

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 533
5335696

BETWEEN	PAT BIDOIS Applicant
AND	ST GEORGE INTERNATIONAL GROUP LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Mike Treen, Advocate for Applicant May Moncur, Advocate for Respondent
Investigation Meeting:	29 and 30 August and 5 September 2011
Submissions Received	13 September 2011 from Applicant 22 September 2011 from Respondent 27 September 2011 from Applicant
Additional information:	30 September 2011 from Applicant 11 October 2011 from Respondent
Determination:	15 December 2011

DETERMINATION OF THE AUTHORITY

- A. St George International Group Limited (“St George”) unjustifiably dismissed Ms Pat Bidois.**
- B. St George unjustifiably disadvantaged Ms Bidois in her employment.**
- C. St George is order to pay Ms Bidois:**
 - (i) \$1,893.09 lost remuneration;**
 - (ii) \$8,500 distress compensation.**

Employment relationship problem

[1] Ms Pat Bidois pursued personal grievance claims for unjustified disadvantage and unjustified dismissal. The disadvantage claim involved a warning which she was given on 14 February 2011 which had arisen out of her actions at a staff meeting on 26 January 2011. She was dismissed on 18 March 2011 for an email she sent to the management team on or around 15 February 2011 which questioned the appointment of Ms Jungshil Park to the Education Manager role.

[2] Ms Bidois worked for St George at the St George language school as a teacher of General English and the International English Language Testing System. She had been employed for four years prior to her dismissal and was generally considered to be a good teacher.

[3] Ms Bidois was also a union delegate for Unite Union which has a collective employment agreement with St George.

[4] St George claimed that it was justified in imposing a warning on Ms Bidois as a result of her actions at the staff meeting on 26 January 2011. It also said that dismissal was justified because Ms Bidois had engaged in serious misconduct which had fundamentally undermined its trust and confidence in her.

Justification test

[5] Because both personal grievances arose prior to 1 April 2011, the 'old' s.103A justification test applied. This required the Authority to assess justification by considering whether St George's actions, and how it acted, were what a fair and reasonable employer would have done in all of the circumstances at the time Ms Bidois was warned and also at the time she was dismissed.

Relevant facts – disadvantage claim

[6] The Principal of the school, Mr Kevin Moncur, was unhappy with the contents of the 2010 Academic Board Report. He therefore prepared his own report dated 11 January 2011 which provided his views on, and response to, the Academic Board Report. He provided his report to staff at a staff meeting on 18 January 2011 and he encouraged them to read and consider what he had written.

[7] Many staff read the Principal's response and had concerns about what they considered to be the thrust of the report and, what was in their view, several inaccuracies in it. Staff who were concerned about these matters agreed to each write comments about their concerns which would be collated and then presented by Ms Bidois at the staff meeting on 26 January 2011 as the staff feedback to Mr Moncur's report. Because Ms Bidois was the union delegate, she agreed to present the concerns on behalf of staff.

[8] Ms Bidois duly compiled the responses she received from staff into a document that was one and a half pages long. Staff were then given an opportunity to review it before she attended the staff meeting. The evidence satisfied me that the document Ms Bidois compiled was an accurate reflection of the staff feedback she had received.

[9] Prior to the staff meeting Ms Bidois informed Mr Moncur that the staff wanted to respond to his report and that they wished to do so at the staff meeting on 26 January 2011. Mr Moncur agreed to add that to the agenda, and that duly occurred.

[10] The staff meeting was held on 26 January 2011 and when the meeting got to the agenda item where the staff could respond to Mr Moncur's views on the Academic Board Report, Ms Bidois introduced her feedback from the staff and began to read aloud the comments staff had made.

[11] During her reading of the staff comments, Mr Moncur became agitated because he viewed the report as being an attack on management and in particular on him personally. I find that was not a reasonable view.

[12] Whilst Ms Bidois was reading the staff feedback Mr Moncur started to speak over Ms Bidois to respond to some of the things she had said. This caused other staff to jump in with their views in response to what Mr Moncur was saying, and some of these staff (but, I find, not Ms Bidois) raised their voices.

[13] It was agreed that Mr Moncur told Ms Bidois to stop three or four times but she continued to read because she said that it was the one opportunity that staff had to discuss the issues that the Principal had raised. It had also been agreed that she could provide this feedback to the meeting and provision for her to do so had been made on the agenda, with the Principal's approval.

[14] I find that the staff meeting became somewhat confrontational because a number of people were trying to put forth their view simultaneously, with Ms Bidois also continuing to read aloud the staff feedback in the background to other people, including Mr Moncur, loudly expressing their views on the issues Ms Bidois was addressing.

