



# New Zealand Employment Relations Authority Decisions

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## Gavin v Smith Developments CA 145/07 (Christchurch) [2007] NZERA 779 (29 November 2007)

Last Updated: 23 November 2021

### IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

CA 145/07 5089965

BETWEEN CHARLOTTE GAVIN

Applicant

AND SMITH DEVELOPMENTS LIMITED

Respondent

Member of Authority: Alastair Dumbleton

Representatives: Jeff Goldstein, Counsel for Applicant

Paul White, Counsel for Respondent Investigation Meeting: 13 November 2007 at Christchurch Determination: 29 November 2007

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] The applicant, Ms Charlotte Gavin, has claimed that the respondent, Smith Developments Limited (“SDL”), dismissed her unjustifiably from employment. Ms Gavin asks the Authority to make that finding in determining the personal grievance claim she has lodged, and she asks for remedies of reimbursement for lost remuneration and compensation for the effects the dismissal had on her. As an alternative to compensation, Ms Gavin claims damages for alleged breaches by SDL of the employment agreement.

[2] Before resorting to the Authority for determination of her employment relationship problem, Ms Gavin tried to resolve it through mediation with SDL.

#### Test of justification

[3] The test of justification in a personal grievance claim is now a statutory one; [s 103A](#) of the [Employment Relations Act 2000](#) requires the Authority to reach its determination on an objective basis by considering whether, in this case, SDL’s actions and how SDL acted were what a fair and reasonable employer would have done in all the circumstances at the time Ms Gavin was dismissed. Principles to be applied under [s 103A](#) of the Act have been set out by the Employment Court in *Air New Zealand v Hudson* [\[2006\] NZEmpC 46](#); [\[2006\] 3 NZELR 155](#). In its judgment the Court found that under [s 103A](#) what is required is for the Court or the Authority to consider whether dismissal was justified “from the point of view of a neutral observer.”

[4] Ms Gavin was dismissed summarily on 12 March 2007 by Mr Hilton Smith, a director of SDL. His company is in the business of property investment and development and Ms Gavin was employed to be its Property Manager. She commenced work on 29 January 2007.

[5] Her dismissal only a few weeks later followed an investigation carried out by Mr Smith into Ms Gavin's role in a charitable trust, and also her actions in passing certain information to that trust while employed by SDL.

[6] From his investigation Mr Smith concluded that Ms Gavin's activities had placed her in breach of express conditions of the individual employment agreement she had entered into with SDL. He advised Ms Gavin that her actions had destroyed the trust and confidence necessary for the employment relationship and that he was dismissing her for that reason.

### **Raising of concerns about conflict of interest**

[7] As Mr Goldstein counsel for Ms Gavin acknowledged, there is little dispute about the facts in this case. There is no dispute that prior to employing her, Mr Smith had made clear to Ms Gavin his particular concern, which was to avoid any conflict of interest situation arising in respect of the person appointed to the Property Manager position. In responding to that expressed concern Ms Gavin had disclosed to Mr Smith the existence of property she owned or had an interest in, and a business she ran. There is also no dispute that in addition she disclosed her role as a trustee of the Belfast Community Trust ("the BCT"), a charitable trust.

### **The Belfast Community Trust**

[8] The BCT was formed in August 2005 upon the settlement of the trust fund by Ms Gavin's father, Mr John Powell. Both he and Ms Gavin were appointed trustees and they held that office with two others at material times from January to March 2007.

[9] The trust deed records that Mr Powell had wished to establish a charitable trust and that the trustees had agreed to act in that office. Further, the deed records that Mr Powell had proposed that "certain additional property" to the trust fund would fall into and form part of the assets of the trust. The deed provides that the trustees would own the assets and would manage those within the framework of the trust.

[10] The objectives of the trust were defined in the deed as the furtherance of charitable purposes for the residents of the Belfast area of the city of Christchurch.

[11] The trust powers expressed in the deed included the following (with underlining added):

#### **7. *General investment powers***

*7.1 The trustees shall either invest or reinvest the trust fund in such manner as the trustees shall in their unfettered discretion from time to time think fit in the acquisition of real property in the Belfast area or by depositing any moneys on current account, term deposit or otherwise ... with any bank which in the opinion of the trustees is beneficial to the trust or to any purposes of this trust or to any beneficiary.*

[12] Specific powers of the trust were expressed to include the following (with underlining added):

#### **9.5 *Purchase***

*The trustees may purchase any property in the Belfast area which the trustees consider will benefit the trust fund, on such terms and conditions as the trustees think fit.*

#### **9.6 *Lease***

*The trustees may let, lease or bail any part of the trust fund on such terms and conditions as the trustees think fit. The trustees may also manage any tenancies, leases and bailments forming part of the trust fund and accept surrenders of them.*

#### **9.7 *Sell***

*The trustees may sell all or any part of the trust fund .....*

#### **9.10 *Maintenance***

*The trustees may maintain, manage and improve any property which forms part of the trust fund in whatever manner the trustees think fit .....*

## 9.11 Grant options

*The trustees may grant an option to purchase, lease or exchange any property forming part of the trust fund on such terms and conditions as the trustees think fit .....*

[13] The trust deed also provided that any trustee could resign from office by giving notice of one month in writing, that trustees' resolutions were able to be passed by a majority of two trustees, and that upon a winding up of the trust its fund would be re-settled to enable the trust's charitable work to be continued.

[14] By the time Ms Gavin became employed by SDL, the BCT owned and managed about six residential properties in the Belfast area. As well as the fund settled by Mr Powell when the BCT was created, he had subsequently gifted \$2 million to it, leaving the trust well able to purchase further real property if its trustees wished.

[15] When Ms Gavin commenced employment with SDL she held qualifications to post-graduate level in valuation, property management and marketing, and she had acquired over 10 years' experience selling real estate, including commercial property, in the Christchurch area. She told the Authority that it was partly because of her training and experience that she had been appointed a trustee of the BCT. She saw her role in the BCT as an adviser on property investment decisions to be made by it. Ms Gavin was paid for time spent on trust work.

[16] The extent to which Ms Gavin informed Mr Smith of BCT's activities became a critical matter in the investigation that preceded her dismissal, and it remains an issue central to the resolution of her grievance claim by the Authority.

[17] Whatever it was, the information Ms Gavin gave to Mr Smith about the BCT and her involvement in its activities as a trustee, did not dissuade him from offering her the position of Property Manager. Upon accepting that position Ms Gavin was told by Mr Smith that before she commenced he would have an employment agreement drawn up by his solicitors. He said he would give instructions for the agreement to include provisions dealing with the matter of conflict of interest in relation to her employment by SDL.

### Responsibilities under the employment agreement

[18] In this regard the employment agreement presented to Ms Gavin, and which she and Mr Smith subsequently signed on 16 February 2007, contained the following provisions:

#### 3. *Your responsibilities*

*3.1 While you are employed by us you must:*

- ...
  - *not be employed or engaged in any other business, or invest in any property, whether directly or indirectly, on your own account or as agent or trustee without our prior written consent;*
- ...
  - *not be directly or indirectly interested in any paid or unpaid activity which competes with our business, or compromises your ability to diligently carry out your responsibilities to us, including, but not limited to, property investment, development and management without our prior written consent;*
- ...

[19] Ms Gavin's "responsibilities" to SDL as referred to in clause 3.1 above, were expressed in the employment agreement to include:

- *Managing our commercial and industrial property portfolio;*
- *Sourcing and researching property for acquisition;*
- *Planning and managing developments, building projects and property fitouts;*

[20] On the bare wording of the SDL employment agreement and the BCT trust deed, when Ms Gavin agreed to the terms and conditions set out in the individual employment agreement and signed it on 16 February 2007, she put herself in breach of that agreement, at clause 3.1 in particular. Under that provision, she had undertaken not to be directly or indirectly interested in any paid or unpaid activity which competed with SDL's business or which compromised her ability to diligently carry out her responsibilities to SDL. SDL and BCT were both engaged in, or were intending or had the potential to engage in, property investment and development. For both entities, that activity could include the sale and purchase of properties in the commercial market within the Belfast area of Christchurch. Belfast had areas of vacant subdividable land and it had commercial as well as residential property.

### Passing information to the BCT

[21] Any problem in the employment may not have surfaced at all in this case, if Ms Gavin had not acted in a way that drew attention to the conflict of interest situation which had existed since she signed the employment agreement on 16 February 2007. On 21 February, by email, Ms Gavin contacted another trustee of the BCT to inform him of a property that had been advertised for sale in Belfast. She said in her email:

*Can you please make JP [settlor and trustee of BCT, John Powell] aware of this one at March Place, Belfast for sale. Is excellent value for land and has holding costs covered with the small tenancies they currently have. Would be excellent development for the belfast community trust to get into.*

[22] Attached to the email was a property sales update from CB Richard Ellis, of the type that firm regularly sends to its clients. The update listed the March Place, Belfast property for sale as a “development” prospect and provided information about it. The CBRE update had been received at SDL as an attachment to an email addressed to Mr Smith alone, but because of the way the computer system had been installed at SDL that email was also received by Ms Gavin and another SDL employee on their work computers. Less than three hours after it had come into SDL, the email attachment was forwarded by Ms Gavin to the BCT but without the knowledge of Mr Smith. There is no dispute that she did not inform SDL of the advertised March Place development opportunity, before passing the information to the BCT.

[23] Mr Smith learned of Ms Gavin’s email to the BCT when a reply was sent by the trustee to whom she had sent it. The reply was that “JP” was not interested in the March Place property. The computer set up meant that as an inbound message the reply was also received by Mr Smith. His response was to require Ms Gavin to meet with him and discuss her actions. In writing to her about the meeting he said the matter was most serious and could effect her ongoing employment. He suggested that she take advice and have a support person with her at the meeting.

[24] The meeting took place on 12 March 2007. Later that day Mr Smith wrote to Ms Gavin advising of his conclusion that her actions had been in direct conflict with her obligations to SDL and were a breach of her employment agreement. He said in his letter;

*.....you will recall that when you were employed it was of the utmost importance to me that conflict situations be avoided at all times.*

[25] Mr Smith advised Ms Gavin that her continued employment was untenable and that she was dismissed with immediate effect.

[26] Ms Gavin contends that her dismissal was unjustified because, before the commencement of her employment, she had disclosed her interest in the BCT to Mr Smith who, with that knowledge, had decided to enter into the employment agreement. In effect Ms Gavin claims that SDL had, by the conduct of its director Mr Smith in offering her the position, waived the express provisions of clause 3.1 of the employment agreement, insofar as they were applicable to the BCT and any conflict of interest situation.

[27] Mr Smith does not dispute that before he offered her employment, Ms Gavin had told him she was a trustee of BCT. He says this caused him no concern at the time. He denies however that Ms Gavin disclosed anything about the BCT’s ownership of real property or its ability to become involved in property investment and development.

### **Evidence of Ms Gavin and Mr Smith**

[28] Prior to entry into the employment agreement, Ms Gavin had answered an advertisement by SDL for the position and had attended two interviews with Mr Smith. The first of those was on 12 December 2006 and the second was a few days later. Ms Gavin’s evidence was that at the second interview she had told Mr Smith that she was a trustee of the BCT and that the trust had been donated \$2 million for the benefit of Belfast and for the development of facilities within that community. She said she had told Mr Smith that the BCT owned a few residential properties but that it was not engaged in development work. Further, she said she had told Mr Smith that the trust’s small residential property portfolio was managed by a property management company and that her involvement with those properties was minimal. She said that she had advised Mr Smith that the BCT was restricted to

investing in property in Belfast, where she thought there were only about 27 commercial properties potentially available for

investment.

[29] After Ms Gavin had received from Mr Smith a copy of the proposed employment agreement, she sent him an email on 28 January 2007 giving information about businesses she was then personally involved in. Her email said that she did not believe the extent of this involvement would place her in “conflict” when carrying out her duties for SDL. With regard to the BCT, in her email she advised Mr Smith of the following:

*Belfast Community Trust – trustee (I am one of four trustees). The trust was donated a sum of \$2 million last year for the purpose of building community facilities in Belfast in light of the likely subdivision in the district being headed up by Clearwater.*

[30] Mr Smith’s evidence about what Ms Gavin told him in relation to BCT was as follows:

*10. During Ms Gavin’s second interview, she advised me of three other interests that she had. The first being Belfast Community Trust, which I understood to be a Charitable Trust as Ms Gavin had advised me that it had been gifted \$2 million for community facilities. I took this to mean facilities such as swimming pools or libraries. Ms Gavin told me that the trustees of the Trust were a local pastor, her father, herself and possibly another.*

[31] When questioned during the Authority’s investigation meeting, Mr Smith denied that Ms Gavin had told him at the second interview that the BCT had acquired properties of any kind. He said he had not made inquiries about any involvement of the BCT in property ownership or development, because he had thought that being a charitable trust the BCT was concerned only with providing amenities such as swimming pools and libraries, for the benefit of the local community. He said he had therefore seen no conflict of interest arising out of the fact that Ms Gavin was a trustee of the BCT.

[32] Mr Smith maintained adamantly that the only property that Ms Gavin told him she had an interest in was property she or her own family trust held and hoped to develop in the future, and also the house property in which she lived. He said it had not crossed his mind when interviewing Ms Gavin that the BCT might have the ability to become involved in property development and investment, although he had thought

it possible that such a trust could buy land. Mr Smith did not see the trust deed until after Ms Gavin had been dismissed.

[33] Ms Gavin, in her evidence, accepted that she had not told Mr Smith that the BCT might be buying and selling commercial property in the future, or that its funds could be used for that particular purpose. She said she had told Mr Smith that the BCT was only able to invest in the Belfast area and that properties it had acquired were for residential purposes.

[34] I find it clear from the evidence that when the interviews were conducted with Ms Gavin in December 2006, Mr Smith plainly demonstrated to her that it was a matter of high importance to him to discover whether there could be any potential for conflict of interest if she was employed by SDL. Ms Gavin noted in her written evidence the extent to which he had asked questions about her previous experience and associations in her real estate work. She acknowledged that at the first interview Mr Smith had discussed with her “conflict of interest.” This had led her to disclose certain interests of hers, which Mr Smith expressed no concerns about.

[35] I find that Mr Smith made it plain to Ms Gavin, through his inquiries about her activities, that he required her to disclose anything that might be considered a conflict of interest. This was not a situation where Ms Gavin would have been entitled to remain silent about the BCT’s involvement in property unless directly asked a question about that. Mr Smith had clearly alerted Ms Gavin to his need to know anything of relevance about the BCT, or any other entity, that might be regarded by him as creating a conflict of interest.

[36] Ms Gavin’s evidence is that she did not remain silent but disclosed that the BCT owned and managed residential properties in Belfast. It is clear that Mr Smith did not ask to see a copy of any trust deed and neither did Ms Gavin offer to show Mr Smith the trust deed. Had he read it, he might well have become concerned about at least the potential for the BCT, in the Belfast area, to compete with SDL in property development, making it possible for Ms Gavin to have a foot in both camps, or be in a conflict of interest situation.

[37] The determination of justification comes down, I find, largely to the question of whether Mr Smith was told by Ms Gavin that the BCT had bought real property.

About this, there is a sharp difference between Mr Smith's evidence and that of Ms Gavin.

[38] I prefer the evidence of Mr Smith that he was not made aware of the full extent to which the BCT was actually involved, or could become involved, in property development in competition with SDL. My reasons for that preference are as follows.

[39] After the two interviews Mr Smith had with Ms Gavin in December 2006, he had asked his solicitors to draft provisions for the proposed employment agreement, to address the high level of concern he had to protect SDL from becoming caught up in a conflict of interest situation with an employee. I accept that Mr Smith told Ms Gavin that he was having the agreement drawn up so as to specifically address the matter of conflict of interest. His lawyers duly produced an agreement which contains clause 3.1, as reproduced above in material respects.

[40] I find it improbable that with full knowledge of the BCT's activity or potential activity in property development, Mr Smith presented to Ms Gavin an employment agreement containing clause 3.1, the words of which must immediately have highlighted the existence of a breach. Further, it is improbable that Mr Smith, with full knowledge of the BCT's activity in property development, would have presented that contract to Ms Gavin to sign but without noting on the contract that clause 3.1 was not intended to apply to the BCT and Ms Gavin's involvement in that trust. I consider it likely that the reason why the contract was produced in that form and why it was submitted to Ms Gavin for signature without any further amendment, was because Mr Smith remained unaware of the BCT's involvement or potential for involvement in property ownership and development.

[41] I accept as reasonably accurate the notes taken of the 12 March disciplinary meeting by Ms Victoria Donaghy, a solicitor acting for SDL. They indicate some surprise expressed by Mr Smith upon learning that the BCT could be involved in property development and investment. The notes record him as saying that he had thought the BCT was for community amenities and building community facilities. The notes record Mr Smith as saying, "Now you say rural zoned land. Originally create more value. Logistically not in a position to do this."

[42] With reference to property investment and development and to the BCT, the meeting notes record Mr Smith as saying;

*Industrial/Rural land for Re-zoning. Clearly things we are interested in – clear conflict. Hadn't anticipated there would be a conflict due to 'Community Amenities' – thought libraries, swimming pools and the like. Because you didn't tell me purpose of Trust was commercial based. I thought it would have been not for profit.*

[43] This response and reaction of Mr Smith to what Ms Gavin had told him at the meeting about the BCT, tends to confirm that he had previously been unaware of the trust's involvement or potential involvement in property investment and development.

[44] I consider it quite unlikely that Mr Smith, having clearly demonstrated to Ms Gavin the high level of importance he attached to matters relating to conflict of interest, and having bolstered this by instructing his solicitors to produce a contractual term to specifically address that matter, would then blithely put aside his concerns and be prepared to take a risk that the BCT was not any real threat to his business, by executing the contract containing clause 3.1.

[45] A demonstration by Mr Smith of how zealously he had sought to protect his business was given when Ms Gavin sought to have changes made to the draft provisions in clause 3.1, once she had been shown them. The changes she wanted would have allowed her to be involved in competing activities provided she had the consent of her employer, which consent she wanted SDL to agree would not be unreasonably withheld from her. Mr Smith responded by flatly rejecting any such watering down or amendment to clause 3.1.

[46] The clear impression given to the Authority from the evidence of Mr Smith is that he was quite taken aback by Ms Gavin's attempt to change this clause. He regarded her request as brazen, or "naughty" as he described it in evidence. It is not the point that the request of Ms Gavin was a perfectly reasonable one made by an employee wishing to retain a degree of freedom in respect of her private activities. What it does demonstrate is the careful and precise approach Mr Smith took towards entry into contractual relations, and the high degree of importance he attached to the protection of SDL's business from competition.

[47] Ms Gavin eventually signed the employment agreement without the changes to clause 3.1 that she had requested.

[48] I find that Ms Gavin's email of 28 January 2007 to Mr Smith, in which she outlined other businesses she was involved in, further tends to confirm the evidence of Mr Smith that he was not told the full extent of the BCT's activities. The email of 28 January containing this information was written in response to receipt by Ms Gavin of the draft employment agreement. The email also contained Ms Gavin's proposals for amendments to those clauses. Nothing is said in that email about the BCT being the owner of property of any kind. It seems to me likely that if Ms Gavin had already disclosed that fact to Mr Smith, she would have again mentioned it in the email, to reassure him that there would be no conflict and to also place it on the record.

[49] Given that Ms Gavin was seeking through her email to negotiate terms more favourable to herself under clause 3.1, amongst others, I consider it was misleading to address her proposals without also referring to the BCT's property interests. They presented a conflict situation under the wording of clause 3.1, as had been proposed by Mr Smith.

[50] I find that this information was withheld from Mr Smith when it should have been made known to him by Ms Gavin, as a required response to his previous inquiries and because of the contents of clause 3.1 as a term or condition of employment that SDL required her to agree to.

### **Employers conclusions**

[51] The conclusions of Mr Smith from his investigation that Ms Gavin's actions were in conflict with her employment obligations, I find were reasonable ones in the circumstances. Ms Gavin had apparently failed to recognise the immediate conflict of interest she had once she entered into the employment agreement. Such conflict is usually regarded as a conflict of roles and may exist without any improper or unethical act, or even without any active participation in the roles. Ms Gavin did not seem to appreciate that the continuation of her employment would give rise to a clear breach of an express undertaking she had given in the employment agreement, even if she did not actively perform her role as trustee of the BCT.

[52] However the conflict did not remain a concept on paper, for it materialised when Ms Gavin sent an email to a trustee of the BCT on 21 February 2007, advising of the March Place development opportunity for the trust. Her actions aggravated the existing breach of clause 3.1.

[53] It has been argued that although Ms Gavin forwarded information that had been sent to Mr Smith as a director of SDL, the same information in the CBRE email attachment had been freely available to the public from an advertisement placed in the property section of The Christchurch Press at about the same time it was sent to Mr Smith. In my view attachments to emails addressed to Ms Smith no matter what they contained, were his property as a director of SDL to do with as he saw fit. Ms Gavin could not reasonably presume that he would have no objection to her opening an electronic envelope that had been addressed to him and forwarding its contents to someone else. It was not for her to distribute communications intended for Mr Smith. There is no evidence that Mr Smith had expressly or impliedly given Ms Gavin permission to do that.

[54] When Mr Smith investigated with Ms Gavin her conduct in sending the email to another trustee of BCT, she expressly acknowledged her behaviour as having been wrong. In her answers to Mr Smith during that investigation, she seemed not to appreciate how any conflict of interest had arisen through her role and activities in connection with BCT. She suggested that a conflict would only have arisen if it had transpired that the BCT was interested in the March Place property. She said her actions had been a way of testing whether a conflict existed. Mr Smith viewed this suggestion with disbelief, reasonably so in the opinion of the Authority.

[55] Ms Gavin should not have been promoting the interests of a competitor even if, as turned out to be the case, SDL was not interested in the property. To do so was a breach of express or implied contractual obligations to faithfully serve her employer SDL. Ms Gavin made an assumption that SDL would not be interested in the property because she thought March Place would not meet Mr Smith's investment criteria. Those criteria were for Mr Smith to decide upon and change whenever he saw fit and not for Ms Gavin to apply without his knowledge. I am satisfied that Mr Smith reasonably viewed with concern a suggestion by Ms Gavin that she could still maintain an active role in the BCT, while at the same time working for SDL. Later though she said that to do things differently she would have resigned from BCT.

[56] I find it was reasonable for Mr Smith to conclude from his investigation that Ms Gavin had breached the terms and conditions of her employment agreement in a serious way, and that in doing so she had demonstrated a significant lack of judgment in passing on to the BCT information about the Belfast property for sale. She had also passed on the information that had been directed to Mr Smith and not to her. Mr Smith reasonably, I find, considered that

she had not displayed the honesty and integrity that SDL required and was entitled to expect from an employee in her position, and he therefore concluded that Ms Gavin should be dismissed. That conclusion was a reasonable one for an employer to make in the circumstances, I find.

[57] I am satisfied that it was reasonable for Mr Smith to lose trust and confidence in Ms Gavin as an employee of SDL. Not only had she failed to disclose the conflict of interest that existed through her trusteeship of the BCT, but she had used the resources of SDL, the computer and her time as an employee, to communicate to the BCT information in a form that was the property of SDL and that was about an activity in competition with SDL. Her responses to Mr Smith during the meeting on 12 March indicated to him a serious lapse of judgement on her part and a lack of honesty in relation to the sending of the CBRE attachment to the BCT and her explanation, which was disbelieved, that she had been testing for a conflict of interest. The Authority accepts that in the circumstances there was a proper basis upon which Mr Smith was left feeling that his trust and confidence in Ms Gavin had been destroyed by her actions.

[58] Mr White, counsel for SDL, submitted that a breach of the duty of loyalty may amount to a breach of trust that strikes at the heart of the employment relationship. He referred to the Employment Court judgment in *Max Tarr Electrical Contractors Ltd v Dixon* [2002] 2 ERNZ 281 at 287, where in summarising the duty of loyalty the Court observed that the duty is strictly applied and any breach may lead to the dismissal of an employee. Conduct that is inconsistent with the maintenance of trust and confidence between the parties to an employment relationship may amount to a breach of the duty. Although as it happened SDL suffered no financial harm or loss in the circumstances, I find that Ms Gavin's actions so seriously undermined the trust and confidence necessary for the employment relationship with SDL that the employer was given grounds for dismissal.

[59] As to the way SDL acted in deciding to dismiss Ms Gavin, I am satisfied that Mr Smith's enquiry or investigation into all the circumstances was conducted fairly and without disadvantaging Ms Gavin. I note that she declined her husband's offer to accompany her as a support person to the disciplinary meeting held on 12 March. I do not consider there was any misunderstanding created about the role SDL's solicitor

Ms Donaghy was taking at that meeting. She was the note taker and was introduced as the lawyer for SDL. I am satisfied that Ms Donaghy was not presented as a neutral mediator and she did not act in any way that would give that impression. I find that Mr Smith kept an open mind to the point of considering other options to dismissal. Ultimately it was his call as to whether he could forgive and forget what Ms Gavin had done, and continue the employment relationship. Given the close working relationship required, his decision to dismiss was understandable and was, I find, one that was supported by law.

[60] I find that a neutral observer would have concurred with Mr Smith's conclusions and viewed dismissal as the response of a fair and reasonable employer in the circumstances as known, or as should have been ascertained, at the time the decision to dismiss was taken.

## Determination

[61] The determination of the Authority therefore is that the dismissal of Ms Gavin was justified in all the circumstances. No orders are therefore required to be made against SDL to resolve the personal grievance claim of Ms Gavin or her claim for damages.

## Costs

[62] It is expected that counsel for the parties will discuss any question of costs that arises and endeavour to resolve it between themselves. If that is not possible, application in writing can be made in the usual way for a determination.

Alastair Dumbleton

Member of the Employment Relations Authority