

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 105
5601720

BETWEEN JENNIFER ANN NGAHOORO
Applicant

A N D SOUTHLAND YMCA
EDUCATION LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Gordon Paine, Counsel for Applicant
Riki Donnelly, Counsel for Respondent

Investigation Meeting: 9 June 2016 at Invercargill

Submissions Received: 16 June 2016 for Applicant
16 June 2016 for Respondent

Date of Determination: 8 July 2016

DETERMINATION OF THE AUTHORITY

A Jennifer Ngahooro was unjustifiably dismissed from her employment with Southland YMCA Education Limited.

B Taking contribution into account Southland YMCA Education Limited is ordered to make the following payments to Jennifer Ngahooro:

(a) Four weeks lost wages under s 123 (1)(b) of the Employment Relations Act 2000. Leave is reserved for counsel to return to the Authority if agreement cannot be reached.

(b) Compensation in the sum of \$2,800 without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000.

C Jennifer Ngahooro was unjustifiably disadvantaged in her employment by the failure of Southland YMCA Education Limited to conclude an investigation into allegations of bullying and harassment.

D Southland YMCA Education Limited is ordered to pay to Jennifer Ngahooro compensation in the sum of \$2,500 without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000.

E Costs are reserved and failing agreement a timetable has been set.

Employment relationship problem

[1] Jennifer Ngahooro was employed by Southland YMCA Education Limited (the YMCA) as a home-based tutor from 15 April 2013. In her role she taught levels 1 and 2 NCEA to young people who for a variety of reasons may not have fitted in at school and had failed to attain the necessary skills in literacy and numeracy.

[2] Following a disciplinary process, Ms Ngahooro was summarily dismissed on 16 November 2015 for serious misconduct in relation to letters sent to two people who I shall refer to as P and M.

[3] The letter of dismissal followed an earlier and more detailed letter dated 6 November 2015 that set out preliminary findings of the employer of serious misconduct on the part of Ms Ngahooro.

[4] Ms Ngahooro says that her dismissal was unjustified and further claims she was disadvantaged in her workplace by bullying and harassment.

[5] Ms Ngahooro has now been successful in obtaining alternative employment and no longer seeks to be reinstated into her position. She seeks lost wages for a period of 14 weeks, compensation for the unjustified dismissal in the sum of \$10,000 and compensation for the unjustified action in the sum of \$10,000.

[6] The YMCA says that it conducted a fair and reasonable process and that the decision to dismiss for serious misconduct was justified. Mr Sheppard, who was at the time he made the decision to dismiss a trustee of the YMCA Charitable Trust (the trust) and a director of the YMCA, said he undertook an investigation into the bullying complaints and did not conclude there was bullying or harassment.

The test of justification

[7] The justification test in s 103A of the Employment Relations Act 2000 (the Act) is to be applied by the Authority in determining justification of the dismissal and the alleged action. The Authority does not do this by considering what it may have done in the circumstances but is required under s 103A of the Act to consider on an objective basis whether the actions of the YMCA and how the YMCA acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal or the action.

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

[9] A fair and reasonable employer could be expected to comply with the good faith obligations set out in s 4 of the Act.

The issues

[10] The issues for the Authority are as follows:

Unjustified dismissal

- Reasons for the dismissal;
- Was it appropriate for Mr Sheppard to make a decision about Ms Ngahooro's employment?
- Had Ms Ngahooro already received a warning for giving the letter to P?
- Did any unfairness arise from a finding of serious misconduct on a preliminary basis that Ms Ngahooro had also sent a letter to M?

- Was there a full and fair investigation undertaken by the YMCA?
- Could a fair and reasonable employer have concluded there was serious misconduct on the part of Ms Ngahooro?
- Could a fair and reasonable employer have reached the decision to dismiss? and
- If Ms Ngahooro was unjustifiably dismissed, then what remedies is she entitled to and is there an issue of contribution and mitigation?

Unjustified disadvantage

- Were the actions of the YMCA into the investigation and conclusion of the bullying and harassment allegations unjustified?
- If there were unjustified actions, then was there corresponding disadvantage? and
- If Ms Ngahooro was unjustifiably disadvantaged in her employment, then what remedies is she entitled to and is there an issue of contribution?

Background against which these issues are to be assessed

[11] Ivan Hodgetts was appointed to the Chief Executive Officer role at the YMCA initially on an interim basis from January 2015 and then permanently from 10 March 2015. Samantha Munroe is the Youth, Justice and Education Services Manager at the YMCA. Ms Munroe was appointed to her position following a restructure and change to management from 14 April 2015. Ms Munroe supervised Ms Ngahooro.

[12] Students from the Southland Institute of Technology (SIT) undertaking the National Certificate in Social Services come on placement to the YMCA for the offsite practical work-based component of the course. Some time is spent with the tutor of the NCEA Level 1 class and the youth worker. Ms Munroe explained that students are required to research the YMCA education facilities and other NGOs in Invercargill to understand the service provision within the community and how this can be utilised.

[13] On 24 September 2015, Ms Munroe received a phone call from M who is the Programme Manager for Social Services at SIT. M raised a concern about an incident involving Ms Ngahooro, P who was a current SIT student on placement at YMCA and a former SIT student.

[14] The concern was that while P was on placement at the YMCA, Ms Ngahooro had talked about her husband's former student, R, in an unprofessional manner. M was concerned that this behaviour raised ethical issues and professionalism as other students were left wondering if they were also discussed in this way.

[15] Ms Munroe asked for the complaint to be put in writing and it was subsequently emailed to her later that same day. What happened then assumes some importance in respect of the matters that were the focus of the subsequent disciplinary meeting and also in respect of the allegation of bullying.

