



[2] Prior to Dr Kardailsky's dismissal he was engaged in research involving genetically modified perennial ryegrass plants. In the afternoon of Monday 21 May 2012 Dr Kardailsky conducted routine maintenance on plants relevant to his research which were stored within Containment Facility glasshouse 3. He says he clipped back all plants that appeared to be close to anthesis, the period during which a flower is fully open and functional. He then went on a short period of approved annual leave and was away from the region until the evening of Thursday 24 May 2012.

[3] At 12.30pm on Thursday 24 May 2012 Alicia Scott, the Delegated Facility Officer in charge of the glasshouses emailed Dr Kardailsky and another scientist. She listed a number of plants registered to Dr Kardailsky and one plant registered against the other scientist that were flowering and advised that the plants needed to be cut back or bagged to prevent pollen spread. Each scientist was asked to confirm that the interventions proposed would be undertaken immediately or the flowering plants would be discarded at the end of the day. The evidence is that the other scientist took the prescribed action within half an hour.

[4] Dr Kardailsky responded to the email 13 minutes later and stated:

*Alicia, I am away today; ...there should not be that many flowering, and definitely none that are close to anthesis: the heads that emerge are immature.*

*I'll take a look tomorrow, but please don't cut anything back: I am going to be collecting floral tissue for myself and Vern too.*

[5] At 1.41pm Alicia Scott emailed Dr Kardailsky and said: *Thanks Igor, can I please remove any mature flower spikes and we can sort a plan out later.*

[6] Dr Kardailsky did not respond to the email.

[7] At 4.05pm Alicia Scott emailed Dr Kardailsky and stated:

*The flower stalks were mature and were shedding pollen – see attached photos. There were a lot of plants. I have cut back the plants to remove all the flowers...*

[8] The following morning Dr Kardailsky sent a follow-up email to Alicia Scott which stated, *inter alia*:

*We actually have a serious contradiction; the miRNA construct we have there affects flowering; the main (expected) outcome was a delay, but somewhat*

*unexpectedly and excitingly [sic], there is also effect on floral morphology, which suggests somewhat different function for the gene we are targeting there.*

*I do need plant to produce floral structures to record these phenotypes, and obviously we don't want any environmental influences that would affect normal development.*

*The only reason I still have those mature plants there is that we don't have enough records of later stages of flowering for the effective lines and controls for obvious reasons...*

[9] On Dr Kardailsky's return to Grasslands on Friday 25 May 2012 he was upset to find his plants had been extensively cut back and regarded his experiment had been destroyed. He left a message on Ms Scott's message board saying "*Don't touch my plants ever Alicia!!!*"

[10] On Monday 28 May 2012 he sent an email to Dr Greg Bryan, Team Leader, Plant Biotechnology and copied it to his line manager. The email was forwarded to Dr Tony Conner, Science Group Leader in Forage Improvement, later that day. Materially the email stated:

*... there was never any danger of increasing the risk of escape by allowing those inflorescences [the flowering portions of the plants] to emerge. So seed dispersal was not a danger.*

*...And putting a paper bag over the plant does not prevent pollen escape anyway. Bags also affect normal inflorescence development, and as I was trying to document morphological differences between transgenics and controls, were not an option.*

[11] Also on 28 May 2012 Alicia Scott emailed Dr Conner to report that ryegrass had flowered. She attached photos of the plants taken on 24 May and the email correspondence between her and Dr Kardailsky. Dr Conner advised the Director of Research, Dr Warren McNabb of the incident.

[12] On 30 May 2012 a disciplinary investigation was commenced. The investigators were asked to report findings and make recommendations. AgResearch sent a letter to Dr Kardailsky setting out allegations that the regulations and controls associated with the experiment had been breached and that Dr Kardailsky's actions appeared to be deliberate. AgResearch advised that it was commencing a disciplinary investigation into the matter.

[13] On 31 May 2012 AgResearch reported the matter to the Ministry of Primary Industries and advised that a non-compliant incident had occurred.

