



[4] Although the agreement referred to the duties and functions of the supervisor position as being those set out in a job description attached as Schedule A to the document, that attachment contained only headings as follows:

*Position Title*

*Reports to*

*Principal Duties and Tasks*

No other details were provided of the duties and tasks for which Ms Gurnell was responsible in her position of supervisor.

[5] After the first day of work, the terms of the written agreement were departed from. Ms Gurnell was rostered to work different hours and she was asked by SCI's manager, Ms Debbie Dimery, to become the assistant manager, the position she had first applied for and a more senior one.

[6] Ms Gurnell did not reject Ms Dimery's request although, I find, she did express an expectation of receiving a pay increase for undertaking the higher responsibilities of assistant manager.

[7] No agreement was reached at that time as to any increase in Ms Gurnell's pay. She commenced performing the position of assistant manager and continued doing that work for several months, particularly at times when Ms Dimery was absent.

[8] SCI acknowledged that Ms Gurnell was undertaking the role of assistant manager. A written appraisal of her made by Ms Dimery on 12 May 2005 contained the comments that "Janene has settled into her role as Assistant Manager. She is taking on more responsibilities and assisting other staff." A further note from Ms Dimery dated 18 July 2005, gave Ms Gurnell reassurance that;

*You are doing a wonderful job as Assistant Centre Manager and I feel very comfortable leaving the Centre in your capable hands.*

[9] In about May 2005 a job description for the assistant centre manager position was given to Ms Gurnell.

[10] Over the months after commencement of her employment with SCI the work situation increasingly came to be regarded by Ms Gurnell as unsatisfactory, particularly because she had not received the pay rise she had been expecting for her

additional responsibilities as assistant manager. The adequacy of staffing at the Centre also became a concern to Ms Gurnell.

[11] By July 2005 she was thinking of leaving SCI. She recorded in her personal journal on 11 July that she had decided to start looking for another job. Ms Gurnell applied to other employers for work, doing so with the knowledge and assistance of Ms Dimery who supplied references for that purpose.

[12] Ms Gurnell did not leave SCI to go to another position but, after about a year, she raised a personal grievance as a result of her continuing dissatisfaction. She instructed her solicitor, Mr King, to write to Mr Andrew Martin, a director of SCI.

[13] Mr King's letter dated 21 March 2006 gave particulars of the grievance, which was a complaint in respect of alleged failures by SCI to provide a description of Ms Gurnell's work and to employ sufficient staffing at the Centre. The latter failure was claimed to have caused the Centre to operate in breach of its licence as an early childcare education institution.

[14] Other particulars given of the grievance related to the overbearing manner in which Mr Martin had allegedly addressed Ms Gurnell and had behaved during discussions about her employment.

[15] To resolve the grievance, costs and compensation for distress and humiliation caused to Ms Gurnell were sought. Mr King's letter to SCI advised that he was making arrangements to try and have the grievance resolved by mediation.

[16] On 22 March 2006, at nearly the same time as Ms Gurnell raised her personal grievance, SCI wrote to her requesting a meeting to discuss matters SCI said it had just learned of. They were expressed to be:

1. *We have been advised that in the week commencing 6th March a parent gave you an amount of \$200 in the playground. There is no evidence of this money being receipted. A staff member states that they witnessed the parent handing you the money. We are taking this matter seriously and require an urgent response from you.*
2. *We have also been made aware that confidential documents have been taken from our private files and used in an inappropriate way. Our initial investigations indicate that you may have been involved with this. The matter has been referred to the Police. We will be happy to give you further detail on this when you are available to meet.*

[17] The letter advised Ms Gurnell that until these two issues were resolved SCI did not consider it appropriate for her to have access to either the school or its property, and she was asked to return her keys and any property belonging to the school. Ms Gurnell was also advised that she should seek independent advice as to the allegations, and that:

*Dependent on your responses, we will look at what disciplinary action that may be taken [ ; ] that could be no further action is taken through to the termination of your employment and proceeding with possible Police charges.*

[18] The letter was signed by Ms Dimery and either of Mr Andrew Martin or Mrs Robyn Martin, both of whom were directors of SCI. All three names were typewritten at the bottom of the letter.