[15] I find that Ms Bidois read the staff comments in a calm manner and that, unlike other staff, she did not raise her voice. She remained seated as she read the staff comments aloud. I find there was nothing in her demeanour or presentation that was inappropriate or unacceptable.

[16] I find that the staff meeting became tense because of Mr Moncur's actions. Despite adding it to the agenda, he was trying to stop Ms Bidois from continuing to read the staff comments, but she was persisting in doing so. Other staff who supported the staff comments became involved in verbally challenging the accuracy of several statements made by Mr Moncur as he was talking over Ms Bidois in an attempt to put his views in response.

[17] I consider Mr Moncur must take a large measure of responsibility for the unsatisfactory nature of the staff meeting because it degenerated largely as a result of his own conduct and actions. He talked over Ms Bidois, despite it being her allotted time to speak. He simultaneously told her to stop reading and engaged with her about what she was saying, by reiterating his view. I consider that Mr Moncur attempted to stop Ms Bidois solely because the views she expressed contradicted his personal view.

[18] The following day Mr Moncur asked Ms Bidois and two other staff members to meet with him to discuss the staff meeting. They declined to meet with him alone in his office and said they preferred to meet and discuss any issues he had at the next staff meeting. As an aside, because of a poor relationship with Mr Moncur, some staff, including Ms Bidois, refused to meet with him at all to discuss any issue without also having a colleague or colleagues present for support.

[19] Mr Moncur said that because Ms Bidois would not meet with him individually to discuss the 26 January 2011 meeting he decided that a disciplinary process was appropriate because he believed there was no other way of addressing his concerns.

Investigation

[20] Mr Moncur then called Ms Bidois to what he described as “*an investigation meeting*” into an allegation of serious misconduct involving “*breaches of Institute culture, mission and code in relation to your employment agreement*”.

[21] The letter which instructed Ms Bidois to attend the investigation meeting included extracts from the Institute’s culture document, its Mission Statement, the Institute Values, and the Staff Code of Ethics. However, it did not identify what words or conduct or actions or behaviour Ms Bidois was alleged to have engaged in which had resulted in a breach of the extracts that had been referred to. I find that it was impossible from the letter to understand exactly what Mr Moncur was concerned about.

[22] Prior to instructing Ms Bidois to attend a disciplinary meeting, Mr Moncur approached a number of staff to request that they sign a statement he had prepared which expressed concern about the actions of Ms Bidois and two other staff (neither of whom were disciplined). This was dated 27 January 2011 and it stated:

“At yesterday’s staff meeting Pat, Lyndsey and Soraya repeatedly criticised Kevin for 10 minutes or more. They worked together to call his honesty into question, using phrases like “that’s news to me” and “that’s dishonest!”. I was very uncomfortable being there when they showed such a lack of respect for the Principal”.

[23] Most staff Mr Moncur approached refused to sign, although some did. One who did sign it was Ms Joyce Liu, who told me she did not intend it to be a complaint about Ms Bidois.

[24] I find that approaching subordinate staff and asking them to sign a prepared statement was not an appropriate way for Mr Moncur to investigate his alleged concerns. It showed he was biased from the outset. His actions were an inappropriate attempt to obtain support for his personal views, they did not amount to an open minded investigation into what had occurred. I note that many staff strongly disputed Mr Moncur’s view of the meeting.

[25] Mr Moncur felt that the staff comments had been personally directed at him and were intended to undermine his authority. He was extremely upset, hurt and offended and that coloured all of his actions from 26 January 2011 onwards. It was

obvious that Mr Moncur was not the appropriate person to be investigating potential disciplinary concerns.

[26] The investigation meeting was held on 3 February 2011. It was attended by Mr Moncur, Jungshil Park, Stephen Bayldon as the management team, and Ms Bidois, her Union representative John Minto, and colleagues Lyndsey Craig, Soraya Hogan and Jeannine. The notes of this meeting show that Mr Minto attempted, without success, to get clarity about Mr Moncur's specific concerns.

[27] It is clear from the notes that Mr Moncur had a predetermined view of Ms Bidois's actions and that he felt Ms Bidois' actions were a personal affront to him and an attempt to humiliate him in front of staff. The questions he asked and the comments he made during the meeting demonstrate the level of bias he had against Ms Bidois.

Disciplinary meeting

[28] The outcome of the investigation meeting was an instruction to Ms Bidois on 7 February 2011 to attend a formal disciplinary meeting "*to discuss these issues further*".

[29] The letter did not identify what specific disciplinary concerns Mr Moncur wanted to discuss, nor did it categorise its concerns as either misconduct or serious misconduct, although it did say – "*please be aware that the issues are serious and the outcome could involve the taking of disciplinary action up to and including dismissal*". That implied whatever the issue of concern was, it may be considered to be serious misconduct, however, the nature of the allegation(s) remained unclear.

