

BETWEEN

GAYE CASSIE
CARROTHERS
Applicant

A N D

HARRISONS FINE ART
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Mark Beech and Elizabeth Smith, Counsel for Applicant
No appearance for Respondent

Investigation Meeting: 8 February 2013 at Tauranga

Date of Determination: 10 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Carrothers), alleges she was unjustifiably dismissed from her employment, suffered a disadvantage by way of an unlawful suspension and a further disadvantage by way of an unjustified failure of the respondent (Harrisons) to pay her appropriately for her role as Managing Director.

[2] Those allegations are resisted by Harrisons which says, amongst other things, that the dismissal was for dishonesty and was procedurally and substantively fair but if there were any procedural defects (which is denied), they need to be set against the significant contributing conduct of Ms Carrothers, including in particular her failure to attend meetings to discuss matters.

[3] A special shareholders' meeting was called by Harrisons for 11 June 2012. At that time, Ms Carrothers was Managing Director of Harrisons and a shareholder. She

was notified of the special shareholders' meeting and was told broadly that the purpose of the meeting was to discuss the contention of some of the shareholders that the "... *business seems to be going down the toilet*".

[4] At the time of the meeting, the business was effectively owned by Ms Carrothers' family. Her grandfather held 34% of the shares, father and stepmother approximately 15% and Ms Carrothers herself the balance of 22%. Ms Carrothers and Ms Hollister-Jones were the directors.

[5] At the 11 June 2012 meeting, there was a discussion about the performance of the business and its apparently vulnerable financial state. Harrisons says that the focus of the 11 June 2012 discussion was on Ms Carrothers' performance as a director while Ms Carrothers regards the focus as being on her performance as an employee. Either way, it is common ground that there were discussions about Ms Carrothers' involvement and various criticisms made of her performance. At the end of the meeting, Ms Carrothers ceased her directorship of Harrisons. She says that she was forced to resign the directorship; Harrisons says that she resigned voluntarily after being confronted with various items of alleged wrongdoing.

[6] In addition, it seems common ground that Ms Carrothers was suspended from her employment pending an investigation into a range of matters which were discussed at the 11 June 2012 meeting. Harrisons says that Ms Carrothers acknowledged at the meeting certain wrongdoing, whereas Ms Carrothers denies any such admission.

[7] It is common ground that at the end of the meeting Ms Carrothers was given a pre-prepared letter entitled "*allegations regarding serious misconduct*" and the thrust of that letter was to suspend her from duty but require her to attend a subsequent meeting to explain herself after Harrisons had investigated the allegations.

[8] Ms Carrothers provided a detailed written response to each of the allegations made against her on 13 June 2012 but declined to attend a disciplinary meeting because of "*stress and exhaustion directly related to our meeting on Monday evening*" (the 11 June 2012 meeting).

[9] On 14 June 2012, Harrisons raised another allegation and on 15 June 2012, Ms Carrothers replied to that single allegation.

[10] The following day, 16 June 2012, Ms Carrothers was invited to attend a further meeting which she declined to attend for the same reason that she had declined to attend the earlier meeting, namely her “... *traumatic experience at the shareholders’ meeting held Monday 11 June 2012*”.

[11] In the result, Harrisons met on 16 June 2012 without Ms Carrothers and indicated to her that she had been summarily dismissed from her employment by email of even date.

[12] A personal grievance was raised by letter dated 7 September 2012 and after an unsuccessful mediation, the matter proceeded to the Authority for investigation.

[13] Although Harrisons chose not to involve itself in the Authority’s investigation, a statement in reply was filed and served, and counsel for Harrisons dealt with the matter entirely properly by explaining his instructions (which were that Harrisons was not minded to defend the application because the business was insolvent and had ceased trading), but that counsel would attend on the Authority if required.

[14] In those circumstances, the Authority did not require counsel for Harrisons to appear but did request access to one of the continuing directors should matters emerge from the examination of Ms Carrothers which the Authority sought to have Harrisons comment on.

[15] The investigation meeting proceeded without Harrisons represented or giving evidence. Having taken Ms Carrothers’ evidence, the Authority then generated a list of questions for Harrisons, in the nature of informal interrogatories, and these were responded to by one of the continuing directors of Harrisons.

[16] Although the process the Authority has used is a little unorthodox, in the circumstances the Authority is persuaded it needed both to hear the applicant’s evidence first hand, she being ready, willing and able to give it, but also get some form of de facto response from Harrisons in order to try to understand its position.

[17] The conclusions that the Authority has reached then are derived first from the *viva voce* evidence of Ms Carrothers as examined by the Authority and re-examined by her counsel together with the responses of Harrisons to the questions that the Authority asked as a consequence of hearing Ms Carrothers give her evidence. While the Authority can only regret that Harrisons chose not to engage in the Authority’s

process, it must express its gratitude to Harrisons for making a continuing director available to respond to the Authority's questions.

Issues

[18] The Authority needs to resolve the following questions:

- (a) What happened at the 11 June 2012 meeting?
- (b) Could a fair and reasonable employer dismiss in these circumstances?
- (c) Are there other grounds for complaint?

What happened at the 11 June 2012 meeting?

[19] The context for the 11 June 2012 meeting seems undisputed; Harrisons was not trading well and all of the individuals involved in it were anxious about it in some way. The ostensible purpose of the 11 June 2012 meeting was to discuss the trading position.

[20] The 11 June 2012 meeting (the June meeting) was a special meeting of shareholders. As such, it could be called by a percentage of shareholders in accordance with the company's articles. That said, it was not a regular meeting.

[21] What is more, Ms Carrothers, when advised of the intended meeting, made the point that the directors of Harrisons represented the majority shareholders anyway and so she was somewhat puzzled at the need for all of the shareholders to gather together.

[22] Harrisons says that Ms Carrothers knew perfectly well that the business was in significant difficulty and that there were criticisms of her directorship made at the May meeting of directors. Ms Carrothers does not accept that that is a correct reflection of the discussion at the May directors' meeting but does acknowledge that there was a substantial loss in April and that that was discussed at the May directors' meeting. The Authority does not agree with Harrisons' contention that there were criticisms of Ms Carrothers at the May directors' meeting either. The Authority has been provided with the minutes of that meeting and there is nothing there to suggest any criticism of her role as director. Harrisons alleges that Ms Carrothers made certain admissions at the May Board meeting, acknowledging mismanagement and the like, but Ms Carrothers again denies that that is a factual reflection of the position.

Again, the Authority notes that nothing in the May minutes supports the Harrisons' view.

[23] Harrisons maintains that its approach at the June meeting was:

... not about Gay's [Ms Carrothers'] employment but her performance as a director. ... The June] meeting was to deal with company business issues and issues with the director and owner of the company. ... It was not a disciplinary meeting. It was not intended to be a meeting in regard to any employment issues whatsoever. No disciplinary measures were discussed or planned. The shareholders felt entitled to question the performance of directors in the running of the company.

[24] It will be apparent from the quotations just included in this determination that Harrisons represented the June meeting as a company matter rather than an employment matter. But with the greatest respect to that claim, it seems to do violence to the facts as we know them. In particular, it is common ground that at the end of the June meeting, Ms Carrothers was handed a pre-prepared letter entitled "*allegations of serious misconduct*" and was told that she was suspended from duty. It is difficult to square either of those factual aspects with Harrisons' contention that the June meeting was not about employment matters.

[25] The letter is expressed in disciplinary terms consistent with an employment relationship. Indeed, there is little in it which could properly be construed as a commentary on Ms Carrothers' role as a director. What is more, she is warned that if the allegations are made out, a possible outcome could be instant dismissal. Given that by the time she was handed this letter, or very soon thereafter, she had resigned her directorship anyway, the only logical conclusion to make is that the letter is about employment and not about company matters at all.

[26] As if that is not enough, the suspension, also effected at the June meeting, is a suspension from the workplace and cannot be a suspension from Ms Carrothers' role as a director because she had already resigned her directorship at the point she was suspended from duty, or was about to.

[27] For these reasons then, the Authority is not persuaded that this was a company meeting pure and simple. The Authority is satisfied on the evidence that this was a disciplinary meeting dressed up as an ordinary company shareholders' gathering. If it were just a commercial meeting, it is difficult to see why the consequences of the meeting included Ms Carrothers being suspended from duty and being given the letter

raising a series of allegations essentially about her work practices and not about her governance functions. As the Authority has already noted, contemporaneously with the receipt of this letter and the notification of her suspension, she had resigned her directorship (she says under duress), so there could be no issue about her governance going forward, in any event.

[28] Having established that this was a disciplinary meeting, whatever its label was, the Authority has no hesitation in concluding that the meeting did not comply with any of the basic principles of fairness for meetings of this kind. First of all, it was effectively a disciplinary meeting activated by stealth. Ms Carrothers was given no proper opportunity to understand the purpose or extent of the meeting. Amongst other things, the Authority notes that the agenda prepared for the meeting gives no hint whatever that she was about to be subjected to a two hour interrogation in respect of her performance as an employee. Nor was she given the opportunity to have a support person or advocate assist her, nor was there any apparent willingness to adjourn proceedings when she became obviously distressed and she was not even given documentary evidence to assist her to respond to the serious allegations made against her in the pre-prepared disciplinary letter of 11 June 2012.

[29] The Authority observes that Ms Carrothers made a commendable job of responding to the allegations levelled at her at the June meeting despite not being given the documentary material that she sought to assist in compiling her response.

[30] Furthermore, despite Harrisons' denials, the Authority is satisfied that Harrisons told staff at staff meetings on 13 June 2012 and 14 June 2012 that, first, Ms Carrothers would not be returning to the gallery as "*she had done some very bad things which had put the future of the business at great risk*", and second that another individual would be taking over Ms Carrothers' responsibilities.

[31] Harrisons denies that those statements were made at staff meetings on 13 and 14 June 2012 respectively, but the Authority has seen statements provided to it by persons who were present at those meetings and who, in the Authority's view, have no reason to make up stories of that sort. The Authority is persuaded that those observations were made on behalf of Harrisons and that suggests the grossest kind of pre-determination of the issue. Predetermination is also strongly suggested by the evidence that the disciplinary letter given to her on 11 June 2013 was pre-prepared.

[32] Looked at in its totality, the June meeting must be seen as a disciplinary meeting wherein Ms Carrothers was interrogated about her alleged wrongdoing over a lengthy period of time, some of which anyway she was evidently distressed, and yet she was not advised that the meeting was concerned with her alleged wrongdoing at any stage before the meeting started. It seems self-evident that there had been significant planning by Harrisons into the interrogation of Ms Carrothers about her alleged errors. Amongst other things, the Authority notes the pre-prepared letter and the evidence from Ms Carrothers herself that she was effectively cross-examined by Harrisons over a two hour period and that they worked through a list of points which had obviously been prepared in advance.

[33] This is just inappropriate. It is transparently unfair to treat any staff member in such a cavalier fashion and it seems particularly difficult to understand why this could have been contemplated given the family relationships within Harrisons itself. Whether this was in truth a family company or not is neither here nor there; the fact remains that many of the principal protagonists are related to each other by blood which makes the structure of this June meeting even more difficult to understand.

[34] The Authority has no hesitation at all in concluding that this disciplinary meeting on 11 June 2012 was completely inadequate in terms of providing Ms Carrothers with a fair and transparent basis for hearing and giving an initial response to Harrisons' criticisms of her employment performance. Whether a family business or not, Harrisons has a perfect right to inquire into the behaviour of any employee, but not in this sort of cavalier fashion where the legal rules designed to protect both parties are completely abrogated.

[35] Harrisons should have notified Ms Carrothers in advance and in writing of its serious concerns about her behaviour, requested an opportunity to meet with her to discuss an initial response to those concerns, encouraged her to have a support person or lawyer or advocate to assist her in that regard, provided her with appropriate documentation to justify the employer's concerns and then agreed with her an appropriate timeframe within which she could respond to the allegations in a measured way. Then Harrisons would need to have considered that response and if necessary sought further information, either from Ms Carrothers or other sources, before indicating a provisional decision to Ms Carrothers for her to comment on. Once that point had been reached, the outcomes would have been either no case to

answer or a range of disciplinary responses depending on the employer's findings of fault.

[36] Instead of that sort of process, which the law mandates, Harrisons has sought to engage in a disciplinary meeting under the guise of an ordinary shareholders' proceeding. As Ms Carrothers' counsel put it, effectively this was a disciplinary meeting undertaken by stealth. As the Authority has noted, none of the basic tenets of fairness and natural justice have been met by Harrisons' process. Not only does that disadvantage Ms Carrothers fundamentally, but it also disadvantages Harrisons because it puts its whole process and conclusion into real jeopardy.

[37] What is more, the Authority is not persuaded that the failure of Ms Carrothers to attend the two subsequent meetings held by Harrisons is a signal failure, as Harrisons maintain. Given the way she had been treated at the June meeting it would seem inevitable that she was unable to participate. The position would have been quite different if the employer had fulfilled its obligations properly in respect to the first meeting, by giving proper notice, making full disclosure of the concerns to be discussed, and so on.

Could a fair and reasonable employer dismiss in these circumstances?

[38] Sadly, the Authority has concluded that not only was the process undertaken by Harrisons in the present case defective, but also there was no substantive basis on which a fair and reasonable employer could have concluded that dismissal was one of the justifiable options available to it at law: s.103A Employment Relations Act 2000 (the Act) applied. This is because the conclusions which Harrisons reached during its consideration of the issues of complaint and Ms Carrothers' responses, simply do not amount to a viable structure strong enough to support a dismissal.

[39] Harrisons maintains that Ms Carrothers admitted wrongdoing in the May directors' meeting (denied), and at the June meeting (also denied), and there are a number of examples where Harrisons has reached conclusions about a particular allegation which the weight of evidence simply will not support.

[40] While the Authority cannot rely on any independent evidence concerning the June meeting (none has been made available), the Authority prefers Ms Carrothers' view that no admissions were made to the view advanced by Harrisons. The view the

Authority prefers is consistent with Ms Carrothers' formal response to the employer's allegations, where she stoutly maintains her innocence on all the allegations.

[41] Moreover, the contention made by Harrisons that Ms Carrothers acknowledged wrongdoing at the May directors' meeting is not only inconsistent with Ms Carrothers' own evidence but also inconsistent with the minutes of the directors' meeting, which has been made available to the Authority. There is simply nothing in those minutes which indicate any level of disquiet about Ms Carrothers' performance and no suggestion she made admissions of any sort. Accordingly, and for the foregoing reasons, the Authority rejects Harrisons' claim that Ms Carrothers admitted wrongdoing.

[42] There were five allegations made in the pre-prepared 11 June 2012 letter which were the subject of discussion at the June meeting. The first of those is consuming alcohol at work. Harrisons points out that in terms of clause 20 of Ms Carrothers' employment agreement, suspension without pay is allowed "*where it is proved that the employee has consumed and is affected by alcohol or drugs*".

[43] Ms Carrothers' response to this allegation is straightforward. She says that she has drunk alcohol at work, that it is part of the fabric of the business, that it has always been understood as such and has always been at worst condoned and at best encouraged. She says that it is part and parcel of the art industry and particularly the running of exhibitions and she refers to regular weekly occasions when there would be drinks after work with others involved in the business, including people who are now complaining about her using alcohol in the workplace. Further and finally, Ms Carrothers points out that a particular incident referred to in the disciplinary letter was more than three months old when referred to her for comment, for the first time.

[44] It is difficult to see how Harrisons could conclude that this allegation is made out, because that is its conclusion. The Authority's view is that if the people making the accusation are amongst the people who are condoning a culture of alcohol use in the business, and there is no evidence whatever of impairment or inability to perform duties, then a finding of fault is against the weight of evidence.

[45] The second allegation relates to the falsification of time sheets. In effect it is suggested that Ms Carrothers has been padding her time sheets. Her evidence is that she worked very hard and that once she became Managing Director, having

previously only been the Gallery Director, her hourly rate remained at \$17 per hour. She said she regularly worked 50 hours a week and that she did not understand there was any concern about her hours until the June meeting. The Authority would expect some measure of freedom being given to a managing director and Harrison's has only itself to blame for this aspect. If it had put Ms Carrothers on a relevant employment agreement as is clear was being discussed at the May board meeting, this issue anyway would not have arisen.

[46] Her 2011 income of \$68,000 does not seem excessive for the range of responsibilities the Authority heard she had. Ms Carrothers rightly points out that her only employment agreement with Harrison's (the one where her role is styled Art Gallery Director), contains the expectation that she would work 43 hours per week. Now, as Managing Director, a role which the Authority heard included the cleaning of the premises as well as a wide range of other responsibilities, an increase of 7 hours a week does not seem excessive.

[47] The Authority's particular concern about Harrison's' approach to this allegation is that it has sought to limit Ms Carrothers' entitlement to the hours set out in her employment agreement but those hours are for a job that she is no longer performing and it is common ground that she has inherited new tasks since becoming Managing Director, including cleaning the building. It is difficult to see how, with extra tasks, including the responsibility of managing director, she should still be performing the enlarged role over the same span of hours, particularly as the self-same employment agreement (the obsolete one) explicitly contemplates the working of additional hours as necessary.

[48] Moreover, the Authority notes that none of this is new. Ms Carrothers has not suddenly started working extra hours. She has always worked the hours that were, in her judgment, necessary for the business and as Managing Director, the Authority would expect that she would have some latitude to use her judgment. If she has no such latitude then it is difficult to see how she can be the Managing Director.

[49] The misappropriation of funds allegation relates to a claim that Ms Carrothers pocketed a cheque which should have been paid into the gallery's funds. This is a particularly damaging allegation and one which Ms Carrothers absolutely rejects. The position is that a cheque was received in the gallery for \$130. The cheque was made out to Ms Carrothers personally. Notwithstanding that, it was plainly meant for the

gallery. Ms Carrothers discussed the matter with her stepmother who worked in the business on a part time basis doing the books. Ms Carrothers says that it was agreed between the two women that she would bank the cheque in her own account and that the funds would be used at some future point for an appropriate business purpose.

[50] It appears that subsequently, Ms Carrothers' stepmother explained the matter in a different way to the other shareholders of Harrisons which resulted in the allegation that Ms Carrothers had pocketed the money. Ms Carrothers is adamant that her recollection of the events is accurate and, for the record, the Authority believes her absolutely. The alternative view, advanced by Ms Carrothers' stepmother, has not been able to be tested by the Authority's usual process because Harrisons has refused to give any evidence in the normal way, but the Authority does note that Harrisons' material provided to the Authority refers incorrectly to the value of the cheque (it says it was for \$300, not \$130).

[51] The Authority is satisfied a good and fair employer ought to have conducted further inquiries about this matter rather than simply choosing to prefer one explanation over another in respect of the allegation of dishonesty. Indeed, as the then Chief Judge said in *Smith v. McCulloch & Partners* CC17/03, dishonesty is "*the most serious of all serious misconduct*" and the law requires employers to be scrupulously fair in investigating such allegations: *Allen v. Transpacific Industries Group Ltd* (Employment Court, Auckland, AC20/09, 4 May 2009 per Colgan CJ).

[52] Moreover, in *Timu v. Waitemata DHB* (Employment Court, Auckland, AC340/07), His Honour Judge Couch dealt with the question whether an employer, faced with conflicting reports of suspected misconduct, should make further inquiries before deciding to dismiss. *Timu* was a case where the employer simply chose which version of events it preferred. Judge Couch made clear that the law required more in those circumstances; indeed His Honour held that further inquiry was required where there were two conflicting accounts pertaining to the alleged wrongdoing.

[53] The present matter is just such a case. Here, Harrisons has simply chosen the view of the matters it prefers, a view advanced by Ms Carrothers' co-director, rather than conducting further inquiries to settle the position. Given the extreme seriousness of the allegation of dishonesty, Harrisons had an even greater duty to inquire further, and it did not.

[54] Then there is an allegation of conflict of interest. It is suggested that Ms Carrothers gave her partner concessions on purchase of artworks because he was her partner. Ms Carrothers says in response that she did give concessions to people who were regular purchasers of artwork from the gallery in order to encourage them to continue to be regular purchasers of artwork from Harrisons. The fact that her partner happens to be a particularly enthusiastic purchaser of artworks means that he is entitled to that benefit as are some other regular purchasers. Ms Carrothers, as Managing Director, seems to the Authority to be entitled to make those kinds of judgments using her discretion and experience. It is difficult to see why that sort of arrangement should be seen as inappropriate.

[55] The last allegation in the 11 June 2012 letter is that Ms Carrothers stole wine from Harrisons. Ms Carrothers said that she did from time to time take wine from the business but only an occasional bottle and that she always replaced it.

[56] The final separate allegation related to the sale of a particular painting where Harrisons complained that payment was made in cash after the painting was personally delivered by Ms Carrothers and she paid the artist from the cash received herself on a cash-in-the-hand basis and then took the money belonging to the gallery home for the weekend. Ms Carrothers said she took the money home for safekeeping over the weekend and that that was the invariable practice of the business in the time that she had been working in it. She also indicated to the Authority in her evidence that her stepmother had done precisely the same thing several weeks previously although apparently that is now denied.

[57] For the record, the Authority accepts Ms Carrothers' evidence. It is plain to the Authority that the usual process for protecting large sums of cash over a weekend or holiday was for someone on the staff to take the money home. Ms Carrothers is understandably affronted at the suggestion that she was not going to declare the funds until the issue was raised with her during the disciplinary process. The fact is that the sale took place immediately prior to the June meeting and the Authority is satisfied that Ms Carrothers genuinely forgot to re-lodge the funds in the limited time that she had available.

[58] The employer made findings of fault in respect of each of the issues that the Authority has commented on. The Authority's considered view is that, looked at in its totality, it is difficult to see how a good and fair employer could conclude, on the

basis of the evidence the Authority heard, that there was any wrongdoing at all, let alone wrongdoing sufficient to justify a dismissal of its most senior employee. It seems to the Authority that Ms Carrothers' detailed and careful explanations of the matters raised with her have not been given proper and full weight and that Harrisons has chosen deliberately to prefer the contrary view advanced by other internal sources rather than accept Ms Carrothers' evidence at face value.

[59] In the particular circumstances of this case, the Authority has taken the unusual step of analysing in some detail the basis on which the employer has concluded that there has been wrongdoing and the Authority has done that because it does not consider that the evidence supports in the smallest particular that there has been any wrongdoing at all, let alone wrongdoing to justify dismissal. It follows that in the Authority's opinion, the dismissal is not one that a fair and reasonable employer could make in the particular circumstances of this case.

Are there other grounds for complaint?

[60] In addition to alleging that she was unjustifiably dismissed from her position by Harrisons, Ms Carrothers also claims that she suffered an unjustified disadvantage in failing to be remunerated appropriately for the increase in her responsibilities when she was appointed Managing Director of Harrisons and a further unjustified disadvantage when she was unlawfully suspended from her employment on 11 June 2012.

[61] Dealing first with the failure to adjust her remuneration appropriately, it is common ground that the only employment agreement covering Ms Carrothers' employment is the one that describes her position as "*Art Gallery Director*" and the job description attached to that employment agreement bears little if any relationship to the role that she fulfilled from 28 January 2011 when she was appointed Managing Director.

[62] Ms Carrothers maintained in her evidence to the Authority that she had sought a fresh employment agreement relevant to her then current role but that Harrisons had failed to attend to that. Conversely, Harrisons maintained that Ms Carrothers had been satisfied with the remuneration agreed for the position of Art Gallery Director and in particular wished to remain on a wage rate rather than to be paid a salary.

[63] The factual position is that, for the period from 28 January 2011, when Ms Carrothers was appointed Managing Director, down to the date of her dismissal on 17 June 2012, a period of some 18 months, Ms Carrothers was paid pursuant to an employment agreement which related to her earlier position with Harrisons.

[64] Amongst other things, as part of its prosecution of the disciplinary claim against her, Harrisons used the executed employment agreement as a basis for complaining about Ms Carrothers' work practices without, in the Authority's view, giving any allowance to the fact that for fully 18 months, Ms Carrothers had been performing additional duties.

[65] The Authority accepts Ms Carrothers' evidence that she sought to have a fresh agreement prepared reflecting her increased responsibilities. That view of matters is, to some extent, confirmed by the email from Mr Hollister-Jones dated June 8 2012 to Ms Carrothers when he said that he is working on her employment agreement and wanted her confirmation that the version he had was the current one. She responded by, amongst other things, confirming that information.

[66] That email suggests to the Authority that Harrisons was intent upon preparing a fresh agreement to reflect Ms Carrothers' increased responsibilities and does not support its subsequently given evidence that Ms Carrothers was happy with the current arrangements in respect of remuneration. Nor is that last mentioned claim consistent with the evidence in the board minutes which record an agreement to have a new employment agreement based on a salary and bonuses on profit and loss.

[67] However, the Authority is not minded to conclude that Ms Carrothers has suffered a disadvantage as a consequence of the employer's failure to provide her with a current operative employment agreement. This is because, as Harrisons Managing Director for all of the period in contention, it would seem self-evident that if Ms Carrothers was genuinely upset about the failure of the employer to attend to this matter, she was in an ideal position to prosecute the issue on her own behalf. Accordingly, while the Authority accepts that it may have been to her disadvantage to continue to be employed pursuant to an obsolete employment agreement, and it may be possible to conclude further that the employer's failure to provide a current employment agreement is an unjustified action, in the particular circumstances of this case, given Ms Carrothers' position with Harrisons, the Authority is not minded to make an adverse finding.

[68] The second allegation to be dealt with under this heading is the claim that Ms Carrothers suffered an unjustified disadvantage by reason of having suffered an unlawful suspension from duty on and from 11 June 2012.

[69] The starting point must be the operative employment agreement which at clause 20 provides for suspension in a variety of circumstances including what is called “*disciplinary suspension*” for up to one week “*where the employee has engaged in misconduct and disciplinary action is warranted*”. Although not clear, the Authority assumes that it is this provision which Harrisons relies upon.

[70] But Harrisons should have gone through a proper process with the suspension, in exactly the same way as it ought to have gone through a proper process in respect of the disciplinary investigation. It is not enough to simply impose a suspension on an employee; the law requires that the employee be given an opportunity to comment on a proposal to suspend and the employer must consider whatever the employee has to say before making its final decision one way or the other.

[71] There is no evidence that any of that process just described was followed in the present case. It seems that Ms Carrothers was simply told that she was suspended from work on full pay.

[72] The Authority has no hesitation in concluding that this suspension was unlawful for the reasons just identified and in consequence, Ms Carrothers has suffered a disadvantage as a consequence of Harrisons’ unlawful action in suspending her without due process. The Authority will take that conclusion into account in considering the question of remedies.

Determination

[73] The Authority is satisfied that Ms Carrothers has been unjustifiably dismissed from her employment and therefore has suffered a personal grievance. The Authority has also concluded that Ms Carrothers has been disadvantaged by an unjustified action of Harrisons when it failed to follow a proper process in suspending her from her employment. It follows that Ms Carrothers also has a personal grievance by reason of that failing by her former employer.

[74] Having concluded that Ms Carrothers has suffered personal grievances, the Authority is obligated to consider whether she has contributed in any way to the

circumstances giving rise to those grievances. The Authority is satisfied that Ms Carrothers has not contributed in any way to either of her personal grievances: s.124 of the Act applied.

[75] To remedy her personal grievances, Ms Carrothers seeks a substantial award of compensation, wages and rectification of the moneys owing to her in terms of her final pay.

[76] The Authority is satisfied on the evidence it heard that Ms Carrothers has suffered significant humiliation, loss of dignity, and injury to her feelings and in particular, while there is ample evidence of the medical consequences for Ms Carrothers, the Authority senses that the more important motivation for this proceeding is vindication in a reputational sense.

[77] Clearly, the most hurtful aspects of this dispute for Ms Carrothers have been the very negative impact on normal family and personal relationships and the damage to her reputation in the small and relatively insular arts community.

[78] Dealing first with the question of compensation, the Authority notes that Ms Carrothers is claiming an award of \$20,000 in respect of each personal grievance. She acknowledges that that sum is at the higher end of the awards made in the Authority. In the Authority's view, the figure claimed, despite the clear evidence of the basis for an award, is just unsustainable. There have been examples of large awards made in the Authority, but the cumulative effect of the claim here is, in the Authority's opinion, beyond its remit. That said, the Authority does propose to award a significant sum of \$15,000 being an aggregate compensatory sum to take account of Ms Carrothers' entitlements in respect of both of her two personal grievances. In the Authority's opinion, that sum adequately compensates Ms Carrothers for the damage done to her by the several actions of the employer.

[79] In particular, the compensatory sum reflects the evident change in Ms Carrothers' circumstances from the period up to 11 June 2012 when compared with the period after that date. Prior to the June meeting, Ms Carrothers was healthy, confident and socially active. Thereafter, she became ill, reclusive and subjected to rumours about her honesty. Most important of all, prior to the June meeting, Ms Carrothers was an active member of her family held in good standing and after

that she has effectively become an outcast. It is self-evident from the Authority's decision that the Authority's considered view is that none of that is her fault.

[80] In respect of wages, Ms Carrothers has given evidence on oath that she had lost the total amount of \$31,833.50. That figure takes into account income derived from a sickness benefit which she has been on since 1 August 2012 but which she hopes to come off soon, and a small amount of income which she has derived from a new business as a sole trader in the fine art industry. In the particular circumstances of this case, the Authority is minded to direct that Harrisons pay to Ms Carrothers that sum in its entirety.

[81] The final significant aspect of the relief sought relates to the calculation of Ms Carrothers' final pay. There appear to be unexplained deductions from that final pay which, in the absence of evidence from Harrisons on the point, the Authority proposes to deal with on the basis of the payment to Ms Carrothers of a global sum of \$6,500 which approximates her calculation of her entitlement in respect of matters such as accrued annual leave, payment of commission, payment of holiday pay and payment of wages due.

Costs

[82] Given the approach taken by Harrisons to this litigation, it seems otiose to contemplate a further step in respect of costs. In the normal course, the Authority would reserve costs but in the particular circumstances of this case it seems appropriate to deal with costs now.

[83] Ms Carrothers is now legally aided and is required to repay a minimum of \$1,299 in respect of that legal aid.

[84] Previously, Ms Carrothers then solicitors provided representation for a fee of \$4,591.67 which Ms Carrothers is currently paying off.

[85] The Authority directs that Harrisons is to pay to Ms Carrothers the sum of \$5,890.67 in reimbursement of her costs. These total costs incurred are modest given the nature of the circumstances and the Authority sees no reason why, in the unusual circumstances of this case, Harrisons should not be responsible for the totality of the costs incurred by Ms Carrothers

Summary.

[86] Harrison is to pay to Ms Carrothers the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$15,000;
- (b) Lost wages in the sum of \$31,833.50;
- (c) A contribution to wage arrears in the sum of \$6,500;
- (d) A contribution to legal costs in the sum of \$5,890.67.

James Crichton
Member of the Employment Relations Authority