[16] On 24 September 2015, Ms Ngahooro said in her evidence that she met her husband, Roger, for lunch. He was at the material time employed by SIT in a teaching role. He mentioned that M, his then manager, had spoken to him about the concern that she had raised with Ms Munroe. Ms Ngahooro became aware through that conversation about the way the allegation from P had been discussed in a group supervision session with M and with other students. Ms Ngahooro believed that was a breach of ethics. She also considered the allegation was unfounded and as she put it in her written evidence *ridiculous*. Ms Ngahooro said that her husband never told her anything about his students.

[17] Ms Munroe raised the complaint from M with Mr Hodgetts. He asked Ms Munroe to speak with Ms Ngahooro at their usual supervisory meeting on Friday, 25 September 2015 to clarify what had happened.

[18] On Friday, 25 September 2015, Ms Ngahooro met with Ms Munroe in the morning. There is a dispute about who raised the issue about M's complaint. Ms Munroe said it was raised by Ms Ngahooro and Ms Ngahooro says that Ms Munroe raised it. I do not need to resolve that matter as it is enough that it was raised. There is some dispute as to exactly what was said. Ms Munroe provided some notes about the discussion upon which I have placed some reliance.

[19] Ms Ngahooro talked to Ms Munroe about her view of the matters giving rise to the complaint. Ms Munroe I accept in all likelihood said that she would investigate the complaint further and then talk again to Ms Ngahooro.

[20] Ms Ngahooro told Ms Munroe that she was going to take some action because she was very unhappy. She did not think she needed permission because she considered writing to P and M was totally separate to her employment with the YMCA. She recalled Ms Munroe saying that any action Ms Ngahooro took was separate.

[21] Ms Ngahooro also said that she believed that the complaint would proceed down a disciplinary process and could involve dismissal but Ms Munroe said that she did not say anything about the type of process that she would use to investigate the complaint. I accept that was more likely as it was at an early stage. Ms Munroe's notes do not reflect that anything was said about the nature of the process for investigation.

[22] Ms Munroe said she recalled Ms Ngahooro asking for P's address but she did not have a contact address for her and would not have felt comfortable in any event providing that. She said in evidence that she did not make a connection between that question and that Ms Ngahooro was going to write to P about the matter. I could not be satisfied that it was clear to Ms Munroe that Ms Ngahooro was intending to write to P or M. As Ms Ngahooro appeared agitated and/or angry Ms Munroe told her she was to have no contact with P until the matter could be investigated. There is no dispute about that. I think it likely that she also mentioned that Ms Ngahooro had to be professional.

[23] Before Ms Ngahooro gave the letter to P, she also had a discussion with Mr Hodgetts. Ms Ngahooro said in her oral evidence that as a result of the discussions with Ms Munroe and Mr Hodgetts, in her mind she had told them both about what she was going to do and thought it was all right to proceed on that basis. In relation to the instruction not to have any contact with P, Ms Ngahooro said that was difficult if not impossible and that in any event she considered contact to be talking to P which she did not do. Instead she handed P a letter in a sealed envelope at the end of the staff meeting about 1.30pm that day. The letter provided as follows:

To P

I have been informed by my Manager this morning of a complaint made about me by both you, and M. This is now taking its course as a disciplinary matter within my organization.

However, as an Academic, who has a P.G. Diploma in Law and Ethics, and who strictly follows ethical guidelines, I am less than pleased to have my character impugned by totally false allegations. I am aware these allegations were made by you, not only to M, but in the situation of a group supervision session, where others are also now involved.

This letter is to inform you that I intend to take personal action regarding this matter against both P and M and will be employing a lawyer to enact legal proceedings on my behalf.

Regards

Jennifer Ngahooro

Ms Ngahooro ended the letter by detailing her qualifications.

[24] Ms Munroe went to the Connect classroom at about 3pm on 25 September 2015 and spoke to P who she observed to be visibly upset, had been crying and looked like she might start crying again. Ms Munroe described her as *shaky and scared*. P advised that Ms Ngahooro had given her a letter after the weekly staff meeting and P gave the letter to Ms Munroe.

[25] Ms Munroe approached Ms Ngahooro later in the day and asked her to come and see her in her office. The meeting became heated. Subsequently Ms Ngahooro complained that Ms Munroe was pointing at her and Ms Munroe then stopped.

[26] One of the material issues about that meeting is that Ms Munroe gave Ms Ngahooro a verbal warning during the discussion. The reason for the warning was somewhat confusing for Ms Ngahooro. Ms Ngahooro at one point left the meeting and then said she was called back into Ms Munroe's office and given a second warning. When Ms Munroe asked Ms Ngahooro about the letter given to P, Ms Ngahooro advised that Mr Hodgetts was aware of the letter and agreed with what she had done. I think it likely there was a reminder by Ms Munroe that in giving the letter to P, the instruction not to have contact with her had been disregarded.

[27] It is common ground that after the heated exchange on 25 September 2015 Ms Ngahooro left the building as she was upset.

[28] Ms Ngahooro sent an email on 25 September 2015 to Mr Hodgetts at 4.05pm and advised that she was taking legal advice on the complaint made about her. Ms Ngahooro wrote that she was not happy about the way she was spoken to by Ms Munroe and did not appreciate having her manager stand over her shaking her finger in her face. Ms Ngahooro said when she raised a voice to tell her to stop; she was told she was getting a warning for unprofessional behaviour.