[14] Dr Kardailsky and his support person met with the investigators, Dr Conner and an HR Advisor on 13 June 2012 to discuss the allegations. Dr Kardailsky's responses are summarised as follows:

- he understood the procedures and regulations he was required to adhere to;
- his research required observation of the entire flowering process;
- he intended to allow the plants to flower for 2-3 days but not release pollen;
- there was a contradiction between the terms of the contract governing the experiment and ERMA<sup>2</sup> processes with regards to control mechanisms;
- ERMA's decision document as to what was required in the management of genetically modified ryegrass plants did not prescribe cutting or bagging of flowering plants;
- he considered Ms Scott had applied incorrect control standards.

[15] Dr Kardailsky also expressed his dissatisfaction with AgResearch's system of registering plants within glasshouses however it was agreed that this matter was outside the parameters under investigation.

[16] Following the meeting of 13 June 2012 AgResearch made further inquiries as to how the relevant control mechanisms were understood and applied by other researchers.

[17] On 28 June 2012 the investigators sent a "*Report on Investigation into Allegation of Contravention of ERMA Best Practice and the Hazardous Substances and New Organisms Act*" to the decision maker, Dr McNabb. The investigators made findings that Dr Kardailsky did not sufficiently contain the transgenic<sup>3</sup> flowering perennial rye grass plants in glasshouse 3. The investigators also found that Dr Kardailsky had no intention of bagging the plants as he believed this would introduce an artificial environment which he did not want.

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<sup>2</sup> Now known as the Environmental Protection Agency (EPA)

<sup>3</sup> Containing a gene or genes from another species

[18] The investigators did not accept Dr Kardailsky's view that seed dispersal was not a danger and considered that his stance indicated his choice to disregard the controls on flowering.

[19] The report also concluded that Dr Kardailsky was mistaken as to which of the various internal and external control documents governed the experiment and considered his responses to show a lack of understanding of the regulations, which was unacceptable in someone performing his role.

[20] The report concluded that the breaches were considered to be serious misconduct and recommended Dr Kardailsky be summarily dismissed.

[21] A second meeting with Dr Kardailsky was scheduled for 2 July 2012 but was postponed and arrangements were made for the parties to meet on 20 July 2012. Dr Kardailsky was represented by his advocate at that meeting and was advised of the investigation's preliminary findings, AgResearch's proposed outcome, and provided with an opportunity to comment on both matters prior to a final decision. At the conclusion of the meeting he was summarily dismissed.

## **Issues**

[22] Dr Kardailsky says his dismissal was unjustifiable. He says there is no substance to the allegations made against him and that the procedure undertaken by AgResearch was unfair.

[23] The legal test as to whether a dismissal is justified is set out at s.103A(2) of the Employment Relations Act 2000 (the Act). The Act requires the Authority to consider and determine, objectively, whether AgResearch's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[24] The test requires the Authority to assess what the employer did (the substantive dismissal and the grounds for it) and, how the employer acted (the process leading to those outcomes)<sup>4</sup>.

[25] The particular issues which need to be determined in this matter are:

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<sup>4</sup> *X v Auckland District Health Board* [2007] ERNZ 66

- Was AgResearch able to reasonably conclude that Dr Kardailsky failed to sufficiently contain flowering genetically modified ryegrass and that he did so intentionally?
- Was the process undertaken by AgResearch in determining Dr Kardailsky's dismissal fair?

### **Were there substantive grounds for Dr Kardailsky's dismissal?**

#### ***Was Dr Kardailsky made sufficiently aware that he not allowed to have genetically modified ryegrass flower without protection?***

[26] Research as it relates to genetically modified plant material is subject to a range of legislative controls<sup>5</sup> which are enforced by the Environmental Protection Authority (EPA) and the Ministry of Primary Industries. The Ministry of Primary Industries and the EPA require genetically modified material to be contained within specifically designed facilities and that those facilities have operating procedures which adhere to minimum standards of operation and with the provisions of the Hazardous Organisms and New Substances Act and the Biosecurity Act.

[27] The operating manual which governs procedures undertaken within AgResearch's glasshouses at Grasslands<sup>6</sup> provides technical information for the use and containment of plants so as to comply with the Biosecurity Act, the HSNO (Low Risk Genetic Modification) Regulations 1998, and MAF and ERMA standards. Clause 4.3.5 states:

#### **Flowering plants and seed harvesting**

##### **Users are required to pay special attention to flowering plants to prevent pollen escape or seed dispersal.**

Flowering plants must be segregated and screened. Additional controls may be imposed for wind pollinated plants (see decision sheets for specific controls). Trays must be used for plants, such as agabidopsis, which freely sheds seeds. Seeds **MUST** be harvested before dehiscence to prevent unintentional seed dispersal.

