

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Ida Murrie (Applicant)  
**AND** Higher Ground Drug Rehabilitation Trust (Respondent)  
**REPRESENTATIVES** Alex McDonald (for Applicant)  
Paul Tremewan (for Respondent)  
**MEMBER OF AUTHORITY** Janet Scott  
**DATE OF DETERMINATION** 30 April 2007

DETERMINATION

**Employment Relationship Problem**

- [1] The applicant Ida Murrie alleges a number of unjustified actions by the respondent against her, including unjustified disadvantage, discrimination on the grounds of disability; and unjustified dismissal.
- [2] To remedy her alleged grievances the applicant claims lost remuneration, compensation pursuant to s.123 (1) (c) (i) and costs in the matter.
- [3] The respondent denies all the allegations and asked the Authority to dismiss the applicant's claims.

**Background**

- [4] Higher Ground Drug Rehabilitation Trust is a non Government organisation and not for profit organisation. High Ground provides an 18 week residential recovery programme for people with severe dependency to alcohol and other drugs. The programme aims to assist residents to improve social and psychological wellbeing and to maintain abstinence from alcohol and other drug use.
- [5] The evidence discloses that all pre-admission clients who make contact with the organisation are informed what the service provides and in particular that Higher Ground focuses on a drug free environment. The programme is voluntary and admission is based on the fact that Higher Ground can meet the needs of the client. Clients whose needs cannot be met by Higher Ground are referred to other services that are more appropriate, e.g., Odyssey House. Higher Ground provides an adult programme that is based on the

12 steps principles alongside a Therapeutic Community Model. Higher Ground can take up to 30 residents and each client is assigned a case manager. Residents receive regular counselling through group and individual one to one time with case managers.

[6] The evidence for the respondent was that Higher Ground insists on a drug free policy and this policy has been in place and a corner stone of its residential programme since 1983.

[7] However, in 1998 when Higher Ground became aware that there was increased prescribing of psychotropic medication by General Practitioners the Board undertook a thorough review of its policy in regard to this and invited all service providers such as the Mental Health Commission, consumers, referrers and staff to participate. As a result of the review, including research undertaken at the time, it was clear that Higher Ground needed to maintain the status quo for its core programme. Further, it was the evidence of Janet Colby, Chairperson of the Board of Trustees that treating clients with dependency in a safe environment provides a wonderful opportunity to use other methods of treating secondary mental health problems, for example anxiety & depressive symptoms. Interventions used include psychotherapy, cognitive therapy, meditation, healthy eating and physical therapies. These offer long term solutions to such problems.

[8] It was also the evidence of witnesses for Higher Ground Drug Rehabilitation Trust that as it is requirement for clients to be totally abstinent the organisation firmly believes that to be congruent as an organisation it has to have the same criteria for recovering staff.

[9] The applicant has in the past had an alcohol and drug dependency problem and in 1994 she attended and completed a four month residential recovery programme run by the Trust. For some time after her treatment with the Trust she worked as a volunteer at the Trust.

[10] Ms Murrie was first employed by the Trust in December 1996 when she became a shopping person for the organisation. Over the years following she assumed a number of positions and in 2003 she was appointed as a counsellor after obtaining a graduate certificate in Addictive Process Studies at Manukau Institute of Technology.

[11] Prior to taking up this position Ms Murrie had been undergoing counselling for former distressing events in her life.

[12] It is not in dispute between the parties that in mid 2002 there was a conversation between Ms Murrie and Stuart Anderson, programme director for the Trust. Mr Anderson's evidence was that Ms Murrie approached him over personal concerns that were emerging from counselling that she had decided to undertake. He agreed that she could have four days special leave from 20 June 2002. At this time he said Ms Murrie stated she was contemplating going on medication (antidepressants). It was Mr Anderson's evidence that he told her that if she was to do that she would have to take St Johns Wort which is a herbal remedy; on the basis that this was what was allowed for residents attending the programme. Ms Murrie was aware of that fact. Mr Anderson said that he was left under the impression and understanding that Ms Murrie would be taking St Johns Wort and at no time did she inform him that she had been prescribed and was taking psychotropic medication. He said he found it astonishing that she remained on this medication for some 12 months and did not raise the issue with management or any other staff members at Higher Ground.