[29] In the morning of 28 September 2015 Mr Hodgetts telephoned Ms Ngahooro and asked her to meet with him to clarify the issue and discuss her concern. A time of midday was agreed to for the meeting but then in an email sent to Mr Hodgetts that same day Ms Ngahooro advised Mr Hodgetts she had been talking to a lawyer in Dunedin and had been advised to put everything in writing and not to meet with either Mr Hodgetts or Ms Munroe in the meantime. She advised in her email that she was issued with two warnings within 20 minutes.

[30] On 29 September 2015 Mr Hodgetts then became aware that there had been some postings on Facebook about matters that he considered were disparaging statements about the YMCA and there was also a post that appeared to be directed at either P or M in a way he considered threatening.

[31] By letter dated 30 September 2015, Mr Hodgetts wrote to Ms Ngahooro asking her to attend a disciplinary meeting on Tuesday, 6 October 2015 at 9am to provide an explanation to four allegations. There was advice that if findings of serious misconduct were made they may result in her dismissal. Relevant documents were attached. Mr Hodgetts set out some background in his letter including at para.11:

P gave the letter to Sam who went to the Kitchen and asked you to come to her office. It is alleged that in response to Sam's questions as to why you had disregarded instructions you advised that I said you could write the letter. Sam, gave you a verbal warning regarding:

11.1 Failure to respect her instruction that morning that she would be investigating the complaint against you before deciding on any further action – including if disciplinary action was necessary.

11.2 Your aggressive and confrontational actions that day both towards your Manager and our SIT student placement P – by handing her your letter.

[32] The four allegations of serious misconduct set out in the letter were as follows:

1. That you contacted P and former SIT student R despite a lawful and reasonable instruction not to and sent a letter that was clearly inappropriate.
2. Refusal to provide detail of location to Manager.
3. Postings of inappropriate statements on Facebook.
4. Refusal to attend workplace, attend weekly supervision or team meetings.

[33] Mr Paine advised in a letter dated 2 October 2015 that he had been retained to act for Ms Ngahooro. He suggested rescheduling the meeting to a time that would suit him as he was required to travel from Dunedin to Invercargill. Further he advised in his letter that he was raising an issue of bullying and harassment as a serious disadvantage. He referred in particular to the meeting with Ms Munroe on 25 September 2015.

[34] The first disciplinary meeting took place on 8 October 2015. Mr Paine attended as the representative of Ms Ngahooro and Mary-Jane Thomas attended with Mr Hodgetts.

[35] Both of the disciplinary meetings were recorded and the Authority has received a transcript of both disciplinary meetings.

[36] At the first disciplinary meeting, Mr Paine raised a concern about the letter dated 30 September 2015 from Mr Hodgetts. Ms Ngahooro received that letter on 2 October 2015. The entity at the top of the letter is described as Invercargill YMCA Charitable Trust and it appears a considerable amount of the meeting was concerned with whether because of that Ms Ngahooro's employer had asked her to attend the disciplinary meeting and had raised the allegations.

[37] Another matter discussed was how the working relationship between Ms Munroe and Ms Ngahooro could continue. Ms Thomas concluded the meeting on the basis that she would clarify whether or not the employer named in Ms Ngahooro's individual employment agreement had commenced the disciplinary investigation and she would also give consideration to the concerns about Ms Munroe and Ms Ngahooro continuing to work together pending an investigation into the allegations of bullying and harassment.

[38] Following that meeting, Ms Thomas wrote to Mr Paine by letter dated 9 October 2015 and clarified Ms Ngahooro's employer as Southland YMCA Education Limited but explained that the trust, named at the top of Mr Hodgetts' letter of 30 September 2015, had a board of directors who were also trustees of Southland YMCA Education Limited and Southland YMCA Recreation Limited. Mr Hodgetts is Chief Executive Officer of YMCA Invercargill incorporating the charitable trust and its two companies.

[39] Ms Thomas also put into place some interim steps with respect to interactions between Ms Munroe and Ms Ngahooro including that Ms Ngahooro would have as her direct manager Mr Hodgetts and that she would continue to work the hours that she says were the terms and conditions of her employment. Whilst the allegation of workplace bullying was being investigated, Ms Ngahooro was not required to attend her usual supervisory meetings with Ms Munroe on Fridays.

[40] Ms Thomas identified two separate matters as the process moved forward. The first was whether Ms Ngahooro had been guilty of serious misconduct and the second was the complaint that Ms Ngahooro had been subject to workplace bullying and that an investigation would be commenced once details were received.

[41] The second disciplinary meeting took place on 15 October 2015. The Authority has been provided with a transcript of that meeting. As a result of some concerns being raised about Mr Hodgetts' independence, it was decided that Mr Sheppard would be the decision-maker on behalf of the YMCA. He attended the second disciplinary meeting. There was a brief period that he was not present during the meeting, however, he was provided with the recording. Mr Sheppard also conducted an investigation into the bullying allegation. Notes provided by Ms Munroe on both the disciplinary investigation and bullying investigation were provided and Mr Paine duly responded to those matters by providing response statements from Ms Ngahooro.

[42] On 6 November 2015, Ms Thomas sent a letter advising that Mr Sheppard had reached a decision that Ms Ngahooro was *guilty of serious misconduct* in relation to the sending of the letter to P and that it was to a degree that it had affected trust and confidence and the outcome should be dismissal. There was an opportunity to provide input into the outcome of that process.

[43] There was also a preliminary decision that Ms Ngahooro had been *guilty of serious misconduct* in relation to the sending of a letter to an employee of SIT, M. There had been no allegation in the 30 September 2015 letter about the letter sent to M and Ms Thomas set that out clearly in her letter and advised that there would be a further opportunity to address that matter in addition to comments already made at the meeting about the letter sent to M by Ms Ngahooro.