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<sup>5</sup> Ibid at footnote 1

<sup>6</sup> Standard Operating Procedure .05. Containment Glasshouse Standard Operating Procedure

[28] In the application document<sup>7</sup> between AgResearch and ERMA to undertake research including that performed by Dr Kardailsky, users of genetic modified plant material are required to ensure:

All seed material will be securely stored and any plants or plant materials that have been in the containment glasshouse will be destroyed by MAF approved method when the experiments are completed.

...

Controlled pollinations of out-crossing grass species for seed production will be performed in such a manner that their reproductive structures will be bagged and will remain bagged until seed harvest to restrict pollen movement and maximise pollen availability for a good seed set.

[29] During the first disciplinary meeting Dr Kardailsky advised he considered it was inherent to his research to study and observe the behaviour of ryegrass plants when flowering. He acknowledged that he was very familiar with the regulations and controls associated with genetically modified grasses. He said he had previously been a participant of the Institutional Biological Safety Committee which had assessed risks associated with the research and it had approved the control mechanisms required to manage and/or minimise risk. He said his prior involvement with the approval process of the research provided him with appropriate authority, knowledge and experience to interpret the correct use of the controls required for his research.

[30] Dr Kardailsky also advised that he considered there was a contradiction as they relate to the implementation of controls over flowering plants, between the documentation associated with the application to ERMA for the research and ERMA's approval of the research. Dr Kardailsky noted that ERMA's approval document did not specifically prohibit the flowering of ryegrass. During the Authority's investigation he acknowledged that he had not advised AgResearch that he considered there was a contradiction between the regulatory documents prior to incident under investigation.

[31] Dr Kardailsky's explanations raised particular concerns for AgResearch as to whether the regulations and associated control documents as they related to flowering of genetically grasses were properly understood and implemented by its researchers. AgResearch interviewed five researchers involved in similar work to that of Dr

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<sup>7</sup> Gene Function and Bio Technology Applications in Agriculture

Kardailsky including Dr White, the senior scientist for the research undertaken by Dr Kardailsky. Notes from those interviews were sent to Dr Kardailsky's representative on 29 July 2012.

[32] Dr Kardailsky's assertion that there was a contradiction between the relevant documents with regards to containment of flowering plants was not endorsed by the scientists interviewed who each advised that it was clearly understood that grass species were to be bagged or cut back when flowering commenced. Dr White advised that there was no requirement within Dr Kardailsky's research to produce pollen.

[33] AgResearch also reviewed the content and frequency of training available to its researchers and found that Dr Kardailsky had regularly attended 6 monthly compulsory training seminars including those on management of flowering grasses and the requirement to bag and restrict pollen spread.

[34] The investigators' report recorded that given the regulatory material and ongoing training available to Dr Kardailsky as well as his seniority and experience, he should have known and understood the requirement to contain flowering plants and have been aware of the implications of his actions.

[35] Having assessed the evidence I find it was open for AgResearch, acting as a fair and reasonable employer, to conclude that Dr Kardailsky had not sufficiently contained the flowering ryegrass in accordance with AgResearch's operating manual standards and practices.

***Was AgResearch reasonably able to conclude that Dr Kardailsky intended to allow the ryegrass plants to flower without protection?***

[36] Dr Kardailsky told the Authority that the issue in dispute was really one of definition. I understand Dr Kardailsky to say that there is a difference between allowing a plant to flower and allowing a plant to flower and pollinate. Dr Kardailsky said he did not allow the plants to flower to the point where they were able to release pollen.

[37] Dr Conner refers to Dr Kardailsky's conduct and points to the content of his email exchange between him, the Delegated Facility Officer, and the Team Leader, Plant Biotechnology, as evidence that Dr Kardailsky intended to allow the plants he was observing to flower without sufficient protection and that these actions were intentional and against regulations. He also says that during the meeting of 13 June

2012 Dr Kardailsky acknowledged that he wanted the plants to flower for 2-3 days without intervention by use of the controls

[38] I accept the inference taken from Dr Kardailsky's evidence that there may be scientific dialogue as to at which point a flowering plant releases pollen however the concern for AgResearch was that Dr Kardailsky intended to allow the ryegrass to flower, and that he wished to do so without implementing protection controls.

