IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 6B/10
5290474

	BETWEEN	ROZ SERVICE Applicant
	A N D	YOUNG MEN'S CHRISTIAN ASSOCIATION OF CHRISTCHURCH INC Respondent

Member of Authority:	James Crichton
Representatives:	Jeff Goldstein, Counsel for Applicant Peter Zwart, Advocate for Respondent
Investigation Meeting:	18 March 2010 at Christchurch
Determination:	28 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Service, was employed by the respondent (YMCA) as education director and she served in that capacity from 2 December 2002 down to her dismissal on 7 December 2009. As education director, she was responsible for YMCA's alternative education programme for students who were disaffected from the traditional school system.

[2] There have been two earlier determinations in relation to this matter. The first dealt with Ms Service's application for interim reinstatement which was granted. That determination issued on 18 January 2010. The thrust of the Authority's decision was that Ms Service was not to be returned to garden leave but to *return to the employment in an active way*. There were, however, two matters which were left for resolution by the parties but leave was reserved to revert to the Authority should that be necessary. Those two matters were the operative date from which the return to duty would start and the question whether Ms Service should be placed on garden leave or return to active employment. The parties were able to resolve the first but not the second.

[3] In referring the second matter back to the Authority, YMCA was vociferous in its submissions that Ms Service could not return to work in its workplace in fulfilment of the Authority's wishes. It maintained that it was the impermanent nature of the interim reinstatement that caused it difficulty and that the position would be otherwise if permanent reinstatement were ordered as a consequence of the substantive investigation meeting. In the result, I was concerned to take a cautious approach and I considered that if the claims made by the YMCA were true, the reintroduction of Ms Service to the workplace would be difficult, not just for the YMCA but for Ms Service. Accordingly, I determined that Ms Service should be returned to the employment on an interim basis but only on garden leave. I made it clear at the time that the decision was a difficult one and that I was concerned that the employee had been denied justice by the Authority being swayed by untested material from YMCA.

[4] In the result, Ms Service returned to the employment on a garden leave basis but within a reasonably short space of time she had withdrawn her claim for permanent reinstatement and, by consent, the parties agreed that 12 February 2010 was the date when her period of garden leave ceased.

[5] Ms Service had been summarily dismissed on 7 December 2009 as a consequence of a YMCA investigation into her conduct some 20 months before. Between 13 February and 14 April 2008, Ms Service had programmed and been responsible for a course known as a *mechanics taster* course. A tutor who reported to Ms Service told her that he had a friend who could offer a home venue for the mechanics taster course. Ms Service was told that the individual in question worked on cars at home and would have the appropriate skills to be involved in the course. The same individual was serving a term of home detention for criminal offending.

[6] Ms Service says that she took all proper steps to protect the students in her care and, amongst other things, took all the steps that she would normally take to check out an outside provider, including establishing the nature of the criminal offending, obtaining the consent of the parents of the affected students and having the offender supervised by a professional tutor at all times. There is an issue about Ms Service's pre-course checking but for present purposes it is sufficient to say that her evidence is that she did everything that she would usually have done in such a situation.

[7] On 16 February 2008, a young female student who was a member of the relevant course attended at the home of the course provider, grossly intoxicated, and subsequently alleged that she was raped by two men, one of whom was the course provider. These events were not immediately disclosed to Ms Service who first became aware of the alleged incident when she was visited by two Police officers investigating the matter on 28 March 2008. Immediately she became aware of the incident, the course was cancelled.

[8] Ms Service's evidence is that she engaged with the then Chief Executive, Peter Tindall, told him what had happened and told him what she was doing to address the issue. Her evidence is that he was satisfied with what she told him and the matter ended there.

[9] On 16 November 2009, the present chief executive of YMCA, Ms Schroeder, received a telephone call from a member of the public referring to the earlier incident. Ms Schroeder knew nothing of it and commenced an inquiry which ended with the summary dismissal of Ms Service on the footing that YMCA had lost trust and confidence in her because of her management of the mechanics taster course and its aftermath.