[13] Ms Murrie's version of this exchange is that she was prescribed citalopram (an SSRI antidepressant) by her doctor in June 2002. She had never taken anti-depressants before and she talked about it with Mr Anderson at Higher Ground. He had discussed with her taking a herbal remedy St Johns Wort instead. He did not suggest that she could not take any anti-depressant or that Higher Ground prohibited that. Ms Murrie said that after this discussion she took St Johns Wort for a time but found that the tablets gave her a headache and she started using citalopram. She said it never occurred to her that Higher Ground would not allow her to take this medication and she took it for approximately 12 months.

[14] In mid 2004 Ms Murrie was suffering from what she described as described as depression and burnout. It was her evidence that she requested six months unpaid leave. Mr Anderson disputes this. However it is not in dispute that Ms Murrie resigned her employment at this time.

[15] Over Christmas 2004/2005 Ms Murrie carried out shopping duties for Higher Ground and in February 2005 she was re-engaged as shopping person for Higher Ground. It was a seven hours per week position and by agreement with Mr Anderson she made herself available on a casual on-call basis to undertake other work that might be available. Between February 2005 and the termination of her employment in December 2005 Ms Murrie worked varying hours. In some weeks she worked as few as six hours and in one particular week in June she worked 41 hours.

[16] Ms Murrie's position is that her name was put on a list to be called to cover a range of positions when work was available and after she was advised that she was in breach of her contract in September 2005 the employer ceased to call her for additional work. It is Ms Murrie's position that she had a contractual entitlement to additional hours that became available.

[17] In July 2005 Mr Anderson was approached by another staff member who advised she believed that Ms Murrie was on prescribed psychotropic medication and as a result in breach of the Higher Ground Code of Ethics. Mr Anderson approached Ms Murrie to check this out. Ms Murrie confirmed to him that she was on prescribed psychotropic medicine and Mr Anderson told her that this issue would have to be raised with the Board of Trustees as it related to the Higher Ground Code of Ethics. He raised it at the following Board of Trustees meeting.

[18] It was Mr Anderson's evidence that he met with Ms Murrie on 2 September to inform her of the outcome of the Board of Trustee's meeting and he told her she would receive a letter outlining what would need to be addressed. Ms Murrie was provided with this letter on 6 September 2005. It is Mr Anderson's evidence that Ms Murrie was aware of the Higher Ground Code of Ethics and knew she had a responsibility to adhere to that Code of Ethics.

[19] Mr Anderson said in that letter:

*"As you know the Code of Ethics states clearly that staff who have identified a past drug dependence will remain abstinent of mood and mind altering drugs whilst employed or under contract at Higher Ground.*

*The Trust does acknowledge and appreciate there are obviously significant reasons that have led to you being prescribed medication. However, the Trust is explicit in its*

*expectations that staff comply to the conditions set out within their individual contracts including compliance to the Higher Ground Code of Ethics.*

*To be in breach of the Higher Ground Code of Ethics is considered a serious misconduct.*

*I have been directed to take the following course of action to support you in addressing the serious misconduct should you wish to continue in your employment with the Higher Ground Trust.*

*Proposed Course of Action:*

- *On a monthly basis you will meet with the programme director to inform him of the steps you are taking to address this non-compliance to the Higher Ground Code of Ethics.*
- *Within three months of this letter you will be compliant with all aspects of your employment contract and the Higher Ground Code of Ethics.*
- *Compliance to your employment contract and the Code of Ethics will be evidenced by providing a letter to the programme director from your prescribing GP stating you are no longer on psychotropic medication.*

*I need to state clearly that failure to comply with your employment contract and the Higher Ground Code of Ethics by 5 December 2005 will result in your employment contract being terminated with the Higher Ground Rehabilitation Trust.*

*Should you have any questions please do not hesitate to contact me. I am committed to supporting you to address this matter”.*

On 16 September 2005 Ms Murrie and another employee who had received a similar letter wrote to the Board seeking clarification of Mr Anderson’s letter.

On 11 October 2005 Ms Janet Colby, chairperson of the Board of Trustees of Higher Ground Drug Rehabilitation Trust wrote to Ms Murrie. Ms Murrie was reminded that the Board of Trustees viewed the situation as staff needing to adhere to the Higher Ground policies and procedures and Ms Murrie was referred to the specific policies contained within her employment contract, the Higher Ground Code of Ethics and the Higher Ground Organisational Pathways Manual.

Ms Murrie was reminded that the Code of Ethics had never changed and that it required that, in their personal use of alcohol or other mood or mind altering drugs, staff must serve as a responsible role model for clients. Ms Murrie was reminded that the Code of Ethics also provided, that if there has been drug dependency in the past, staff were required to be totally abstinent while employed at Higher Ground.