[39] On the basis of Dr Kardailsky's statements contained within his email correspondence between 24-28 May 2012 and his response to Dr Conner during AgResearch's investigation I consider it was fair and reasonable for AgResearch to conclude that Dr Kardailsky intended the ryegrass to flower without the use of controls.

***Was there an ulterior motive for initiating a disciplinary process against Dr Kardailsky?***

[40] During both AgResearch's investigation and the Authority's investigation Dr Kardailsky focussed on the actions of the Delegated Facility Officer, Ms Alicia Scott.

[41] Dr Kardailsky regards Ms Scott's actions in cutting back all the ryegrass plants had been unduly severe and extensive. He acknowledges that he had reacted angrily towards Ms Scott on his return to Grasslands when he discovered the plants. Dr Kardailsky considers Ms Scott's notification of non-compliance to Dr Conner was motivated by difficulties in their working relationship as opposed to a breach to containment regulation and policies. Dr Kardailsky challenges Ms Scott's assessment that the ryegrass plants were flowering and releasing pollen.

[42] Ms Scott's testimony was that there had been areas of dispute between her and Dr Kardailsky as regards operational matters within the glasshouses but regarded their relationship as respectful prior to the events which led to his dismissal. She denies she had an ulterior motive in reporting that the ryegrass was flowering.

[43] Ms Scott said she had worked as the Delegated Facility Officer for the glasshouses since 2009 and that there had not been any instances of plant flowering to the point of pollination in glasshouse 3 during that time. Ms Scott produced a copy of the photo she sent to Dr Kardailsky at 4.05pm which evidenced the ryegrass releasing pollen. I accept Ms Scott's evidence that she became concerned that the plants were pollinating and that she discussed her concerns with the Biological Safety Officer who

also viewed the plants and agreed that immediate action was required. I also accept that Ms Scott in her role as Delegated Facility Officer was tasked with a responsibility to report instances of non-compliance with containment regulations which she did in this case.

[44] I do not accept Dr Kardailsky's contention that the concerns raised by Ms Scott were made because of professional difficulties between Ms Scott and himself, or that the substance of those concerns was fabricated.

***Was it fair and reasonable for Dr Kardailsky to be held responsible for the ryegrass whilst on approved annual leave?***

[45] It was submitted by Dr Kardailsky's representative that Dr Kardailsky was employed pursuant to the terms and conditions of a collective agreement between AgResearch and NZPSA which included an entitlement to 5 weeks' annual leave.

[46] He says the events for which Dr Kardailsky was dismissed occurred during a period of approved annual leave and he was therefore not under any management control nor were there conditions attached to his annual leave. He further submits that AgResearch was aware that Dr Kardailsky did not have an allocated technician to monitor his experiment while on leave and that AgResearch must have assumed this risk in the absence of the provision of support. Dr Kardailsky's representative says there are no substantive grounds for dismissal in circumstances where the events in question occurred during his annual leave.

[47] I do not accept Dr Kardailsky's submissions that he was not responsible for the ryegrass plants whilst on annual leave. During questioning Dr Kardailsky said he was not clear about AgResearch's policy as to who was responsible for monitoring of on-going experiments when on annual leave however he conceded that there was a communal responsibility amongst researchers using the glasshouses to ensure compliance. He said there was an ad-hoc system whereby researchers would ask someone to care for plants whilst away but says in this instance he did not have a technician assigned to him and his leave was of short duration. He says he had taken proper care of the plants prior to commencing his leave and did not anticipate there was any risk. Dr Kardailsky stated that if he had been away longer he would have asked someone to assume responsibility of the plants.

[48] The system of shared accountability was reiterated in the evidence of Dr Conner, Dr McNabb and Ms Scott and I accept that the expected practice at AgResearch was to make arrangements with colleagues prior to taking leave to ensure monitoring and compliance of research. I conclude that Dr Kardailsky was aware of his obligation to arrange cover whilst on annual leave. I also find that Dr Kardailsky was provided with an opportunity to allow a colleague to assist as evidenced by Ms Scott's email communication with him on 24 May but that he did not take up her offer to remove the flowering plants. Although Dr Kardailsky was on annual leave and not required to attend the workplace I consider as a senior scientist he had an ongoing obligation to ensure his research remained compliant with his employer's policies and regulations. I do not accept the proposition that Dr Kardailsky's annual leave absolves accountability for his actions and/or omissions as regards the genetically modified plants under his control.