[10] Ms Service claims that she was unjustifiably dismissed, disadvantaged by unjustified actions of the YMCA and treated without good faith by the YMCA. YMCA resists those allegations and by way of response brings a counterclaim in which it seeks penalties for various alleged breaches of the employment agreement together with alleged breaches of the duty of good faith by Ms Service to the YMCA.

Issues

[11] The fundamental issue in this case is whether the YMCA's response to the disturbing outcome from the mechanics taster course was the decision of a fair and reasonable employer in the circumstances of the case at the relevant time. In order to explore that question and associated issues like the allegation that the suspension of Ms Service was unlawful, and the various counterclaims brought by the YMCA, I propose to address the following questions:

(a) What did the employer do after the telephone call?

(b) Did the YMCA deal appropriately with this historical allegation?

(c) Has Ms Service suffered disadvantage at the hands of YMCA?

What did the YMCA do after the telephone call?

[12] Immediately after receipt of the telephone call from a member of the public alerting her to the events in the mechanics taster course of early 2008, Ms Schroeder, YMCA's Chief Executive, sought to find out what had happened. Her evidence suggests that at first she did not regard the matter as particularly serious and thought that the caller might well be mistaken or, at least, exaggerating.

[13] Ms Schroeder spoke first of all with Ms Jonelle Ward rather than with Ms Service, the head of the department that ran the course. Ms Ward was a subordinate of Ms Service and the two women had an uncertain relationship. Ms Ward was keen to talk to Ms Service about the February 2008 course but she wanted to do so with a support person present and without Ms Service knowing that she had done so. Ms Schroeder's evidence is that she knew that Ms Ward's relationship with Ms Service was not strong and that as a consequence Ms Ward's very negative portrayal of the events of early 2008 were taken by her with a grain of salt.

[14] I have already advanced the view, in the course of dealing with the application for interim reinstatement, that I was anxious about Ms Schroeder's discussion with Ms Ward predating her discussion with Ms Service. I said then that it troubled me that, as Ms Service was responsible for the matter (she was the director whose responsibility it was), then if there was culpability of any kind, it was important that Ms Service had the opportunity to defend herself without the prospect of any other individual earlier prejudicing the view of the decision-maker. As it was self-evident that Ms Ward had her own issues with her immediate superior Ms Service, I indicated I was troubled by Ms Schroeder's decision to speak to Ms Ward before speaking to Ms Service. There can be no criticism about her speaking to Ms Ward in general; she indeed has an obligation to speak to all persons who can provide her with information relevant to the matter of concern. The issue is around timing and whether, by talking to a subordinate first, and a subordinate who had issues of her own by Ms Schroeder's own admission, with Ms Service, Ms Schroeder does not either allow herself to be influenced adversely or at least create the semblance that that has happened. Nothing that I have heard in the substantive hearing encourages me to resile from the view that there is a genuine risk of the decision-maker allowing herself to be encumbered by

negative observations or inferences which Ms Service can have no way of countering. Even if she is accurately advised of what was said, the inferences drawn from an obviously negative portrayal of the events must have some potential to influence the decision-maker adversely.

[15] In any event, next Ms Schroeder spoke initially with Ms Service. Ms Schroeder describes the first meeting held on 11 November 2009 as *an exploration of what the actual issues were*. She says that she was *quite casual* about arranging the meeting and that she wandered down to talk to Ms Service *very informally*. She says that she started off in a *very friendly* manner but that she became *more and more formal* as it became clear to her that *the issue was really serious*. Quite clearly from this very first discussion onwards, the two women had an absolutely different appreciation of the events in issue. Ms Schroeder thought that Ms Service was minimising the importance of the YMCA's involvement, was seeking to avoid responsibility and was generally not treating the issue with the seriousness that Ms Schroeder thought it deserved.

[16] Ms Service thought that Ms Schroeder was seeking to involve herself in matters that had already been dealt with having happened nearly two years before, to assume responsibility for events that were not YMCA's responsibility, and to create a present issue of a past event. Even on Ms Schroeder's own evidence, by this very first meeting, she seems to have formed a view about the matters in question which was antithetical to the view advanced by Ms Service. Ms Schroeder was troubled by the fact that Ms Service had a poor recall of the events (which by common consent happened 20 months before) and despite Ms Service maintaining that the events complained of happened outside of *YMCA time* (that is, they happened outside of course time), Ms Schroeder made clear that she thought she should have been told about it even though she was not chief executive when the events happened, and indeed had only just been appointed to the role.

[17] After the first meeting with Ms Service, Ms Schroeder went to see the young female victim of the alleged rape and her family and confronted complaints from the family about the YMCA's failure to deal with the issue up to then. There was a further meeting between Ms Service and YMCA on 25 November 2009 at which Ms Service made an extensive statement defending her view of matters. Amongst other things, the passage of time meant that Ms Service had difficulty recalling all of

the events that happened and she is criticised for this by the YMCA which alleges that she *changed her story* at each successive meeting. I do not accept that claim at all. The events complained of happened 20 months before Ms Service was confronted with them and it is, in my view, completely understandable that a busy person would not have full recall of any incident that far back in time, no matter how serious it might have been. It is also self-evident from the very first meeting between the two women on this matter that they had a diametrically different view of the significance of the issues to the YMCA. It is plain from Ms Schroeder's evidence that she left the first meeting with Ms Service with the conviction that the matter was *really serious* and that she, as chief executive, ought to have been told about it notwithstanding the fact that she was not chief executive when it happened. Ms Schroeder clearly regarded the matter as extremely significant, very dangerous to the YMCA as an organisation and an incident which the YMCA had to take responsibility for. Conversely, Ms Service always maintained that it happened outside of course time and while the incident itself was tragic, it was not the YMCA's fault that a grossly intoxicated young woman should place herself in a dangerous situation.

[18] A particular instance of the YMCA's conviction that Ms Service changed her position regularly during the investigation of the events complained of, is the issue about what the chief executive of the time knew of the episode. At the first meeting on 11 November, Ms Schroeder says that Ms Service could not remember a number of significant aspects like whether she had done a Police check on the volunteer or whether she had discussed the issue with the then general manager, Peter Tindall. At the first formal disciplinary meeting on 25 November 2009, both of those issues were clarified in Ms Service's statement. She said that she had in fact briefed Mr Tindall, that he was satisfied with what she was doing to deal with the issue and that in fact the matter had been resolved at the time. Furthermore, Ms Service remembered that she had spoken to the Probation Service about the volunteer and had found the volunteer's Police record which of course listed his offences. Ms Service claimed to have extracted a statement from the volunteer's probation officer that the volunteer would not be a danger to the students.

[19] Because Ms Service provided much of this information for the first time at the meeting on 25 November 2009, that meeting was adjourned specifically to give the YMCA an opportunity to talk to both the probation officer and to Peter Tindall, the former chief executive. The probation officer, who continues in the Probation

Service, provided information to the YMCA and also appeared on a subpoena at the Authority's investigation meeting. His evidence at the investigation meeting and his previous evidence to the employer were consistent that he would not have given an assurance of the sort Ms Service claimed to have extracted from him. This was in part because it would be poor professional practice and partly because he did not have the authority of the volunteer to provide any such information to inquirers. He did not recall the conversation with Ms Service in any detail (again, given the passage of time, that is hardly surprising), but he did remember there was a conversation about this particular person.

[20] In relation to Mr Tindall, by the time of the YMCA's investigation, Mr Tindall had left the jurisdiction for the United Kingdom. The YMCA, through Ms Schroeder, engaged with Mr Tindall by telephone on 4 December 2009. Ms Schroeder says that she referred to the background *as blandly as possible* and that she was left in no doubt from his response *that he had no recollection of a rape*. Immediately after the telephone call, Ms Schroeder sent Mr Tindall an email with a handful of a numbered points and invited him to confirm his telephone conversation with her on that basis. Mr Tindall did so and it was based on that email response from Mr Tindall and Ms Schroeder's recollection of the short telephone discussion which she had with him prior to the email exchange that she relied upon in terms of assessing Mr Tindall's knowledge of the subject matter.

[21] A second disciplinary meeting was held on 7 December 2009 at which Ms Service's responses to the intelligence gathered from both the probation officer and from Mr Tindall was considered by the employer. In the result, YMCA decided it had no trust and confidence in Ms Service and she was summarily dismissed.

[22] I am satisfied on the evidence before the Authority that Ms Schroeder had a significantly different view of the culpability of the YMCA for the events complained of from the view that Ms Service had. I think that difference was a difference of philosophy and would have been there even if Ms Service was not the person ultimately responsible for the course proceeding. Ms Service is very experienced in this sort of work. She has worked in alternative education for many years in a variety of different positions. She seems well respected nationally. In assessing her evidence and the manner in which she gave it, she struck me as a pragmatist. Without minimising the significance of the events that befell the young student, Ms Service I

think took the view that the YMCA was simply not responsible because its only obligation was to be responsible during class time. I advanced the analogy during the hearing whether the situation was similar to a secondary school's role in managing the behaviour of young people. Ms Service agreed with the analogy on the basis that secondary schools quite clearly differentiate between school time (when they are responsible) and personal time (when they are not).

[23] The YMCA, on the other hand, did not accept my analogy at face value. Ms Schroeder's view was that the YMCA had introduced the young female student to the man who had allegedly assaulted her and therefore it was responsible whenever the assault happened. Ms Schroeder (who also impressed me as a witness) was, I thought, an idealist who took her responsibilities very seriously and who sought to impose very high standards on the organisation that she leads. No doubt that is well and good, but the question for decision here was whether she can impose those standards on the organisation and **back-date them 20 months to a period before she was the organisation's leader**.

[24] Ms Schroeder makes a number of other subsidiary claims against Ms Service. She thinks that the volunteer ought to have been more carefully checked, that Ms Service should have met with him and assessed him for herself before the course started (it is common ground that this did not happen until the course had commenced), and that although the volunteer was just that, the standard that ought to have been imposed on him was the self same standard that ought to apply to a staff member.

[25] In all the circumstances, I conclude that Ms Schroeder was never going to be satisfied with the actions taken 20 months previously in preparation for the mechanics taster course. Her perspective and her aspirations were simply different from the standard that then applied. Implicit in the evidence for Ms Service is that what she did in 2008 to prepare for this course that went so disastrously wrong, was pretty much the standard. While that standard may not be acceptable today under Ms Schroeder's leadership, the evidence suggested that, at the beginning of 2008, it may have been.

Did the YMCA deal appropriately with this historical allegation?

[26] As I have made clear throughout the progress of this file through the Authority's system, I am not satisfied that the YMCA did deal appropriately with this historical allegation. Ms Service's position is she took all reasonable steps in the arranging of the mechanics taster course and that the steps that she took were appropriate for the particular circumstances. The fact that the outcome of the course was tragic is regretted by all (including her) but does not visit culpability on either her or the YMCA. This is because the events complained of happened outside of course time in an entirely unsupervised context and it is unreasonable to expect the education provider (YMCA) to be responsible for students 24 hours a day. Furthermore, Ms Service argues that the matter was dealt with at the time. As soon as she heard about the allegation of sexual assault (a month after the assault allegedly happened), she immediately cancelled the course, offered to move the affected student to another course and engaged with the student to establish what it was that she herself wanted. Ms Service says that she took her lead from the student and as the student wanted *no fuss*, Ms Service provided that. Critically, Ms Service says that she spoke to the then chief executive, told him what she was doing to deal with the matter and got his blessing to proceed on that footing.

[27] For its part, YMCA believes it has a basis for fundamentally doubting Ms Service's evidence that she spoke to Mr Tindall and got his blessing for the way that she was dealing with the aftermath of the course. Furthermore, YMCA says that the steps Ms Service took in organising the course in early 2008 were simply inadequate and did not conform with what might loosely be described as *best practice*. As to the first contention, YMCA relies on its single telephone discussion with the former chief executive and the immediately following email exchange wherein Ms Schroeder (for YMCA) summarised the nature of the immediately preceding telephone discussion and invited the former Chief Executive to confirm that summary, which he did. In my determination dated 18 January 2010 at para.[14], I imply (erroneously) that YMCA placed reliance in part on the previous chief executive's affidavit. In fact, the affidavit was only received after the dismissal and the only reliance YMCA had at the time of dismissal was on the telephone call and the email exchange confirming it.

[28] The most important aspect of the telephone call and the confirming email exchange from YMCA's perspective is that it was clear to Ms Schroeder that the former chief executive (Mr Tindall) *had no recollection of a rape*. That theme is picked up in a number of places in the submissions of YMCA and clearly weighed with it in the decision it took to not believe Ms Service's evidence. In essence, the closing submissions of YMCA make the point on more than one occasion that, to put it colloquially, *one would not forget a rape*. No doubt that is true, but it rather overlooks the possibility that Ms Service may not have referred to the incident as a rape but may still have given Mr Tindall sufficient information to enable him to satisfy himself that matters were in hand. Ms Service may not have referred to the matter as a rape because that description was not uniformly used at the time. Certainly the Police investigated the matter as an allegation of rape but it is clear from the evidence that Ms Service was told at the time by the tutor responsible for the course that the sex was consensual.

[29] Whatever the position in respect of the alleged sexual offending, the exchange between Mr Tindall and Ms Schroeder on which YMCA made the decision that Ms Service had not spoken with Mr Tindall was, in my opinion, so equivocal as to be completely unhelpful. Absolutely the only aspect that seems clear is Mr Tindall's failure to remember being told about a rape. In the summary email prepared by Ms Schroeder and sent back to Mr Tindall for confirmation, she records him telling her, inter alia, that he vaguely recalled a conversation with Ms Service *about a person who was on home detention but was assured that the person had no convictions that would be of concern*. Then there are various other points, including that he had no recollection of being told about a rape, that he would have expected a paper trail, and that had he heard about a rape, he would have referred that to the Executive Board (which, it is common ground, had no knowledge of the incident).

[30] Those details are sketchy enough but they become even more opaque when Mr Tindall's response to the email is considered. He starts by saying that Ms Schroeder's email was *a fair summary of our conversation*. Then in the next paragraph he goes on to say that he usually discussed Ms Service's concerns *in a fair amount of detail* but that *with the passage of time* he could not remember *any detailed conversations about the type of offence referred to* and that without an aide memoire by way of a paper trail or an electronic trail *I cannot confirm that such a conversation did take place*.

[31] Analysing this response, I note first that Mr Tindall accepts Ms Schroeder's email summary but then in the second paragraph seems to almost qualify that acceptance out of existence by first saying that he talked to Ms Service extensively then saying that he could not remember any *detailed conversations about the type of offence referred to* (the rape) and finally saying that he was unable to confirm that *such a conversation did take place*. In my judgment, the only thing that one could reasonably take from this response is that Mr Tindall was unable to confirm one way or the other that there had been a conversation between himself and Ms Service two years before in which she had a alerted to him to the fact that a student had been raped. As I have already pointed out, that may very well be because Ms Service never did that, but that does not mean that she did not talk to him about the difficulties with the course and the fact that it needed to be shut down because of those difficulties.

[32] It is equally plain that in concluding that Mr Tindall was never briefed (as Ms Service claims), the YMCA is choosing to reject her unequivocal testimony and prefer instead the evidence of a chief executive no longer in the organisation whose responses on the issue in its totality can hardly be called clear. That does not mean that Ms Service did not speak to him and that the pair of them did not agree on a course of action. That is her evidence and I am bound to say that I prefer her evidence to the uncertain and confused evidence from the other side of the world. In my considered opinion, given the length of time between the events complained of and the YMCA's present investigation of them, placing reliance on a former chief executive's view conveyed in a long distance telephone call and a subsequent brief email exchange is simply not robust enough to set aside the unequivocal evidence of a senior manager that she had taken the steps she claimed.

[33] That view of matters is confirmed rather than unsettled by the affidavit which Mr Tindall subsequently prepared and filed in relation to the Authority proceedings. There are two relevant observations in that affidavit. In the second sentence of para.5 Mr Tindall says:

> *5.* *… On reflection since the phone call, I would have thought it likely that Roz* [Ms Service] *would have discussed such a matter with me.*
>
> *6.* *With the passage of time however I am unable to recall all discussions we had, and in relation to this incident I do recall a discussion about engaging a volunteer to support a course who had a criminal record, but Roz and I discussed this and*

> *did not deem him to present a risk to the participants on the course, and that Roz had gained permission from the parents for their children to take part in the programme.*

[34] Those excerpts suggest to me that Mr Tindall is indicating first that he would have expected Ms Service to have told him about a matter such as the one under investigation and that he remembered that she had in fact done so, at least to the extent of his being advised of the nature of the then identified risk factors. Of course, as I have already noted, that affidavit was not available to YMCA until after the decision to dismiss was made. For the Authority's purposes, when the matter came before me, in respect of the present substantive issues between the parties, I sought to make arrangements to have Mr Tindall give evidence to the Authority in an effort to gain some clarity around his recollection of events.

[35] I was particularly interested to ask him what he could remember about what precisely Ms Schroeder told him in their telephone discussion because it seemed to me by way of a preliminary conclusion that Ms Schroeder may have inadvertently influenced the response that she got by the way in which she framed her request for information. In the result, both parties told me they had sought to get Mr Tindall to give them evidence and that he had refused them both. I then approached Mr Tindall directly and sought his assistance in my investigation and he did not even have the courtesy to respond to me. I have no power to compel a witness outside the jurisdiction and accordingly the matter rested there.

[36] I remain convinced that the evidence on which YMCA made its decision to reject the testimony of a senior manager in favour of the uncertain recollections of a former chief executive is not the action of a fair and reasonable employer within the meaning of that phrase in s.103A of the Employment Relations Act 2000.

Has Ms Service suffered disadvantage at the hands of YMCA?

[37] Ms Service claims that she has suffered disadvantage in particular because of the unjustified suspension of her by YMCA. The legal position is that in the absence of a contractual entitlement to suspend, the employer must be able to demonstrate that the continued presence of the suspended employee in the workplace will create some significant issue. The cases suggest that this will often be the position where there is some contention that the suspended employee might interfere with evidence or potentially seek to influence witnesses.

[38] The particular claim advanced by Ms Service is that YMCA had closed its mind to any submissions she might make on the issue because when the matter was discussed with her, Ms Schroeder was effectively reading from a script prepared for her by her advocate. It follows, so the argument goes, that anything that Ms Service might have said by way of submission on the suspension would not have been appropriately considered as the decision to suspend had already been made.

[39] For YMCA, it is contended that while Ms Schroeder was working from a prepared script, she was perfectly prepared to hear Ms Service on the suspension issue and made that clear. The purpose of the suspension, notwithstanding the absence of a contractual provision allowing it, was to enable the YMCA to conduct an unfettered inquiry into the matters in contention. There were two employees involved (Ms Service and another less senior employee) and in those circumstances alone, I am satisfied that it is fair and reasonable for the YMCA to maintain that the continued presence of Ms Service in the workplace could have given rise to a significant issue and could potentially have made the investigative process more rather than less difficult. Amongst other things, because the other employee reported to Ms Service, the YMCA was, I hold, entitled to have an apprehension that the two affected staff members might have contact with each other which would make the fact finding process more difficult. That risk was, I think, potentially exacerbated by the fact that the other individual involved reported to Ms Service.

Determination

[40] On the basis of the foregoing analysis, I conclude that the basis for the YMCA's decision to summarily dismiss Ms Service is unfair and unjust and is not the decision of a fair and reasonable employer in the particular circumstances of this case after the conduct of a full and fair inquiry: s.103A Employment Relations Act 2000 applied.

[41] I reach this conclusion because of my fundamental disquiet at the scant regard given by the YMCA to Ms Service's clear testimony that she had dealt with the issue at the time with the former chief executive, who was satisfied with the actions that she took to put matters right, once the outcome of the course took such a disastrous turn. Clearly, if Ms Service were believed then it would not be available to the YMCA to investigate the matter anew, make findings of fault against her and summarily dismiss her. But that is precisely what happened and it seems to me that the YMCA reached

the conclusions it did on the basis of the scantiest evidence from a single telephone call and an email exchange with the former chief executive who, like Ms Service, was trying to recollect events that happened nearly two years before. In the end, the mere passage of time places a real onus on the investigating employer to do everything in its power to ensure that the employee is given a fair hearing and particularly in this case is not subject to double jeopardy: *Petersen v. Board of Trustees of Buller High School* [2002] 1 ERNZ 139 considered.

[42] Ms Service maintains on oath that the matter was dealt with by her employer at the time. Unlike her employer, I believe her. More than that, I think the basis on which her employer has reached a different conclusion is simply not sustainable because of the way in which Mr Tindall, the former chief executive, was engaged with. It is clear on the evidence that Mr Tindall simply spoke to Ms Schroeder by telephone and there was then the briefest email exchange. I have described those events in the determination. I have expressed my anxiety about the message that Mr Tindall was supposed to have conveyed and my reasons for concluding it was unsafe to rely on his vague recollections to displace the sworn testimony of a senior manager remaining in the organisation.

[43] At the very least, I would have expected the YMCA to engage more formally with Mr Tindall if it was proposing to place such reliance on his evidence. For instance, the decision to dismiss was made before Mr Tindall's affidavit was made available and that affidavit, in my considered opinion, tends to rather support Ms Service's recollection of events rather than Mr Tindall's earlier comments. Furthermore, I would have thought the obvious thing for an employer in this situation to do would have been to make available to Mr Tindall the detailed statement made by Ms Service. It will be remembered that Ms Service made such a statement to the substantive disciplinary meeting on 25 November 2009. At the very least, the provision of that document would have provided Mr Tindall with the aide memoire that he understandably sought. The difficulty with YMCA's position is that it can only provide evidence from Ms Schroeder of what she says she told Mr Tindall on the telephone. It is plain there was no written documentation provided to Mr Tindall save for Ms Schroeder's email and his response, so there is a real risk in my judgment that Mr Tindall is, to put it in the language of the common lawyer, being asked to answer leading questions.

[44] What is more, aside entirely from issues about whether the matter was dealt with by Mr Tindall or not, YMCA completely discounts Ms Service's position that the organisation (and therefore her of course) could not be responsible for the student 24 hours a day. After all this was not a situation where Ms Service herself was accused of harming the student; what she is accused of doing is creating an environment (or perhaps more accurately providing an introduction) which led to the student placing herself in danger. Ms Service articulates her position very clearly in her 25 November 2009 statement. She says that the YMCA simply cannot be responsible for the students 24 hours a day and that its obligations must cease outside of class time. As I have already said, that view is one that Ms Schroeder fundamentally disagrees with. For the Authority's part, I think it creates too high an onus to require that education and service providers, in an analogous position to YMCA, are to be responsible for their charges 24 hours a day. That simply is an unrealistic standard and, in my opinion, is not the decision that a fair and reasonable employer would require of its employees. I am satisfied that there is a strong analogy between the alternative education situation here and the provision of ordinary secondary education where it is plain that secondary schools cannot and do not take responsibility for their students 24 hours a day.

[45] I am satisfied then that Ms Service has been unjustifiably dismissed from her employment and subject to the issue of contribution which I deal with next, she is entitled to remedies.

[46] For the sake of completeness, I note at this point that I am not satisfied Ms Service has been disadvantaged by unjustifiable actions of YMCA in relation for instance to her claim to have been unfairly suspended nor am I persuaded by YMCA's counterclaim. I do not need to consider the counterclaim in any detail; it fails because of my factual findings and the conclusions I draw from those findings as they are set out in this determination.