[30] Mr Moncur said that the reference in the letter to "*these issues*" referred to the matters discussed at the investigation meeting on 3 February 2011.

[31] I find that although there was lengthy discussion on a number of different issues on 3 February 2011, it was still not made clear (despite Mr Minto's best efforts) what specific disciplinary concerns St George had about Ms Bidois. I consider that the disciplinary letter was insufficient to put Ms Bidois fairly or properly on notice of the specific allegations she needed to respond. That was a fundamental breach of natural justice.

[32] The disciplinary letter also contained a new allegation which was raised for the first time and which involved a concern that Ms Bidois was absent from her class from 12 noon on 3 February 2011 without the Principal's approval. The letter stated "*unauthorised absence from class without good reason is unacceptable and can be regarded as serious misconduct*".

[33] I find that in this case, that allegation was not capable of amounting to serious misconduct, even if it had been established. The Head Teacher, Mr Stephen Bayldon said that he had told Mr Moncur he had agreed to cover Ms Bidois' class so that she could meet with Mr Minto immediately before the 3 February 2011 investigation meeting. Mr Moncur should not have pursued this as a disciplinary concern in these circumstances.

[34] The same people who attended the investigation meeting on 3 February 2011 also attended the disciplinary meeting on 11 February 2011.

[35] Mr Moncur started the meeting by identifying three questions:

- (a) Were Ms Bidois's actions at the 26/1/11 staff meeting serious misconduct?
- (b) What is the way forward after the 26/1/11 staff meeting?
- (c) Was Ms Bidois' abandonment of her students at 12 noon on 3/2/11 serious misconduct?

[36] Mr Moncur started with the second issue (the way forward) and the minutes show that almost the entire meeting was devoted to discussion about that. Mr Moncur very much directed the meeting in terms of identifying the matters he wanted to discuss. He also asked Ms Bidois to make seven written commitments about her actions in future which he saw as necessary to the way forward. She agreed to do so.

[37] The again minutes show Mr Moncur's bias against Ms Bidois, and that he had a predetermined adverse view about Ms Bidois' conduct on 26 January 2011.

[38] I find that the minutes show that the first and third questions (did Ms Bidois's actions on 26 January 2011 amount to serious misconduct; and was the abandonment of her students serious misconduct?) were not properly discussed, which meant that Ms Bidois did not have a full or proper opportunity to provide her explanations to

those issues. I consider that one result of Mr Moncur's predetermined view of events was he failed to properly put his concerns to Ms Bidois to respond to.

Warning

[39] Ms Bidois was issued with what was described as a written warning on 14 February 2011. It was unusual as a warning letter because it just quoted from various Institute documents, but it did not identify what specific behaviour Ms Bidois had engaged in or explain why that was considered to have amounted to misconduct.

[40] It was therefore difficult to work out what Ms Bidois had actually been warned for, because that had not been clearly stated. I find that as a warning letter, it was seriously deficient.

[41] The warning letter also concluded:

“On two occasions Pat abandoned her responsibilities to her students by absenteeing herself from class an hour early on Thursday 3/2/2011 and Friday 11/2/2011. On both occasions this was done despite confirmation that such action would not be approved.”

[42] The allegation about Ms Bidois abandoning her class on 11 February 2011 had not previously been raised as a disciplinary concern and had not been discussed at the meeting on 11 February 2011. St George was not justified in giving Ms Bidois a warning for such alleged misconduct when it had never been raised with her.

[43] I find that St George was not justified in concluding that Ms Bidois had abandoned her responsibilities to her students because she had arranged with the Head Teacher, Mr Bayldon for him to cover her class and he had agreed to do so.

[44] Although Mr Moncur appeared to have pursued the allegation about Ms Bidois' conduct on 26 January 2011 as serious misconduct, the outcome did not make it clear whether he had concluded misconduct or serious misconduct had occurred.

Outcome – disadvantage claim

[45] I find that the written warning which St George issued to Ms Bidois on 14 February 2011 unjustifiably disadvantaged her in her employment.

[46] The process adopted was unfair from the outset. Mr Moncur should not have been both a key witness, the main complainant, and the decision maker. It was clear

that he had been personally deeply hurt and distressed by what he had incorrectly perceived was a personal attack on him. His personal involvement meant he could not be impartial and the meeting notes show that he obviously had a predetermined view of Ms Bidois' conduct, which I find was inappropriate and unfair to her.

[47] There was also no proper investigation into Ms Bidois' alleged misconduct. It was wrong for the Principal to approach his subordinate staff with a written statement which he had himself prepared, and which reflected his own view of the meeting. If St George had wanted to go down a disciplinary track, then the matter could, and should, have been properly investigated by Carolyn Shi (a part owner, director and management team member of the School) who was not at the meeting. She could have brought an independent view to the matter, but did not wish to become involved so abdicated responsibility entirely to Mr Moncur to do whatever he wanted.