[20] Ms Colby went on to say that the Board of Trustees apologised if Ms Murrie had misunderstood the term *abstinent* used in the Code of Ethics to simply mean relapse into recreational alcohol and other drug use. Ms Colby concluded her letter by stating that the Trust’s representatives had provided clear instructions to her as to what was required for her to comply with the relevant policies and procedures set down by the Higher Ground Board of Trustees.

[21] On 14 November Ms McDonald, acting for Ms Murrie, wrote to the Trust raising a personal grievance in relation to the Trust's letter of 6 September. The grounds on which the claim was based included:

- Failing to act in good faith towards Ms Murrie by treating her taking of psychotropic medication as a breach of Higher Ground's Code of Ethics.
- Failure to act in good faith by deciding to terminate her (Ms Murrie) employment if the terms of the proposed course of action are not met without providing her with an opportunity to comment before the decision to do so was made; and
- Breach of the Human Rights Act 1993<sup>1</sup> in discriminating against her on the basis of disability.

[22] Remedies were sought on Ms McDonald's behalf.

[23] There followed an exchange of correspondence between the Trust and Ms McDonald (on Ms Murrie's behalf). Ms McDonald sought to address Ms Murrie's grievance while the Trust continued to focus on the issue of Ms Murrie's compliance with the Code of Ethics.

[24] In the event the Trust sought a meeting with Ms Murrie at a time to be agreed between the parties. A meeting arranged for 24 November was, I believe, adjourned when Ms McDonald was not available to attend as Ms Murrie's representative.

[25] On 25 November the Stuart Anderson wrote to Ms McDonald. He stated the problem as he saw it and clarified the purpose of the proposed meeting which was now described as a disciplinary meeting.

*"Ms Murrie is employed as a purchaser for the resident's provisions at the Higher Ground Drug Rehabilitation programme. As an employee Ms Murrie is to adhere to the Higher Ground Code of Ethics. Ms Murrie has identified herself as a "person in recovery". She has stated directly to me that she is on psychotropic medication. This places Ms Murrie in breach of point 4 of self regulating behaviour of the Higher Ground Code of Ethics. To be in breach of the Higher Ground Code of Ethics is considered a Serious Misconduct.*

*Ms Murrie is now invited to attend a disciplinary meeting with senior management (Programme Director and Finance Manager) acting on behalf of the employers, to have input into how she will comply with the Higher Ground Code of Ethics. Ms Murrie is welcome to bring a witness along to the disciplinary meeting. Should she not be available the meeting will proceed without her. At the conclusion of the meeting there will be a decision made as to whether or not the Trust continues to employ Ms Murrie.*

*The venue for the meeting is ..."*

[26] The parties met on 2 December.

[27] It is the respondent's evidence that Mr Anderson opened the meeting with a reminder about Higher Grounds core policy of abstinence from drugs and alcohol and he stated that

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<sup>1</sup> Ms Murrie did not raise a discrimination claim with the HR Commission and her claim will be addressed by the Authority as a claim under s.103 (1)(c) & s.105 (1)(h) of the Act.

the policy would not change. He also referred to the Higher Ground Code of Ethics to which staff must adhere and reminded those present that the purpose of the meeting was to establish what Ms Murrie would need to do in order to comply with the code of ethics.

[28] Ms McDonald stated she would be speaking for Ms Murrie. Mr Anderson advised he needed to speak directly with Ida and that he considered Ms McDonald to be there as her witness. There ensued a discussion about Ms McDonald's role at the meeting and it is Mr Anderson's evidence that Ms McDonald was trying to tell him how the meeting should be run. She put herself between him and Ida Murrie. Ms McDonald then asked to have a meeting alone with her client and they retired. When they returned Ms McDonald advised the meeting would not be continuing. Mr Anderson reiterated the purpose of the meeting. However, Ms McDonald advised they would not continue the meeting and the two women left. Mr Anderson accepts that Ms Murrie was upset at this meeting. However, she did not advise him that she was suffering from laryngitis.

[29] Ms Murrie's view of the meeting was that she wished Ms McDonald to speak for her because she was upset and emotional and she had laryngitis. It was her expectation that Ms McDonald would speak for her and explain that she was not in breach of the Higher Ground Code of Ethics – it being her position that staff who have been formerly dependent are not prohibited from taking the type of drug she had been prescribed. She accepts she did not tell Mr Anderson this or that she had laryngitis but she did tell Mr Anderson she wanted Ms McDonald to speak for her. She also accepts that it was Ms McDonald that terminated the meeting.

[30] Following this meeting Mr Anderson again wrote to Ms McDonald. Ms Murrie was offered another opportunity to meet with him for the purpose of discussing what she needed to do to become compliant with the Higher Ground Code of Ethics. That meeting was set for Wednesday 14 December.

[31] Ms Murrie did not attend that meeting and neither was there any contact made by her or on her behalf.

[32] It was Mr Anderson's evidence that this left him with no choice but to terminate Ms Murrie's employment. She was paid four weeks notice and all other entitlements. The point was made by Mr Anderson and Ms Colby, Chairperson of the Board of Trustees, that they were not happy with having to terminate Ms Murrie's employment given their very long association. The Trust's hope and all the actions it took, were focused on addressing the problem posed by Ms Murrie's non-compliance with the Trust's Code of Ethics so that she became compliant and continued in her employment with the Trust. Ms Murrie's repeated failure to engage with the Trust to address the problem left the Trust with no choice (given the significance of the principle in question) but to terminate her employment.

[33] Mr Anderson said he even took the step of asking Ida directly if they could address the problem one on one without lawyers involved. Ms Murrie does not dispute this nor does she dispute that she replied that she *"would speak to Alex (Ms McDonald) about it"*. However, nothing came of this initiative.

## **Issues for Determination**

[34] The issues for determination are:

- Was Ms Murrie disadvantaged in her employment?
- Was Ms Murrie unjustifiably dismissed from her employment?
- Was Ms Murrie discriminated against on the grounds of disability?

## Legal Test

[35] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A. It sets out a new test of justification in respect of assessing dismissal and disadvantage claims.

### **103A Test of justification**

*For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[36] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of **a fair and reasonable employer ...in all the circumstances ...at the time....**

[37] The Court has recently examined the test for justification (Air New Zealand v Hudson unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[38] At paragraph 144 the Court said in respect of the case before it:

*"The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her".*

[39] The Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do in.

## IEA & Code of Ethics

[40] Ms Murrie signed up to the Higher Ground Code of Ethics in July 2003 and reaffirmed them when she recommenced employment in February 2005. Under the heading **Self – Regulating Behaviour** it is recorded at Pt 4:

*“In their personal use of alcohol and other mood or mind altering drugs, serve as a responsible role model for clients, staff and community. **If there has been drug dependence in the past, staff and consultants are required to be totally abstinent whilst employed or under contract at Higher Ground**”.*  
(Emphasis mine)

[41] Ms Murrie’s 2005 letter of appointment superseded her 2003 employment agreement and did not contain the clear reference in that (2003) agreement to a breach of the Higher Ground Code of Ethics being an instance of serious misconduct entitling the employer to dismiss without notice. However, given Ms Murrie’s long association with Higher Ground and her knowledge of Higher Ground’s policies and rules (see credibility findings below) I do not consider the absence of a current contract which specifically spelt out the breach and its consequences to be a barrier to the view Higher Ground took to Ms Murrie’s breach of the Code of Ethics in 2005.

## Discussion

[42] The history of this case, its management and the evidence/submissions presented by and for the applicant has made a simple matter complicated and confusing.

[43] The matters to be determined here do not include questions as to whether or not Higher Ground should have a policy under which clients and formerly dependent staff are prohibited from taking the medication in question here. Higher Ground has taken a principled and considered approach in setting its policy on this point and it is entitled to do so. Neither is it about the reasons Ms Murrie resigned her employment in 2004 – a matter about which I directed that an application to raise a grievance out of time would be required<sup>2</sup>. However, these are subjects upon which I received a significant amount of evidence. Neither will I address the challenge raised, to the effect that Higher Ground was interfering in a doctor/client relationship when it took the line that Ms Murrie was in breach of its Code of Ethics when she was taking the drug in question.

[44] The matter is about the obligations the parties had to each other as parties to an employment relationship and in deciding the questions before me it is important to determine what Ms Murrie knew of Higher Grounds policies/rules and whether she was in fact in breach of those policies/rules. Then I must examine the employer’s actions against the s.103A test described above.

## Credibility

[45] Credibility is an issue here.