[49] Having considered all the evidence I find that it was fair and reasonable for AgResearch to consider Dr Kardailsky had allowed the transgenic ryegrass to flower without the required controls and that he intended to do so. These actions were in breach of AgResearch's operating standards and practice. AgResearch had substantive justification for dismissing Dr Kardailsky.

**Was the process undertaken by AgResearch prior to Dr Kardailsky's dismissal fair?**

[50] Dr Kardailsky says it was never clear to him what regulations or controls it was alleged that he had breached and that he was not given a copy of AgResearch's report until the meeting on 20 July when he was dismissed. He says the process undertaken by AgResearch in reaching a decision to dismiss him was unfair.

[51] In its assessment as to the justifiability of a dismissal the Authority is required to give consideration to the minimum standards of procedural fairness set out at s103A(3) of the Act including whether prior to its decision to dismiss, AgResearch raised its concerns with Dr Kardailsky, gave him a reasonable opportunity to respond to the concerns, and whether it genuinely considered Dr Kardailsky's explanations. The Authority should consider the resources available to AgResearch when it undertook its investigation into Dr Kardailsky's actions and may consider any other factors it thinks appropriate. The Authority must not determine a dismissal to be

unjustifiable solely on the basis of a defective process if the defects were minor and did not result in Dr Kardailsky being treated unfairly.

***Did AgResearch properly raise its concerns with Dr Kardailsky and provide him with access to information relevant to the continuation of his employment so that he could properly respond during the meeting of 13 June 2012?***

[52] The evidence is that on 30 May 2012 AG Research wrote to Dr Kardailsky and set out the allegations against him and the ERMA controls alleged to have been breached. Materially it stated: –

*This letter is to formally notify you of our concerns that you may not have sufficiently contained transgenic flowering perennial rye grass plants in glasshouse 3. In addition, we are concerned that you may have made a deliberate decision not to bag or cut the flower spikes prior to anthesis. This action would contravene the ERMA controls associated with the development of transgenic rye grass plants, specifically stipulated in GMDO 9017 (ERMA Form 3 approval).*

[53] The letter concluded with the advice that if the allegations were substantiated disciplinary action may be taken including a written warning or dismissal.

[54] It is apparent that prior to the meeting of 13 June 2012 Dr Kardailsky was not given copies of the email exchange between himself, Ms Scott and Mr Bryan. I consider these should have been provided as the contents of the emails matters of concern for AgResearch. However it is clear from the transcript recording of the meeting of 13 June 2012 that Dr Kardailsky was cognisant of the specific concerns his employer had and that he was able to respond to those concerns. I note that it was the content of the email authored by Dr Kardailsky which raised concerns and I consider that he would have been aware of his own correspondence. In this respect I find that the failure and/or omission to provide copies of the relevant emails prior to the meeting of 13 June is a minor procedural defect which did not result in AgResearch treating Dr Kardailsky unfairly and I do not consider Dr Kardailsky's dismissal is unjustifiable on this basis.

[55] There is an inference contained in Dr Kardailsky's evidence and submissions that there were communications between Ms Scott and Dr Conner in or around the time of the incident and that Dr Kardailsky was disadvantaged because he was not supplied with these.

[56] The evidence of representatives from AgResearch was that there were verbal discussions as to how AgResearch would notify the Ministry of Primary Industries but these were not reduced to written form. In response to an information request on behalf of Dr Kardailsky, AgResearch said there was no other material on which it relied to dismiss Dr Kardailsky, which I accept.

[57] Pursuant to s. 103A(3) and s. 4(1A)(c)(i) I am satisfied that AgResearch raised its concerns with Dr Kardailsky and provided him with sufficient information to allow him to respond to the allegations against him on 13 June 2012.