[44] The second allegation in the letter of 30 September 2015 was found not to amount to either misconduct or serious misconduct.

[45] The third allegation, which was about the Facebook post, was that it was the first time that had occurred and that it amounted to misconduct, not serious misconduct, and a preliminary decision had been made that a first written warning would be provided. Mr Sheppard confirmed that matter was not taken into account in reaching the decision to dismiss.

[46] In relation to the fourth allegation in the letter of 30 September 2015, it was accepted that it was not serious misconduct and would not be further investigated.

[47] The explanations from Ms Ngahooro that P's letter was in a closed/sealed envelope and that Ms Ngahooro had a belief that she was able to send a letter to P were rejected by Mr Sheppard. He had reached a view that the letter was threatening and aggressive and would reflect poorly upon the YMCA and that P had made a complaint as she was entitled to do and it was to be investigated. Ms Thomas wrote that Mr Sheppard had concluded that the decision to act precipitously was an action that Ms Ngahooro must have known would affect the reputation of the YMCA and was in direct contravention of a lawful and reasonable instruction.

[48] A similar preliminary view was also taken in relation to the letter sent to M, an employee at SIT, and that as SIT was a business partner, that action was as serious if not more serious than the letter to P. Ms Thomas reiterated, however, that there would be an opportunity to comment on that before a final decision was made.

[49] Ms Ngahooro was invited to provide additional comments about the allegation that she sent a letter to M constituting serious misconduct and to provide input into the preliminary decision that the sending of the letter to P constituted misconduct to such a level that dismissal was justified and also input into the preliminary decision of the employer that the Facebook posts justified a written warning.

[50] Some further submissions were received from Mr Paine but not about the M allegation. In the intervening period, Ms Thomas advised Mr Paine of a concern that text messages had been received by Mr Hodgetts from students about Ms Ngahooro's employment. Mr Paine responded to that by letter dated 16 November 2015 and on that same day Ms Thomas advised of the final determination that Ms Ngahooro's employment was to be terminated summarily.

Reasons for the dismissal

[51] The reasons for the dismissal were provided in the letter of 16 November 2015 from Ms Thomas to Mr Paine and were the letters given to P and M. It is helpful to set the reasons out more fully as it was expressed in the letter.

2. Mr Sheppard has concluded that the letter to P was unprofessional, harmful and outside the manner with which the YMCA operates and occurred before an investigation into the complaint could occur. The reputational damage that this letter could incur is real but limited. The letter to M was all of these things but also had a highly significant potential of severely damaging the YMCA's reputation with SIT with whom the employer has an ongoing partnership and opportunities to develop this partnership further in the future.

3. Your client's employment agreement provides at 9.2.3 that employment may be terminated summarily where the employee has conducted herself, whether or not in the course of employment, in a manner likely to bring the employer into disrepute or jeopardise its relationship with customers or the general public.

Was it appropriate for Mr Sheppard to make a decision about Ms Ngahooro's employment?

[52] Mr Paine raised a concern at the first disciplinary meeting that Mr Hodgetts' letter inviting Ms Ngahooro to a disciplinary meeting was on letterhead other than that of her employer. There was another concern after Mr Hodgetts was replaced as decision maker in the disciplinary process by Mr Sheppard whether he was a representative of Ms Ngahooro's employer. A side but relevant issue at this point was an issue about whether company minutes which were specifically requested at the first disciplinary meeting by Mr Paine should have been provided.

[53] Having heard evidence about the first matter I find any concerns on the part of Mr Paine were adequately addressed and answered by Ms Thomas in her letter of 9 October. YMCA is a charitable trust which operates through two companies,

Southland YMCA Education Limited and Southland YMCA Recreation Limited. Mr Hodgetts is the chief executive officer of the entity that employed Ms Ngahooro. In respect of the second concern Mr Sheppard was at the material time a trustee for the YMCA Trust. He resigned on 25 May 2016 after a three year term. Mr Sheppard advised that all trustees of the charitable trust are also directors of the two companies the trust operates under. He also confirmed that he had full authority to make a final determination about the allegations.

[54] I do not find any issues arise about the appropriateness or authority of Mr Sheppard to make a decision about matters pertaining to Ms Ngahooro's employment.

[55] I will consider the failure to provide company minutes if I need to at a later point in this determination.

Had Ms Ngahooro already received a warning for sending a letter to P which was one of the reasons for the dismissal?

[56] Mr Hodgetts' letter of 30 September 2015 confirmed a warning had been given to Ms Ngahooro and the reasons for the warning. I am not satisfied that before then it was clear to Ms Ngahooro why she had been warned and how many warnings she had received. Mr Hodgetts clarified that the verbal warning was given for a failure to respect Ms Munroe's instructions and her aggressive and confrontational actions towards Ms Munroe and P by handing P the letter.

[57] The disciplinary meeting was to deal with four allegations, three of which were not the subject of warnings. The first allegation on its face appears to have been the subject of the warning. It concerned an allegation of interaction with P and another student R despite a lawful and reasonable instruction not to and sending an inappropriate letter. Ms Munroe had before she gave Ms Ngahooro a warning seen the letter handed to P and regarded it as a breach of her instruction and inappropriate.

[58] Mr Sheppard concluded the allegation about R was a mistake and it was put by him to one side. It would have been appropriate to have clarified that in the preliminary findings letter but I agree with Mr Donnelly that if that is seen as a defect in the process then it was under s 103(5) of the Act minor and did not result in unfairness to Ms Ngahooro. That then left the allegation about P.