[46] Ms Murrie told the Authority that she had no knowledge that the drug she was taking was prohibited under the Trust’s code of ethics. She knew, she said, that clients were prohibited from taking such medication but she was not a client. She was upset at the implication she took from the employer’s position that she was not ‘clean’. Neither did she

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<sup>2</sup> Ms Murrie’s counsel specifically advised that no application to seek leave would be filed.

accept that citalopram is a 'mood or mind altering drug' within the meaning of Higher Ground's Code of Ethics (Pt. 4 Self Regulating Behaviour) Ms Murrie also denied having taken part in any staff meeting at the time the organisation's position on psychotropic medication was reviewed and confirmed in the late 90's.

[47] Ms Murrie did recall speaking to Mr Anderson in 2002 when she was having trouble coping with issues raised through counselling. It is her evidence that Mr Anderson suggested she take St Johns Wort but he never told her she could not take antidepressants or that Higher Ground prohibited it.

[48] I simply do not accept Ms Murrie's evidence on these points. Ms Murrie had a long standing association with Higher Ground and has been an employee of the organisation for many years – on and off. This policy of abstinence is a core value of Higher Ground upon which all its policies are based to provide congruence. I find Ms Murrie understood this policy both as a client and then as an employee who (to her credit) was able to take on ever increasing responsibility for the delivery of Higher Grounds programmes to help and support its clients to live healthier and happier lives.

[49] Ms Murrie had earlier signed up to an IEA and comprehensive associated policies which addressed the issue. She went through a comprehensive induction policy with Mr Anderson. She accepts they had a discussion in 2002 specifically in relation to issues that were causing her distress where the question of her taking medication came up. It is inconceivable that in those circumstances Mr Anderson would not have confirmed the application to Ms Murrie of Higher Ground's policy of abstinence from 'mood or mind altering drugs' – particularly when reference was made to her taking a permissible herbal remedy.

[50] Neither do I accept that Ms Murrie was not aware of the discussion and outcome of the 1998 review of Higher Ground's policies.

[51] Lastly, on the issue of credibility Ms Murrie and other witnesses questioned whether citalopram is a 'mood or mind altering drug' within the meaning of Higher Ground's Code of Ethics. Ms Murrie wrote to the Board seeking clarification of Mr Anderson's letter of 6 September. Ms Colby replied for the Board apologising if Ms Murrie had misunderstood the term 'abstinent' to refer to a relapse to recreational alcohol or other drug use. Ms Murrie's evidence was that she wanted to tell Mr Anderson that she did dispute the classification of citalopram as a 'mood or mind altering drug'. However, she did not dispute it. Neither did Ms McDonald on her behalf.

[52] I find that Ms Murrie was well aware of the fact she was prohibited from taking SSRI's whilst she was an employee of Higher Ground and in any event the policy was clarified for her by Ms Colby. If Ms Murrie did not agree with Ms Colby's advice she did not say so and neither did Ms McDonald on her behalf. The appropriate way to deal with a genuine dispute of this nature is to raise it as an interpretation dispute – these are issues the Authority deals with frequently and gives urgency to resolving where it is indicated.

[53] I find on the other hand that the evidence of the respondent's witnesses was focussed on relevant matters and it was consistent and credible.

[54] As a result of these findings, where there are disputes in the evidence on issues relevant to my determination it is the evidence of the respondent's witnesses that I prefer.

## Findings

[55] Ms Murrie was, I find, aware of the requirement on her to be abstinent from 'mood or mind altering drugs' and I find she knew the antidepressant she was taking came within this definition for the purposes of Higher Grounds Code of Ethics. She was also aware that a breach of Higher Grounds Code of Ethics amounted to serious misconduct.

[56] It is not in dispute that Mr Anderson questioned Ms Murrie and she advised she was taking psychotropic medication. He advised this issue would need to be referred to the Board. I find that Mr Anderson – having discussed the matter with the Board – met with Ms Murrie and explained that she would be receiving a letter and described to her the contents of the letter. It is not the case therefore (Ms Murrie's evidence) that she received the 6 September letter without any prior discussion.

[57] A grievance was raised with the Trust over the contents of this letter. One significant plank of the grievance described was the fact that the Trust had decided to terminate Ms Murrie's employment (if the proposed course of action was not met) without providing her with an opportunity to comment before the decision to dismiss was made.

[58] This claim reveals a fundamental misunderstanding of the Trust's letter of 6 September. That letter confirmed the Trust's understanding (advised to it by Ida Murrie) that she was taking psychotropic medication whilst employed by Higher Ground; it confirmed Higher Ground's policy contained in the Code of Ethics that persons in Ms Murrie's situation must remain abstinent; and stated that to be in breach of the Code of Ethics is considered serious misconduct.

