Determination Number: AA 117/05
File Number: AEA 804/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Sue Wright (Applicant)
AND	Te Tuinga Whanau Trust (Respondent)
REPRESENTATIVES	David Bruce, for Applicant Ingrid Anderson, for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	16 December 2004 17 December 2004
DATE OF DETERMINATION	4 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Ms Wright was a Whanau Support Worker with Te Tuinga Whanau Trust (TTWT).

The Trust is a non profit organisation based in Tauranga. It is a pan – tribal, government funded community organisation which provides support to local families in need.

Ms Wright has a brought a problem to the Authority. She alleges she was unjustifiably disadvantaged in her employment and then unjustifiably dismissed from her employment.

The respondent denies these claims.

There is little dispute between the parties as to the events leading to Ms Wright's dismissal. There is however, a world of difference in the interpretation the parties place on the facts of the matter.

For her part Ms Wright describes a lengthy history of ill treatment, abuse and discrimination in her employment culminating in her dismissal.

The respondent on the other hand described a negligent and incompetent employee who failed to lift her performance despite being given extensive support and assistance.

What happened?

Ms Wright commenced working with TTWT in May 1996. She was employed as the organisation's receptionist. In 2002 Ms Wright moved into the position of Whanau Support worker initially to assist the team and later she was confirmed in the role on a permanent basis. This was a front line role in working with the families being assisted/supported by the organisation. Ms Wright described a number of matters that gave rise to concern on her part over the years 2001/2 but the event which is at the core of the dispute between the parties to this dispute occurred over December/January 2002/3.

In December 2002 a funding application form sent by CYPS to TTWT was mislaid by Ms Wright whose responsibility it was to collect the mail. It came to Ms Andersen's[1] attention in March 2003 when CYPS advised her that a deadline for funding had been passed and that TTWT would now not qualify for this funding. Ms Andersen was upset about this and sought an explanation from Ms Wright who advised she had asked for the information she had mislaid to be resent by email to TTWT. She had thought that would have been done and was sorry she had not raised the issue with Ms Andersen previously. Ms Wright provided Ms Andersen with a report regarding her role in mislaying the correspondence and her attempts to have the matter rectified. The incident was taken up by Ms Andersen with Board members and the possibility of dismissing Ms Wright was canvassed.

In the event, Don Brebner, a Trustee, undertook to speak to Ms Wright about the matter. A meeting took place between them on the morning of 6 March 2003. The events leading to the mislaying of the funding application were discussed as were the subsequent attempts by Ms Wright to have the information resent (which did not happen), the failure by Ms Wright to inform Ms Andersen of the problem and the passing of the funding application date. Mr Brebner's evidence as to what happened next is set out below:

"I offered her my personal view, saying that I was not speaking for the Board. My feeling was that, in view of the tensions and disharmony that I believed would now build up, much of it would now focus on her and I felt she would essentially find her position untenable. I recommended that she start looking for other employment and to assist her……I would be prepared to provide her with a reference".

Confirming his view Mr Brebner told me at the Investigation Meeting that he told Ms Wright "*that if she stayed her position would be untenable because of the erosion of trust and confidence. It would affect all staff. She rang two days later and advised she was choosing not to take his advice in which case the matter ended".*

Ms Wright's evidence on this point was blunt *"He informed me that he had been sent to ask for my resignation".*

It is not in dispute that Ms Wright having thought about the request and taken advice communicated to Mr Brebner that she would not be resigning.

It was Ms Wright's evidence that from that point on Ms Andersen became withdrawn and refused to acknowledge her. She felt isolated and felt that other staff looked at her with contempt. The issue of the lost funding was raised in meetings even with complete strangers. She felt she would forever pay the price for what had happened.

[1] Ms Andersen is the Director of TTWT.

Ms Wright described being abused, discriminated against and isolated over the ensuing months.

By October, she was suffering from stress and her workload was falling behind. On 17 October she visited her doctor and was diagnosed as suffering a situational depression and put on sick leave. She gave her doctor permission to discuss her situation with Mr Brebner. Ms Wright's doctor did contact Mr Brebner. According to Mr Brebner's notes of that discussion the doctor advised that *"her stress leave could go on indefinitely unless somehow the conditions of her working environment changed, including the management."* Mr Brebner advised the doctor *"there would be no changes in the foreseeable future"*. He believes he advised the doctor that *"this non-profit business was strongly and well – managed, even if she [Ms Wright] disagreed and that Sue had possibly contributed to her own problems through her actions at the time of losing vital documents re funding for the organisation at the beginning of the year. Also she had opted for a Family Support role and there were no alternative positions available."*

On 26 October Ms Wright attended at the office of TTWT for the purpose of delivering a medical certificate. She ran into Ms Andersen and Mr Brebner. There the possibility of Ms Wright's potentially indefinite leave was discussed. Ms Wright said she was offered "*the opportunity to resign"*. She was advised they had *"more than enough to dismiss me"*.