[59] The warning was not raised during the disciplinary meeting by either party.

[60] I have considered the implications of a warning for the same conduct that the dismissal was in part based on. Mr Donnelly referred me to the Employment Court judgment in *B v Virgin Australia (NZ) Employment and Crewing Limited*¹ where it was alleged that the decision to dismiss was unjustified in part because it followed an unauthorised re-opening of an investigation that had been concluded with a final warning and submissions on behalf of the plaintiff that the defendant was not entitled to re-discipline for the same conduct.

[61] The *Virgin Australia* judgment provides a careful analysis of the law on re-opening a matter through a formal disciplinary process. Judge Inglis did not find that there was a blanket legal barrier that prohibited the defendant in that case from re-opening the disciplinary process, in the absence of fresh information. That conclusion was reinforced Judge Inglis found by the wording of s 103A itself.² Judge Inglis distinguished the judgment in *Service v Young Mens' Christian Association of Christchurch Inc*³ because in *Virgin Australia* further information had come to light justifying inquiry by the company. In that sense Judge Inglis stated it was not a simple substitution based on the same facts of the original final warning.

[62] Mr Donnelly submits that Ms Munroe did not have delegated authority to impose a disciplinary sanction against Ms Ngahooro. That was not stated in Mr Hodgetts letter dated 30 September 2015 or addressed subsequently and therefore I do not find an argument available on that basis or on the basis that the warning has not been finalised in the circumstances.

[63] I have then considered whether the basis for dismissal was based in part on the same information and facts as the oral warning. I have considered whether there was new information from Mr Hodgetts about what he said to Ms Ngahooro before she gave the letter to P. Ms Munroe knew though before the warning was given that Ms Ngahooro said Mr Hodgetts had approved the action about the letter and I do not conclude that is new information. Mr Hodgetts denied that he had approved the action about the letter. Mr Sheppard rejected Ms Ngahooro's explanation that he had.

¹ *B v Virgin Australia (NZ) Employment and Crewing Limited* [2013] ERNZ 72

² N 1 above at para 147

³ *Service v Young Mens' Christian Association of Christchurch Inc* [2011] NZEmpC8.

[64] I accept Mr Donnelly's submission that the warning was given prior to the delivery of the letter to M and that was new information. There is the complicating factor however that the letter to M was not one of the original four allegations and I will come to that.

[65] I also agree with Mr Donnelly that there are some similarities between the facts of this matter and the decision referred to in the *Virgin Australia* case of the Employment Appeal Tribunal in *Christou and Ward v London Borough of Haringey*.⁴ In that matter a baby had died of lack of care and abuse. The social worker and her team leader were disciplined and given a written warning. Following a change in management and media attention a second set of proceedings were commenced in relation to the same employees and the same conduct. Both were summarily dismissed and the Tribunal upheld those dismissals as fair in light of the new management regime and the different view of the seriousness of the conduct taken. The decision was unsuccessfully appealed.⁵ The Court of Appeal observed that consideration had to be given to whether it was fair to institute the second proceedings at all. It found that while the factual substratum remained the same, the particular focus of the complaint in the second proceeding was different because whilst the first was focussed on procedural error the second was concentrated more firmly on substantive errors of judgment and breaches of the applicable care plan. This was considered to justify the institution of fresh proceedings.

[66] The starting point from *Virgin Australia* is that there is no blanket legal barrier in the absence of fresh information to re-opening the disciplinary process. Section 103A of the Act and its wording need to be considered.

[67] Mr Hodgetts letter inviting Ms Ngahooro to a disciplinary meeting was written some 5 days after the warning was given to Ms Ngahooro. The reasons for the warning or warnings seemed unclear initially but Mr Hodgetts clarified this in his letter of 30 September 2015.

[68] The allegation Ms Ngahooro was facing about the letter given to P was based on the same grounds that Mr Hodgetts said she had been verbally warned for. The warning was said to have been imposed for a breach or failure to follow an instruction not to have contact with P and aggressive and confrontational action which in relation

⁴ [2012] IRLR 622 (ScEATSC)

⁵ *Christou & Ward v London Borough of Haringey* [2013] EWCA Civ 178

to P could sensibly only refer to the content of the letter itself. There was no evidence of other interactions between P and Ms Ngahooro.

[69] Relevant circumstances at that time included that Ms Ngahooro may not necessarily have considered the warning was the end of the matter although that was never specifically put,⁶ and/or if that was the case what the status of the warning was.

[70] The warning was not given as part of a fair process. There was a short period between the warning and the disciplinary process but nothing was said further about the warning during the disciplinary process and there was no new or fresh information about the allegation concerning P that came to light after the warning. The disciplinary process about the letter to P was based on the same facts and had the same focus as the warning. The letter given to P was part of the decision to dismiss.

[71] Objectively assessed and weighing all the matters I do not find in all the circumstances that a fair and reasonable employer could have justifiably conducted a new disciplinary process about the allegation about the letter given to P and reached a decision to dismiss in part about the letter to P when Ms Ngahooro had already been warned in respect of the same conduct.

[72] The YMCA did have new information in relation to a letter from Ms Ngahooro to M which Ms Ngahooro put under M's office door after she was given the warning about the letter written to P. I will turn to that now as that was the other conduct the YMCA concluded was serious misconduct and relied on for the decision to dismiss.

Did any unfairness arise from a finding of serious misconduct albeit initially on a preliminary basis that Ms Ngahooro had also sent a letter to M?

[73] This allegation was not in the letter dated 30 September 2015. There is no dispute that Ms Ngahooro gave M a letter which was virtually identical to that given to P on 25 September. She gave M the letter after receiving the verbal warning for the same conduct to P by putting it under M's office door as she was not in her office.

