immediately.

[63] By letter dated 23 May 2012 Ms Ryder advised that her client did not accept the findings and raised a personal grievance for unjustified dismissal on behalf of Ms Walker.

[64] The parties attended mediation but the matter was not resolved.

Was there a full and fair investigation undertaken by Delta at the conclusion of which it could be found by a fair and reasonable employer that serious misconduct was disclosed on the part of Ms Walker

[65] Ms Ryder/Mr Goldstein make a number of criticisms of the process and substantive findings in final submissions that I have identified as follows:

- (a) It was inappropriate for Mr Weir to be the investigator.
- (b) That there was pre-determination of the outcome of the allegations.
- (c) Although said by Delta that the Board made the decision to dismiss the decision was in fact that of Mr Weir.
- (d) The allegations were historical.
- (e) That Delta did not under s103 (3)(a) of the Act sufficiently investigate the allegations.
- (f) That Delta did not under s103 (3)(b) of the Act raise the concerns that Delta had by providing sufficient information about them.
- (g) That Delta did not under s103A (3)(c) provide Ms Walker with a reasonable opportunity to respond to the concerns.
- (h) That Delta did not genuinely consider Ms Walker's explanations under s103A (3)(d).
- (i) That a fair and reasonable employer could not have made findings that Ms Walker's conduct amounted to serious misconduct in all the circumstances.

Was there a full and fair investigation undertaken by Delta at the conclusion of which it could be found by a fair and reasonable employer that misconduct was disclosed on the part of Ms Walker?

Mr Weir as investigator

[66] Mr Weir holds the equivalent of a Chief Executive position in Delta.

[67] Documents had been disclosed after Ms Walker's terminations that have now been relied on in the applicant's submissions in support of the view that it was inappropriate for him to have been the investigator. The Authority was directed in the main to an email dated 10 February 2012 sent by Mr Weir *confidentially to the Board* (page 242 of the bundle). This email was in response to Ms Walker's own report to the Board dated 10 February 2012 in which she said amongst other matters *To carry DFL forward and successfully work with Tim and under your guidance I must be allowed to be the manager and then manage as **my** personality dictates.*

[68] Mr Weir in his email expressed concerns about Ms Walker's understanding or comprehension of the managerial, administrative and organisational requirement he had requested of her in her managerial role. Mr Weir expressed that he felt that Ms Walker had repeatedly resisted or failed to comply with instructions and in some cases deliberately disobeyed and undermined. He referred to a possible engagement in a restructuring process on the basis that the role had grown beyond Ms Walker's capability, skills and knowledge or the issue of a warning.

[69] I accept Mr Hargreaves submission that an employer having prior concerns about an employee and even a preliminary view about how to deal with those concerns does not mean that it is as Ms Ryder put in her submissions *totally inappropriate* that Mr Weir investigate allegations made by another employee about Ms Walker. Whether Mr Weir's involvement as investigator caused unfairness is a matter I will return to a part of an assessment into the overall substantive fairness and reasonableness.

Who made the decision to dismiss?

[70] The evidence from Rev. Jason King was that the Board had made the decision to dismiss and that in doing so it relied on the 13 allegations found to have substance in the investigation report. Ms Ryder/Mr Goldstein submit that the Authority should

not be satisfied that in fact Mr Weir was the decision maker. I have no good reason not to accept the evidence of Rev. King and of Mr Weir that the Board made the decision to dismiss and not Mr Weir. I do accept from reading the material provided and hearing the evidence there did not always appear to be a clear distinction between the investigative role undertaken by Mr Weir and the decision making role of the Board. The Board accepted all of the conclusions about the various allegations in the report tabled.

Predetermination

[71] Ms Ryder/Mr Goldstein submits there was pre-determination of the decision to dismiss. An email sent by Mr Weir to the Board on 24 February 2012, the day Ms Allison raised her concerns is relied on. In that email Mr Weir states that his trust in Ms Walker was being completely undermined and that he was of a mind to undertake an *instant dismissal* for theft. He also makes it clear in the same email that he intends to and in fact did instruct a lawyer, who *we* can consult and go through the procedure correctly.

[72] In light of my findings as to who made the decision in [70] the most appropriate way forward is to objectively consider the fairness of the process and the reasonableness of the findings rather than deal with the issue of pre-determination in a vacuum. I shall then return to consider whether the investigation leading to the conclusions in the investigation report and the decision making process leading to a decision to dismiss was undertaken in an open and unbiased manner.

Historical nature of the concerns

[73] Ms Walker was concerned about the historical nature of the concerns. Whether it is unfair and unreasonable for an employer to put forward as allegations historical matters depends very much on the circumstances of each case and what the allegation is about. Ms Walker as manager of the Friendship Link Division had considerable control over cash handling processes. She managed other employees who looked to her for guidance. Ms Allison said in her second statement that she had been reluctant to challenge issues with Ms Walker about accountability as it resulted often in a nasty atmosphere. In those circumstances I do not find that it is unreasonable for the Trust on being advised of a recent concern and some other more historical matters to ask Ms Walker for explanation about accounting for client

income and petty cash money within the Friendship Link Division even though the events went back in time to 2010.