[48] It was not clear what disciplinary allegations Ms Bidois had to answer and I find that the explanations she did give at the meetings were not properly, or impartially, considered. Although Mr Moncur was clearly upset and agitated during the investigation and disciplinary meetings, he continued to sit in judgement of Ms Bidois and improperly refused to remove himself, despite Mr Minto requesting he do so.

[49] I find that the allegations about Ms Bidois' conduct on 26 January 2011 and leaving her class on 3 February 2011 were both not capable of amounting to serious misconduct.

[50] St George also failed to comply with its s.4(1A) of the Employment Relations Act 2000 ("the Act") good faith obligations to provide access to information and an opportunity to comment on it because Ms Bidois was provided with no information in support of the disciplinary concerns.

Relevant facts - dismissal

[51] On 16 February 2011 Ms Bidois sent an email to the school management team in which she questioned the appointment of Jungshil Park (who was one of the management team members) to the position of Education Manager at the school. She asked whether Ms Park had the relevant qualifications for the Education Manager position and pointed out that Ms Park's appointment appeared to breach the schools QMS policy which stated that anyone appointed to the management team had to have

either permanent residence or New Zealand citizenship, neither of which Ms Park had.

[52] Mr Moncur responded immediately with his views on Ms Park's suitability for the position. Ms Bidois replied to that in a second email on 5 February 2011 which asked for a copy of Ms Park's degree.

[53] Ms Bidois raised Ms Park's appointment in her capacity as a union delegate on behalf of staff who had already raised it at a staff meeting in January and who believed they had not received a satisfactory response to the query.

[54] The day after sending her email, Ms Bidois was approached by Mr Moncur to say that Ms Park was upset at the email and that she should apologise to her for it. Ms Bidois agreed to do so and duly then spoke to Ms Park. Ms Bidois gave Ms Park an apology and said that the questions she had raised were not directed at her personally but were directed at the failure of school management to follow the proper procedure in terms of her appointment to the Education Manager position.

[55] Ms Park initially accepted Ms Bidois' apology but then changed her mind. Ms Park told me that subsequent to accepting Ms Bidois' apology she realised that Ms Bidois would not comply with the management instructions which had been set out in the warning letter of 14 February 2011 when she learnt that Ms Bidois had not handed in the written commitments Mr Moncur had asked her for at the first disciplinary meeting on 11 February 2011.

[56] Ms Park said that caused her to decide to write a letter of complaint. Her evidence was "*I was really worried about the future of our business if this kind of behaviour did not stop*". Ms Park told me her reference to "*this kind of behaviour*" was to what she thought was Ms Bidois' lack of respect towards management.

[57] I therefore find that Ms Park was not actually genuinely concerned about the content of the email Ms Bidois had sent regarding her appointment to the Education Manager role, but was concerned about Ms Bidois' failure to hand in written confirmation of the commitments she had made at the disciplinary meeting.

[58] Ms Park provided Mr Moncur with a written complaint dated 24 February 2011, which Mr Moncur re-drafted and dated 25 February 2011. Mr Moncur said he

did that so that the complaint read better because English was Ms Park's second language.

[59] I find that the changes made by Mr Moncur were not limited to merely correcting poor English, but improperly changed the content focus of the complaint.

Disciplinary letter

[60] By letter dated 28 February 2011 Ms Bidois was instructed to attend a disciplinary meeting on 3 March 2011 into what I shall refer to as 'the email issue'.

The letter stated:

"The complaint is with regard to the same concerns as those which were the subject of the first disciplinary process – failure to follow policies and lawful instructions.

[...]

The purpose of this meeting is to discuss management's concerns about this incident which allegedly amounts to serious misconduct.

You should view this matter seriously as it may result in disciplinary action being taken against you.

[...]"

[61] The disciplinary letter was deficient in that it did not explain what specific behaviour was of concern or what policies Ms Bidois had allegedly failed to follow or what lawful instructions she had allegedly breached. It also did not advise her that her job was in jeopardy, although that was implied by the reference to "*serious misconduct*". No information was provided with this letter.

[62] Mr Minto emailed Mr Moncur and stated that the email issue should not be treated as a disciplinary concern because the issues that had arisen were to do with leadership and relationships. He suggested disciplinary action be suspended so the parties could address leadership and relationship issues. This was a sensible proposal which I find Mr Moncur unreasonably rejected.

[63] Mr Minto had asked for a copy of Ms Park's original complaint, but it was never provided. He did not see that until the Authority's investigation. Instead Mr Minto was given the copy of the complaint which had been redrafted by Mr Moncur, although Mr Moncur did not state that the document he had provided was not the original complaint.