[59] I find that by definition Ms Murrie was in a position where (despite the existence of good medical reasons for taking such medication) she was in breach of her employment obligations such as to amount to serious misconduct on her part.

[60] Usually admission of conduct amounting to serious misconduct will entitle an employer (who otherwise acts in a fair and reasonable manner) to dismiss an employee with justification.

[61] This is a situation where a summary termination would not be justified and the respondent recognised this. It acknowledged in its letter that there would have been good grounds for Ms Murrie to be prescribed such medication and it is clear on the evidence Ms Murrie's long association with the Trust was a significant factor in the steps the respondent proposed to take to assist her to comply with the Code of Ethics. The steps to be taken – over time – for her to become compliant were clearly spelt out and Ms Murrie was invited to make contact with Mr Anderson who stated he was committed to support her to address the issue.

[62] I find it was also appropriate and in accordance with well understood guidelines in these matters that the consequences of a failure to comply with her employment contract were spelt out clearly to Ms Murrie.

[63] It is not the case on reading of the letter of 6 September that the Trust was communicating a decision to terminate Ms Murrie's employment without allowing her an opportunity to comment. Ms Murrie had admitted serious misconduct; the Board was simply advising her of the consequences of a failure on her part to reach compliance with

her contract having set out a process over time to achieve compliance with the commitment and support of her employer.

[64] Ms Murrie was entitled to raise a grievance with her employer if she disagreed with the approach taken. Her grievance would ultimately have been resolved through the appropriate channels. However, it was a mistake to confuse this process with the notice given to her that she was in breach of her contractual obligations and that she was required to become complaint with the support and assistance that Higher Ground could offer.

[65] Ms Murrie failed to focus on and address the fundamental concern addressed to her and this led the Trust to invite Ms Murrie to attend a disciplinary meeting on 2 December where she again failed to address the concern that had so squarely been put to her over a period of weeks. Ms Murrie failed at that meeting to take the opportunity presented to her to have her say on the issue of compliance and how she would achieve that. She would have been heard on that issue if she or her representative chosen to address it. They did not do so and the meeting was terminated by Ms Murrie's representative.

[66] I find specifically that Ms Murrie was not denied the right to legal representation at the 2 December meeting. An employer is entitled and indeed required to raise with an employee any issue that could affect that employee's ongoing employment. What Mr Anderson did do was to refuse to allow Ms McDonald to set the agenda and conduct of the meeting. Neither was it a breach of duty towards Ms Murrie that Mr Anderson declined to have a mediator attend the 2 December disciplinary meeting. (*Kimber v The New Zealand Fire Service*) AA 3/01

[67] Ms Murrie again failed to take the opportunity offered to her to meet the Board on 14 December to address the employer's concerns. In a disciplinary setting, which this became, an employer is required to offer an employee the opportunity to be heard. It is the opportunity to be heard which is critical and case law is clear that if a worker fails to take the opportunity provided the employer is entitled to consider its position without the worker's input.

[68] The Trust could do no more. In a situation where Ms Murrie was in breach of her contract such as to amount to serious misconduct and where there was a refusal on her part to address the issue as to how and when she would achieve compliance the Board had no choice, I find, (given the importance of the principle at stake) but to terminate her employment.

[69] Ms Murrie was not disadvantaged in her employment and her dismissal although unfortunate was not unjustified.

[70] Ms Murrie offered no evidence on the claim of discrimination on the grounds of disability. Ms McDonald has subsequently submitted that Ms Murrie was dismissed on the grounds of psychological disability. As noted, I received no evidence in support of this claim and note the evidence discloses that Ms Murrie was not dismissed because she was suffering from a psychological disability but because she was in breach of her contract and she refused to take part in the disciplinary proceedings.

[71] Lastly I find Ms Murrie was not disadvantaged when work over and above her contractual hours of 7 per week was not offered to her. Any work offered over and above Ms Murrie's contractual hours was offered and accepted on terms notified at the time of offer and acceptance. There was no contractual entitlement to additional hours.

## Determination

[72] The Trust's actions conform with the s.103A test described above (p 7). Ms Murrie was not disadvantaged in her employment. Ms Murrie was not unjustifiably dismissed from her employment. She was not discriminated against on the grounds of psychological disability.

[73] Ms Murrie's claims are declined.

## Costs

[74] The respondent does not seek costs in the matter. Therefore there will be no order for costs.

Janet Scott  
Member of the Employment Relations Authority