[74] Ms Ngahooro spoke during the second disciplinary meeting on 15 October 2015 about giving the letter to M. It was recognised during the second disciplinary meeting that there was no allegation in the letter of 30 September 2015 from

⁶ See transcript of second disciplinary meeting 15 October 2015

Mr Hodgetts about the letter given to M.⁷ Ms Ngahooro was specifically advised by Ms Thomas during the disciplinary meeting that the allegation *was really just about P okay and we'll put M to one side and imagine that that's been dealt with, if it gets dealt with it will be SIT dealing with it as you as an employee in relation to that.*⁸

[75] In the letter of 6 November from Ms Thomas to Mr Paine containing Mr Sheppard's preliminary findings of serious misconduct there was a conclusion reached on a preliminary basis that Ms Ngahooro was guilty of serious misconduct in relation to the sending of a letter to an employee of SIT who was M. There was reference to the preliminary view that the letter to SIT as a business partner *is as serious, if not more serious, than the letter to P.* Ms Ngahooro was given an opportunity to provide additional comment on that conclusion.

[76] A fair and reasonable employer could not, where there was no allegation made before the meeting and the statement referred to in paragraph 74 of this determination, proceed to reach a preliminary decision that there had been serious misconduct in respect of the conduct. I accept that the ability to make further comment was an attempt to bring some fairness to the process about the letter to M but I do not find it was sufficient. A fair and reasonable employer could have been expected to have commenced a new disciplinary process in respect of that allegation.

Was there a full and fair investigation into the actions of Ms Ngahooro?

[77] For reasons set out above I find that the YMCA's inquiry into the actions found to be serious misconduct, the letters to P and M, was not carried out in a reasonable and fair manner. There had already been a disciplinary outcome for the allegation about the letter given to P. The process in respect of the letter to M was not a fair and reasonable process although I do not conclude that the YMCA could not have started a fresh process in respect of that allegation. These were not minor defects in the process and they did result in unfairness to Ms Ngahooro. For completeness there was a suggestion that Ms Ngahooro was never advised why the letters were detrimental to the relationship or reputation of the YMCA with SIT. I find that Ms Thomas did refer to this including during the disciplinary meeting on 15 October 2015. I refer to pages 73 and 74 of the bundle of documents which is the transcript of the meeting. I am not persuaded that the company minutes, the provision

⁷ Page 73 of the bundle of documents (the transcript of the disciplinary meeting)

⁸ Ibid.

in all likelihood of which was simply overlooked, was information that would have been relevant to the continuation of Ms Ngahooro's employment.

Substantive justification

[78] The type of conduct by an employee that interferes with an employer's complaint process and investigation and threatens the individual who complained is conduct that goes to the heart of the employment relationship and undermines the essential trust and confidence that the employer must have in an employee. The fact that the letters were given to P and M is not disputed.

[79] Ms Ngahooro's explanation that she believed she was able to give the letter to P after discussion with Mr Hodgetts and Ms Munroe was rejected. I accept that a fair and reasonable employer could reject that explanation in all the circumstances. It was accepted that Ms Munroe had said that there was to be no contact with P and Mr Hodgetts discussion did not go so far as to confirm that Ms Ngahooro could write to P and/or M. Mr Hodgetts emphasised that Ms Ngahooro's personal situation needed to be kept separate from the YMCA's business. The giving of a letter to P I find could fairly and reasonably be considered a breach of Ms Munroe's clear instruction.

[80] Mr Paine submits that no weight was placed on the hurt to Ms Ngahooro caused by the allegations which she said were without foundation and the manner in which they were made but the focus was on P's emotional upset.

[81] Employees who receive complaints usually find them upsetting and Ms Ngahooro's husband was also involved which increased the level of distress for her. The step of writing to the complainants expressing concern about the complaint and threatening legal action is another matter altogether. Ms Ngahooro would have had an opportunity to contribute her views about the matter into the YMCA's investigation into the complaint. She had obligations towards the YMCA to act in a manner consistent with obligations of trust and confidence and to act in good faith.

[82] I find that Mr Sheppard was entitled to conclude that P was able to make a complaint if she wished and that by giving her the letter Ms Ngahooro placed pressure on P, a younger student about the complaint. P was upset and distressed by the letter. I am not satisfied that Ms Ngahooro's view that P was no longer on placement at the time the letter was given is material.

[83] In respect of both letters Ms Ngahooro said by way of explanation during the disciplinary process that she was entitled to do what she did. I find that the YMCA was fairly and reasonably entitled to conclude that Ms Ngahooro should have known that the letters would reflect poorly on the YMCA and its relationship with SIT and that they contained a threat and were aggressive. Ms Ngahooro is an intelligent professional and the YMCA was entitled to take this into account in assessing whether or not she could have considered the writing and provision of the letters to P and M acceptable and appropriate. To the extent that Mr Paine suggested that if a lawyer had written the letters it would have been acceptable I find objectively assessed a fair and reasonable employer could still have reached the same view about the conduct.

[84] The letter to M was placed under her office door by Ms Ngahooro after she had been given a warning for the letter to P and had seen Ms Munroe's displeasure about the action of giving the letter to P. I accept Mr Donnelly's submission that there is a suggestion in that action of an entitlement to act as she saw fit without regard to the YMCA.

[85] A fair and reasonable employer could conclude the effect of Ms Ngahooro's conduct impacted on the reputation of the YMCA and its ability to deal with complaints appropriately. For that reason it was conduct likely to bring the YMCA into disrepute with SIT and its students. Objectively assessed the conduct limited if not completely thwarted the ability of the YMCA to conduct a proper investigation into the complaint of P as advised through M because of the threatening letters.