***Did AgResearch properly provide Dr Kardailsky with the investigators' report and a reasonable opportunity to respond to the findings of the report during the meeting of 20 July 2012?***

[58] Dr Kardailsky complains that he was not provided with a copy of the investigators' report until 20 July when he was required to attend a meeting to respond to it.

[59] The evidence is that the report was sent to Dr Kardailsky's representative on 18 July 2012. In this regard, I consider AgResearch complied with its obligation to provide to Dr Kardailsky material relevant to the continuation of his employment prior to his expected response to it. It appears from the evidence that Dr Kardailsky did not read the report in its entirety until the meeting of 20 July 2012.

[60] I do not consider AgResearch can be considered responsible for Dr Kardailsky's failure to fully appraise himself of the investigators' findings as a basis for a claim of procedural unfairness in circumstances where the report was made available to him prior to the meeting of 20 July 2012.

[61] Dr McNabb's evidence is that the meeting of 20 July was intended to discuss with Dr Kardailsky the findings of the investigators as set out in the report and to obtain and consider any responses Dr Kardailsky may have to the report before making a final decision.

[62] It is not disputed that at the beginning of the meeting Dr Kardailsky advised AgResearch that his representative would speak on his behalf. His representative focused on assertions that the employer had not adequately advised it was undertaking a disciplinary process, that the allegations against Dr Kardailsky were not grounds for dismissal, and that the procedure undertaken by AG Research was deficient. It is

apparent from the evidence that he did not address the substantive content and/or findings contained in the report.

[63] Dr Kardailsky told the Authority that it was not made clear to him by AgResearch how it made findings that his actions were in breach of the legislative controls<sup>8</sup>.

[64] I have already found that the allegations against Dr Kardailsky were sufficiently detailed in the letter of 30 May 2012. It is also clear from the correspondence that disciplinary action including dismissal was a possible consequence if the allegations against Dr Kardailsky were substantiated and it is apparent from Dr Kardailsky's responses in the meeting of 13 July that he understood the implications of AgResearch's investigation.

[65] Dr McNabb's evidence is that three adjournments were taken over the course of the meeting on 20 July to consider the claims made on Dr Kardailsky's behalf. Dr McNabb says he reviewed the correspondence provided and information exchanged between the parties and considered AgResearch had acted fairly towards Dr Kardailsky. He says that during the meeting he reiterated AgResearch's concerns that Dr Kardailsky had allowed the plants to flower, which was denied.

[66] Dr McNabb says that in the absence of any additional information from Dr Kardailsky or comment on the substance of AgResearch's concerns and findings contained in the report he considered he no longer had trust and confidence in Dr Kardailsky and advised him that he was dismissed.

[67] I do not consider that Dr Kardailsky can allege that he was not provided with an opportunity to put forward any information that may be relevant to AgResearch's investigation or respond to the findings made by AgResearch in circumstances where neither he nor his representative chose not to respond to those findings.

[68] It was submitted on behalf of Dr Kardailsky that Dr McNabb did not make any independent inquiry as to the content of the investigation report and by inference that his dismissal was predetermined prior to the meeting of 20 July. There is no evidence to support this assertion and I do not accept it.

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<sup>8</sup> Ibid at footnote 1

[69] Finally, Dr Kardailsky says there was no sincere or realistic opportunity during the meeting to discuss a lesser penalty. I also do not accept this submission. I find Dr Kardailsky did not fully participate in the meeting of 20 July 2012 other than to have his representative assert claims of procedural unfairness. It is clear that AgResearch considered the allegations against Dr Kardailsky to be serious. I accept Dr McNabb's evidence that in the absence of meaningful dialogue with Dr Kardailsky or his representative as to the findings of the investigation, AgResearch no longer had trust and confidence in Dr Kardailsky to comply with both internal and external regulations and controls and in these circumstances any discussion as to a sanction alternative to dismissal was not an appropriate resolution to the matter.

[70] I find AgResearch undertook its investigation into the allegations against Dr Kardailsky in a procedurally fair manner in accordance with the statutorily prescribed minimum standards set out at s103A(3).

### **Determination**

[71] I am satisfied that summary dismissal was a disciplinary outcome which was available to a fair and reasonable employer in all the circumstances. Dr Kardailsky does not have a personal grievance and I decline to award remedies.

### **Costs**

[72] Costs are reserved.

Michele Ryan  
Member of the Employment Relations Authority