[64] The difference between the complaint and Ms Park's language skills led Mr Minto to conclude that it was unlikely she had written the complaint herself. When pressed by Mr Minto, Mr Moncur admitted he had re-worded the complaint to improve the english, but he still refused to provide a copy of Ms Park's original complaint, despite Mr Minto pressing for a copy of it.

[65] No investigation meeting was held in respect of the email issue. St George proceeded straight to a disciplinary meeting.

[66] Mr Moncur emailed Ms Bidois on 3 March 2011 and stated, among other things, that

"If our further investigation concludes that misconduct or serious misconduct has occurred then you will be subject to further disciplinary action. This may include counselling, verbal or written warning or dismissal."

[67] A further disciplinary letter was sent on 4 March 2011. This alleged a further failure to follow lawful instructions arising from failure to attend the disciplinary meeting scheduled for 3 March 2011.

[68] Mr Minto had advised Ms Bidois not to attend the disciplinary meeting before he had obtained the information about the complaint which he had been requesting. That was not an unreasonable position to adopt, particularly in light of the serious problems that had already been experienced during the first disciplinary process because the nature of the specific concerns Ms Bidois had to respond to were unclear.

Disciplinary meeting

[69] The disciplinary meeting was held on 11 March 2011. In attendance were Mr Moncur, Mr Bayldon (as the note taker), Ms Bidois and her union representative, Mr Minto.

[70] Mr Minto expressed at the outset that Mr Moncur should not be involved because he was so intimately involved with the issues because Ms Bidois' email had effectively criticised his appointment process. Mr Minto proposed that Ms Carolyn Shi and Mr Bayldon were appropriate people to deal with the disciplinary matter because they were less directly involved. I find this was a sensible request which was unreasonably declined.

[71] I find that it was inappropriate for Mr Moncur to be involved in this process when it was his appointment process in issue. The meeting notes show that Mr Moncur had obviously predetermined the matter. Mr Moncur was too closely and personally involved in the issues to be an impartial decision maker. It was also very clear that he and Ms Bidois had a personality conflict which had rapidly escalated over the preceding seven weeks.

[72] I find that Mr Moncur was not able to be an impartial decision-maker because of his personal animosity towards Ms Bidois.

Actual concerns

[73] It was also unclear from the disciplinary letter, the disciplinary meeting, and from the notes of the disciplinary meeting, what the specific concerns about Ms Bidois' email(s) were.

[74] From what I was able to ascertain during my investigation it seems that the disciplinary process was a misguided attempt by Mr Moncur to address what he believed was Ms Bidois' "*divisive*" attitude and disrespect to management.

[75] Mr Moncur appeared to proceed on the basis that the first email sent on 15 February 2011 was "*insensitive*" and that it was inappropriate for Ms Bidois to have copied it to Mr Minto because he was not a school employee. I do not accept that was a view a fair and reasonable employer would have arrived at.

[76] When I questioned Ms Park about her complaint and asked her to explain what exactly she was concerned about, she told me she was not concerned about the matters Mr Moncur had referred me to. Ms Park told me that her only concern was that Ms Bidois had asked for a copy of her degree. I note that differed from her earlier evidence during which she told me it was Ms Bidois' failure to provide written commitments that was of concern to her.

[77] This case provides a very good example of why it is so important for an employer to clearly set out their specific disciplinary concerns because here Mr Moncur's concerns were different from the complainant's (Ms Park's) concerns. This was a fundamental disconnect because the disciplinary action had proceeded on the basis that Mr Moncur was pursuing Ms Park's complaint, not that he was pursuing his own (separate) concerns.

[78] St George's failure to properly or clearly articulate its specific disciplinary concerns made it quite difficult to unravel what the disciplinary process was actually about.

[79] Ms Bidois' email of 15 February 2011 raised four matters with Mr Moncur. Two of these involved Ms Park's appointment and said:

“What qualification does Jongshil [sic] have to be Education Manager at the school?”

- *What implication does this have for all the professional teachers in the Institute?*
- *What responsibility does she have for the Institute's educational direction?*
- *Why was her appointment to the position not signalled to staff at a staff meeting?”*

[80] Although Mr Moncur responded to this email on 15 February 2011 he did not at that time raise any concern about it being insensitive or in breach of the Institute's culture, values, policies or procedures or contrary to any instructions or policies. If he had genuinely held that view at the time, then it is surprising he did not raise that in his immediate response to Ms Bidois.

[81] I find that the email above could not reasonably give rise to legitimate disciplinary concerns.

[82] The email that Ms Park said she was concerned about and had complained about was also sent on 15 February 2011 and it stated:

“[...] am I able to get a copy of Jongshil's [sic] degree simply to verify the information? [given by Mr Moncur in his email response to the first 15 February 2011 email from Ms Bidois] You will recall Kevin, that Stephen explained in the staff room, in full earshot of everyone that Jongshil was given that title in order to fulfil criteria for her application for a visa and not for any administrative or educational reasons. He also stated that she had not received her visa yet. According to the QMS criterion for, section 7, it says “management applicants hold NZ citizen or PR status”. Clearly this is not the case.”

[83] However, when Mr Moncur was giving his evidence it was clear that his concern was about the first email, not the second email requesting a copy of Ms Park's degree.

[84] The allegation about not attending a disciplinary meeting on 3 March 2011 was not discussed at the 11 March 2011 disciplinary meeting at all.

[85] I also find that a number of irrelevant matters were discussed at the disciplinary meeting on 14 March 2011, which had nothing to do with the emails regarding Ms Park and which had not previously been raised as disciplinary concerns.

[86] This included discussions about union the action, about a union meeting held on 10 March 2011, issues around Unite's actions in threatening stop work action, the distribution of leaflets to students, and approaches made to Ms Park by other union members. I find these were all matters Unite union was responsible for, not matters that Ms Bidois had any personal responsibility for. These issues should have been raised with Unite, not with Ms Bidois during her disciplinary meeting.

[87] I find that Ms Bidois was not on notice that these new matters were going to be discussed or that they were seen as alleged disciplinary concerns. That was unfair to her and was not what a fair and reasonable employer would have done in all the circumstances.

Dismissal decision

[88] After the meeting, Mr Moncur discussed his proposed decision to dismiss Ms Bidois with Ms Shi and Ms Park, both of whom approved it. He also discussed his decision to dismiss with Mr Bayldon, who opposed it.

[89] When I asked Ms Park what she had based her decision that Ms Bidois should be dismissed on, she did not know. Ms Park was unsure whether she had seen the minutes of the meeting, but she did agree that she had seen the draft disciplinary letter before it was sent to Ms Bidois and she was given an opportunity to comment on it before it was finalised. Ms Park said she told Mr Moncur that she believed Ms Bidois should be dismissed.

[90] I find it was inappropriate for the complainant to have input into the outcome of the disciplinary meeting, particularly when she did not attend the disciplinary meeting and therefore had not heard Ms Bidois' explanation to her complaint.

[91] Ms Shi apparently agreed that Ms Bidois should be dismissed. However, there was no evidence about what information (if any) she had been given before she

expressed that view. Ms Shi was not at the disciplinary meeting and she declined to attend the Authority's investigation, so the nature of her involvement was unclear. She did, however, receive the draft dismissal letter to comment on and she was sent a number of letters from staff in support of Ms Bidois, which she appeared to have ignored, preferring instead to leave the matter solely in Mr Moncur's hands.

[92] Mr Bayldon told me that he did not agree that Ms Bidois should be dismissed because he did not believe that the conduct was serious enough to warrant dismissal. That was a sensible view and is one which I concur with.

[93] I find that the termination of Ms Bidois's employment was very much Mr Moncur's decision. I find that he was improperly influenced by his personal adverse view of Ms Bidois. I also find that the process used was fundamentally unfair to Ms Bidois.

Dismissal letter

[94] I find that the dismissal letter was seriously defective.

[95] The dismissal letter dated 18 March 2011 referred to issues that were never raised as disciplinary concerns. It stated;

"Your Union representative threatened to use Union action to pressure the Institute to cease the disciplinary process. [...]"

A Union stop work meeting was organised on 10 March 2011 in which classes were effected and reception was left unattended. This is a breach of section 86(1)(c) and (d) of the Employment Relations Act 2000, seriously deepening the concerns management had about you. Management felt pressured and bullied by such actions, and was disappointed that you failed to act in good faith to cooperate with management during this disciplinary process. [...]"

In humiliating a colleague straight after the first disciplinary process you showed a complete disregard for earlier commitments made to follow policies and process. [...]"

We conclude that your words and actions at several stages in the disciplinary process represent additional failure to follow Institute policy and procedure. Furthermore, your behaviour has breached the relationship of trust and confidence which is at the heart of the employment relationship. [...] We have decided to terminate your employment, effective immediately".

[96] The letter did not explain what policies or procedures Ms Bidois had apparently breached. Nor did it identify what specific behaviour had been found to have breached policy and procedure. There was nothing to suggest Ms Bidois' explanations had been considered.

Outcome - dismissal

[97] I find that the decision reached by St George was not one which a fair and reasonable employer would have reached in all the circumstances. I find that the conduct for which Ms Bidois was disciplined (the email issue) was simply not capable of amounting to serious misconduct.

[98] I also find that how St George acted was not how a fair and reasonable employer would have acted in all the circumstances at the time. I find that the process used by St George was unfair to Ms Bidois.

[99] Ms Bidois was not clearly put on notice of the specific allegations against her so therefore was deprived of a real opportunity to respond to St George's actual concerns.

[100] St George failed to follow the disciplinary procedure it had set itself in the Staff Procedures Manual Code of Conduct. It also breached the disciplinary process provisions it had agreed to in the collective agreement.

[101] St George also failed to comply with its s.4(1A) good faith obligations under the Act to provide all relevant information and an opportunity to comment on it, because Mr Moncur refused to disclose Ms Park's original complaint.

[102] I find that Mr Moncur's actions and how he acted throughout the entire process was fundamentally unfair to Ms Bidois. He should not have rewritten Ms Park's complaint. He should not have withheld the original complaint. He should not have instituted a disciplinary process and he certainly should not have been the decision-maker.

[103] Mr Moncur did not approach the matter with an open mind. It was also improper for him to seek Ms Park's input on the decision to dismiss, when she was a complainant and had not been involved in the disciplinary process and did not appear to know anything about Ms Bidois' explanation.

[104] A number of irrelevant matters were discussed during the disciplinary meeting and the dismissal letter shows that these factors were relevant to Mr Moncur's decision to dismiss. It was unfair for Ms Bidois to be dismissed for matters that had not been raised as disciplinary concerns for her to respond to.

[105] I find that Ms Bidois' dismissal was substantively and procedurally unjustified.

Remedies

Reinstatement

[106] On 1 April 2011 the remedy of reinstatement was changed. Section 125 of the Act allows the Authority to apply the remedy of reinstatement if "*it is practical and reasonable to do so*". Reinstatement is no longer the primary remedy, but is now just one of a smorgasbord of remedies available to the Authority.

[107] Ms Bidois said that she wanted to return to the school because she had close working relationships with her colleagues and she missed them. However, I find that reinstatement is not practical or reasonable and is therefore not an appropriate remedy in the particular circumstances of this case.

[108] All of the witnesses agreed that there was a risk that if Ms Bidois was reinstated, the relationship between her and the Principal would breakdown again. All witnesses agreed that I was right to be concerned about the risk of further problems arising if Ms Bidois returned to St George.

[109] I consider it significant that when giving her evidence, Ms Bidois said the Principal had been "abusive" to her. When asked to clarify what she meant by such a serious allegation, Ms Bidois maintained that she believed that Mr Moncur had been verbally abusive to her and had also been abusive to her in writing.

[110] I find that the evidence before me did not support that very serious allegation. However, Ms Bidois' subjective view that she had been subjected to abuse by Mr Moncur it is relevant to my assessment about whether or not reinstatement is an appropriate remedy, given he is her boss.

[111] Ms Bidois also told me that because of her poor relationship with the Principal, "*the School had not been a happy or healthy environment*" for her to work

in. Notwithstanding that evidence, she still maintained she wanted to go back and she gave the sole reason for that as liking her colleagues.

[112] I find that both Mr Moncur and Ms Bidois had personal animosity towards each other which adversely affected their professional working relationship. I consider that Mr Moncur embarked on the unjustified disciplinary actions in this case in a misguided attempt to address his concerns about Ms Bidois' attitude towards him. I believe his actions were borne out of frustration, a desire to make changes to the culture of the school, and a lack of management and people skills.

[113] The evidence has led me to reluctantly conclude that reinstatement is not going to be a workable solution in this particular case.

[114] One example is that for quite some time Ms Bidois had refused to meet one on one with Mr Moncur and I find that this had created some practical problems in terms of school administration. I was also concerned that Ms Bidois did not demonstrate an appreciation or understanding that as the Principal Mr Moncur was entitled to make decisions about the running of the school.

[115] Ms Bidois' view appeared to be that the Principal had to justify himself to her or she would not go along with what he had decided to do. That is quite wrong. The Principal is entitled to make decisions about the running of the school. He does not need Ms Bidois' agreement before he can do so.

[116] However, I find the way in which Mr Moncur has addressed issues has created unnecessary conflict. After hearing from him I do not believe he has the inherent skills to be able to effect a permanent and fundamental change his management style. That means that if I were to reinstate Ms Bidois she would be going back into an unhappy and unhealthy environment to work under a manager she subjectively believed was abusive towards her.

[117] I took some time to explore my concern about whether Ms Bidois was likely to adhere to Mr Moncur's decisions in future with her and I am satisfied that she remained of the view that it was up to the Principal to convince her that what he was saying or doing was correct and that if he was unable to do so then she would resist him or push-back against him. I can see this is likely to happen in future if Ms Bidois was reinstated and I believe that would create an environment for potential problems going forward.