[47] I turn now to contribution and consider whether, in terms of s.124 of the Act Ms Service has contributed in any way to *the situation that gave rise to the personal grievance*. I conclude that Ms Service did contribute in a significant way to the circumstances giving rise to the grievance. I am satisfied on the facts before me that Ms Service did not apply the level of skill and attention to the arranging of the mechanics taster course as one would have expected of somebody with her level of

seniority and experience. It is plain on the facts that Ms Service knew about the criminal offending for which the volunteer had been convicted and yet she considered there was no risk to the reputation of her employer in engaging with this individual. It is also clear that Ms Service did not meet with the volunteer until after the course had started and her contact with the probation officer took more from his observations than was reasonable in all the circumstances. I am satisfied the probation officer could only have said that there was no legal impediment to students being on the guest tutor's premises while he was on home detention; I am satisfied on the balance of probabilities that the probation officer did not say and would not have said that the students would be safe.

[48] I am not persuaded that the memorandum of understanding between the YMCA and the volunteer assists greatly either. Given the nature of the individual and his previous criminal offending, a document that seeks to bind him to a code of behaviour does seem a rather impractical approach. In fact, I am satisfied there is nothing in the memorandum of understanding which requires particular behaviours of the volunteer other than a requirement that he not talk about his criminal offending.

[49] Further, the acceptance of a particular member of her staff as a principal tutor for the course can hardly demonstrate good judgment; the individual appointed was the person who had recommended the guest tutor and it was the same individual who had told Ms Service about this individual's criminal convictions. But what Ms Service was told about the criminal convictions was simply erroneous and once she obtained the Police record of the guest tutor, she would have been on notice that the principal tutor's judgment or recollection was to be doubted. That view was compounded after the tragic events which brought the course to an end when it became evident that the same staff member had been told about the alleged sexual offending some weeks before Ms Service found out from the Police and she took no steps to deal with that staff member.

[50] Finally, the permission slip which was prepared and forwarded to parents of the students to take part in the course was, in my judgment, hardly fulsome and certainly did not adequately convey the nature of the environment in which the students would be learning.

[51] I am satisfied then that Ms Service has significantly contributed to the circumstances giving rise to her personal grievance. Despite my finding that she has

been unjustifiably dismissed, in part because of an unrealistic visiting of the consequences of these events on her, it nonetheless follows from my finding on contribution that the work that she did in preparation for this course was simply not good enough and therefore it is appropriate that her level of contribution sound in the compensation and wage loss that she would otherwise awarded. I am satisfied that a contribution of 50% is appropriate in the particular circumstances of this case.

[52] Ms Service claims significant compensation. She seeks $30,000 for the unjustified dismissal and $5,000 for the allegedly unjustified suspension. I have already decided that the suspension was not unjustified and so that matter is automatically excluded. I do not think that this is a case where a $30,000 compensatory payment is justified but without the contribution I should have awarded $18,000 in compensation. Accordingly, with contribution, I direct that YMCA is to pay to Ms Service the sum of $9,000 free of deduction as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[53] As to wages lost, the claim is that Ms Service has lost the sum of $19,247.85 after the dismissal. In addition, I am encouraged to exercise my discretion beyond that sum, to add to it compensation for the loss of the benefits of the employment (including a vehicle and a tax-free allowance together with her employer's contribution to Kiwisaver). Taking all these matters into account, I think the appropriate course of action is to fix a global gross sum as a contribution to wages lost and then rebate that by the 50% contribution that I have found.

[54] On that basis then, I think the global amount without contribution would be appropriately fixed at $20,000 gross and with Ms Service's contribution I direct that YMCA is to pay her a sum of $10,000 gross as a contribution to lost wages.

[55] In addition, YMCA is to pay to Ms Service the $70 Authority application fee.

Costs

[56] Costs are reserved.

James Crichton
Member of the Employment Relations Authority