[86] I find in conclusion for the above reasons that there was substantive justification for the dismissal.

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

[87] I have found that the investigation by the YMCA into the allegation of the letters written to P and M was not carried out in a fair and reasonable manner and that Ms Ngahooro had already been disciplined for the letter to P.

[88] For those reasons the decision to dismiss was not one that a fair and reasonable employer could have reached in all the circumstances.

[89] Ms Ngahooro has a personal grievance that she was unjustifiably dismissed and she is entitled to consideration of remedies.

Remedies

Lost Wages

[90] Mr Donnelly submits that Ms Ngahooro should not receive any lost wages and there was no evidence of any real attempt to mitigate loss. Ms Ngahooro said that she did look for work and eventually found some part-time work in December. She said that there were very few jobs and applied for some roles outside Invercargill.

[91] There was very limited evidence about attempts to mitigate loss. The Authority did ask in its notice of direction of 7 March 2016 for all documentary evidence including that relevant to remedies. I do though balance the more limited opportunities for work in Invercargill in a role similar to that which Ms Ngahooro was undertaking with the YMCA and that it was towards the end of the teaching year.

[92] It did seem from the evidence that Ms Ngahooro had only applied for one job before she was successful in obtaining some part-time work and I do not find that the full burden of lost wages should be visited on the YMCA.

[93] In all the circumstances I am minded to limit reimbursement under this head to 10 weeks lost income subject to contribution. Although Ms Ngahooro's starting salary was \$43,000 the evidence supported a small increase to that but there was no direct evidence about what that was. I will leave counsel to reach agreement about a figure for lost wages and reserve leave to return to the Authority if this proves difficult.

Compensation

[94] Ms Ngahooro said that she felt she had been treated unfairly and that she was unemployed for 14 weeks. She felt she had been a good teacher and worked very hard. Ms Ngahooro also said that a woman from Community College advised her in a supermarket that she was aware the YMCA *had to let her go*. I could not be satisfied that those from the YMCA involved in the disciplinary process were the only people responsible for community knowledge. On 9 November Mr Hodgetts received three text messages from Ms Ngahooro's students, two referred to Ms Ngahooro having been *fired*. Ms Ngahooro accepted that she advised her students that she had been dismissed at that time because she erroneously thought she had been although the findings at that point were only preliminary. Ms Ngahooro also said that a medical

condition was caused by stress related to the dismissal but I could not be satisfied of that in the absence of medical evidence.

[95] Subject to issues of contribution a suitable award for compensation is \$7000.

Contribution

[96] The Authority is required under s 124 of the Act where it determines there is a personal grievance to consider the extent to which the actions of Ms Ngahooro contributed towards the situation that gave rise to the grievance and if required reduce the remedies that would otherwise have been awarded.

[97] Ms Ngahooro said in her mind she thought she had told both Ms Munroe and Mr Hodgetts about the letters and that it was all right to proceed and she does not consider her actions inappropriate. Mr Paine in his submissions states that Ms Ngahooro had her integrity challenged and that she understood that as long as she did not involve the YMCA she could do what she wanted.

[98] Ms Munroe advised Ms Ngahooro that she was not to have any contact with P. The natural meaning of no contact includes giving a letter. There was nothing unreasonable or unlawful about that instruction. I am not satisfied on the balance of probabilities that Ms Ngahooro and Mr Hodgetts were on the same page about what Ms Ngahooro intended to do. Ms Ngahooro could not reasonably draw an inference from what was said that her proposed action was acceptable. Ms Ngahooro for example did not show Mr Hodgetts the proposed letter and did not tell him she was told by her manager not to have any contact with P.

[99] Ms Ngahooro interfered in a complaint that the YMCA was to investigate and that is a very serious matter. Ms Ngahooro agreed under questioning that a legal threat could be interpreted by P as aggressive. Although she said she did not know at the time she gave P the letter that P had just been taken on as a volunteer at the YMCA I do not find that that changes the inappropriateness of the action or the breach of a lawful and reasonable instruction.

[100] Virtually the same letter was provided to M. I do not find that the provision of that letter is a separate matter to Ms Ngahooro's employment with the YMCA. M raised the complaint from P with Ms Munroe and was asked to put it in writing. It was the complaint sent by email from M that was to be investigated. The letter to M

from Ms Ngahooro refers specifically to the complaint which was made to Ms Munroe. There is an important relationship between YMCA and SIT that could be damaged seriously by such actions. Ms Ngahooro took the action of giving M her letter by placing it under her office door after she had been warned about the inappropriate behaviour in giving a letter to P. The evidence supported that Ms Ngahooro was upset and angry at that time. Her actions had a sense of deliberateness and determination about them that I find reflected that state of mind. I formed that view because Ms Ngahooro confirmed that one of her Facebook posts on 25 September 2015 was about M in which she referred to the official complaint M had made to her manager and called M a *muppet*. For completeness I have taken account of this posting in assessing state of mind only.

[101] I find that there was blameworthy conduct on the part of Ms Ngahooro. Ms Ngahooro contributed to the circumstances that gave rise to the personal grievance. Mr Donnelly says that Ms Ngahooro contributed wholly to her dismissal. That submission does not take account of the fact that Ms Ngahooro had been disciplined for the P letter short of dismissal although I accept in a confused and unmeasured manner. I balance the letter to M that I have found could, with a fair process, have been the subject of a disciplinary investigation. A fair and reasonable employer could have found the conduct of giving letters to P and M to be serious misconduct. Mr Paine submits that contribution was minimal. I do not accept that. The conduct went to the heart of trust and confidence in the employment relationship. Balancing all matters and in all the circumstances I find it fair and reasonable to assess contribution at 60%.