[19] A meeting to discuss the issues raised by SCI was held on 27 March 2006. Ms Gurnell and her solicitor Mr King attended, together with representatives of SCI including Ms Dimery. Ms Gurnell agreed that the meeting would only be about the issues raised by SCI and that any discussion and consideration of the grievance she had raised would be deferred for another meeting.

[20] The day after the 27 March meeting SCI wrote to Ms Gurnell to advise the following outcome of it:

*Regarding issue 1: You acknowledged receiving an envelope from Bradyn's father indicating that \$200 was enclosed and advised that you placed it unopened in the cash box in the office. You acknowledged that you were aware of the Centre's policy of receipting all incoming payments but that, because it was busy, you did not do this.*

*Regarding issue 2: You denied any knowledge of this issue. You advised that it was not your handwriting on the postscript of the covering letter.*

*Janene, it is disappointing that you did not follow company policy in receiving moneys on behalf of the Centre when you are aware of this requirement. One of the reasons for having this policy is to protect the Centre's employees. While it is regrettable that your actions implicated you, this was a direct result of your breach of Centre policy.*

*Taking into account all the information in hand on both issues, we have decided to record a written warning on your file for not following Centre policy (copy attached). This written warning will remain on your record for the duration of your employment with the*

*Centre. Any further occasion of breaching the Centre's policies could result in termination of your employment.*

[21] On 30 March 2006, a few days after receipt of the above advice from SCI, Mr King wrote to Mr Martin advising that Ms Gurnell had resigned her employment with SCI. The letter included the following advice:

*As a result of the personal grievances raised on 21 March, the allegations initiated by the employer on 22 March and the warning issued on 28 March, Ms Gurnell lost trust and confidence in the employer. That left her no option but to resign and I notified Ms Heynan of this at 17:30 on 28 March.*

[22] In his letter Mr King raised several grievances surrounding the resignation of Ms Gurnell. They included disadvantage caused by SCI issuing a warning that was unjustifiable, and dismissal that was also claimed to be unjustified. With regard to the latter, it was expressly alleged in the letter that SCI had breached an implied obligation to maintain a productive employment relationship. It was claimed that SCI had done this by making unreasonable allegations against Ms Gurnell of theft and taking confidential documentation. Through these actions, it was claimed, SCI had caused Ms Gurnell to lose trust and confidence in her employer.

[23] A few weeks after the resignation Ms Gurnell lodged a statement of problem in the Authority listing nine separate problems.

[24] Mediation undertaken by the parties did not resolve the problems and the Authority must now do that.

### **Issues raised by SCI and subsequent resignation of Ms Gurnell**

[25] I consider first the problems expressed to arise from SCI's inquiry into Ms Gurnell's conduct, which resulted in her being advised that a warning was to be issued to her. The disadvantage grievance raised before these remained unresolved and had not been considered at all when Ms Gurnell resigned. In the absence now of an ongoing employment relationship, resolution of disadvantage type grievances may not have much practical benefit or impact to employer or employee.

[26] The first problem raised is about SCI preventing Ms Gurnell from having access to the school and its property until the employer's issues were resolved. It is claimed that in suspending Ms Gurnell by withdrawing her access to the work place,

SCI had unlawfully locked Ms Gurnell out within the meaning of the Employment Relations Act 2000.

[27] The particular section of the Act relied on is s 86(1)(c) which makes it unlawful to participate in a lockout if the lockout relates to a personal grievance.

[28] To participate in a lockout requires there to be a lockout to begin with. Section 82 of the Act defines "lockout" as meaning certain acts of an employer carried out with a view to compelling employees to accept terms of employment or to comply with demands made by the employer.

[29] The action taken by SCI does not readily fit within any of those under s 82(1)(a)(i)-(iv), as this was not a situation where an employer was attempting to impose terms of employment on an employee. SCI wished to conduct and conclude a disciplinary investigation into allegations about Ms Gurnell's conduct. SCI's issues with Ms Gurnell were entirely independent of and unrelated to the complaints raised by Ms Gurnell on 21 March in her grievance. I find that she was not suspended because of that grievance.

[30] There was no coercive element associated with the suspension of Ms Gurnell. SCI simply did not wish to have her present at the place of work while the disciplinary investigation was being carried out. SCI required nothing more of her than the return of her keys and school property until the issues had been resolved. The employer achieved that end when it notified Ms Gurnell of her suspension. After the investigation had been completed by SCI, Ms Gurnell was invited to return to the place of work and continue doing her job.

[31] The unlawful lock out problem is unfounded I find, and it is therefore resolved without requiring any orders to be made against SCI.

[32] The second problem is the disadvantaging of Ms Gurnell by issuing her a warning contended to be unjustified.

[33] Section 103(1)(b) of the Act is referred to in this regard. That provision makes it clear that an employee's employment or one or more conditions of that employment must be affected to the employee's disadvantage by action that is unjustifiable on the part of the employer. In this case, almost at the same time that SCI notified Ms Gurnell that a warning was to be issued to her, she resigned her employment. It is

a separate issue as to whether that resignation was really a reaction by Ms Gurnell to being dismissed, but for whatever reason her employment terminated, at the moment it did there ceased to be any possibility of disadvantage in it by the employer's proposal to issue a warning. Any possible disadvantage had not crystallised before the employment ended.

[34] I do not consider that issuing a disciplinary warning was an unjustified action in the circumstances, as Ms Gurnell accepted at the 27 March meeting that she had not complied with SCI's money handling policies for staff of the Centre. The question of the severity of any warning justified by Ms Gurnell's conduct is discussed further below.

[35] This particular problem is resolved against Ms Gurnell. I find that no sustainable grievance arises from the circumstances.

[36] The third problem in relation to SCI's issues with Ms Gurnell is her claim that she was unjustifiably dismissed. It is claimed that by making unreasonable allegations of theft and of taking confidential information, SCI caused Ms Gurnell to lose trust and confidence in her employer and that SCI thereby breached the implied obligation to maintain a productive employment relationship.

[37] The fundamental question in cases of this kind is at whose initiative did the employment end, that of the employer or the employee? Only if the former, is the termination a dismissal. It was argued for Ms Gurnell that although she resigned she had no reasonable alternative in the circumstances and that therefore the employer's actions amounted to a dismissal of her constructively.

[38] The concept of constructive dismissal was considered by the Court of Appeal in *Auckland Shop Employees' Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372. It has not been contended that this was a situation where an ultimatum was given to Ms Gurnell to either resign or be dismissed, which is one particular category of constructive dismissal.

[39] A second category is where a course of conduct has been followed by the employer with the deliberate purpose of coercing the employee to resign. It was contended SCI had done this.

[40] A further Court of Appeal decision has closely considered a third category, where constructive dismissal arises out of a breach of duty on the part of the employer. In *Auckland Power Board v. Auckland Local Authorities IUOW* [1994] 1 ERNZ 168, the Court held that in such cases there are two questions: first, whether a resignation has been caused by a breach of duty on the part of the employer; and second, whether the breach of duty was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing. The Court expressed this second question in the following way:

*In other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[41] Mr King advised SCI in his letter of 30 March 2006 that Ms Gurnell had been left with no option other than to resign. The reasons for her resignation were expressed to be the personal grievance Ms Gurnell had raised on 21 March, the allegations levelled at Ms Gurnell by SCI on 22 March and the decision notified by letter on 28 March to issue her with a warning.

[42] Ms Gurnell said in her evidence that because of SCI's letter of 28 March she made her mind up not to return. She said that the letter had confirmed to her she could not go back to work, because of the fear of being issued with the warning. I find that Ms Gurnell's resignation was caused largely by her receiving SCI's letter of 28 March 2006 advising that a warning was to be issued to her.

[43] I find that SCI had proper cause for embarking on the disciplinary inquiry as notified to Ms Gurnell by letter of 22 March 2006. SCI had a reasonable and genuine concern to find out how moneys seen to have been given to Ms Gurnell by a parent had been handled and accounted for afterwards by her. Also, personal and confidential information from the file of a former employee had gone missing, and there was a serious issue as to whether that information had been misused.

