

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 150
5624315

BETWEEN REBECCA EDMONDS
Applicant
A N D SOVEREIGN STAR LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Michael O’Flaherty (Counsel) and Billy Clemens
(Advocate) for Applicant
David Beck, Counsel for Respondent
Investigation Meeting: 13 and 14 June at Christchurch
Submissions Received: 14 June 2017 from Applicant
14 June 2017 from Respondent
Date of Determination: 8 September 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A Rebecca Edmonds was unjustifiably dismissed from her employment with Sovereign Star Limited.**
- B Taking contribution into account Sovereign Star Limited is ordered to pay to Rebecca Edmonds:**
- (i) The sum of \$4,160 gross being reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000.**
 - (ii) The sum of \$4,800 without deduction being compensation under s 123 (1) (c)(i) of the Employment Relations Act 2000.**

C Costs are reserved and a timetable set for an exchange of submissions.

Prohibition from publication

[1] I prohibit from publication under clause 10(1) of the second schedule of the Employment Relations Act 2000 (the Act) the names of the parents of children at the early childcare centre, the names of any children who attended at the early childcare centre and the details of the applicant's medical information except to the limited extent it is referred to in this determination.

Employment relationship problem

Ms Edmonds' claim

[2] Rebecca Edmonds commenced her employment in January 2015 at Sovereign Star Limited (Sovereign Star or the Centre) which is an early childhood centre in Kaiapoi, as Head Teacher. She was party to an individual employment agreement with Sovereign Star signed before employment commenced on 12 October 2014.

[3] Ms Edmonds says that she was unjustifiably dismissed from her employment on 10 May 2016. She says that there was no substantive justification for her dismissal, and that the process adopted by Sovereign Star was unfair and she believes in retaliation for raising concerns about bullying and for showing support to another employee at Sovereign Star.

[4] There is no separate claim about the bullying allegation made on 22 April 2016 by Ms Edmonds. I have therefore assessed the making of this allegation and the issue about showing support to another employee in findings made about the reasons for dismissal. I have also assessed the bullying complaint in respect of procedural fairness.

[5] Ms Edmonds seeks reimbursement of a sum equal to lost wages assessed at \$25.00 per hour for 32 hours per week from 11 May 2016 to the date she obtained alternative employment on 9 January 2017 together with payment of compensation for humiliation, loss of dignity and injury to feelings in the sum of \$17,000 and costs.

Sovereign Star's reply

[6] The sole director and owner of Sovereign Star is He Weng who is also known as Brooke Philpott. Ms Philpott married a New Zealander and came to New Zealand in 2001 to study accountancy. She undertook a graduate diploma course in early childhood education and then worked at a kindergarten and a day care. Ms Philpott said that setting up and owning her own centre was her dream and she planned and designed Sovereign Star which is an architecturally designed new early childhood centre on leased land.

[7] Sovereign Star says that Ms Edmonds' dismissal was substantively and procedurally justified and that it was based on concerns put to Ms Edmonds and not for any ulterior reason. It says that it commenced its disciplinary process before Ms Edmonds raised bullying concerns. Sovereign Star's view is that the timing of the bullying complaint was to deflect attention away from performance, absences and disciplinary matters. It denies that the bullying claims made more generally but subsequently particularised after a request in early May 2016 amounted to a pattern of bullying behaviour but rather that Ms Edmonds was not performing her role.

[8] Sovereign Star says that aside from some initial procedural errors in respect of a warning, its process leading to dismissal was consistent with the obligations in s 103A (3) of the Act and the decision reached was one that a fair and reasonable employer could have made in all the circumstances.

The issues

[9] The Authority needs to determine the following issues in this matter:

- (a) What were the reasons for Ms Edmonds' dismissal?
- (b) What were Ms Edmonds explanations to the allegations?
- (c) Was there a full and fair investigation into the allegations, and did that investigation disclose serious misconduct?
- (d) Could a fair and reasonable employer have reached a decision to dismiss?
- (e) If Ms Edmonds was unjustifiably dismissed then what remedies is she entitled to and is there issues of contribution and mitigation? Were work

factors and/or the dismissal causative of Ms Edmonds inability to mitigate her loss of wages including a period from 9 September to 10 November 2016 when a medical certificate provides that she was unfit to work?

What were the reasons for Ms Edmonds' dismissal?

[10] Following a disciplinary process commencing formally in late April 2016 Ms Edmonds was advised of her dismissal from Sovereign Star in an email from Mr Beck to her counsel dated 11 May 2016. The dismissal took effect from 5pm the previous day 10 May 2016. Mr Beck's email provided that he would write later setting out fuller reasons for the dismissal.

[11] In a further email dated 16 May 2016, Mr Beck confirmed that the dismissal decision was as a result of the findings set out in his email of 9 May, cumulatively destroying the trust and confidence Sovereign Star is entitled to place in Ms Edmonds. He noted in particular that Ms Edmonds had in the final submission made on her behalf shown no contrition and continued to assert that she was denying all allegations against her.