Mr Brebner denied seeking a *"quick solution"* to the issue – being Sue Wright's resignation. His evidence was that an indefinite period of stress leave was untenable. In light of that possibility he sought a solution that would be best for both parties. He agrees Ms Wright's resignation was an option. He cannot recall saying that "they *had more than enough to dismiss her"* but he accepts the "*possibility of dismissal was real"*.

Ms Wright did not resign. She remained on sick leave and on 1 December she wrote to TTWT advising she planned to return to work on 15 December. She outlined her understanding of the meeting of 26 October with Ms Andersen and Mr Brebner. She advised if she had not had feedback on her understanding of that meeting by Monday 8 December she would return to work on 15 December.

Ms Wright received no response to her letter and returned to work on 15 December

Ms Wright's evidence was that she was isolated from the whanau support team and left to work in a side office and denied access to a phone and contact with staff and clients. She was made to bring her client files up to date within five weeks. She was happy to do this but after 3 weeks Ms Andersen was unhappy with her progress. She was denied training/support to assist her in bringing her files up to date. Then because she was making insufficient progress Ms Andersen took over her files and she was directed to undertake an induction programme. Then she was criticised for taking too long to complete the induction programme despite being given no work to do when that programme was completed. Ms Wright said she was directed to read client files.

Ms Andersen sees this situation differently. Sue's computer and her files had been moved into a side office because it was not known how long Sue would be away. When Sue returned it was proposed she take five weeks to get her cases up to date. This involved 20 files. She was relieved of case work in order to complete this task. Ms Wright had herself requested to undertake a newly implemented induction programme in the sixth week. Ms Andersen could see no harm in that and agreed with this proposal.

However, Ms Andersen was concerned to find that by 20 January only four files *"were almost ready to view"*. This was despite being offered help by her supervisor and other staff. She had also had meetings with Ms Andersen where she was asked if she needed help but said things were fine.

Ms Andersen could not let the situation drag on. The whanau support team had been under strength since October. Ms Andersen's evidence was that she had no choice but to take over Ms Wright's files, have her complete the induction process and get back to her role as in the whanau support team.

The event which initiated disciplinary action leading to Ms Wright's suspension and dismissal

On 18 January 2004 Ms Wright was reading a client file. She was at the time completing the induction process and she took a file she had been reading the previous day from her supervisor's desk with a view to completing her reading of this file. The fact that Ms Wright had removed a file from her supervisor's desk was a matter of concern to her supervisor, Ms Frawley. Ms Frawley was also, I understand, concerned that someone had interfered with her computer. She reported it to Ms Andersen who called a staff meeting to discuss the situation. Ms Wright attended the staff meeting. She was questioned about having taken the file and felt offended by the tone of mistrust implied in the question. Ms Wright gave a response that to Ms Andersen was indicative (to Ms Andersen) of her failing to have regard to the authority of her supervisor.

Suspension

The next morning Ms Wright was called to a meeting and advised to collect her things and to leave. She was advised she was being put on paid leave until 24 February to allow the employer to sort out what *"the options were."* Ms Wright was told she would receive a letter on 24 February.

Ms Wright attended the workplace on 24 February with a former colleague as a support person. She was handed a letter by Ms Andersen and elected to take the letter away to read it.

The Letter

The letter advised Ms Wright that the organisation had concerns relating to her poor performance; her jeopardising the funding of the organisation and the well being of clients; her disregard for authority; her lack of communication and her inability to work as a team member. Ms Wright was invited to attend a meeting on 27 February 2004 where she would have the opportunity to have her point of view heard. Ms Wright was notified of her right to a representative at the meeting. The specific concerns put to Ms Wright and on which she was to provide a response at the meeting on 27 February are summarised below:

> Funding Contract: Ms Wright had (in January 2003) jeopardised the organisation's main funding contract by losing a funding application form and had attempted to hide this mistake. It was acknowledged that the mess Ms Wright had created had now been sorted out. However, it was stated *"It has taken one year and you have done nothing but continue to jeopardise this contract"*.
>
> Files not up to Date: In the latter part of 2003 Ms Wright was found to have 20 client files that were not up to date. She had been given six weeks to get these files up to date but after 4 weeks had only *"almost completed 4 files"*. As a result Ms Andersen herself had taken over the files and Ms Wright was to undertake a week's induction and then return to her role as Whanau Support Worker. Another concern related to the fact Ms Wright had taken four weeks to complete the induction programme that should have taken one week. This was itself considered to be inappropriate.

Absence from Work and Related Matters: It was outlined to Ms Wright that Monday 26 January was a public holiday; she had been absent due to sickness on 27 January; on Wednesday morning staff had attended a tangi for a deceased colleague and Ms Wright had taken leave in the afternoon. Ms Andersen expressed surprise that Ms Wright expected to be paid for that afternoon. On Thursday Ms Andersen was concerned to find an application for leave (for Thursday 29/30 January) left on her desk. Ms Andersen's concern related to the fact that Ms Wright had not given Ms Andersen the opportunity to approve or deny the request for leave. The letter records that on the following Monday Ms Andersen held a meeting with Ms Wright where it was alleged Ms Wright was *"blatantly uncooperative"*. Despite agreeing to use annual leave for the purposes of payment for that week Ms Wright had refused to sign an agreement to that effect saying she wanted a written record of the meeting before she signed the agreement. Ms Andersen recorded that she had not paid Ms Wright for the week in question because Ms Wright had not signed the agreement that she would be using her annual leave.

Removal of a Case File: It was alleged that on 18 February 2004 Ms Wright had removed a file from her supervisor's desk and when questioned about it the tone of her answer was *"completely inappropriate and a blatant disregard for her authority"*. At a staff meeting called to discuss this matter it was alleged Ms Wright again showed disregard for her supervisor's authority when she responded to a direct question by staring blankly out the window. Ms Andersen stated that Ms Wright's behaviour in this matter was "*inappropriate and unprofessional"*.

Luncheon Incident: It was alleged that Ms Wright had set a bad example to youthful attendees at a luncheon in February when she left the table and did not return to rejoin the lunch. It was stated that *"Again your behaviour was inappropriate and unprofessional."*

Stress leave: Ms Andersen expressed concern that while Ms Wright had provided medical certificates for the sick leave she took over October/December 2003, she had offered no proper explanation for her absence to Ms Andersen and was uncommunicative when invited to discuss the reasons for her sick leave and had failed to provide a certificate stating she was fit to return to work (when such a certificate was requested by Ms Andersen). It was also a concern that Ms Wright's absence during this time had seriously disadvantaged the employer as she had left no indication of the status of her cases and case notes were so far behind and notes inappropriately recorded that it was impossible to take over those cases. In many cases consent forms were also missing. It was noted this latter point had been taken up with Ms Wright prior to her taking leave but she had done nothing to improve her performance.

Client Case Management: It was put to Ms Wright she had taken sick leave in the knowledge that she was meant to be supporting a client facing serious charges in Court and that she had advised no-one of this and left the file in a mess. It was stated that once again Ms Wright's performance had seriously jeopardised the organisation.

The letter concluded that Ms Wright continued to provide the organisation with substandard performance despite being provided with training, support and time to improve and being given the benefit of the doubt on many occasions.

27 February Meeting

On 27 February the parties met in a coffee shop below the office. Ms Andersen attended together with Ms Alderton the office administrator. Ms Wright was accompanied by her former colleague,

Nancy Powell and her representative, David Bruce. The venue was of course a public one and the applicant and her witnesses advised it was very noisy.

The evidence suggests that at this meeting attention focussed initially on preliminary matters e.g. the applicant's concern she had been suspended from her employment and the employer's position that she had been sent away from work on paid leave. Another issue raised was the absence of any Board members at the meeting. Ms Wright had been of the view that Board members would be attending. In the event only the first of the issues set out in the February 27 letter was addressed at this meeting i.e. the loss of the funding application letter in January 2003. Mr Bruce who was speaking for Ms Wright at her request advised the respondent's representatives that there was nothing in the letter that warranted disciplinary action being taken against Ms Wright.

The meeting then turned to a discussion on the future of Ms Wright's position with TTWT. A number of options were discussed but it emerged that Ms Wright's preference was for an agreed separation in return for an exit package. Terms were proposed by Mr Bruce. Ms Andersen advised she would not be making a decision but would get back to Ms Wright by 2 March after she had consulted the Board. By agreement it was later agreed that Ms Andersen would get back to Ms Wright with an outcome by 5 March.

The Dismissal

The evidence discloses that Ms Andersen reported the options/preferences to individual Board members and they discussed the issues/options between themselves and with Ms Andersen. The decision was taken by the Board to dismiss Ms Wright. It was communicated to Ms Andersen who agreed with the decision. It was also described to me as a *"mutual decision."*

On 4 March Ms Anderson rang Ms Wright and requested her to come to a meeting at the office on 5 March where she would be advised of the outcome of the meeting. She advised Ms Wright she had a letter for her. Ms Wright subsequently advised the employer she would like the letter to be posted to her.

That letter informed Ms Wright that after lengthy conversation with four of the Trustees and the organisation's legal advisor they had decided to dismiss Ms Wright from her employment. She was advised she would be paid two weeks pay and holiday pay; provided with a certificate of service would be provided with advice from a reputable employment agency to provide guidance on future employment and to update her CV.

What is the employer required to show if I am to uphold its position?

Ms Wright submits that being suspended by her employer on 19 February 2004 amounted to an unjustified action to her disadvantage. She also submits that she was unjustifiably dismissed from her employment.

The respondent denies *suspending* Ms Wright but accepts that she was sent away (on full pay) from her employment for a few days. This I was told was to allow the employer to take advice regarding Ms Wright and her future employment. The respondent accepts that it dismissed Ms Wright and claims that dismissal was justified for poor performance and misconduct.

The short answer to the above question is that the respondent employer is required to show that in its dealings with Ms Wright it has acted fairly and reasonably in all the circumstances. However, it is convenient in determining whether or not the employer has acted fairly and reasonably in all the

circumstances to consider whether it had ***good reasons*** for the actions it took in respect of Ms Wright's employment and ***whether she was treated fairly in the process.*** (See Elements of Procedural Fairness below). The test I have described here applies to all of the issues in question be they claims of alleged misconduct or poor performance.

Fundamental to the question as to whether a worker has been treated fairly in any process that could affect their employment to their disadvantage is the concept that the employer will bring an open mind to the issues in question. This calls for a consideration of the law relating to bias and predetermination

"Bias [at law] includes situations where it appears persons charged with the responsibility of making decisions have so conducted themselves to lead an objective observer to conclude that they have closed their minds and were no longer giving genuine consideration to the issues before them . It relates not merely to the existence of some pecuniary or other interest in the subject matter of litigation but also to any predetermination of the issue sufficient to show a real probability that the issue will not be determined in an unbiased or impartial manner. The existence of bias or predetermination may cause a dismissal to be unjustified". *NZ Educational Institute v Board of Trustees of Auckland Normal Intermediate* [1992] 3 ERNZ 197.

In addition to showing that it has approached the issues of concern in an open mind the respondent in this matter must also show that it treated Ms Wright fairly in the process it took to addressing the concerns it had regarding her conduct and performance. There are four elements to procedural fairness. (See Butterworths Employment Law 1-1510).

Warning: The employer must warn the employee of the misconduct (unless it is serious misconduct warranting summary dismissal) and request an improvement in conduct and/or performance. The employee must also be advised at the warning stage that his or her job is "on the line".

Investigation: the employer must carry out a full investigation of all the relevant facts before actually terminating the employee and the result of such an investigation should be communicated to the employee.

The investigation carried out by the employer must be fair and thorough and sufficient to allow the employer to arrive at a reasonable belief that misconduct or poor performance exists such that dismissal is warranted. *Airline Stewards and Hostesses (NZ) IUOW v Air New Zealand Ltd* [1990] 3 NZILR 797. No investigation will be thorough and complete without inquiry of the worker.

Reasons: Reasons for the dismissal must be given to the employee before the dismissal is effected.

Opportunity to be heard: Before the dismissal is effected the employee must be provided with a real opportunity to be heard and to offer an explanation to the allegations made. Notice to the employee should also advise how seriously the allegations are viewed and if the worker's employment could be in jeopardy. An opportunity to be heard also implies that serious consideration will be given to the worker's explanations.

Before closing on the general considerations to be applied in testing the facts of this matter I must outline the case law as it relates to the suspension of workers. Suspension of a worker is usually reserved for situations where an employer suspects that a worker may be guilty of serious misconduct. It is usually initiated to allow an investigation to be carried out in a manner which preserves evidence or to maintain health/safety in the workplace.

Speaking generally there must be either a statutory or contractual right to suspend. It is noted that the individual employment agreement (IEA) between the parties in this matter makes provisions for suspension of the employee in situations where ***serious misconduct or gross negligence*** is alleged. Clause 7 of the agreement provides:

"In the event of proven serious misconduct or gross negligence by you, termination without notice may occur. ***We may suspend you on pay pending an investigation into any serious misconduct or gross negligence involving you".***

The Court of Appeal in *Birss v Secretary of Justice* [1984] 1 NZLR 513,521 referred to suspension as a "*drastic measure which if more than momentary must have a devastating effect on the [employee] concerned."* The decision to suspend an employee pending an investigation into their conduct is not a decision to be taken unilaterally and the rules of procedural fairness apply. At the minimum the employee should be advised of the proposal to suspend and be given an opportunity to comment.

Issues to Be Decided

General

My investigation has not focussed on the management of TTWT and I must avoid sweeping statements relating to the management of the organisation that are outside of my brief and which because of the limited focus of my inquiry would not necessarily reflect the true picture.

What is clear from my inquiry, however, is that there has been a failure to separate governance and management in operations of this organisation at least in respect to staff management issues. It is also clear that some day to day management decisions are made on the hoof. That being the case they are not necessarily well considered and so may be insufficiently robust to stand the test of time – critical to ensuring consistency in managing people and processes.

It is also clear that there is significant staff dissatisfaction with the management of the organisation. A number of past employees appeared as witnesses. In a large measure they used the Investigation Meeting to describe their own dissatisfaction with their employment experience at TTWT. These people and others have addressed their concerns to the Board but they have fallen on deaf ears. While there will be two sides to each of these stories it would be a mistake, I believe, to dismiss these people entirely as malcontents.

In pointing this out I am not laying the blame solely at Ms Andersen's door. The management practices that have given rise to serious staff concerns go back beyond her time and she herself was appointed to her role after an organisational crisis which, I understand, involved the walk-out of almost all staff at one time.

It is my considered view that TTWT would be well served by the implementation of a review of its operations and management practices. I have heard and do not doubt that funding is an issue with this organisation. However, it is a business like any other and the breakdown in relations that has occurred here shows it is ultimately a false economy not to have sound management structures/process and skilled/experienced management personnel in place.

The Suspension

The advice given to the respondent to send Ms Wright home on full pay was extremely poor advice.

In law the action amounted to the suspension of Ms Wright. The IEA applicable to the employment provided that the respondent could suspend Ms Wright where an issue of *serious misconduct or gross negligence* had been raised. If Ms Andersen considered Ms Wright's attitude to her supervisor on 18 February (which apparently gave rise to the suspension) as serious misconduct then it was not advised to Ms Wright, nor was it argued at the Investigation Meeting.

I will address Ms Wright's attitude later in this decision (p 12) but there is nothing in the evidence relating to the circumstances relating to Ms Wright's suspension that qualifies as serious misconduct or gross negligence on her part that would have allowed the respondent to exercise its right to suspend her.

I note the comments of the Court in *Birss* (cited above). Suspension has a drastic effect on an employee and should only be considered in the rarest of cases where the worker's continued presence at the workplace could prejudice the inquiry being made; affect health and safety in the workplace or otherwise result in serious damage e.g. sabotage. When suspension is considered it is a minimum requirement that the worker should be allowed to obtain representation; be advised of the allegations against him or her and the proposal to suspend pending an investigation and allowed to respond to the proposal.

The basis of the suspension of Ms Wright was deeply flawed and unaccompanied by the fair process the law demands. This amounted to an unjustified disadvantage in her employment.

The Dismissal of Ms Wright

General

At its most basic this is a case about predetermination and bias. The predetermination and bias evident throughout the respondent's dealings with Ms Wright is compounded by the fact that the decision makers in the matter (Trustees) took no part in the disciplinary inquiry including the inquiry of the worker. The evidence shows that the Trustees had closed minds towards Ms Wright since the incident of the lost funding application and the second hand information they received subsequently relating to her competency or lack of it cemented their views.

While it is questionable whether Trustees should have been involved in the decision at all (see my comments on the desirability of separating the roles of governance and management in such organisations) it is clear that the Trustees made the decision to dismiss Ms Wright. When the time came to consider her future employment not only did they take no part in the inquiry which they should have (see *Ioane v Waitakere CC* [2003] 1ERNZ 104) but they brought to bear on the question they decided the cemented opinions they had long held about Ms Wright.

The Process

Apart from the contextual setting in which this dismissal occurred i.e. one pervaded by predetermination and bias there are other procedural failings which dogged this matter.

I will address the substance of the allegations against Ms Wright elsewhere but must note it is inappropriate and unfair to gather up a host of complaints relating to incidents that go back over time (and which were not raised and dealt with at the time) and put those complaints to a worker

enmasse in some cases months after the event. In *Donaldson and Young v Dickson* [1994] 1 ERNZ the Court had this to say about such an approach to raising complaints with an employee.

"To store them up and to smite the employee with them, hip and thigh, in one giant instalment, is about as great a breach of the duty of trust and confidence inherent in every employment contract as can be imagined".

I also note that the opportunity given to a worker to explain allegations against her is a critical part of any disciplinary process. In addition to ensuring Ms Wright was informed about the allegations against her (flawed though that process was) there was a duty on the employer to ensure the venue for the discussions on those allegations was appropriate for the seriousness of the occasion. A public café simply does not cut it.

While both parties must share some responsibility for the fact the focus of the meeting on 27 February turned from Ms Wright's explanations in relation to the allegations made against her, the obligation rested with the employer to show that its inquiries revealed misconduct/poor performance that was serious enough to justify dismissal in all the circumstances. After the discussion turned to an agreed separation, the employer failed to complete its inquiry by ensuring that Ms Wright appreciated and exercised the opportunity to provide explanations – if she wished - to all the allegations made against her. This was itself a failure of process and without an inquiry of worker on *all* the matters raised with Ms Wright it could not come to an honest belief that there had been misconduct and/or poor performance of such seriousness to warrant Ms Wright's dismissal.

When the employer acquiesced in a discussion about a separation on agreed terms it created an expectation that this would be seriously considered as an alternative to a disciplinary outcome. When the employer rejected the concept it was under an obligation to inform Ms Wright of this and to resume the unfinished disciplinary inquiry.

The reasons for Ms Wright's dismissal

I was told at the Investigation Meeting that Ms Wright was dismissed for "*the things in the letter"* (27 February). As part of the process of determining the justification for this dismissal I will address the allegations raised there.

Funding Contract:

I find that in March 2004, the respondent through Mr Brebner sought Ms Wright's resignation. The respondent presented this euphemistically as giving Ms Wright an option. Had Ms Wright responded in the manner that the employer clearly sought her to respond (by resigning) and brought a personal grievance action the law would soon have called this what it was – a termination at the initiative of the employer i.e. a dismissal.

Mr Brebner to his credit did take steps to ascertain what had happened in respect to the loss of this funding application and Ms Wright's role in the matter. It is clear that at that point the respondent genuinely believed that misconduct or negligence had been shown that justified severing the employment relationship. Had the process been handled properly at that time the employer may have passed muster on the examination of a dismissal in such circumstances. Instead the employer requested Ms Wright to resign and then accepted her decision not to do so. On the face of it (and this was confirmed by the employer through Mr Brebner) *"that was the end of the matter."*

The reality, however, was that it was not the end of the matter. The loss of the funding application continued to dog the relationship between Ms Wright and the management TTWT thereafter. That

is abundantly clear on all the evidence before me, not least in the letter of 27 February 2004. For the employer the erosion of trust and confidence in the relationship was complete and total. Ms Wright was told this in the context of giving her *'the option'* to resign. She felt the effects of labouring under the weight of this supposedly resolved matter and it poisoned the minds of those who ultimately decided that dismissal was warranted in February/March 2004. They brought completely closed minds to that decision influenced largely, I find, by the events of January/March 2003.

Despite the actuality of the situation the law views funding application issue as being at an end from the moment the employer took no disciplinary action against Ms Wright in relation to it in March 2004. As a result the employer was not permitted to raise the issue in a disciplinary setting in February 2004 and the event could not in March 2004 give rise to any justification to dismiss Ms Wright.

Files not up to Date/Client Case Management:

These were performance issues and were potentially more serious.

It is possible that Ms Wright's performance was below par. However, there are a number of difficulties with these allegations both in the manner they were raised and the reliance on them as justification for the dismissal.

- The allegations should have been raised and dealt with at the time they occurred. It was not, as I have already noted, permissible to raise these matters months after the event.

- These were serious allegations and after the discussions of 27 February were diverted to discussion of an agreed separation the employer failed to come back to Ms Wright to ensure these concerns were put to her for an explanation.[2]

- Ms Wright had been confirmed by the respondent in the role of Whanau Support Worker. It was felt that with her networks in the community and with *proper training support and guidance* she would be fine in whanau support. Ms Wright was new to the role. She had a passion for the families that TTWT work with and excellent community relations. However, I believe she needed training, support and close supervision to meet the contractual requirements of the role. It should not have been possible for the situation to arise where 20 of her files where so badly kept that they were useless to other employees who took over her work and in such a state that they could not be retrospectively brought up to date which is what happened.

- Where poor performance is an issue such that it could jeopardise an employee's continued employment the law is clear that the respondent must take a careful and structured approach to assisting the worker to raise their performance. The emphasis should always be on raising the performance and avoiding disciplinary outcomes. The most comprehensive statement of principles applicable in situations poor performance is that set out in *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659. Those principles are summarised in the head note to that case and attached to this Determination as Appendix A.

The employer has not shown me that it undertook the careful evaluation of Ms Wright's performance, that it set objectives and provided the training and support/warnings it needed to show

[2] I have already noted both parties must share some responsibility for the fact that not all the concerns were responded to at the meeting of 27 February.

before it considered dismissing Ms Wright for poor performance. The evidence required to satisfy me that dismissal for this reason was justified was just not there.

Absence from Work and Related Matters

I am not entirely sure but it appears that in relation to Ms Wright's absences from work over the week beginning 26 January that the employer expected her to use annual leave for a statutory holiday where the employer was obligated to allow a paid holiday to all workers. In respect of the time taken to attend tangi and related events associated with the colleague's death the employer was obliged to treat Ms Wright exactly the same as other workers in respect of approved time off taken for that purpose. For other days taken off the employer was entitled to discuss the basis of payment with Ms Wright where she did not have sick leave/special leave to fall back on. Once agreement was reached on that matter the employer should simply have recorded it and implemented it accordingly instead of getting into a dispute about signing documents on the subject. TTWT's records would or should have been able to a) verify any absence if a dispute subsequently arose and b) show what, if any, leave was available to Ms Wright to compensate her for time taken off.

I note in conclusion this matter did not give grounds for dismissal of the worker.

Stress Leave

The evidence shows that Ms Wright laboured under the burden of oppressive mistrust from March 2003 onwards. Ms Andersen admitted the relationship was strained

It is not surprising given the burden of mistrust that pervaded the relationship that Ms Wright succumbed to stress in October 2003. Her absence as a result of a stress related condition for which the employer's actions were the main contributor resulted in only more blame being heaped on Ms Wright – that she chose to be sick and that the best option would be (again) for her to resign. I also find she was told that the employer *"had more than enough to dismiss her"*. The request for her resignation at this time compounded the unfair treatment she had been labouring under and was repudiatory in itself. It was only a matter of time before the respondent came out with it and took the final step to actually dismiss Ms Wright.

Luncheon Incident: The employer did not obtain an explanation from Ms Wright over this matter of concern. Again it was not an issue that could justify the dismissal of the worker.

Removal of a Case File:

As I understand it the real concern raised under this head was Ms Wright's reaction when she was questioned in relation to her removal of a file from her supervisor's desk. It was alleged that in responding to questioning on this she showed disregard for the authority of her supervisor when she said "it doesn't matter" and that later when questioned again she stared out the window.

The respondent did not obtain an explanation from Ms Wright prior to bundling this matter into the grounds which justified dismissing Ms Wright. Ms Wright's explanation for her response – explained at the investigation meeting – was understandable in the circumstances. Her response was simply an expression that she recognised she could do no right. She was correct in this belief – by this time nothing was penetrating the closed minds of her managers and it was confirmed in Ms Andersen's evidence that by this time *"she had had enough"*.

Again there was nothing in this that justified Ms Wright's dismissal albeit had Ms Wright demonstrated this attitude in different circumstances it may have justified a warning.

Determination

Ms Wright was unjustifiably disadvantaged in her employment by the general attitude taken towards her by management and Trustees and their repudiatory behaviour which flowed from the views they had formed about her following the incident in January/March 2003. Ms Wright's employment was persistently disadvantaged from that time and she has a personal grievance against her employer on this basis.

Ms Wright was unjustifiably disadvantaged in her employment when she was suspended from her employment on 19 February 2004. She has a personal grievance against her employer under this head.

Ms Wright was unjustifiably dismissed from her employment on 5 March 2004 and she has a personal grievance against her former employer.

Remedies

Ms Wright was unjustifiably disadvantaged in her employment over a long period and was then unjustifiably dismissed. She is entitled to remedies to compensate for the unfair treatment she was subjected to.

Contribution

Section 124 of the Act requires that where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

In setting remedies in this matter I have considered this matter carefully. The employer may have had grounds to dismiss Ms Wright in March 2003. However, when it took no disciplinary action at the time the matter ended there. It was unfortunate and inappropriate for the employer to keep this issue at the forefront of its mind thereafter. Once it closed the matter it could not provide any justification for the later dismissal of Ms Wright and neither can it be considered as contributory conduct in setting remedies.

I have found that the other issues that gave rise to concern on the employer's part were not dealt with appropriately at the time they occurred. If there was substance to any of these issues the employer has not demonstrated that to me by bringing evidence they were appropriately raised, that objective standards of expected conduct/performance were set; that Ms Wright's performance was appropriately monitored; that she was given appropriate support and training to achieve the standards required and that she was counselled and/or warned that her employment would be in jeopardy if she did not reach the required standards of performance/conduct.

As a result I am unable to find Ms Wright has contributed to the situation giving rise to the disadvantage/dismissal she has faced and accordingly I will not be reducing remedies ordered in her favour for these reasons.

Lost Remuneration

To remedy her grievance I direct the respondent to pay to Ms Wright lost compensation from 5 March 2004 until she obtained new employment on 26 July 2004. From the gross sum payable the employer is entitled to deduct the gross amount of the two weeks wages it paid Ms Wright on her termination and a sum equivalent to Ms Wright's gross earnings in the period 5 March – 25 July 2004. Ms Wright is to submit a summary of her earnings for this period to the respondent to allow the appropriate calculation of lost remuneration.

If there is any dispute over the matter the parties are to advise me and the matter will be determined by me after I have considered submissions on the subject.

Compensation

Ms Wright's employment was seriously disadvantaged and she laboured under a burden of mistrust and suspicion in her everyday employment that I have seen only rarely. Then she was unjustifiably dismissed.

In all the circumstances of this case and recognising the respondent is a non-profit organisation and a relatively small employer I direct the respondent to pay to the applicant the sum of $10,000 to compensate her for the humiliation, loss of dignity and injury to feelings that she has suffered.

Arrears of Wages Owing

If Ms Wright has not been paid for the following days I direct she is to be paid for Anniversary Day 2004 and for the same time paid to other employees who attended the tangi on 28 January 2004.

The time taken off by Ms Wright on 27 January and 29/30 January should have been paid out of special leave or special leave. If Ms Wright had no sick leave/special leave available then the time should have been taken or paid as LWOP or holiday pay. If Ms Wright was paid all outstanding leave at the time she was dismissed there may be nothing owed for these days.

It Ms Wright was not paid for the entire period of her suspension I direct the respondent to pay her in full for the period 19 February – 5 March 2004.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Final Note: This has not been an easy decision to write and I have had to make some strong findings. The managers and Trustees of TTWT are dedicated people delivering needed service on a shoe string to their community but they lost their way in this case when they allow a matter they apparently dropped to poison their ongoing dealings with Ms Wright. It also seems to me - from this and other matters I have dealt with lately - that there is a general failing in the ability of such organisations to access specialised advice and expertise Whether it is a result of a general lack of management expertise or the availability of funding to access such expertise I don't know. However, organisations such as TTWT perform a valuable service in our communities and they rely on persons with good links to those communities to provide appropriate and credible services. Ways

need to be found to make management support services to such organisations readily available at a cost which is commensurate with the means available.

Janet Scott
Member of Employment Relations Authority

Appendix A

Trotter v Telecom Corporation of New Zealand Ltd [1993] 2 ERNZ 659.

"(1) the test for any justified dismissal is the same, "what was it open to a fair and reasonable employer to do?" A dismissal for poor performance is fundamentally no different from one for misconduct. In both cases the question is whether the employee's behaviour was a breach of the contract and was so serious that the employer was entitled to accept the repudiation of the contract.

(2) The same requirements of fair and reasonable treatment apply in both situations. These requirements mean that the employee, who may potentially be dismissed for poor performance, must be given specific reasons for the dissatisfaction and a reasonably specific and measurable improvement should then be demanded by the employer, giving a reasonable period to establish whether the employee is able to achieve the improvement. The trial of the employee's work must be fair and the results at the end of the trial period considered dispassionately. The employer should take into account an employee's previous good record and the possibility of redeployment.

(3) Without a fair trial of the employee's capacity the employer has no reasonable basis for reaching a conclusion adverse to the employee and must be treated as if it had not in fact reached such a conclusion. Airline Stewards & Hostesses of NZIUOW v Air New Zealand Ltd [1990] 3 NZILR 584 (CA).

(4) If poor performance is established by a fair trial/investigation, the employer must still consider whether the employee is so deficient as to entitle a fair and reasonable employer to dismiss.

(5) Warnings for poor work performance should be explicit and fair. They should describe how an employee's behaviour is deemed to be unsatisfactory, give clear information about what improvement will meet the employer's requirements, and how improvement will be measured. Their purpose is to give an employee an opportunity to improve, and to enable dismissal to be averted. They may not be used to create a pretext for dismissal.

(6) The following list (not necessarily exhaustive) of questions should be asked when considering dismissal for poor performance:

(a) Did the employer in fact become dissatisfied with the employee's performance?

(b) Did the employer inform the employee of the dissatisfaction and set out the expected standard?

(c) Were the criticisms and future requirements objective and readily comprehensible by the employee?

(d) Was reasonable time allowed for the attainment of the required standards?

(e) After the above had been done, did the employer turn its mind fairly to the question whether the employee had achieved what was expected, including:

- *(i) Using an objective assessment of measurable targets;*
- *(ii) Giving the employee an opportunity to answer the conclusions arising from the trial period;*

(iii) Listening to the employee's explanation with an open mind;

(iv) Considering the explanation and all favourable aspects of the employee's service record and any fault on the part of the employer in terms of poor training, management, or promotion;

(v) Exhausting all possible remedial steps such as training, counselling, and redeployment?"