[118] I was impressed with the way that Mr Bayldon gave his evidence. He appeared to be impartial and although he was on the management team he was also, in many respects, supportive of Ms Bidois. Mr Bayldon did not believe she should have been disciplined and he spoke out during the disciplinary processes in her support. He also enjoyed a positive relationship with her and had good things to say about her teaching record.

[119] However, Mr Bayldon stated that he did not see how the relationship between Ms Bidois and Mr Moncur could be repaired and how it would actually work in practice if she were reinstated. I share that concern. Mr Bayldon only works minimal hours at the school so it is not a matter of being able to delegate the management of Ms Bidois to him.

[120] The reality is that Mr Moncur is responsible for managing Ms Bidois and he is responsible for conducting her performance reviews and the like. It is simply not workable for Mr Moncur and Ms Bidois not to have daily or ongoing contact and to expect, based on both their strong personalities, that will occur without further difficulties arising. I consider that such contact is likely to cause their inter-personal difficulties to flare up again and I am of the view that if I reinstate Ms Bidois there is a high likelihood that arrangement would breakdown within a very short period of time.

[121] My view is that neither Ms Bidois or Mr Moncur have the self awareness or personal skills necessary to satisfy me that ordering a facilitation or mediation process to address their personal difficulties would be likely to give reinstatement a better prospect of success. If I had been confident that was likely to address the risks of reinstatement then I would have been inclined to have considered reinstatement subject to conditions. However, my view is that reinstatement, even with conditions would not be appropriate in the circumstances of this case, given the personalities involved.

[122] It is with reluctance that I have reached the decision not to reinstate Ms Bidois. I was inclined to award reinstatement in principle because Ms Bidois had been treated very unfairly for actions she had taken in her capacity as a Union delegate. I agree in principle with Mr Treen that there is considerable merit in reinstating an employee who has been a union delegate back into the workplace to signal to an employer that unjustified behaviour towards that individual will not be condoned.

[123] However, that principle must be balanced against the particular facts of this matter and against the detailed evidence I heard from a large number of witnesses. The evidence I heard convinced me that if I reinstated Ms Bidois then the parties are very likely to end up back at the Authority within a short period of time because of their mutual animosity between Mr Moncur and Ms Bidois.

[124] I do not believe it appropriate for the Authority to reinstate an employee into the workplace (particularly when reinstatement is no longer the primary remedy) when the evidence has established it is unlikely to be successful. The aim of the Authority's process is to solve employment relationship problems, not to create more which is what I believe reinstatement would be likely to do in this particular case.

[125] It is for those reasons that I have concluded that reinstatement is not practicable or reasonable in these particular circumstances.

Lost remuneration

[126] Ms Bidois quickly found new employment shortly after she was dismissed. Her hours gradually built up and she is now earning more than she earned when employed by St George. Ms Bidois claimed lost remuneration of \$1,893.09. I accept her evidence that she lost remuneration of \$1,893.09 so I award her that amount under s.128(2) of the Act.

Distress compensation

[127] I have considered distress compensation on a global basis for both the unjustified disadvantage and the unjustified dismissal because Ms Bidois' evidence did not make a distinction between the distress she had suffered in respect of each. The disadvantage and dismissal grievances also arose within a short period of each other. Ms Bidois claimed \$30,000 distress compensation. However, the evidence did not support an award at that level.

[128] Distress compensation must be limited to the effects the grievances had on Ms Bidois. The evidence showed that she was resilient. She did not need medical attention, she obtained alternative work almost immediately and she enjoyed excellent support from her colleagues and union. I consider these positive factors limited her actual distress.

[129] I recognise that Ms Bidois was put through two very unfair and inappropriate disciplinary processes for conduct which should not have been dealt with in that way. The manner in which Mr Moncur engaged with Ms Bidois during both disciplinary processes was highly inappropriate and unprofessional. I accept this caused Ms Bidois considerable hurt and distress.

[130] I am also aware that the decision not to reinstate Ms Bidois has deprived her of the ability to work alongside colleagues she liked and has missed. I accept that decision is going to cause Ms Bidois additional hurt and distress, so I have increased the level of distress compensation I would otherwise have awarded to reflect that she will not be returning to St George.

[131] I award Ms Bidois distress compensation of \$8,500.

Costs

[132] It is unclear whether Ms Bidois has actually incurred any costs other than her filing fee and the hearing fee because she was represented by her union. If she has, then she is entitled to a contribution towards her actual legal costs. Proof that Ms Bidois has actually incurred legal costs (such as invoices or receipts for payment of costs) will be required in support of any costs application.

[133] The parties are encouraged to resolve costs between them, but if that is not possible Ms Bidois has 14 days from the date of this determination within which to file a costs memorandum and St George has 14 days thereafter in which to respond.

Rachel Larmer
Member of the Employment Relations Authority