Should the Trust have continued to attempt to get Ms Walker to attend a meeting in person

[74] A fair and reasonable employer could be expected during a disciplinary investigation to strongly encourage and even insist on attendance by an employee at a face to face meeting so that an explanation can be given. In the absence of input from an employee the process, both of investigation and decision making, is very difficult. Questions and answers do not flow naturally as they do in a conversation/interview. Before a decision is made there is no ability to sensibly explore options and alternatives with an employee.

[75] It was certainly the emphasis of the Trust at the start of the process to have Ms Walker attend a meeting. Ms Ryder then advised her client was too unwell to attend a meeting and explanations were provided in writing. After Ms Walker was confirmed well enough to return to work there appears to have been no continued pressure on Ms Walker to attend a meeting. Ms Walker after providing an initial written explanation essentially took no further part in the process at all.

[76] I am satisfied after hearing from two expert witnesses at the Authority investigation meeting that Ms Walker was very unwell from the time she was first advised of the allegations. Her own expert witness said that attendance at the disciplinary meeting could have caused deterioration to her condition and there was nothing to suggest that Ms Walker would, even if there was insistence, have attended a meeting with the Trust. It would be unfair in those circumstances to be critical of the Trust. Additionally the Trust had no way of knowing that Ms Walker was so unwell because they had been provided with a medical certificate that Ms Walker was fit for work from 12 April 2012 and she thereafter remained on paid suspension until her dismissal rather than sick leave. There was no request for an adjournment of the process until Ms Walker was well enough.

The employment agreement

[77] Ms Walker was party to a written individual employment agreement with Delta dated June 2010. The relevant provisions are contained in clause 18.0 that deals with disciplinary and dismissal procedures. Clause 18.3.2 provides a description of

the sorts of matters that may amount to serious misconduct. Clause 18.2.4 provides that the employee should be allowed to explain her behaviour and such explanation should be considered by the employer before making a decision to dismiss.

[78] Clause 5.1 enabled the employer to make such rules relating to the performance of the work and conduct of employees as may be deemed necessary for efficient operations and good order.

[79] Ms Walker noted that one of the objectives set out in the employment agreement in 2.1 (c) of the Trust was *To alleviate the difficulties of those experiencing hardships of whatever kind, including financial hardship and to bring relief through whatever means are available.*

Was there an opportunity for Ms Walker to respond to the report containing further investigations and conclusions before the decision to dismiss was made?

[80] Ms Ryder/Mr Goldstein submit that there was no further opportunity after Ms Walker had provided her explanation for her to respond to the draft report. The Authority has considered as relevant to this matter the email of 2 May, the letter of 10 May and the email of 16 May 2012 from Mr Abdinor to Ms Walker. Ms Ryder/Mr Goldstein submit that the email of 2 May accompanying the investigation report only asked of Ms Walker that she respond to the trust and confidence issues.

[81] I take into account that Ms Walker was represented by experienced counsel and the report attached to the email sets out Ms Walker's response and comment on that and the result of further investigations as well as a conclusion. There was nothing to suggest that Ms Walker could not give a further explanation if she so wanted as there would be in any disciplinary procedure when as a result of further investigations new matters are raised or further questions arise. The difference in this case was that there was not going to be a meeting. As stated earlier there was no request for an adjournment on the basis that Ms Walker was not well enough to attend.

[82] If I am wrong about that matter and such opportunity to explain was not reasonably clear from the 2 May email then on 10 May 2012 Mr Abdinor in his letter wrote to Ms Ryder specifically advising that the Trust wanted to provide Ms Walker with an opportunity to put forward any further information or submission she wanted the Trust to consider before it reached a decision on whether her conduct constitutes

misconduct and if so, if the misconduct is serious or not. There was some suggestion that there was no point making any further submission because the findings had already been made. I do not accept that. I find that there was opportunity and ability to explain and at that time the ability to do so was clear and beyond doubt.

[83] Ms Walker in her evidence to the Authority said that she did not reply because the Trust had already made its findings and she said that she thought *they hadn't listened to her anyway* and it was *an ambush* from day one and *she had no doubt they wanted her out*.

[84] On 16 May 2012 Mr Abdinor emailed Ms Ryder again noting that no further information or submission had been received in response to his letter of 10 May 2012. He asked Ms Ryder to urgently confirm that she did not intend to provide anything further on behalf of her client. There was no response and on 21 May 2012 the Trust through Mr Abdinor delivered its decision.

[85] In conclusion I find that there was an opportunity for Ms Walker to have made comment on, and/or provide further explanation to the matters in the further investigation report before the decision to dismiss was made.

[86] It is helpful in this particular case to set out each of the thirteen allegations found to have been established and assess procedural fairness and justification for each. It is important to note that the explanation I have referred to as having been given by Ms Walker as I go through this process is that given in writing by Ms Walker at the time of the investigation. Justification for a dismissal is to be assessed at the time of the dismissal.

Failing to account for money given to Ms Walker by J's support worker, record how much money was received and for what purpose and failing to ensure the money paid was actually received by the Trust

[87] This allegation was clearly put to Ms Walker. She had an opportunity to explain. Sufficient information was provided to enable an explanation. Ms Walker accepted that she had received \$8.00 from J's support worker but said there was confusion as to what groups were paid for on behalf of J. She agreed that she told Ms Allison that J had paid for the Friendship Link Group on 14 February and says by way of explanation that she put the \$4 for J herself into the tin or she gave the money to J to do so on 14 February 2012.

[88] There was further, and I find adequate, investigation about this explanation undertaken by Mr Weir with Ms Allison, Ms Lawn and with J. Ms Walker was advised of the outcome of the investigation. She did not explain further. Ms Allison said that no money was given to her by Ms Walker or J on 14 February and that she recorded in the client record book that J did not pay for the Friendship group on 14 February and that Ms Walker had the money. J said that she was not given any money by Ms Walker. It was agreed that on 21 February at another group at which J attended Ms Walker gave Ms Allison \$4.40 following Ms Allison again raising with her the issue of payment for J. That left a balance unaccounted for of \$3.60.

[89] Mr Weir concluded that there were some inconsistencies with Ms Walker's explanation. Ms Walker said that she was confused about what groups had been paid for on behalf of J and provided a page from a notepad on which she had written *J Pamper February/March* with her explanation. It was open to a fair and reasonable employer to conclude if that was correct that would only have been a \$6 payment required for the balance of groups for February and for March at \$2 per group. It is also less likely where money is paid on the day that the Friendship Link Group is taking place there could be confusion about what the money was actually paid for.

[90] Ms Walker also explained that she told Mr McCahon on 21 February 2012 that she had lost \$4. That was after she had given Ms Allison \$4.40 for J on 21 February. That is inconsistent with Ms Walker's explanation that she put \$4 into the tin either herself or got J to do so on 14 February 2012. Had she done so that would mean there was no money missing or unaccounted for as at 21 February 2012 and in fact she had paid 40 cents too much. That then leads to the next explanation that Ms Walker gave that when she talked to Mr McCahon she thought that she must have been given \$12 by J's support person for later pamper groups as well as the friendship group. That though it could fairly and reasonably be concluded is inconsistent with Ms Walker's own written note of what the money was for, the written record in the client record book of 14 February that payment of \$4 was not made and the action of advising Mr McCahon that \$4 was missing as at 21 February 2013.

[91] I find that it was available for a fair and reasonable employer to conclude that payment was not made by Ms Walker or J of \$4 on 14 February 2012.

[92] There were issues raised about the credibility of Ms Allison and Ms Lawn not only in relation to this concern but generally. In relation to this matter objectively

assessed, most of what Ms Allison said about the various approaches to Ms Walker about money paid on behalf of J was confirmed by Ms Walker. If Ms Allison was trying to set Ms Walker up, as seems to be alleged, it is unlikely that she would have asked Ms Walker to confirm the payment was made on behalf of J on both 14 and 21 February 2012. It is more likely that she would have said nothing on either day and simply waited to see if payment was made. After a further request was made on 21 February Ms Walker did go and get the sum of \$4.40 from her office to be paid on behalf of J. I find that a fair and reasonable employer could conclude that Ms Allison's account of what occurred was credible.

[93] I find that a fair and reasonable employer could have concluded that Ms Walker failed to record how much money was received on behalf of J and for what purpose. A fair and reasonable employer could conclude that Ms Walker failed to ensure that the money in the sum of \$3.60 paid by a client's support worker was received by the Trust.

[94] Failure to ensure money paid on behalf of J was received by the Trust could justifiably be regarded by a fair and reasonable employer as a serious omission or performance failing on the part of a manager. The explanation was not one that payment was simply overlooked which could have, considered in isolation, been a less serious matter. The explanation was that payment had actually been made and a fair and reasonable employer could conclude it had not been.

Having G initial a client income slip on 4 October 2011 despite having been instructed the previous day by Mr Weir and Ms Slot-Brand that G was not to have any involvement with cash handling due to him having admitted breaking in and stealing petty cash

[95] Ms Walker accepted that she had G sign the client income slip on 4 October 2011. She explained that she could not recall the specific instruction that G was not to sign client income slips but did recall that he was not to be involved in counting the money or left alone with the money and she adhered to that instruction. Ms Ryder/Mr Goldstein submit the unfairness about this matter was that Mr Weir had already dealt with the allegation about G because it appeared in Ms Walker performance appraisal – page 241 of the bundle as under any comments pertaining to the employee's performance not yet mentioned – *React personally and can be 'childish' vindictive/spiteful/undermining eg getting G to sign income slip on 4/10*

after our tense meeting with Helen on 3/10. Ms Walker says that she had not, prior to it being provided for the purposes of the Authority investigation meeting, seen the last page of her performance appraisal which contained this comment. Mr Weir accepted that Ms Walker had not responded to the concern about G and I accept from her explanation about this matter she was, in all likelihood, simply not aware of it.

[96] If an employer discovers there has been misconduct but overlooks it and continues the employment then the employer is taken to have affirmed the employment and cannot subsequently dismiss the employee in reliance on that conduct - *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421. In this case I find that the concern about G signing the client income slip was intended to be put to Ms Walker in a way she could properly respond to at an earlier stage. That did not happen. The matter was then raised together with other allegations in Ms Allison's second written statement provided at the start of the investigation process. Ms Allison expressed the action as *an act of defiance against Mr Weir's rulings* and said that as it took place in the presence of both Ms Allison and Ms Lawn it was *a very bad error of judgment*. I find that it was able to be put to Ms Walker and it was a matter that was able to be taken into account.

[97] A fair and reasonable employer could have concluded that Ms Walker understood the policy of the Trust that two people are to count and attest to the amount of money received by both signing the client income slip. The Trust could conclude that Ms Walker as a manager did not follow a reasonable instruction that G was not to be involved with client income because she knew that the other person signing the slip should have been the person who counted the money. Ms Walker knew that G was not allowed to count the money and it was not suggested by Ms Walker in her explanation that G was able to confirm that the amount of money was received before he signed. Ms Allison and Ms Lawn were present when this signing took place. I find that a fair and reasonable employer could conclude that there was some deliberateness in relation to this matter to involve G in some way given the earlier instruction.

Ms Walker giving G \$10 from the Friendship Link petty cash float and telling Christine that she had taken it to give it to G for a haircut. Money was replaced the Trust understands after Ms Lawn asked repeatedly for Ms Walker to do so

[98] Ms Walker denied this allegation. Adequate information was provided about it and there was an opportunity for explanation which was considered and further investigation undertaken..

[99] Ms Lawn was a reluctant participant in the process involving investigation of allegations made against Ms Walker. She had been a very good friend of Ms Walker's for many years. This was a historical matter, having occurred in the latter part of 2010 and a degree of care was required in those circumstances. There was an attempt by Mr Weir to talk to G but it was recorded in the report that G said he did not want to talk to Mr Weir and would not discuss it. It was also set out that G had previously sent abusive messages to other members of the Trust's staff and he was not considered a credible witness. That was not an unreasonable view.

[100] There was a further interview appropriately with Ms Lawn after Ms Walker denied the allegation. Ms Lawn said that she did not feel comfortable about what had happened with the payment out of the petty cash float and did not think it was right. She was asked why she did not report it at the time. Ms Lawn said that because Ms Walker gave the money back she did not see it as a big issue but would have reported it had Ms Walker not paid the money back when asked to.

[101] I find that a fair and reasonable employer could conclude that it was unlikely that Ms Lawn's recollection of this would be unreliable or that she would simply make this matter up. A fair and reasonable employer could conclude that even though the money was repaid it was outside of Ms Walker's authority to use the petty cash in this way. Some emphasis appeared to be placed on Ms Lawn reminding of the need for repayment. I do not find that was unreasonable because it could be contrasted with a reimbursement without the need for any prompting.

On 22 February 2011 Ms Walker should have received \$19 for the Active Group and should have billed the client from Skillwise. This \$19 appears not to have been received and the client was not billed

[102] This was the day of the significant earthquake in Christchurch. Adequate information was provided about the money having been received for Ms Walker to

explain. Ms Walker explained that she did not know what had happened to the money. The report setting out further investigations provided that it was recorded in the client record book that \$19 was received for attendance at the Active Group and there was \$3 to bill to Skillwise. It was recorded [additionally in the report] that the client income would have been received at the beginning of the group in the morning of 22 February 2011 two hours before the earthquake. It was stated additionally that Ms Walker took the petty cash float and client income kept in a lockable cash tin home telling Mr Weir and staff that it was to keep it safe. It was also stated that no client income slip was ever submitted and neither did Ms Walker advise that the money was missing.

[103] Ms Walker did not respond to these additional matters. The evidence at the Authority investigation meeting satisfied me that there had been investigation undertaken into whether the money could have subsequently been banked notwithstanding no client income slip had been submitted with the money. Although not disclosed in the final report the Trust concluded that the \$19 was not banked when groups started up again and there was the first banking after the earthquake. I was provided with the relevant group attendance sheets and the client income slip for the first groups back at Friendship Link on 19, 20, 21 and 26 April.

[104] Ms Walker did not respond to whether she had taken the client income home although there was no conclusion reached from the information that Ms Walker was dishonest with the money. A fair and reasonable employer could conclude that money was paid and receipted on 22 February 2011 for the Active Group in the sum of \$19 before the earthquake struck; that there had been no client income slip submitted for the \$19 subsequently and it appeared reasonably clear that the money had never been received by the Trust. There was no conclusion about the allegation about failing to bill the client \$3 from Skillwise so I conclude that matter was not relied on. The Trust was alive to the possibility that the money had gone missing although that was not Ms Walker's explanation.

[105] It was available to a fair and reasonable employer to have concluded that Ms Walker, the person ultimately responsible for managing the running of the programmes of group activities at the Friendship Link, failed to ensure that the funds paid by the Active Group of \$19 were received by the Trust and/or advise administration or Mr Weir that \$19 was missing. The process with respect to this

allegation was fair. A fair and reasonable employer could regard this as a performance failing.

Only \$20 was received from clients for the Go Clubbing Group during 2010. The only receipt by Ms Walker appears to be for 13 May 2010 and there appears to be no other record of any other funds received for the other Go Clubbing Group events in 2010

[106] Ms Walker explained that the Go Clubbing group was her initiative and it took place outside normal working hours. She said that the club worked on a donation basis with discretion not to charge people if they did not have the money for it. She said that funds received were mostly used to purchase refreshments during the evening for those who could not afford it and she often paid for refreshments herself. Ms Walker said that any other money was accounted for. The allegation I find was fairly and reasonably put although historical because it was unusual for no money other than \$20 to be received by the Trust over a year for any one group.

[107] Ms Ryder/Mr Goldstein submit that the explanation given was that Ms Walker had spent the client's own money on refreshments because they had given it to her to purchase chips and refreshments rather than the donation that is payable for attendance at the group itself. I have reread the explanation provided in light of that submission. I do not find that a fair and reasonable employer could have taken the explanation to apply to that more restricted meaning. The interpretation in the submission when read with the actual explanation would mean that Ms Walker was using client's money they had come along with for food and drink to buy refreshments for other people.

[108] If Ms Walker wanted to convey that she was not using the costs of attending the Group (donation money of \$2) to buy food and refreshment then she did not explain further when there was an opportunity to do so. Ms Walker said in her evidence that she simply chose not to charge clients \$2 from Clubbing night at all and the only reason there was money collected in May 2010 was because Ms Lawn was there. In fairness the Trust could not possibly have known that was her explanation at the time it made its decision. At best what it had before it was that Ms Walker exercised her discretion not to charge people if they did not have the money, not that she elected not to charge at all.

[109] Katherine Pont provided a statement which was attached to the explanation. Ms Pont was employed to coordinate various groups. She said that Clubbing night was at no cost to the client. I find that it was available to a fair and reasonable employer to conclude that Go Clubbing was understood by clients and the Trust itself to be a Friendship Link group and that it was advertised in the programme of groups by Ms Walker with a cost of \$2. It was accepted that money for food and drinks was each person's own responsibility.

[110] From the explanation provided it was available to a fair and reasonable employer to conclude that Ms Walker did receive money from clients at Go Clubbing events by way of a donation for the Group which was not recorded. It was available to the Trust to conclude that this was not in accordance with the cash handling policy that required accurate accounting for client income by way of recording who attended at each group and the amount paid. I find that a conclusion could be reached that Ms Walker was aware during 2010 of the required procedure to account for client income and not to spend it. To prevent client income being spent there had been a Friendship Link visa card established in October 2008 as a replacement for petty cash. This changed in October 2009 to a Friendship Link Eftpos card. Statements attached to the investigation report from the Eftpos Card showed at two Go Clubbing Groups Ms Walker had used the card; 11 March 2010 \$20 on a bowl of fries and on 10 June 2010 the sum of \$25 was shown as spent at one of the Go Clubbing Groups. These were supplied to Ms Walker.

[111] Although Ms Walker said in explanation that all funds received were accounted for I find a fair and reasonable employer could conclude that there was no written record, aside from 13 May 2010, of any income received from clients or receipts showing what had been purchased with the client income during the Go Clubbing events for 2010.

[112] I find that a fair and reasonable employer could conclude that Ms Walker at the Go Clubbing events in breach of the required procedures did not record payments received from clients, spent client income in breach of the instructions and did not account for what had been purchased with the income.

Since 13 April 2010 Ms Walker appears to have increased the petty cash float from \$40 to \$50, apparently from client funds, without permission

[113] Ms Walker denied this concern without elaboration. There was a petty cash float voucher attached to the initial allegation that confirmed as at 13 April 2010 the petty cash float was \$40. The investigation report provided that Mr Weir was unaware that the float had increased to \$50 until after the concerns were raised with him by Ms Allison and Ms Lawn. They both understood the petty cash float was \$50.

[114] The Trust could find no records as to how the petty cash float was increased. Some reliance was placed on Ms Allison and Ms Lawn reporting Ms Walker using client income to make up shortfalls in the petty cash float balance to explain the increase. Ms Walker did not explain that matter further.

[115] The Trust concluded that Ms Walker failed to account for funds in the petty cash float. In the absence of any explanation or suitable record about how the petty cash float was increased from \$40 I find this was open to a fair and reasonable employer to reach that conclusion and conclude that was a serious omission.

Ms Lawn and Ms Allison found the petty cash float to be short on several occasions which were noted in the client record book. This stopped happening after they started counting the petty cash at the beginning of each day before the groups

[116] The information in support of this allegation supplied to Ms Walker consisted of five pages from the client record book showing at the top the float balance. Ms Allison started recording when petty cash was short. For the Friendship Group on 13 September 2011 the float balance was written as \$34. On 5 October 2011 it was written as \$37.80. On 12 October 2011 it was written as \$38 and on another undated page it was written as \$41.60. The last page showed the float as back to \$50.

[117] Ms Walker denied any responsibility for any shortage in the float money and said that Ms Allison and Ms Lawn had more dealing with the money than she did. The only explanation about any shortfall from Ms Walker was that it could have been used to purchase milk and Ms Allison or Ms Lawn did not use the proper process to have petty cash reimbursed by Administration.

[118] The further investigations of Ms Allison and Ms Lawn provided that they both told Ms Walker when the petty cash was short. Ms Allison said that Ms Walker would

respond by saying *don't worry about it and once the groups are up and running normally again we will sort it out* or *she would use an excuse that she could not keep track as she was under stress and pressure.*

[119] There was also a comment in the investigation report to Ms Walker's explanation that Ms Lawn and Ms Allison have more dealings with the money than she did. The report stated that Ms Walker's longer hours meant that Ms Allison and Ms Lawn were only very infrequently alone in the Friendship Link office with access to the petty cash float whereas Ms Walker often finished work later than them and was alone with the money. Ms Walker did not explain further.

[120] Notwithstanding the comment about who had access to the petty cash float the Trust did not and could not, fairly and reasonably have concluded that Ms Walker was responsible for the shortfalls from time to time in the petty cash float. There was no convincing proof of that only suspicion.

[121] I find that a fair and reasonable employer could accept the statements from Ms Allison and Ms Lawn that they advised Ms Walker when the petty cash float was short. There was no good reason why they would not report that to their manager or that they would simply make up that they had. A fair and reasonable employer could conclude that if milk had been purchased Ms Allison and Ms Lawn would not have had to report the shortfall to Ms Walker because they would know why there was a shortfall.

[122] There was no clear conclusion set out in the report under this concern about how the shortfall in petty cash was made up. The inference from the previous concern was that Ms Walker simply used client income to make up the short-falls and that was what Ms Allison had written in her second statement at the time of the allegations – *Petty cash often being short. The shortfall then gets made up from the next attendance group. Questioning Fiona about the shortfall is futile. She always has an explanation with no back up proof. As her employee, I have to accept that she is telling the truth (during the latter part of 2011, I started the day by checking the petty cash before and after every group as there were so many anomalies).*

[123] The proper procedure if money had been spent from the float was to obtain reimbursement from administration on production of a receipt. The Trust could reasonably conclude that Ms Walker knew about this procedure because it formed

part of her explanation about reimbursement for milk purchased. I find in the absence of an explanation from Ms Walker as to how any shortfalls were made up the Trust could conclude in those circumstances that they were not made up in the usual way on production of receipts by a payment from the Trust administrator.

[124] A fair and reasonable employer could conclude that Ms Walker in her management role failed to account for funds in the petty cash float. This could be viewed as a serious omission because it obscured any accountability as to what had been received by way of client income and how the petty cash float was made up.

Ms Allison and Ms Lawn advised the Trust that it is a frequent practice of Ms Walker after a big event to take money to her office and start counting it while the other cleaned up. It was only then that one of them would be asked to check the money and sign off

[125] The period over which this was alleged to have occurred was prior to September 2010. Ms Walker denied this allegation saying in any event it was not an uncommon practice at Delta. Although not recorded by Mr Weir, Mr McCahon who was also in a management role accepted that he counted money in this way and had advised Mr Weir of this. It was unfair that this did not appear in the report.

[126] The allegation was a very general one and there were no specifics as to what events it was alleged this had occurred at so that Ms Walker could properly answer it. The procedural unfairness with respect to this allegation means that I am not satisfied a fair and reasonable employer could conclude when and where money was counted alone and whether the practice of counting money was clearly unacceptable at the time it was done. I do not find that a fair and reasonable employer could find this allegation established.

Looking at the overall picture of client donations and income for the Friendship Link there are big discrepancies in income received compared with client contact?

[127] This allegation was a very broad one. There was little, if any, supporting documentation provided that demonstrated any big discrepancies to enable Ms Walker to properly answer this allegation. Ms Walker explained that it is a Christian and donation based programme where if people do not have the money to pay they are not required to. She said that there had never been a requirement for Ms Walker, Ms Allison or Ms Lawn to record who did not pay. Mr Weir concluded that he had

instructed Ms Walker to record who does and does not pay and that Ms Allison and Ms Lawn did record in this way whether clients paid or did not. In the investigation report Mr Weir noted that he had requested from 2008 that Ms Walker implement a policy or accounting for client income by recording how many clients paid and how much.

[128] I do not find with such broad ranging allegations and in the absence of specific examples Ms Walker was able to fairly and reasonably answer this allegation. In those circumstances the Trust could not without more investigation and provision of specific information properly conclude that Ms Walker did not adequately address its concerns regarding the discrepancies between client attendance and income received.

The Trust understands Fiona's mother paid for P to attend the Friendship Link. This money does not appear to have been received by the Admin office nor produced by Ms Walker at the time of each group

[129] Ms Walker accepted in her explanation that her mother did not pay for P in 2011 because she did not have the heart to ask her for the money. She said that her mother paid though for P in late 2009 early 2010 and *obviously Delta is aware of the payment.* Ms Walker said that she gave P grace for the whole year [2011] and believed that she had the authority and discretion to do so.

[130] On further investigation in the report it was stated that any payment by Ms Walker's mother at the end of 2009 or 2010 if made was not recorded separately in the accounts as a donation by Ms Walker's mother for payment for P's attendance at groups for 2009 or 2010. It was stated that more detailed specifics of the date it was made, whether it was made by cheque or bank transfer and if by cash whether it was submitted along with other client income would have to be provided to locate if such a payment was made from the records.

[131] Ms Allison was questioned further and advised that Ms Walker said that her mother paid for P on a number of occasions. It was concluded that Ms Walker misled Ms Allison by saying that her mother paid for P to attend the Friendship Link when she had decided not to charge P for 2011 and that Ms Walker should have referred the matter to Mr Weir rather than deciding herself not to charge P given the family relationship. The Trust administrator was questioned and she stated she could not recall ever receiving prepayments of group donations for Friendship Link clients.

Ms Walker did not provide a further explanation or any information about how the payment for P was made in 2009/2010.

[132] It was open to the Trust to conclude that Ms Walker should have told Ms Allison about her decision to give P grace for 2011 so that any record of P's attendance at groups was accurate and there was no expectation that payment would be forthcoming from a source when it was not going to be. It was open to the Trust to conclude where there was some family involvement Ms Walker should have talked to Mr Weir about whether Ms Walker's mother should be charged or not. This was a performance matter about the need for transparency and accountability about money.

[133] Ms Walker never responded to the Trust with details of how her mother had paid money in 2009/2010 at the time of the investigation as requested so no conclusion could be reached about that. In her evidence to the Authority Ms Walker said that her mother wanted to remain an anonymous donor so Ms Walker paid the money over a period of 10 months by way of ten separate payments by putting the money into other client donations at various groups. There was nothing to suggest that it would be clear that the money had been paid on behalf of P. At the time of the investigation the Trust was willing to investigate further the comment from Ms Walker *Delta is obviously aware of the payment* made in 2009/2010 but that would, as it transpired, have been fruitless.

The Trust understands that Ms Walker has previously charged clients \$1 for a pickup from the Bus Exchange and \$2 towards taxi fares to take them home after. Why these payments were never separated out from client donations for the group they were attending and the money does not appear to have been handed into the administration office

[134] Ms Walker explained that all money received was accounted for in one lump sum and that there was never a requirement to itemise out the source of funding for the disco night into transport and donations. She said that all money was paid to the Trust.

[135] The investigation report concluded that Ms Walker had once briefly discussed charging for transport costs and that Mr Weir had asked that it be separately accounted for. The report provides that neither Mr Weir nor the administrator were aware transport was being charged and transport charges are not a donation and

should have incurred GST. The conclusion was that Ms Walker failed to account for client income received and failed to follow the reasonable instruction to account for transport charges separately.

[136] I find that this was an example of where further information was required to be provided to Ms Walker before the first conclusion could be reached that Ms Walker failed to account for the transport payments received. It is not enough in my view that simply there was no separate accounting. Details of the relevant client income reports would have needed to have been provided to ascertain if it was clear whether some clients had paid more than the donation or not. I do not conclude that there was enough information provided or sufficient investigation about this allegation. I find that it would have been fairer to have a person other than Mr Weir investigate the nature of any instruction given about the proposed transport charges. A fair and reasonable employer would have had to have reached a conclusion whether there was a clear instruction that there should be separate accounting for the transport costs (there appeared to be one brief comment) so as to conclude Ms Walker failed to follow the instruction. Her explanation was that there was never such an instruction. Whilst the requirement to account for transport costs separately was reasonable I do not find that a fair and reasonable employer could have been satisfied of both the matters it had concluded had occurred under this head.

An oddity in the collection and counting of client income during the Disco night in January 2012

[137] Ms Walker denied this. The specific concern was whether Ms Lawn [as Ms Allison had stated in her second statement] had identified client donations which Ms Walker had placed separately from the other money received which she was concerned would not have been included if Ms Lawn had not made sure it was included and counted. Ms Lawn on further questioning could not remember talking to Ms Allison about this but said that she did remember thinking there was a large discrepancy in the number of plates she was told to prepare for supper based on people who entered compared to the amount of money counted even allowing for support staff.

[138] There was an absence of specific information about this allegation. There was Ms Lawn's statement that she could not recall advising Ms Allison about money kept separately from other donations. That left as a matter to be answered a view on

Ms Lawn's part that there was a large discrepancy between the plates she was told to prepare and money collected at the end of the event. I am not satisfied that the Trust could conclude from that without any other information that Ms Walker failed to accurately record client attendance and account for client funds received on the Disco Night. I do not find that a fair and reasonable employer could conclude this allegation was established.

Taking money from the petty cash float and giving it to a third party in breach of authority and instructions received

[139] Ms Walker explained that she recalled a situation in 2011 when on a whim she took \$20 out of the petty cash float and gave it to a pregnant needy woman who had come in for a food parcel. Ms Walker said that she spoke to Ms Lawn at the time and it was discussed that \$20 could be made up from further donations (client income). Ms Walker queried in her explanation why if Ms Allison and Ms Lawn had an issue with her *act of kindness* they had not raised it at the time. Ms Walker also said that it was her understanding that any communication about expressly forbidding spending float money and client income occurred after the incident.

[140] Ms Lawn was questioned further. She said that she was not present when Ms Walker gave the money to the woman and does not remember Ms Walker asking whether they should make it up from client income. She said that she did remember on previous occasions during 2011 where the petty cash float was short Ms Walker told her they would make it up from client money. She said that she did not approve of it and did not say anything in agreement of the practice but felt uncomfortable as Ms Walker was her manager.

[141] Mr Weir, it is recorded in the investigation report, did not accept that Ms Walker did not know the practice of spending the petty cash float and client income was expressly forbidden referring to the issue of both the Visa Card in 2008 and the EFTPOS card in 2009. The EFTPOS card it was stated in the report was provided to Ms Walker because she using client income received on Movie night to buy fish and chips and this obscured accurate accounting for the client income on the night. Mr Weir states that he again communicated that the spending of petty cash and client income was unacceptable at the time the petty cash float was stolen by G and replaced on 12 April 2010. Mr Weir said previously to this Ms Walker had maintained that she used her own money to top up petty cash as a reason why she

could take and use money for her own purposes. Mr Weir stated in the report that he told Ms Walker that this was not an acceptable and transparent practice and if an increase is approved it should be done so through the Trust fund and properly recorded in the Trust financial systems.

[142] In the absence of any further explanation I find that a fair and reasonable employer could regard the conduct of taking money from the petty cash float and giving it to a third party was in breach of Ms Walker's authority and instructions received. Although the explanation was that it was paid for kind hearted reasons it is the sort of conduct that a fair and reasonable employer could regard as unacceptable because it involved payment of the Trust's money and thereafter the repayment of the money effectively obscured any accountability for it. Had Ms Walker explained to Mr Weir or administration what had occurred immediately then because of the caring Christian nature of the organisation the conduct may not have been viewed as seriously as it would have been in most organisations. That did not happen.

Conclusion on Justification

Process

[143] I am not required to pedantically scrutinise the Trust's process rather I have considered overall fairness and reasonableness. I am satisfied that there was overall a fair and reasonable process, given the very real difficulties of limited explanations and no face to face meeting, for nine but not for four of the allegations. There was adequate information provided about the nine allegations, an opportunity for explanations given, admissions about some of the conduct and a further opportunity for explanation about further investigations and conclusions.

[144] There was some initial basis for a concern about pre-determination about a decision to dismiss. On careful reflection I am not satisfied that the investigation was undertaken without an open mind into nine of the allegations or that there was pre-determination that there would be a dismissal regardless of any explanation. In support of that I rely particularly on the further investigations undertaken and the opportunity to respond further. Although not a perfect process I conclude with the exception of four allegations it was how a fair and reasonable employer could have done its process in the circumstances.

Substance

[145] Although the correct categorisation of the conduct disclosed may not easily fall within a description of serious misconduct ultimately the statutory test is not whether dismissal for serious misconduct is justified but whether what the Trust did and how it did it was justified –*Faapito v Chief Executive of Department of Corrections* [2012] NZEmpC 206.

[146] From the established allegations a fair and reasonable employer could have found there were some serious performance issues on the part of Ms Walker. The Trust had to have a particularly high degree of trust and confidence in Ms Walker in her management role that she would adhere to procedures and receipt money paid by clients and caregivers who attended groups and record any money spent or owing in a manner so there could be proper accountability and transparency. In that way then there was protection for all the staff of the Trust including those who report to Ms Walker and are required to deal with the money. Ms Walker was responsible for setting a good example to her staff. A fair and reasonable employer could take into account that there was no accountability accepted by Ms Walker for any of the matters raised as allegations.

[147] I find that the Board concluded justifiably in all the circumstances at the time that there was conduct by Ms Walker from the nine established allegations that impacted to such a degree on the necessary trust and confidence required that it could no longer rely on Ms Walker in her role as Manager.

Was the decision of Delta to summarily dismiss Ms Walker what a fair and reasonable employer could have done in all the circumstances at the time?

[148] Only nine of the allegations were established. The Board said it relied on the thirteen allegations in making its decision to dismiss. It has been held under earlier legislation that an employer was not required to justify each and every ground for the dismissal provided that it discharged the onus of establishing the dismissal justified –*Auckland Local Authorities Officer IUOW v Northcote Borough Council* [1989] 2NZILR 67. The Authority must apply the test in s.103A whether the employer's actions and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[149] In making the decision the Board knew that Ms Walker had many wonderful qualities. The evidence supported that she was a kind and compassionate person who loved working with the clients of the Trust. The matters investigated were about the cash handling procedures and processes, and accountability part of Ms Walker's role.

[150] Ms Walker was concerned that dishonesty was alleged by Ms Allison. A failure to follow proper procedures in handling and dealing with money can lead to a genuinely held view of dishonesty. The Trust however did not conclude after its investigation that Ms Walker had been dishonest with the money rather that there was a failure to account.

[151] At the time the decision was made on 21 May 2012 there had been no further communication from Ms Ryder on behalf of Ms Walker since 10 May. There had been nothing put forward on behalf of Ms Walker about any outcome short of termination. There was no advice about Ms Walker's medical condition which at that time would have prevented her returning to work. The Authority was advised that was still the situation at the date of the investigation meeting.

[152] The test in s.103A does provide an employer with a range of responses and I find that a fair and reasonable employer could have dismissed Ms Walker in all the circumstances at the time the dismissal took place notwithstanding, not all of the allegations were established.

Determination

[153] Ms Walker does not have a personal grievance that her suspension was unjustified, that the replacement of paid suspension leave with sick leave was unjustified or that she was unjustifiably dismissed.

Costs

[154] I reserve the issue of costs. Mr Hargreaves has until 29 July 2013 to lodge and serve submission as to costs and Ms Ryder/Mr Goldstein have until 19 August 2013 to lodge and serve submissions in reply.