[44] At the inquiry held on 27 March, SCI confirmed that Ms Gurnell was suspected of serious misconduct in the nature of theft. Again, in my view, that was not overstatement or exaggeration made to harass or intimidate Ms Gurnell, or put pressure on her to resign her employment. The employer was asked what it thought of the matters at a midway stage during the inquiry and it expressed the view that the

allegation amounted to one of theft. It might have been criticised if it had not made clear to Ms Gurnell the serious nature of the misconduct alleged against her.

[45] In the circumstances, advising Ms Gurnell that the matter of the missing file and misuse of information had been “referred” to the Police was reasonable and was not an action merely intended to harass or intimidate Ms Gurnell as an employee.

[46] It emerged at the Authority investigation that no official complaint had been made to the Police. It is more accurate to say that the Police were “consulted.” I do not consider that Ms Gurnell was misled by the terminology used, which served to make her fully aware of how seriously the employer regarded the matters under investigation by it at the 27 March meeting.

[47] As to the justification for a warning, I consider that some warning in the circumstances was reasonable in relation to the failure to follow SCI’s procedures for the handling of money.

[48] At the meeting on 27 March, Ms Gurnell responded to the allegations by confirming that she had received money from a parent, which was in an envelope with a child’s name on it and which she had then placed in a drawer in the office. She confirmed that she did not receipt the money because she had been busy at the time and because details of the payment were written on the envelope. It was open to SCI to find, as Ms Gurnell accepted, that she did not follow the employer’s written policy about handling fees received at the Centre. These require all cash to be receipted and signed for by the person receiving the money.

[49] In the result, it is clear that SCI considered it had no basis for concluding that Ms Gurnell was guilty of serious misconduct through the taking of money without authorisation, but it concluded that she had breached a workplace policy for which a warning was the appropriate penalty.

[50] It can be inferred from SCI’s letter of 28 March 2006 to Ms Gurnell that no conclusion was able to be reached that Ms Gurnell was guilty of any misconduct in relation to the allegation of taking confidential information from private files and of misusing that information. The warning was not expressed to be in relation to that allegation.

[51] The issue of a written warning, which was not expressed to be *final* but which was to remain permanently on Ms Gurnell's file, could possibly have been the foundation for raising a disadvantage grievance, although the warning had not been put in writing by the time Ms Gurnell resigned.

[52] The raising of a grievance could reasonably have been foreseen by SCI as a response to any warning issued by it, and the use of the grievance procedure would have been an appropriate way for Ms Gurnell to pursue any dissatisfaction she had about the justification for too severe a warning or any warning at all. Resigning in protest at the warning was not something I find was reasonably foreseeable to SCI in the circumstances.

[53] I do not find that there was any bad faith involved in the way the employer went about inquiring into the allegations it had made against Ms Gurnell. The allegations were not an invention but were derived from information received by the employer from others. The inquiry was conducted in a reasonable manner and Ms Gurnell fully participated in it along with her representative, Mr King.

[54] I am satisfied that SCI in its actions surrounding the disciplinary inquiry had not intended to put pressure on Ms Gurnell to resign. I consider that the final line in its letter of 28 March 2006 was a genuine expression of its attitude towards Ms Gurnell and the continuation of her employment:

*We confirm that we have concluded our workplace investigations and anticipate your return to work on Wednesday 29 March 1006.*

[55] It is possible that punishment by issuing a permanent warning was excessive and therefore unjustified. If that was the case it could then be argued that this amounted to a breach of duty by the employer, in that it had conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between it and the employee. Even if that had been the situation, in my view such a breach would not have been sufficiently serious to make it foreseeable by a reasonable employer that Ms Gurnell would respond by resigning. Only more serious breaches by an employer will make resignation by the employee foreseeable.

[56] The claim that SCI deliberately acted to coerce a resignation is against the weight of the evidence. I need mention here only the undisputed evidence that SCI

had encouraged Ms Gurnell to attend a work related conference at Rotorua and to take her partner and stay on for a few days, all at the expense of the employer. The offer was rejected, but in my view it was a genuine attempt made by the employer to alleviate some stress Ms Gurnell appeared to be suffering from and which Ms Dimery could reasonably believe had to do with pressures in her personal life as well as the work situation.