[102] The awards for lost wages and compensation are to be reduced by this amount.

Orders made for unjustified dismissal

[103] Taking contribution into account I order Southland YMCA Education Limited to pay to Jennifer Ngahooro the following:

- (a) Reimbursement of lost wages for a period of four weeks under s 123 (1) (b) of the Act. I reserve the right to counsel to return to the Authority if this calculation proves difficult.
- (b) Compensation in the sum of \$2,800 without deduction under s 123 (1) (c) (i) of the Act.

Unjustified action

[104] Section 103 (1) (b) of the Act provides that personal grievance includes a claim:

That the employee's employment, or 1 of more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during the employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[105] Ms Ngahooro's claim is that she was bullied and harassed. The bullying is said to have taken place on 25 September 2015 during the meeting after Ms Munroe became aware that the letter had been given to P and by an unreasonable series of texts and emails from Ms Munroe asking for Ms Ngahooro's whereabouts said to amount to harassment.

[106] The actions or omission complained of are in essence the failure to provide a safe workplace and the adequacy of the investigation.

[107] The concern about the meeting and being given a warning was raised by Ms Ngahooro initially with Mr Hodgetts who asked to meet with her. Ms Ngahooro wanted to take legal advice and put matters in writing. Mr Paine raised a personal grievance on 2 October 2015 after the allegations of serious misconduct were raised in the letter of 30 September 2015 received on 2 October.

[108] At the first disciplinary meeting on 8 October 2015 Ms Thomas confirmed that Ms Ngahooro was not to meet with Ms Munroe for the normal supervisory meeting on the Friday of that week either and on 9 October in a letter Ms Thomas confirmed that Mr Hodgetts would manage Ms Ngahooro whilst the allegations were investigated and she would no longer be required to answer text messages as to her whereabouts for the time-being. Ms Ngahooro did not have physical contact with Ms Munroe after 25 September 2015 but there were some text messages sent.

[109] On 27 October 2015 Mr Sheppard met with Ms Munroe to investigate her response to allegations of bullying. On 2 November 2015 Ms Thomas wrote to Mr Paine and advised that the investigation into bullying was continuing and provided Mr Paine with a copy of Ms Munroe's statements. Ms Ngahooro was given until 5 November 2015 to provide further input and duly provided a response to

Ms Munroe's reply by 5 November 2015. Mr Sheppard said that he could not find any evidence of bullying from Ms Munroe. He accepted there was a heated exchange on 25 September 2015 but did not conclude that amounted to bullying. He did not conclude the text messaging from Ms Munroe was inappropriate but that they raised concerns and requested information. He felt evasive responses to the text messages from Ms Ngahooro escalated the tension.

[110] I find that the investigation into bullying and harassment commenced appropriately and the YMCA took appropriate steps in that Ms Ngahooro was managed by Mr Hodgetts and was not required to respond to text messages/emails from Ms Munroe. A safe workplace was therefore provided to Ms Ngahooro very soon after she made complaints about Ms Munroe and no grievance can arise about that.

[111] In respect of the events of 25 September 2015 objectively assessed the communication in the afternoon with Ms Ngahooro by Ms Munroe was not measured and considered and as a result difficulties arose which in part resulted in the finding that the dismissal was unjustified. Heated discussions are not usually productive. The more appropriate approach would have been to raise the concern briefly with Ms Ngahooro about the letter to P and advise that the matter would be taken further. Even if Ms Ngahooro's account of the exchange on 25 September 2015 is correct I accept Mr Donnelly's submission that the prompt steps taken by the YMCA after the complaint was made meant that Ms Ngahooro was not disadvantaged by having to continue to work under the supervision of Ms Munroe.

[112] There was however no written conclusion to the investigation of the allegations of bullying/harassment. I find that was an unjustified action. Ms Ngahooro was entitled to some sort of formal conclusion to her complaint of bullying and harassment and she had entered into the process with that expectation and provided a full statement in advance of the termination of her employment. That failure disadvantaged Ms Ngahooro notwithstanding that the relationship did not continue.

[113] It was not what a fair and reasonable employer could have done in all the circumstances at the time. Mr Paine submits that the investigation should have extended to other staff members. It is difficult to reach any view on whether the investigation was full and fair because it was incomplete and any inadequacy of

investigation is therefore not apparent. The failure to conclude an investigation into allegations of bullying and harassment was unjustified and it disadvantaged Ms Ngahooro.

[114] For that reason I find that Ms Ngahooro has a personal grievance that she was unjustifiably disadvantaged. She is entitled to remedies.

Remedies on personal grievance of unjustified action causing disadvantage

[115] The failure to conclude that investigation I find did cause some distress to Ms Ngahooro. The evidence was limited but it was clear that the afternoon meeting on 25 September was distressing to Ms Ngahooro in particular and she was entitled to a conclusion on an investigation of her complaint.

[116] I find an appropriate award for compensation is the sum of \$2500. No issue as to contribution arises.

[117] I order Southland YMCA Education Limited to pay to Jennifer Ngahooro the sum of \$2500 under s 123 (1)(c)(i) of the Act without deduction.

Costs

[118] I reserve the issue of costs and encourage the parties to reach agreement. The usual daily tariff for a one day investigation is \$3,500. If agreement cannot be reached then Mr Paine has until 25 July 2016 to lodge and serve submissions as to costs and Mr Donnelly has until 8 August to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority