

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 492
5394625

BETWEEN

MEENA SUDHAKAR
Applicant

A N D

BOARD OF TRUSTEES,
SIR EDMUND
HILLARY COLLEGIATE
Respondent

Member of Authority: K J Anderson

Representatives: G Bennett, Advocate for Applicant
P Robertson, Counsel for Respondent

Investigation Meeting: 15 May 2013 at Auckland

Submissions Received: 4 June 2013 and 26 July 2013 from Applicant
1 July 2013 from Respondent

Date of Determination: 30 October 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mrs Meena Sudhakar, claims that she was unjustifiably dismissed on 11 March 2013. Mrs Sudhakar asks the Authority to find that she has a personal grievance and award her the remedies of reinstatement to her previous position, reimbursement of lost wages and compensation of \$15,000.

[2] The respondent, the Board of Trustees, Sir Edmund Hillary Collegiate (SEHC/ the School) rebuts Mrs Sudhakar's claims and says her dismissal was justifiable on the grounds of serious misconduct involving inappropriate actions towards a pupil at the School.

[3] The Authority heard evidence from Mrs Sudhakar. For SEHC there is evidence from Mr John Shearer, Mrs A¹, Mr Brian Martin, Ms Waimarie Martin, Ms Maraea Howe, Ms Teioa George and Mr Gary Reading.

[4] The parties have presented a combined bundle of documents. All of the evidence and material has been closely considered by the Authority, albeit it may not be specifically referred to in this determination.

Background

[5] Mrs Sudhakar is an experienced and generally well regarded school teacher. She began her teaching career in 1979 and became a relieving teacher at SEHC in 1999; with a permanent role from 2000. Mrs Sudhakar has a Master's degree in Education and it is commonly accepted that her performance as a teacher has been to a high standard and she was well regarded by her colleagues.

The complaint

[6] The written evidence of Mrs A is that on 14 May 2012, her son [the child A], told her that Mrs Sudhakar had pulled his ear and hit him on the back of the head and that it had hurt. Under cross-examination at the investigation meeting, Mrs A acknowledged that she was not entirely certain if it was 14 May 2012 that her son informed her of this incident and it may have been 16 May 2012 "or around there". Upon further cross-examination, Mrs A appeared to be more certain that it was Wednesday, 16 May 2012.

[7] Upon hearing from her son about what Mrs Sudhakar had (allegedly) done, Mrs A contemplated going to see the teacher, but then thought she should see Mr Shearer, the Principal of SEHC. It appears that Mrs A contemplated for a few days in regard to what she should do about her son's complaint and then rang the school on 25 May 2012.

[8] The evidence of Mr Shearer is that on 25 May 2012, he was informed by the Associate Principal of the school, Ms Kula Peyroux, that she had received a voicemail message from a parent, Mrs A, the mother of a pupil at SEHC. The message that

¹ Mrs A is the mother of the student and for obvious reasons in regard to protecting the identity of the child, the identity of his mother is likewise protected.

Mrs A had left was that Mrs Sudhakar had pulled her son's ear and hit him on the head.

[9] Mr Shearer telephoned Mrs A the same day and informed her the matter would be investigated. He asked her to put the allegation in writing as it was a serious matter. Mr Shearer says that he met with Mrs Sudhakar that day (25 May 2012) and informed her of the complaint and that it would have to be properly investigated. Mrs Sudhakar was informed that she should not talk about the incident with her class. Mr Shearer could not recall if he told Mrs Sudhakar not to talk about the complaint with the child A, but Mrs Sudhakar revealed under cross examination that Mr Shearer did advise her not to do so. Mr Shearer also advised Mrs Sudhakar to take advice from her union, the New Zealand Educational Institute (NZEI), and to talk about it with her husband.

[10] Also on 25 May 2012, Mr Shearer interviewed [A], a 9 year old child, the son of Mrs A. Mr Shearer says that he took notes² and then typed them into a report which he subsequently provided to the Board of Trustees (the Board). Mr Shearer attests that based on his long experience,³ he had "no doubt" that A was giving an accurate account of what happened in the class. Mr Shearer also interviewed several other children from A's class⁴ and a summary of the interviews is contained in the report.

[11] Having made her complaint to the School on Friday, 25 May 2012, Mrs A says that during the weekend she received a phone call from Mrs Sudhakar. The evidence of Mrs A is that Mrs Sudhakar told her that she was: "... sorry that she had hit A and that she did not mean to do it". Mrs A attests that Mrs Sudhakar asked her not to send a written complaint to the school and explained that it was her last year of teaching and any complaint could affect her retirement.

[12] While Mrs Sudhakar makes no mention in her evidence about phoning Mrs A, when the evidence of Mrs A was put to her in cross-examination, Mrs Sudhakar acknowledged contacting Mrs A but says that she did not say that she was "sorry she hit A". Rather, Mrs Sudhakar says that she said to Mrs A that she was sorry that she hurt Mrs A's feelings. Mrs Sudhakar also denies that she asked Mrs A not to make a

² Mr Shearer says that he destroyed the notes after he had prepared his report.

³ Having been a teacher since 1979 and a principal for 22 years.

⁴ Mr Shearer records in his written report to the Board that the Ms Peyroux was present as a witness.

written complaint. Mrs Sudhakar says that she only invited Mrs A to come and see her if she had any concerns.

The written complaint

[13] Mrs A took a written complaint to the school on 31 May 2012:

Dear Mr Shearer,

It has been disclosed to me by my son [A] that his teacher Mrs Sudhakar hit him in class. This hurt him. I am concerned about this behaviour in class and I would appreciate it if something is done about this.

Yours sincerely,
[Mrs A]

[14] The further evidence of Mrs A is that during the same weekend, and following the phone call from Mrs Sudhakar, two further phone calls were made to her house. The calls were received by Mrs A's daughter (aged 25) who informed Mrs A she had been spoken to by an older man with an Indian accent. This person had asked to speak to A. He also asked to speak to Mrs A's niece, who used to attend SEHC as a pupil. Mrs A's daughter was, apparently, shocked by the nature of the call from the man concerned. It has been speculated that the person who made the call was Mrs Sudhakar's husband but this remains inconclusive.

[15] Subsequently, Mrs A also received a phone call from a member of the Board, a man who identified himself as "Pat". The evidence of Mrs A is that Pat asked her if she "wanted to get rid of Mrs Sudhakar"; to which she responded "no". But she did want Mrs Sudhakar to be held accountable for what she had (allegedly) done to her son. It appears that Pat informed Mrs A that it was not appropriate what had happened to Mrs A's son but Mrs Sudhakar was a good teacher. The Authority is not required to make any findings about the identity or nature of these two calls to Mrs A, except to note that it appears that they may have originated as a result of Mrs Sudhakar discussing with other parties, the complaint made against her, shortly after 25 May 2012⁵. Via a further written complaint dated 2 July 2012, Mrs A summarised the telephone calls received at her home and her dissatisfaction about them.

[16] The evidence of Mr Shearer is that, having interviewed A, and other students from his class, on Friday, 25 May 2012; on Tuesday, 29 May and Wednesday, 30

⁵ The evidence of Mr Shearer is that the person called "Pat" is a Mr Vine, the Chairman of the Board.

May 2012, A and two other students approached him to retract the statements they had made. The children informed Mr Shearer that Mrs Sudhakar had discussed the allegations with the whole of the class. One of the children said that Mrs Sudhakar had talked to the whole class and said “better not make a blunder”. Mr Shearer says that A informed that he had been tapped but not hit. The child A also referred to a discussion where he had been asked by Mrs Sudhakar what he had said to his mother and that he had also been told by Mrs Sudhakar that “he got it wrong”.

[17] Mr Shearer attests that the “mass retraction” of the statements by students is “most unusual” and he has never experienced an instance when, after making a statement, children several days later say they got their earlier statements wrong. Mr Shearer says that he had a “strong suspicion” that Mrs Sudhakar had ignored his instructions not to talk to her class about the incident involving A and that she had coached them as to what to say.

[18] On Tuesday, 26 June 2012, Mr Shearer met with Mrs Sudhakar along with her representative from the NZEI. Mrs Sudhakar denied pulling A’s ear or hitting him. She also denied hitting any students but said sometimes she puts her hand on their heads or shoulders to gain attention. Given that Mrs Sudhakar had denied the complaint and hence there was contradictory evidence, Mr Shearer was unable to resolve the matter at a low level and hence he was bound to refer the matter to the Board.

[19] The evidence of Mr Shearer is that, at the June 2012 meeting of the Board, he requested that the Board appoint a disciplinary subcommittee to deal with the complaint against Mrs Sudhakar. This is consistent with the *Sir Edmund Hillary Collegiate Policy Manual*. It provides that:

6. The Board of Trustees will establish a subcommittee to deal with staff disciplinary issues. This subcommittee will take advice from STA and/or school lawyers. The Board chair will be part of this subcommittee. It is expected that all members on this subcommittee will have a full understanding of the Employer’s Legislation.
7. The disciplinary committee is delegated the power to make decisions and will report its ruling to the Board of Trustees at the next constituted meeting. In the absence of a principal the authority will be delegated to an appropriate Senior Leader.

The investigation process

[20] Having conducted an initial inquiry and following a meeting with Mrs Sudhakar and her representative (on 26 June 2012), Mr Shearer prepared a *Report to the BOT Disciplinary Committee* (the report), dated 27 July 2012. The report is subtitled: *Alleged incident: Mrs Meena Sudhakar striking a child and pulling his ears*. The report records that Mrs A had made a complaint on 25 May 2012: saying that Mrs Sudhakar had pulled her son's "ears" and slapped her son on the head.

[21] But the evidence of Mrs A is that her son told her that Mrs Sudhakar "had pulled his ear and hit him on the back of the head". This is acknowledged by Mr Shearer in his evidence to the Authority and quite why the report records that A had his "ears" pulled has not been revealed. But it is clear that Mr Shearer presented an incorrect record of the allegation in his report. Indeed, the overall content of the report refers to A informing Mr Shearer that Mrs Sudhakar had "*pulled my ear*". However, Mr Shearer also records that A told him that Mrs Sudhakar had "... pulled [another child's] ears". Nothing more needs to be said about the mistake made by Mr Shearer in regard to his use of the plural (ears) rather than the singular (ear) in relation to the report, as it has been established that the complaint from Mrs A related to an allegation that her son had one ear pulled.

[22] The evidence of Mr Shearer is that upon the formation of the Board's disciplinary subcommittee, he "stepped back" because he would be involved as a witness in the investigation to be conducted by the subcommittee.

[23] While it was apparently agreed at the June meeting of the Board that a disciplinary subcommittee would be formed to investigate the complaint against Mrs Sudhakar, there appears to have been some delay in the Subcommittee (the Committee) commencing its investigation. This is evidenced by the fact that Mr Shearer's report is dated 27 July 2012 and the first BOT Subcommittee Disciplinary Meeting did not occur until that date also.

The BOT disciplinary subcommittee meeting – 27 July 2012

[24] A detailed written record of the proceedings of this meeting has been produced to the Authority. The apparent purpose of the meeting was for the Committee, assisted by a School Trustees Association representative, Mr Gary Reading, to interview Mrs A and her son.

[25] The record shows that Mrs A informed the Committee, in some detail, of what her son had told her in regard to the nature of the complaint that had been made earlier to the School. Mrs A also referred to receiving a telephone call at her home from Mrs Sudhakar. Mrs A related to Mrs Sudhakar telling her that she “didn’t mean to do it” and requesting Mrs A not to make a written complaint. Mrs A was of the view that Mrs Sudhakar knew that she had hurt the child.

[26] Mrs A also related to a further phone call to her home from “an Indian man”. This was received by her daughter. The man asked to speak to Mrs A and upon that request being refused, the man asked to speak to another daughter [B]⁶. Upon being informed that B no longer resided with Mrs A, the man asked to speak to A. This request was also rejected and the call was terminated.

[27] Mrs A then related to receiving a third call at her home from a SEHC Board member⁷. Mrs A informed that Mr Vine asked her if Mr Shearer had asked her to come in [to the school] and give a statement. Mrs A informed that Mr Vine then asked her: “Do you want to get rid of Mrs Sudhakar?” Mrs A says that her response was that she wanted Mrs Sudhakar to be “held accountable for what she had done to A”.

[28] The child, A, subsequently was interviewed by the Committee and he informed that Mrs Sudhakar: “pulled me at the back of the ear and then she hit, slapped me at the back of the head”.

[29] I note from the record that Mr Reading then proceeded to ask A some questions. Given that A is only 9 years of age, I am bound to make the observation that the questions were leading in their nature and related to whether Mrs Sudhakar had hit other children. It seems to me that the child could only respond in a manner that delivered the answer apparently being sought by Mr Reading. However, given that the disciplinary process subsequently only involved the assault on A and no allegations were ever put to Mrs Sudhakar about other children, I make no further comment. Nonetheless it is clear that, in response to some of the questions from Mr Reading, A appears to have exaggerated his version of events in regard to other children allegedly being hit by Mrs Sudhakar. Hence, this account from A must be seen to be quite unreliable. It was also most inappropriate for Mr Reading to ask A to hit him on the arm as a demonstration as to how Mrs Sudhakar had (allegedly) hit

⁶ This girl had previously been a pupil at SEHC.

⁷ It has been confirmed that this was Mr Pat Vine.

other children. Regrettably, on the basis of the written record, I am left to conclude that the interview technique adopted by Mr Reading in regard to the child A was most inappropriate and had it not been for the credible evidence of Mrs A, the School would have faced considerable difficulty in regard to the reliability of the evidence elicited from A by the interviewing techniques adopted by Mr Reading.

Meeting - 3 September 2012

[30] Apart from rather vague mention of the unavailability of certain people, it has not been explained why Mrs Sudhakar did not get to meet with the Disciplinary Subcommittee until 3 September 2012. Also it appears that Mrs Sudhakar did not have access to the record of the 27 July meeting until 27 August 2012. The record of the meeting held on 3 September 2012 shows that it lasted approximately 70 minutes. Mrs Sudhakar was represented by an advocate and her husband was also present in support; in addition to two other people as whanau support. Mr Reading assisted the Committee.

[31] The record shows that Mrs Sudhakar's representative informed that she had not hit the child A or pulled his ear. It was conceded that Mrs Sudhakar had contacted Mrs A, as the latter had attested to. According to the record of the meeting, Mrs Sudhakar had little to say and it seems that her representative and her husband largely spoke on her behalf. However, Mrs Sudhakar did relate to her telephone discussion with Mrs A; albeit her version of events was quite different from what Mrs A had related to the committee and subsequently, to the Authority.

[32] The record also shows that Mr Sudhakar alleged that when Mr Shearer had initially spoken to Mrs Sudhakar on 25 May 2012, about the complaint received from Mrs A, Mr Shearer allegedly said to Mrs Sudhakar that if she "didn't come out" he would "show her the gate". It was also alleged by Mrs Sudhakar that Mr Shearer had said to her that "Gary Reading will come on to you".

[33] The evidence of Mr Shearer is that he never made these statements. Mr Shearer's evidence is that on 25 May 2012, when he first raised the complaint from Mrs A with Mrs Sudhakar she was "emotional" at the time and wanted to resign. Mr Shearer attests that he urged Mrs Sudhakar to talk to her husband and to get advice from the NZEI. Mr Shearer says that he advised Mrs Sudhakar not to resign as there was a process that would need to be followed and while that would be "hard", he

hoped that it would be “restorative”. Mr Shearer attests that he did inform Mrs Sudhakar that Mr Reading would most likely be supporting the Board and that she should therefore obtain advice from the NZEI. Mr Shearer testified that:

At that time (i.e. 25 May 2012) the expectation I had was the matter would be resolved by me hearing from Mrs Sudhakar with, perhaps, an apology to [A] and his mother and a written warning. However, once Mrs Sudhakar flatly denied the allegations, the position became difficult for me and it was necessary to refer the complaints to the Board.

[34] The meeting on 3 September 2012 concluded on the understanding that Mrs Sudhakar’s representative (Mr Bennett) would be informed about what steps the committee intended to take after appropriate consideration.

BOT Disciplinary Subcommittee Meeting – 12 September 2012

[35] It appears that this meeting was held for the specific purpose of hearing from Mr Brian Martin, another teacher at SEHC. Mr Martin provided a written statement to the committee:

Meena Sudhakar incident

Monday 10 September

During the week beginning 28 May 2012, it was either a Thursday or a Friday I was walking in the purple pod. I was intending to visit Room 5 and Mr Khan. Mr Khan wasn’t in his room so I walked towards Room 4. When I stepped into the room the room was empty except for Meena (Ms Sudhakar) and [A]. I overheard Meena cajoling [A] saying to him “do you really want me to leave this school?” [A] didn’t reply he just stood there staring at her not knowing what to say. I left the room, Meena and [A] were unaware that I had walked into the room and heard this part of their conversation.

[36] Mr Martin gave evidence to the Authority in regard to his observations and location⁸ pertaining to Mrs Sudhakar speaking to A; consistent with his evidence to the Disciplinary Subcommittee and the written statement that he provided to the Committee. Mr Martin attests that he did not want to become involved but when he became aware of the complaint made by Mrs A, he discussed what he had seen with the Assistant Principals who subsequently passed this information to Mr Shearer and the Board.

⁸ The evidence of Mr Martin, supported by diagrams, is that he was out of the line of sight of Mrs Sudhakar and the child.

[37] At the investigation meeting, it was clear to the Authority that Mr Martin was still reluctant to be involved; indeed it seems that he had some regard for Mrs Sudhakar as a colleague. And while the reluctance of Mr Martin to be involved, as he is, led to his evidence being somewhat hesitant, I nonetheless found him to be a credible witness.

[38] The evidence pertaining to the ongoing investigation conducted by the Disciplinary Subcommittee is somewhat unclear, although it is established that there was some ongoing contact between Mrs Sudhakar's representative and SEHC. The best evidence regarding the progress of the investigation and the conclusions reached by the Committee, is recorded in a letter dated 12 November 2012 from SEHC to Mr Bennett, the pertinent content of which is summarised below.

[39] The Committee confirmed that there were three matters, or allegations, that it had to consider:

- (a) Whether Mrs Sudhakar pulled the ear of the child A and subsequently hit him;
- (b) Whether, following the complaint, Mrs Sudhakar subsequently spoke to the children in her class and asked them to tell Mr Shearer that she had only "tapped" them;
- (c) Whether Mrs Sudhakar telephoned Mrs A and attempted to persuade her not to make a written complaint.

[40] The letter records the various interviews that had taken place and the statements received from various people, including a number of children, along with other relevant correspondence and emails involved. The letter records that:

7. Having considered all [the] evidence the Board has reached the following decisions with regard to the complaints.
 - (a) The committee upholds the allegation that Mrs Sudhakar did pull [A's] ear and hit him on the head. The committee accepts the evidence of [A] who was open, honest and consistent in the story he told and his answers to the Board.
 - (b) The committee upholds the allegation that Mrs Sudhakar did speak to the children in her class and asked them to go back to the principal and to say that she only "tapped" them. In this, the description

given by John Shearer was considered and the witness statement of [A]. The Board did reluctantly conduct further interviews of students namely [four student names]. The Board believes that these children had been spoken to by Mrs Sudhakar over a period of time and their evidence confirmed those discussions. The Board also heard from Mr Martin who gave evidence that he saw and heard Mrs Sudhakar speaking to [A] about her having to leave the school. We have drawn the conclusion that this was an example of Mrs Sudhakar trying to get the students to change their evidence.

- (c) The committee upholds the allegation that Mrs Sudhakar telephoned [Mrs A] at home and tried to stop her from making a written complaint. [Mrs A] was open and honest with the committee and gave a credible account of what happened when Mrs Sudhakar called her. Mrs Sudhakar denies making the statements that [Mrs A] has attributed to her. The committee accepts the evidence of [Mrs A] on what was said in the alleged conversation.

- 8. The committee must now turn its mind to the appropriate penalty and as advised we seek a submission from you on the appropriate penalty. The committee's preliminary view is that the actions of Mrs Sudhakar amount to serious misconduct. The committee would like to receive that submission in writing by Friday 16 November 2012. The committee will meet the following week to determine this matter and will advise you of its decision following the meeting.

The response from Mrs Sudhakar

[41] Following the letter of 12 November 2012 from SEHC to Mrs Sudhakar, whereby she was informed that the Committee's preliminary view was that her actions amounted to serious misconduct, matters appear to have gone into a vacuum, so to speak. There is no evidence of any response from Mrs Sudhakar until 5 March 2013 when a document of this date, *Submissions of Meena Sudhakar*, was presented to SEHC. The content of this document can be summarised as follows:

- (a) Mrs Sudhakar denied pulling the ear of A and hitting him on the head. Mrs Sudhakar also denied the other allegations made against her;
- (b) The substance of the submissions are critical of the initial investigation conducted by Mr Shearer, in particular the interviewing of the various children and the unreliability of the information obtained from the children in general;

- (c) Mrs Sudhakar defended her telephone call to Mrs A on the basis that it was “common practice” where a parent has expressed a concern;
- (d) Mrs Sudhakar is also critical of the information elicited from A in regard to other children allegedly being hit by her; and
- (e) The evidence of Mr Martin is criticised and his credibility is questioned.

The dismissal of Mrs Sudhakar

[42] Via a letter from SEHC dated 11 March 2013, Mrs Sudhakar is informed that, having considered her submissions, it has been decided that her employment would be terminated on the ground that she had engaged in serious misconduct. The pertinent content of the letter informs that:

The committee reached this decision because of the following reason.

Your misconduct involved hitting [A] and pulling his ear. These are serious incidents. They are contrary to the professional standards, and they undermine the trust and confidence that the Board must have in its employees.

We separately found that you interfered with the investigation and again this seriously undermines the trust and confidence that the Board needs to have in its staff.

You have not acknowledged these incidents took place. Given the clear evidence that we have heard, this stance also makes it impossible for the Board to have confidence in you going forward.

[43] Mrs Sudhakar was also informed that there would be a report to the Teachers’ Council relating to the dismissal.

The challenge to the dismissal

[44] Mrs Sudhakar (via submissions) says that her dismissal was substantively and procedurally unjustified; because:

- (a) SEHC did not have sufficient grounds to conclude that Mrs Sudhakar had committed serious misconduct;
- (b) SEHC did not adequately investigate the allegations against Mrs Sudhakar;

- (c) The process adopted by the school meant that Mrs Sudhakar did not have a real and timely opportunity to respond to the respondent's concerns before the school had already formed its views;
- (d) The school did not genuinely consider Mrs Sudhakar's explanation or turn its mind to other possibilities; and
- (e) The length of the interview and investigation process disadvantaged Mrs Sudhakar making the decision to dismiss unsafe and unjustified.

[45] On the other hand, SEHC says that the dismissal was justified because:

- (a) There are three separate allegations that (individually or collectively) amounted to serious misconduct;
- (b) The subcommittee was entitled to prefer the evidence of A over that of Mrs Sudhakar in relation to the allegation that she pulled his ear and slapped him on the back of the head;
- (c) The subcommittee was entitled to prefer the evidence of Mrs A over Mrs Sudhakar in regard to the allegation that Mrs Sudhakar tried to encourage Mrs A not to make a written complaint to the Board; and
- (d) The subcommittee was entitled to accept the evidence of Mr Martin (bolstered by the observations of the principal) that Mrs Sudhakar had encouraged students to withdraw or change their statements to the principal.

[46] The School says that because Mrs Sudhakar was in a sole charge position the Principal and the Board needed to have trust and confidence in her to a high degree. While Mr Shearer had confirmed that the incident(s) may have been a "one off" and he did not harbour any long term concerns about the possibility that Mrs Sudhakar might again strike a child, the refusal by her to acknowledge that she had done any wrong, along with the evidence that she had encouraged students to "lie" to Mr Shearer, resulted in the school not being able to have trust and confidence in Mrs Sudhakar to such a degree that dismissal was the only viable option.

Analysis and conclusions

[47] In determining, on an objective basis, whether a dismissal was unjustifiable, the Authority must apply this test⁹:

... whether the employer's actions and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[48] Then, in applying the test, the Authority must consider¹⁰:

- (a) whether, having regard to the resourced available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee;

[49] While Mrs Sudhakar says that the procedural aspects of the investigation and the disciplinary process adopted by the school were unsatisfactory, having viewed the overall evidence and given consideration to it accordingly, I am satisfied that the above requirements of s.103A(3) have been appropriately met.

[50] In applying the test provided by s.103A(2) of the Act in regard to the circumstances pertaining to the dismissal of Mrs Sudhakar, the primary matter for the Authority to consider is:

Could SEHC, as a fair and reasonable employer, reasonably conclude that the actions of Mrs Sudhakar constituted serious misconduct?

[51] In determining this question, the Authority must be cognisant that a personal grievance action is not an appeal to the Authority from the employer's finding of fact. Rather, the inquiry into the question is whether the employer actually believed, and

⁹ Section 103A(2) of the Employment Relations Act 2000

¹⁰ Section 103A(3) of the Act

did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal¹¹. As stated by Chief Judge Goddard in *Travis-Jones*:

In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.

[52] The dismissal of Mrs Sudhakar was on the grounds set out in the letter from the School dated 11 March 2013 (para [42]). It has to be said that the investigation conducted by Mr Shearer, and then later the disciplinary subcommittee of the Board, came close to muddying the waters to such a degree that it became in danger of becoming flawed. This is because, apart from the child A, a number of other children were interviewed at various times with the result that because of the young age of the children and the manner in which the interviews took place, little reliance could be placed on what these children had to say. This is simply because the children would have been probably confused and also, most likely, willing to please. However, it also has to be acknowledged that interviewing young children, where a serious disciplinary matter is involved, is always going to be difficult exercise.

[53] And while there is some validity to the criticism levelled at the School by Mrs Sudhakar in regard to the interviewing of the other children, and also the exaggeration by A in regard to the later interview with him, one must return to the initial complaint that was made by Mrs A in order to put matters back into some perspective.

[54] Upon interviewing Mrs A in regard to what her son had told her, and then interviewing A, the Committee concluded that Mrs Sudhakar had pulled A by the ear and hit him on the back of the head. The Authority also found Mrs A to be a most credible witness and I have no doubt that what she had to say to the Board was an accurate recollection of what her son had told her and hence her subsequent concern for his welfare.

[55] I am also satisfied that, taking into account the evidence of Mr Shearer and Mr Martin, the Committee could reasonably conclude that Mrs Sudhakar had

¹¹ *Chief Executive of the Ministry of Maori Development v. Travis-Jones* [2003] 1 ERNZ 174

interfered with the investigation pertaining to the complaint made by Mrs A in that she attempted to persuade A, and possibly other children, to change their original version of events in order to reduce the possible consequences for her.

[56] Finally I find that, on the evidence available to them, the Committee was entitled to conclude that Mrs Sudhakar had engaged in serious misconduct related to a physical assault on the child A, and also in her attempts to persuade young children to change the version of events that they had initially related to Mr Shearer and then subsequently to the Board.

Determination

[57] I find that on the basis of the tangible evidence available, following a fairly conducted investigation, the Board of Trustees of Sir Edmund Hillary Collegiate was entitled to conclude that serious misconduct existed due to the actions of Mrs Sudhakar as previously outlined.

[58] The Court of Appeal in *W&H Newspapers Ltd v. Oram*¹² confirmed that there may be more than one correct response open to a fair and reasonable employer where serious misconduct is found to exist. And given the overall teaching background of Mrs Sudhakar and the stage that she had reached in her working career, her dismissal may seem to be a harsh sanction to some. However, the issue for the Authority to determine is whether it was open to SEHC, acting fairly and reasonably, to have concluded that dismissal was the appropriate response in the circumstances.

[59] I find that having conducted a proper investigation and having met the other essential criteria set out in s.103A(3) of the Act, the dismissal of Mrs Sudhakar was what a fair and reasonable employer could have done in all the circumstances; hence the dismissal was justifiable.

[60] In conclusion, I make the observation that had Mrs Sudhakar been prepared to acknowledge that her actions in regard to the child A were inappropriate, and that she had over-reacted on the day to the disruptive behaviour of the children as a group, it may have been possible for the School to have adopted a “restorative” approach, as had initially been contemplated by Mr Shearer. But, regrettably, even faced with the evidence before the School, and being given an opportunity to reconsider her position

¹² [2000] 2 ERNZ 448

of total denial, Mrs Sudhakar maintained her stance and as a consequence the School was left with little option but to exercise the sanction of dismissal accordingly.

Costs

[61] Costs are reserved. The parties are invited to resolve this matter. In the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file a memorandum with the Authority. The applicant has a further 14 days to file a memorandum in response.

K J Anderson
Member of the Employment Relations Authority