[57] I find the Martins and Ms Dimery had no reason to want Ms Gurnell to go. They did not want to lose her from SCI and hoped that she would settle into the job despite some difficulties experienced in her personal life and in staff management at the Centre. Her resignation was unexpected, unforeseen and undesired by SCI. I find it was not the result of any wrongful conduct on the part of SCI.

[58] I find that there was no breach by SCI in relation to the conduct of the disciplinary inquiry or the conclusions reached and actions resulting from that. On that basis, the test of constructive dismissal given by the Court of Appeal has not been met.

[59] I determine that Ms Gurnell was not dismissed, whether actually or constructively, but that she terminated her employment by resigning. Accordingly, this third problem must also be answered in favour of SCI.

[60] The remaining problem of the four arising from the issues raised by SCI is expressed to be a breach of s 6 of the Health and Safety in Employment Act 1992, in that the employer caused Ms Gurnell distress by raising allegations at a time when it was known she was already on sick leave because of stress.

[61] SCI as an employer was subject to the general duty under the 1992 Act to take all practicable steps to ensure the safety of its employees while at work. Taking “all practicable steps” means doing what is reasonably able to be done in the circumstances, taking account of the severity of any injury or harm to health that may occur, the degree of risk or probability of that injury or harm occurring, the available knowledge about the hazard and ways of eliminating, reducing or controlling it, and the availability and effectiveness and cost of possible safeguards.

[62] SCI wrote to Ms Gurnell on 22 March 2006 and its letter was left at her house on that day or the next day. It was known she was absent from work for medical reasons, but she was expected to be returning within a few days.

[63] In the circumstances, SCI could not reasonably be expected to have realised there was any risk that by communicating the serious issues it had with Ms Gurnell, her health would be seriously impaired. What SCI could reasonably have expected is that if Ms Gurnell's medical condition prevented her from immediately taking part in the inquiry as required, she or her representative would ask for some deferment of the inquiry.

[64] Undoubtedly the timing was not perfect. Ms Gurnell was absent for medical reasons but was expected to be away for the usual relatively brief period of such leave. On the other hand, SCI had just become aware of the issues it decided to inquire into, and it was reasonable for it to do that promptly in the interests of both Ms Gurnell and SCI.

[65] Treating this particular problem as a personal grievance of the unjustified disadvantage kind, I do not find that SCI acted unfairly or unreasonably in the circumstances, so that its actions could be said to be unjustified. SCI did not take any appreciable risk with regard to Ms Gurnell's health.

[66] This problem is also to be resolved in favour of SCI and no orders or remedies are required in respect of it.

#### **Issues arising out of entry into and performance of employment agreement**

[67] Six specific problems are listed in the statement of problem in relation to the disadvantage grievance Ms Gurnell raised on 21 March 2006.

[68] The first is that there was a failure to act in good faith in March 2005 when the employment agreement was entered into.

[69] I find there was no breach of the duty imposed on SCI under s 4 of the Employment Relations Act 2000 to act in good faith towards Ms Gurnell. SCI did not mislead or deceive her but was open and honest, if a little indecisive at the beginning of the employment about the role it wanted her to perform. Ms Gurnell's expectation of a pay increase was based on a hope or a wish rather than any promise made by SCI.

[70] In any event, whether or not Ms Gurnell had grounds for complaining she appears to have affirmed or acquiesced in the employer's conduct, by taking no action

and performing the employment for nearly 12 months. There had been no agreement by SCI when Ms Gurnell started working as assistant manager that as a condition of the variation made to her job she would be paid more.

[71] There is certainly no breach of the duty of good faith sufficient to found the remedy of a penalty as provided for by the Employment Relations Act, although only in cases of serious and sustained breach.

[72] The same must be true of the second problem specified, that SCI failed to provide a description of the work to be performed by a supervisor. In fact, I find the parties subsequently agreed that Ms Gurnell would be employed in a different position as assistant manager for which she was eventually provided a list of duties.

[73] The third problem specified is that Ms Gurnell was placed at risk and caused distress by the actions of SCI by putting her in charge of an early childcare education centre that regularly operated outside the conditions of its licence. I have found no evidence that this was so and in any event I do not consider that Ms Gurnell suffered any material disadvantage in relation to her employment.

[74] The fourth problem specified is an unjustifiable breach of s 236 of the Act on 13 March 2006, when SCI failed to provide Ms Gurnell with an opportunity for representation at a disciplinary meeting. Such meetings are not convened pursuant to a statutory right “to do anything or take any action” and the meeting was therefore not an occasion or situation within the meaning of s 236. I find there was no breach in this regard.

[75] The fifth problem is expressed to be the use of language on 2 February and 13 March 2006 that was impolite or unreasonable and not constructive to maintaining a productive employment relationship. As noted in *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd* [1990] 438 at page 448, the law does not impose a standard of perfection for the behaviour by employers towards employees, in all respects and at all times and in all circumstances. “Inconsiderate conduct causing unhappiness or resentment” will not usually found a personal grievance. In this case, if there was one, neither does an isolated incident of impatience or discourtesy by Mr Martin towards Ms Gurnell.

[76] The last problem specified is that SCI caused Ms Gurnell distress requiring her to take leave from work on the advice of her doctor, and that the employer’s actions

were in breach of s 6 of the Health and Safety in Employment Act 1992, which requires every employer to take all practicable steps to ensure the safety of employees while at work.

[77] Again, the law does not require the employer to become a guarantor of workplace safety but does require that all practicable steps are taken to ensure the safety and good health of employees. I am unable to find that anything SCI did or failed to do fell below the standard required.

[78] The six problems specified in the statement of problem, or many of them, were embodied in the personal grievance raised on behalf of Ms Gurnell on 21 March 2006. In the letter written by Mr King to SCI, it was acknowledged that Ms Gurnell had performed her employment under the particular conditions for a year notwithstanding the fact that the employer's actions allegedly breached the employment agreement.

[79] This particular grievance was never resolved because Ms Gurnell resigned shortly after agreeing that a meeting or mediation to discuss the grievance would be deferred until the outcome was known of the inquiry into the issues raised by SCI against Ms Gurnell.

[80] It seems inevitable that in the course of a year of employment there were some ups and downs in it. Ms Gurnell I find in her complaints has focused exclusively on the downs of the employment without acknowledging assistance given to her by Ms Dimery at most times and offers of assistance made by SCI, such as the expenses-paid weekend in Rotorua, which Ms Gurnell chose to see as an unreasonable action on the part of the employer. Neither has Ms Gurnell in her analysis of things allowed sufficiently for her own personal problems concerning members of her family. She confided in Ms Dimery about these and alluded to them several times in her personal journal. One of them in particular, involving her child, would inevitably have been distressing and a serious distraction for any employee, but these were matters that had nothing to do with SCI.

[81] Ms Gurnell's journal also reveals that she struggled with trying to manage staff, and understandably this would have led to some loss of self confidence and dissatisfaction with her employment. It seems to me that Ms Dimery provided all the support and assistance she could to help Ms Gurnell step up to the position.

[82] After looking at the various instances of alleged unjustified action on the part of SCI, I have found nothing that amounts to unfair or unreasonable treatment that would found a grievance. An unbalanced view was taken by Ms Gurnell of the employment and its performance by SCI.

[83] I have found that Ms Gurnell resigned her employment and was not dismissed from it. By doing so, she effectively precluded the possibility that her grievance raised on 21 March would be able to be resolved by discussion or if necessary in mediation with SCI. It serves no useful purpose now to go back and attempt to redress the various problems raised, after Ms Gurnell has left the employment of her own accord.

[84] I therefore determine that all of the six problems are resolved in favour of SCI.

### **Determination**

[85] In summary, the Authority has found no basis for finding that SCI acted without justification and caused the termination of Ms Gurnell's employment or caused any disadvantage in that employment. Ms Gurnell has no sustainable grievance of any kind in any respect. It follows that there is no basis for making any orders or granting any remedies against SCI in favour of Ms Gurnell.

[86] Her resignation was a precipitate and unnecessary step in the circumstances. Her problems in the employment were readily amenable to resolution by the personal grievance process she initiated. Instead of following that path to improving the employment relationship, she chose of her own free will to resign.

### **Costs**

[87] It is expected that counsel for the parties will discuss any question of costs that arises and endeavour to resolve that between themselves. If an order is required from the Authority, application in writing can be made in the usual way for a determination.