[12] I am not satisfied that Ms Edmonds alleging bullying was a reason for dismissal. I am satisfied that after the bullying allegation was raised Sovereign Star tried to meet with Ms Edmonds to see how the situation could improve even though they were not prepared to attend mediation. Further, although I accept that there was a view Ms Edmonds was supporting another employee of Sovereign Star who had instructed lawyers at Mr O'Flaherty's firm, I am not satisfied that was a reason for dismissal. I find that there were five reasons for dismissal.

[13] The five reasons for dismissal were:

- (a) The content of Mr P's¹ email of 4 May 2016 - finding of serious misconduct.
- (b) Open defiance to instruction to not leave the Centre on 18 April 2016 - finding of serious misconduct.
- (c) Yelling at Mr P's child - finding of misconduct.

¹ The initial bears no resemblance to the parent's actual initial.

- (d) Placing own daughter in the Centre when not enrolled - finding of serious misconduct.
- (e) Refusal to participate in Ms F's appraisal process - finding of serious misconduct.

Two allegations of excessive absences and unaddressed parental complaints were not found to be misconduct. The first was to have been the subject of counselling and the second was not made out.

What were the explanations before findings were made about each of the allegations?

Process not involving face to face meetings

[14] The investigation process did not involve face to face meetings. Mr Beck's instructions and involvement in this matter had followed steps of a less formal nature by Sovereign Star from in or about 21 April 2016. After Mr Beck was instructed between 21 April and 27 April 2016 Ms Edmonds was invited to attend face-to-face meetings as part of the investigation process but did not take that offer up.

Medical certificates to support not being able to attend disciplinary meetings

[15] A medical certificate was provided on 29 April, advising that Ms Edmonds was medically unfit to attend work from 29 April until 20 May 2016. There were statements from her counsel that Ms Edmonds was suffering from work related stress. The medical certificate only certified the period until fitness to return to work and no further specific information was supplied although requested by Mr Beck several times. Some information was provided for the Authority investigation meeting.

[16] Matters were further complicated when Ms Edmonds returned to work on 2 May 2016. Her counsel advised this was for financial reasons as sick leave had been exhausted. After attending at work for a short period Ms Edmonds was then sent away to obtain medical clearance. As her return on that day was unexpected her role had been covered that day by another employee.

[17] On 5 May 2016 Ms Edmonds returned to the work place again and provided a further medical certificate dated 4 May 2016 that she would be fit to return to work on 5 May 2016. The second medical certificate was inconsistent with the first certificate.

Ms Edmonds was then placed on paid special leave until her employment was terminated.

How were the explanations given

[18] There is a considerable amount of communication between Mr Beck and at various times three different lawyers including Mr O'Flaherty all from the same firm. The other two lawyers from Mr O'Flaherty's firm are Netta Egoz and Tony Herring. The explanations to the allegations are found amongst this correspondence in the form of written responses from Ms Edmonds forwarded to her lawyers and then onto Mr Beck and some explanations to the allegations directly from Ms Edmonds lawyers sent to Mr Beck.

[19] Mr O'Flaherty became involved after Ms Edmonds had received four letters from Ms Philpott. These letters are found at pages 24 – 27 of the bundle of documents and some of the concerns in the letters were allegations in the formal disciplinary process. There was a dispute about whether a fifth letter dated 21 April 2016 at 28 of the bundle was received by Ms Edmonds. She does not accept she received that letter. It is about childcare fees owing for Ms Edmonds daughter in excess of \$1000 and provides that the enrolment of Ms Edmonds daughter had been cancelled in accordance with Sovereign Star policy.

[20] There was also a verbal warning dated 21 April given to Ms Edmonds which was subsequently withdrawn in an email from Mr Beck dated 6 May 2017 because of potential unfairness in terms of the process. For current purposes I note that the warning was given for amongst other matters the failure to complete appraisal reviews of staff members.

[21] Between 27 April and 9 May 2016 one additional matter and one new piece of information material to the above reasons for dismissal was raised with and provided to Ms Edmonds. They were the matters on which findings were reached about yelling at a child and Ms Edmonds placing her own daughter in the centre when not enrolled. These matters were also responded to in writing.

Mr P's email of 4 May

[22] The email contained general concerns that Ms Edmonds had an unprofessional attitude towards children, parents and staff members. There was reference to her

talking to staff members without respect and “in his opinion making others and the centre look bad.” Mr P referred to comments of Ms Edmonds and of another employee R as unprofessional and not something that should be spoken about with a parent of the centre. He had also made an allegation that his child was yelled at by Ms Edmonds.

[23] A specific comment or comments that Sovereign Star attributed to Ms Edmonds in Mr P’s email was that she told Mr P management [of Sovereign Star] was failing and that he needed to attack management for the well-being of his child.

[24] Mr P’s complaint was forwarded to counsel representing Ms Edmonds by letter on 5 May 2016. Mr Beck advised that this was a new matter that Ms Edmonds had openly disparaged the centre and its management. He wrote that Sovereign Star was entitled to treat this as a “gross breach of the duty of fidelity” that was potentially a serious issue of misconduct as was the other allegation of inappropriately yelling at a child. The allegation of yelling at a child was considered separately and I will turn to that shortly. Mr P advised in the same email that his child would not be attending the Centre whilst Ms Edmonds was a teacher there. Mr Beck stated that his client had not formed a view on the [breach of the duty of fidelity] issue pending a response from Ms Edmonds.

[25] The relevant explanation to the allegation was that Mr P had referred to R’s last day at work and Ms Edmonds said that she was away that day. She explained that she struggled to believe that Mr P could recall a conversation with her and other employees R and K where apparently the three teachers had “rallied together about the centre not being run properly, staff numbers and resources.” Ms Edmonds went on in her response to say that she understood this was only his [Mr P’s] opinion but she was unsure “how he was aware that she and two other staff member have rallied together.”

[26] Ms Edmonds went on in her explanation to say that Mr P had made comments to her about Ms Philpott and the 2IC Pamela Parker and that she had directed him appropriately to address those concerns with management. In conclusion Ms Edmonds stated that she wanted to stress that Sovereign Star and management can trust that “I always act and behave in a way that shows confidence in the centre but most importantly in myself as Head Teacher.”

Open defiance to instruction not to leave the centre on 18 April 2016

[27] This allegation arose out of a text exchange where Ms Edmonds asked Ms Philpott on Sunday 17 April at 8.35pm if she could finish work by 1pm the following day. Ms Philpott responded to say that she was sorry she could not let her finish early as two staff were away. Ms Edmonds responded and said her daughter had an appointment in town which she was taking her to so she will be leaving. There were some further text messages and then some interaction on 18 April. Ms Edmonds left for her appointment at 1pm.

[28] The allegation that Ms Edmond's leaving appeared to be open defiance and that there was open hostility was put in Mr Beck's first letter of 27 April 2016.

[29] The first explanation to this allegation is found in a letter from Ms Egoz to Mr Beck dated 3 May 2016. Ms Egoz explained that initially Ms Edmonds had misread a text message to understand that permission had been granted but the next time she should ask with more notice. Although Ms Egoz said that the further text message sent on 18 April 2016 from Ms Philpott clarified the instruction, by that stage Ms Edmonds had committed to taking her daughter to her appointment. It was also stated that Ms Edmonds took issue with the way she was approached in front of other children and teachers about the matter. Ms Egoz stated that this was in line with other negative behaviour that Ms Edmonds had experienced from Ms Philpott and had led to her filing a complaint of bullying.

[30] Ms Edmonds also responded herself in a written response at [77] of the bundle to the allegations. In relation to this allegation she explained that she was not being defiant but interpreted the text as a warning of future action. She stated that she did not read the text sent the following day as she was not allowed her cell phone in the classroom.

The yelling at Mr P's child

[31] At 4.22pm on 9 May 2016 a copy of an email sent to Sovereign Star from another parent K was provided to Mr O'Flaherty by Mr Beck. Mr Beck noted in the email that K was very reluctant to be involved but she had agreed for her email to be released. The date of K's email was 6 April 2016. Ms Edmonds knew from Mr P's complaint that K was the one who had overheard the exchange and told Mr P.

[32] The email also set out a concern K had about the way she overheard Ms Edmonds spoke to Ms Parker and she had heard Ms Edmonds “scream” at Mr P’s child to sit down and have breakfast.

[33] Ms Edmonds in a document dated 6 May 2016 at [65] of the bundle denied yelling at Mr P’s child. She expressed concern that she had not been advised earlier of the complaint. She also expressed a view that the other parent who said she had witnessed Ms Edmonds yelling at Mr P’s child did not like her.

Placing own daughter in the Centre when not enrolled

[34] This allegation changed from a single concern that Ms Edmonds had not addressed childcare fees owing which were allowed as a staff privilege to include a new concern that Ms Edmonds had placed her child in the Centre on 2 May 2016 when she was not enrolled as she had failed to resolve unpaid fees. Ms Edmonds was advised of the new concern in an email from Mr Beck to Mr O’Flaherty. Mr Beck said in his email that it was a concern Ms Edmonds had brought her child to the centre knowing her enrolment had been cancelled because she owed over \$1000 in unpaid fees and that unenrolled children can place the licence to operate in danger.

[35] Ms Edmonds originally explained through her counsel on 3 May 2016 that she was awaiting WINZ payments for childcare which should be paid shortly. This explanation expanded to include a response that her lawyer had confirmed she would be returning to work that day with her child. Further Ms Edmonds said that there had been many occasions where children have not been booked in and Ms Philpott or Ms Parker has been all right with that. There was an additional explanation that Ms Philpott was not treating her fairly in respect of outstanding fees as she would other parents.

Refusal to participate in Ms F’s appraisal process

[36] The first explanation to this allegation was from Ms Egoz in an email to Mr Beck dated 3 May 2016. It was that Ms Edwards had never been asked to provide a review in her 20 years as a teacher. Additionally Ms Edmonds felt that she was being asked to provide evidence in a case against Ms F which was not something she was willing to do, nor could be forced to do. It was stated that Sovereign Star failed to engage in a constructive dialogue regarding why this was needed, or how this was part of Ms Edmond’s job role. Ms Edmonds expanded on this concern in her own written

response that she did not see this as part of her role as she works in a different room to Ms F. She did not accept that she was asked to undertake another employee's appraisal. In respect of a concern that she had checked the requirement to undertake an appraisal with a competitor she stated "this is entirely false and is just another statement on the long list of fabricated comments from Brooke. I would encourage you to investigate this."

Was there a full and fair investigation into the allegations, and did that investigation disclose serious misconduct?

The test of justification

[37] The Authority is asked to consider whether Ms Edmonds was justifiably dismissed and is required in those circumstances to apply the justification test which is set out in s 103A of the Act. The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of Sovereign Star, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[38] The Authority must consider the four procedural fairness factors set out in 103A (3) of the Act. These are whether the allegations against Ms Edmonds were sufficiently investigated, whether the concerns were raised with her, whether she had a reasonable opportunity to respond to them, and whether such explanations were considered genuinely by Sovereign Star before dismissal. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[39] Sovereign Star as a fair and reasonable employer could be expected to comply with the good faith obligations set out in s 4 of the Act.

Procedural concerns raised by Ms Edmonds

[40] Mr O'Flaherty in his submission raises several concerns about the process and investigation and submits that it was deeply flawed and fell short of the s103A requirements. Mr Beck in his submission does not accept that the process or investigation was unfair and he submits that in terms of s 103A (3) of the Act

Sovereign Star is a small inexperienced employer with limited resources that it has expended on legal advice to defend the claim.

[41] I accept that Sovereign Star has limited resources. There were elements of the process that accorded with the requirements of s103A of the Act. I do, however, find that there was some procedural unfairness in the investigation of the allegations that was not minor and did cause unfairness. One element that impacts on substantive fairness is the failure in light of Ms Edmonds explanation to further investigate Mr P's allegation.

No further questioning of Mr P

[42] Mr Beck submits that Ms Edmonds did not deny the conduct complained of by Mr P. Her explanation that she was away on R's last day required, I find, further investigation and questions before a decision was made on whether what was alleged to have been said was in fact said. Ms Edmonds also made a general statement that she always acts in a way that shows confidence in the Centre. Mr O'Flaherty asked during the process that Mr P be questioned further. Further questioning did not take place in all likelihood because of a measure of discomfort in questioning a client of the Centre. A further difficulty is that there is some ambiguity in Mr P's email as to who made the statement that management was failing and that he needed to attack management. That is because the paragraph in the email starts with reference to R's last day and Ms Edmonds was not present on that day.

[43] Ms Philpott and Ms Parker said in their evidence Ms Edmonds did make comments undermining Sovereign Star. It is important in disciplinary investigations that an allegation is clearly put. In this matter the allegation for Ms Edmonds to answer was limited to Mr P's email and emphasis placed on a specific statement in that email. A fair and reasonable employer could and would want to be very clear that Mr P was attributing that comment in particular to Ms Edmonds. I cannot be satisfied that the investigation sufficiently enabled that conclusion to be made.

[44] Another concern Mr O'Flaherty raises is that Mr P's complaint was sent to Mr Beck. I cannot be satisfied anything sinister turns on that matter. I do acknowledge Ms Edmonds felt concerned about that.

Questioning of K

[45] I am not persuaded that further questioning was required of K. I find that Sovereign Star was entitled to prefer her account over that of Ms Edmonds. She was considered to be a credible parent at the Centre.

Belated provision of K's email

[46] The email from K was only provided some half an hour before the preliminary finding were made to Ms Edmonds. That does not accord with good faith requirements, however I accept K was approached about releasing the information which delayed matters. Any unfairness about that in all the circumstances is minor and did not cause unfairness. The email was able to be responded to before the final decision was made and Ms Edmonds was alerted earlier in Mr P's email to the fact that K had told him she had overheard Ms Edmonds yelling at his child. She directly responded to that.

Failure to provide employment agreement and copies of parent complaints

[47] An initial complaint about Ms Edmonds sent to the Education Council suggests that there may have been some parent complaints in writing. Ms Philpott in her oral evidence seemed to accept there were other parental complaints in writing. At one point of the process it was raised on behalf of Sovereign Star that parents were reluctant to put the complaints in writing and/or have those provided to Ms Edmonds. Parent complaints other than Mr P's supported by K were not found to be a reason for dismissal. Notwithstanding there is unfairness in raising an allegation and then providing no information to support it.

[48] A copy of Ms Edmonds individual employment agreement was requested on several occasions and should have been provided to her counsel. I am not persuaded that the failure to provide a copy was such that it prevented a face to face meeting to answer the allegations about which information had been provided. I am equally not persuaded that the failure to provide an employment agreement was minor and did not result in unfair treatment. The employment agreement contains a process for misconduct/performance and set out what conduct may be regarded as serious. It was, I find, information that could be relevant to explanations for the continuation of employment.

Bias

[49] Ms Philpott is the sole director of Sovereign Star. Mr O’Flaherty submits that she was not sufficiently objective to conduct the investigation and make the decision in a fair manner as she was the complainant in three of the matters forming the basis for dismissal as well as the investigator and the decision maker. Mr O’Flaherty submits Ms Philpott completed a staff wellness survey undertaken to deal with allegations of bullying to the effect that she was bullied by Ms Edmonds.

[50] If Ms Philpott was not involved in the decision making then she would have had to delegate to somebody at a lower level. I do not find that would have been appropriate given the comparative seniority of Ms Edmonds in her head teacher role. The second option would have been to delegate the decision making to a person outside of the organisation. That would have meant that an individual not involved in the business would have been making its decisions and that would have been expensive.

[51] I accept Ms Philpott recognised at the time of the disciplinary process that she was distressed about Ms Edmonds actions and what she said was her refusal to acknowledge wrongdoing. To assist and counter that she said she involved her 2IC Ms Parker in the disciplinary process and took legal advice at every step of the process.

[52] Support for Ms Philpott making efforts in light of this to be fair and objective is found in the first letter Mr Beck sent in the process dated 27 April 2016. The letter sets out the allegations at that time to be responded to but suggests a constructive way forward by way of an early meeting with counsel involved to discuss how best the situation could be improved. The letter was referred to in later communication by Mr Beck with Ms Edmonds counsel as an olive branch. Ms Edmonds did not attend that meeting saying in her written evidence that Ms Philpott would not listen to her and she did not want to damage her mental health further. Her counsel though would have been present as support at that meeting.

[53] The Employment Court in its judgment in *Mobeen Bhikoo v Stephen Marr Hair Design*² emphasised in previous decisions there is no requirement on an employer in carrying out disciplinary functions to be independent in the way a person

² *Bhikoo v Stephen Marr Hair Design* [2016] NZEmpC 32 at [31] – [33]

acting in a judicial capacity would be required to be. In *Bhikoo*³ Judge Perkins found that the test comes back to a consideration under s 103A of the Act and whether the decision maker was so involved with the events leading to the grievance that their objectivity was fettered so as to render them completely partial. Judge Perkins agreed in those cases the person may not be the appropriate person to decide the outcome of the process because it would not be what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[54] In the circumstances I am not satisfied that Ms Philpott could not have fairly and reasonably with legal advice carried out the investigation and made the decision whether Ms Edmonds could be dismissed.

Pre-determination

[55] Mr O’Flaherty submits that there was a pre-determined view to terminate Ms Edmonds employment. He relies on the complaint Ms Philpott made to the Education Council on 23 April 2016 about Ms Edmonds. I shall refer to it as the initial complaint. The mandatory report made after Ms Edmonds dismissal was noted by the Education Council to cover the same concerns as the initial complaint. The Council did not conclude that the allegations reached the threshold required for a disciplinary response and said a number were unsupported by evidence and documents focussed on matters related to the employment relationship. The Council noted that the complaint seems to have arisen in the context of an apparent break down in the employment relationship between Ms Edmonds and Ms Philpott. Mr O’Flaherty suggests that was bad faith by the employer and a pre-determination to dismiss.

[56] Mr Beck acknowledges that the complaint to the Education Council was premature but says that it was a decision Ms Philpott made under a time of pressure. In that complaint Ms Philpott refers to on the part of Ms Edmonds “multiple misconducts and serious misconducts”.

[57] The initial complaint to the Education Council was unfortunate, unwise and premature. It was I suspect a reaction to the incident on 18 April 2017 and Ms Philpott feeling overwhelmed in her dealings with Ms Edmonds. It would have been stressful for Ms Edmonds to have received that complaint. What I need to consider is

³ Above n 1 at [32]

whether Ms Philpott's mind was already made up to dismiss Ms Edmonds and she no longer had an open mind or intention to change any views in her decision making as a result of that complaint. The process after Ms Philpott obtained legal advice did not, I find, reflect a lack of an open mind. There was a lot of effort in trying to meet with Ms Edmonds so that her explanation could be heard including initially an attempt to improve the relationship and I cannot be satisfied of predetermination.

Complaint of bullying

[58] Mr O'Flaherty says that one of the reasons there was no attendance at a meeting to discuss the allegations was because there was no assurance for Ms Edmonds that her complaint about bullying would be addressed. Further he says that there was no investigation of bullying.

[59] Mr Beck set out to Mr O'Flaherty that the allegation of workplace bullying was denied and was lacking in contextual detail and that Ms Philpott had advised of incidents where Ms Edmonds had yelled at her in front of teachers and generally treated her in a disrespectful manner.

[60] Mr Beck suggested in a letter dated 27 April 2016 a constructive way forward would be an early meeting between the parties with counsel present to discuss how best the situation could improve.

[61] Ms Edmonds would have felt under increasing pressure as performance issues were raised with her. These would have necessitated increased interactions with Ms Philpott and Ms Parker of a less positive nature when her conduct was challenged. The proposed meeting in the 27 April 2016 letter would have been an opportunity to talk about those concerns if they formed part of the explanations to allegations or were relevant to improving the relationship. It was an appropriate first step. The staff wellness survey undertaken by Mr Beck was not inappropriate to ascertain if there any wider issues or concerns in a general way. The surveys did not indicate a wider concern with management.

[62] I do not find that Sovereign Star was prevented from conducting an investigation into disciplinary matters simply because a complaint of bullying was made. The complaint does not stop the process. I do not find that it was procedurally unfair for Sovereign Star to decline to attend mediation about alleged bullying in the middle of its disciplinary process.

Conclusion on procedural fairness

[63] I have found that there were some procedural failings that were not of a minor matter and that did result in unfairness. I now set out whether the investigation disclosed serious misconduct.

*Were the findings available**Mr P's email*

[64] Statements to a client undermining an organisation or management are inimical to obligations of fidelity and good faith an employee has and as such can amount to serious misconduct. Ms Philpott said that this complaint from Mr P was essentially the last straw.

[65] I find that it was available to Sovereign Star to conclude something was said by Ms Edmonds to Mr P that he considered unprofessional. Caution is required when relying on a part of a conversation put without specific context. The failure to investigate further in light of the explanations from Ms Edmonds and her counsel meant that it could not be established with sufficient certainty exactly what was said and in what context. That was necessary to be able to conclude whether what was said amounted to serious misconduct that deeply impaired or was destructive of basic trust and confidence essential in an employment relationship.

Leaving without approval

[66] A fair and reasonable employer could conclude, I find, that Ms Edmonds did not have a reasonable explanation to the failure to follow a lawful and reasonable instruction from Ms Philpott that her leave was not approved. Ms Edmonds left notwithstanding the instruction. Ms Edmonds seized in her explanation on one text message from Ms Philpott that was less clear and only in part supported a future situation. The earlier text message was very clear that leave was not approved and so were the messages sent the following day by Ms Philpott and there was a verbal discussion about leave not being approved. Ms Edmonds denied that on 18 April 2016 she received a letter from Ms Philpott as she left advising again that leave was not approved. I find a fair and reasonable employer could have concluded that had been provided. Even without that letter the absence of approval for leave was perfectly clear. I find that a fair and reasonable employer could also conclude that Ms

Edmonds entered into a confrontational exchange with Ms Philpott in front of other staff the following day before leaving.

[67] Ms Edmonds said that she had an appointment to take her child to but there was no documentary evidence provided to support that by way of mitigation. I accept that the appointment was important to Ms Edmonds and her child but it was not put in explanation that it was an emergency. Deliberate disobedience in the face of a lawful and reasonable instruction can amount to serious misconduct and it was open to Sovereign Star to find on this occasion it was.

Yelling at Mr P's child

[68] I find that it was open for Sovereign Star to prefer K's account about the tone in which Ms Edmonds spoke to the child over Ms Edmonds denial and find misconduct. K was regarded as a credible parent.

Placing own daughter at the Centre when not enrolled.

[69] Ms Edmonds thought her lawyer had contacted Mr Beck about her return to work and the child was only in the Centre for a very short time. There was some question about who had dropped the child at the Centre. Ms Edmonds did leave the Centre with her child when asked to without incident and there was no repeat of the conduct.

[70] I find that it was open to a fair and reasonable employer to conclude that Ms Edmonds knew her daughter was not enrolled because of the quantum of outstanding fees and what I find was earlier discussion about payment of the fees. I am not satisfied that a fair and reasonable employer could conclude that this conduct, although unsatisfactory and with the potential for serious consequences, was serious misconduct. Whilst Sovereign Star was understandably concerned about Ms Edmonds professional standards and whether such an action was simply confrontational, those issues could and should have been dealt with as performance issues rather than findings of serious misconduct.

Refusal to assist with performance appraisal

[71] This was a task in Ms Edmonds job description. Her explanations were that she had not worked with Ms F to be in a position to appraise her performance but also

earlier that she did not want to provide evidence for use in a case. There was a concern that Ms Philpott had not sufficiently explained why this task was necessary.

[72] Of concern to Sovereign Star was that Ms Edmonds said that she had spoken to a person at a competitor and relied on that advice in support of not undertaking the task. I accept that Ms Philpott was concerned about that. She also regarded the employee to be appraised as struggling with her performance and behaviour. I find that a fair and reasonable employer could regard this as a performance matter to be dealt with under clause 10 of the employment agreement. That was in line with the earlier approach taken with the warning before it was withdrawn. Continued failure to comply with the instruction could have led to termination. I do not find a fair and reasonable employer could conclude at the point it was raised as an allegation that it was serious misconduct.

Could a fair and reasonable employer have reached a decision to dismiss?

[73] Ms Philpott had begun to feel overwhelmed and intimidated in dealing with Ms Edmonds from March 2016 and the relationship had seriously deteriorated. She found Ms Edmonds became very unapproachable and challenging. No formal performance process was undertaken under clause 10 of the employment agreement. Ms Philpott accepted that such a process should probably have been commenced earlier. Objectively assessed Ms Philpott was hopeful that Ms Edmonds would acknowledge some fault or wrongdoing early on when the allegations were formally put by Mr Beck which would provide a basis for the relationship to rebuild and continue. That did not happen and then Mr P's concerns were put in writing which took the seriousness in Ms Philpott's view to another level.

[74] Only one of the five allegations found to be made out I have found could be concluded by a fair and reasonable employer in all the circumstances to be serious misconduct. The dismissal was on the basis that all five allegations were cumulatively destructive of trust and confidence in the relationship. In her written evidence Ms Philpott said that she would not have dismissed Ms Edmonds for deliberately leaving without approval in the face of a lawful instruction not to do so although her oral evidence about that was not as clear.

[75] In all the circumstances I cannot be satisfied that Ms Edmonds would have been dismissed for that one matter alone. In those circumstances I do not find that a

fair and reasonable employer could have reached a decision to dismiss for all the reasons set out above.

[76] I find that Ms Edmonds has a personal grievance that she was unjustifiably dismissed and she is entitled to consideration of remedies.

Remedies

No remedies

[77] Mr Beck submitted that before the Authority assesses remedies it should consider whether Ms Edmonds should be deprived because of her conduct from receiving any remedies whatsoever. Mr Beck referred to the full Court of the Employment Court judgment in *Xtreme Dining Limited v Dewar*⁴ and the finding that s 124 of the Act does not permit complete removal of a previously established remedy.⁵ He submits that there is misconduct in this case which is so egregious that no remedy should be given under s 123 of the Act. He relies on Ms Edmonds leaving without approval and the allegation of Mr P. He submits both display a belligerent and contemptuous attitude on the part of Ms Edmonds and destroyed the employment relationship. I have not found the allegation about what was said to Mr P to have been adequately investigated to enable a conclusion that the words attributed to Ms Edmonds were in fact said. I did not hear evidence from Mr P who was reluctant for reasons Mr Beck expressed to the Authority to be involved. I do not find this is one of the situations where there should be no remedy. The matter falls to be considered in the usual way with contribution to be assessed after an initial consideration of remedies.

Lost wages

[78] Ms Edmonds seeks lost wages from 11 May 2016 until she obtained other employment on 9 January 2017. It was disclosed Ms Edmonds received sole parent support from 25 May 2016 and some additional support benefits. There is no evidence of any job applications during that period. In anticipation of the Authority process some further information was provided by Ms Edmonds which included a letter from Work and Income dated 9 November 2016. It advised that Ms Edmonds was on a medical certificate from 9 September 2016 to 10 November 2016.

⁴ *Xtreme Dining Limited v Dewar* [2016] NZEmpC 136 31/10/2016

⁵ Above n 3 at [216]

[79] A letter from Ms Edmonds doctor dated 29 September 2016 provides that Ms Edmonds commenced on antidepressant medication in January 2016 with depression said to be as a result of another medical condition. I could not be satisfied that Sovereign Star was aware that Ms Edmonds was prescribed anti-depressants from January 2016. The letter from the doctor provides that Ms Edmonds first presented with significant anxiety on 29 April 2016 with both physical and psychological symptoms from her anxiety. The letter stated that Ms Edmonds did not feel able to return to work in her previous occupation with children.

[80] I accept that Ms Edmonds was quite unwell at the time of her dismissal and this in all likelihood impacted on a decision not to look for other roles. Whilst employed at Sovereign Star there is evidence of several difficult challenges Ms Edmonds faced outside of work. I do not need to set those out here but this was not a situation where the evidence objectively assessed supports the only stressor was the work place or the dismissal. Ms Edmonds described her dismissal in words to reflect that it was the last straw. I accept that the job at Sovereign Star provided a sense of regularity and security in difficult and turbulent times for Ms Edmonds. The work place however had started to become a less pleasant place for her. There had been earlier talk by Ms Edmonds about the possibility of her leaving that had come to Ms Philpott's attention.

[81] The Authority is asked to conclude that the dismissal and its resulting impact was the significant causative factor in Ms Edmonds being unable to mitigate her loss for an extended period. I accept Mr Beck's submission that there was only limited medical evidence to support that. Mr Beck specifically asked during the disciplinary process in an email at [51] of the bundle for specific information to support any claim of workplace stress. He set out clearly that Sovereign Star denied causative factors and viewed the anxiety as a combination of the misconduct matters due to confrontational behaviour. No specific information was provided.

[82] The Authority did not hear from a medical specialist. Further there seemed to be an intervening event leading to a later period Ms Edmonds was unfit for work from September to early November 2016. There is also the confusing change of the fitness to return to work date prior to the dismissal from 20 May to 5 May 2016.

[83] I also take into account a high degree of likelihood that this employment relationship if it had remained on foot would not have lasted for more than a few

months. It was a relationship in very serious trouble in April 2016. Performance issues would have needed to have been addressed in a situation where Ms Edmonds would not meet to discuss matters and was not forthcoming about matters.

[84] As an example, the request made for the return of the children profile books from in or about early April 2016. Ms Edmonds did not say directly to Ms Philpott or Ms Parker that she had not completed the work and needed help. Ms Edmonds delayed despite several requests to return the books. This was in circumstances where it was clear that their return was of significant importance to Sovereign Star and their absence had been subject of parents' complaints. The profile books were eventually returned without specific advice to Ms Philpott or Ms Parker shortly before the termination of employment. It was then clear that the learning story part of the profiles had not been updated since September 2015. That matter would have had to be addressed somehow if the relationship was to stay on foot.

[85] I cannot be satisfied in all those circumstances that Sovereign Star should be liable for the full period of time that Ms Edmonds was without work and I am further not satisfied had Ms Edmonds not been dismissed the relationship would have lasted more than a few months. I am not prepared to exercise my discretion to award a sum greater than that in s128 (2) of the Act of three months ordinary time remuneration.

[86] Subject to issues of contribution reimbursement of three months' salary at \$25 per hour for 32 hours per week is \$10,400 gross.

Compensation

[87] I accept that the impact on Ms Edmonds of her dismissal was significant. She said that she isolated herself at home and that she was not the same person that she had been. She felt nervous about coming across anyone from Sovereign Star. Ms Edmonds described having anxiety attacks, shutting people out and not being able to sleep. Ms Edmonds accepted that she may have previously had anxiety but it was not diagnosed until April/May 2016. The written statements of evidence from Ms Edmonds son and his partner about the effect the dismissal had on Ms Edmonds were both by agreement taken as read. They confirm that the impact on Ms Edmonds was significant and that her ability to care for her younger children was impacted. They describe Ms Edmonds staying on the couch during the day and being unable to sleep at night. The home environment suffered as a result.

[88] Subject to contribution I consider an appropriate award for compensation would be \$12,000.

Contribution

[89] The Authority is required under s 124 of the Act where it determines that an employee has a personal grievance to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance and if required reduce the remedies that would otherwise be awarded.

[90] I find that the actions of Ms Edmonds did contribute to the situation that gave rise to the personal grievance to a significant extent.

[91] In the face of a clear instruction that leave was not approved Ms Edmonds left the work site on 18 April 2016 and the cook was required to supervise the children to maintain ratio. Ms Edmonds provided no evidence of the appointment that she said she attended. She accepted under cross-examination that she was not afraid to stand up for herself to her employer and that she had been told that she could come across at times aggressively even though that may not be her intention. I find it more likely than not that her interactions with Ms Philpott at that time when Ms Philpott was instructing her not to leave the work place were somewhat hostile and that Ms Edmonds was going to leave regardless of what was said.

[92] I find Ms Edmonds also contributed to the personal grievance by unreasonably not undertaking the appraisal of K and saying that she had spoken to a competitor about that. In her evidence at the Authority investigation meeting Ms Edmonds said that she had made the part about talking to a competitor up to get Ms Philpott “off her back”. If Ms Edmonds had said that at the time of the disciplinary process it would have been a less serious matter. What Ms Edmonds did explain about that at the time of the disciplinary process was that the comment about the competitor was “entirely false” and “just another statement on the long list of fabricated comments” from Ms Philpott. She wrote that she encouraged Mr Beck to investigate the complaint. That was untruthful. Had Mr Beck investigated further then Sovereign Star would have looked foolish. This was a serious breach of good faith.

[93] Ms Edmonds was further not communicative and responsive during the disciplinary process. She would not meet and there was no specific medical evidence supplied to support that stance. Her explanations were provided in writing which

prevented the usual process of question, answer and clarification. She was not able to be specifically asked about Mr P's complaint to clarify her written response. There was little put forward to assist with the restoration of a significantly damaged relationship. Ms Edmonds simply denied all the allegations and made no concessions even to say that some of her behaviour was due to her medical condition. The proceeds from the sale of a cot despite request were never re-paid and the profile books which were not up to date returned without discussion. There was a denial that Ms Edmonds had used a particularly loud tone for a child to come and have breakfast. Having heard from K I accept K's evidence about the loud tone of voice.

[94] I find that the contribution in this matter was significant and I assess it at 60%. The above remedies are to be reduced by that amount.

Orders made

[95] Taking contribution into account I order Sovereign Star Limited to pay to Rebecca Edmonds the sum of \$4,160 gross being reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000.

[96] Taking contribution into account I order Sovereign Star Limited to pay to Rebecca Edmonds the sum of \$4,800 without deduction being compensation under 123 (1) (c) (i) of the Employment Relations Act 2000.

Costs

[97] I reserve the issue of costs. Mr O'Flaherty has until 21 September 2017 to lodge and serve submissions as to costs and Mr Beck has until 5 October 2017 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority