

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2011] NZEmpC 8  
CRC 26/10**

IN THE MATTER OF      a challenge to a determination of the  
Employment Relations Authority

BETWEEN                ROSLYN SERVICE  
Plaintiff

AND                      YOUNG MENS' CHRISTIAN  
ASSOCIATION OF CHRISTCHURCH  
INCORPORATED  
Defendant

Hearing:      26 October 2010  
                  27 October 2010  
                  28 October 2010  
                  25 November 2010  
                  26 November 2010  
                  (Heard at Christchurch)

Appearances: Jeff Goldstein, Counsel for Plaintiff  
                  Peter Zwart, Advocate for Defendant

Judgment:      9 February 2011

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**JUDGMENT OF JUDGE A D FORD**

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**The challenge**

[1]      The plaintiff, Ms Roslyn Service, worked at the Young Mens' Christian Association (the YMCA) in Christchurch as an Education Manager. She had been employed by the YMCA in various senior roles for close to 20 years. On 7 December 2008, Ms Service was summarily dismissed from her employment. The grounds for her dismissal, in essence, were that she had exercised errors of judgment in relation to the appointment of an outside tutor to run a mechanics' course for a YMCA class. The tutor in question had a list of convictions and was on home

detention at the time. The mechanics' course was to be run from his home. It was alleged that he and one of his colleagues raped a 15-year-old female student who was a member of the mechanics' course class.

[2] In its determination<sup>1</sup> the Employment Relations Authority (the Authority) upheld the plaintiff's claim that she had been unjustifiably dismissed but the Authority dismissed her other claim that she had been unjustifiably disadvantaged by the YMCA in unfairly suspending her prior to the dismissal. In relation to her unjustified dismissal, the Authority found substantial contribution by the plaintiff and reduced her remedies by 50 percent on that account.

[3] The plaintiff challenged the dismissal of her unjustified disadvantage claim and the finding that she had contributed to the situation that gave rise to her unjustified dismissal grievance. In response the defendant challenged the finding of unjustifiable dismissal. As a result, all aspects of the employment relationship problem came before the Court for hearing de novo.

### **The alternative education programme**

[4] The principal purpose of the YMCA is described in an appendix to Ms Service's employment agreement in these terms:

To meet and relate to the needs of people in their communities, and where they work, in a way that will encourage them to develop as individuals, express their own needs and reach their full potential. It does this through programmes and relationships, involving YMCA workers with special youth, community, recreational and motivational skills.

[5] The YMCA on a national basis provides a range of community programmes and services including, in the case of nine of the YMCAs, youth education programmes. The education programmes are funded through government contracts.

[6] The Court heard how in Christchurch, the YMCA Education Centre offers programmes for youths between the ages of 13 to 24 years. On average up to 200 young people pass through the centre every year. One of the youth education programmes on offer is what is known as "Alternative Education" or Te Kaupapa

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<sup>1</sup> CA 6B/10, 28 May 2010.

Kiri Kairangi. This programme is especially designed for youngsters between the ages of 13 and 16 years who have, for one reason or another, dropped out of the mainstream education system. The participants in the programme are referred to as “TK3 students”. The classes run between 9.00 am and 2.30 pm (Mondays to Thursdays) and on Friday mornings. The majority of the TK3 students are also involved with agencies such as CYFS, police, Youth Justice, alcohol and drug centres, anger management and psychological services. Some of them belong to gangs and/or come from gang-related families.

[7] In 2008 there were approximately 22 students in the TK3 class. The number would vary because one of the YMCA objectives was to try and get the students back into school or some other educational establishment or arrange employment. There were a number of course options available for TK3 students such as cooking, jewellery making, sewing, arts and crafts, bone carving and the like. There were three TK3 tutors, namely Ms Jonelle Ward who was the Team Leader, Mr Adam Tai and Mr Stephen Scott. Ms Ward had been engaged in tutoring work for some five and a half years. As Team Leader she was responsible for planning the TK3 programming on a term by term basis. She reported to Ms Service.

### **The plaintiff**

[8] Ms Service is a qualified secondary school teacher with over 20 years’ management experience in four different organisations. She is 54 years of age, married with two children both of whom attend Canterbury University. Between the years 1986 and 1998, Ms Service was employed by the Christchurch YMCA in various senior positions which she described as Director of Outdoors, Director of Youth and Outdoors Department and Manager of Recreation Industry Training. After a break in 2002 Ms Service returned to work for the Christchurch YMCA in the capacity of Education Director. Her individual employment agreement was dated 2 December 2002.

[9] As Education Director Ms Service was responsible for the management and all activities of the YMCA Education Centre in Christchurch. She had authority to manage all courses at the Education Centre, to negotiate contracts and to deal with the various YMCA funding agencies. She was also responsible for managing all the

staff at the Education Centre. At the material time the staff totalled 18, comprising both administration staff and tutors. Ms Service reported directly to the Chief Executive Officer (the CEO) who at the time was Mr Peter Tindall.

[10] For seven years Ms Service was also on the National YMCA Education Programme Executive Committee that had oversight and quality management control of all YMCAs' involvement in education within New Zealand. This role involved her visiting and mentoring smaller YMCAs. From 2004 she was the Secretary of the Alternative Education National Body. In 2009 she joined the Regional Advisory Group of Ako Aotearoa, the National Centre for Teaching Excellence.

### **The mechanics' course**

[11] Ms Ward told the Court that either just prior to Christmas 2007 or in January 2008, at a point when they were planning the TK3 first term programme for 2008, one of the tutors, Mr Tai, came to her with a plan to run a mechanics' beginner course. He explained that his friend, Mr Mike Smith, who was on home detention because of traffic convictions, had a garage at his home from which he carried out auto repairs. Mr Smith was prepared to run the course as a "volunteer". Ms Ward said that she was concerned that the proposal "sounded a bit dodgy" but as Mr Tai was very keen on the idea, she suggested that he seek permission from Ms Service to include the course in the programme. Mr Tai had been a tutor for approximately three years.

[12] Ms Service told the Court that initially she was "uncertain about this arrangement" but she was assured by Mr Tai that Mr Smith's convictions related to vehicle matters. She questioned Mr Tai about the type of vehicles that Mr Smith worked on. Mr Tai assured her that Mr Smith was a mechanic and that he had worked on vehicles belonging to friends and family including Mr Tai's parents. Ms Service said the concept was agreed to after discussion with Ms Ward and Mr Scott but before she fully approved the course she wanted to ascertain the details of Mr Smith's police record. She, therefore, arranged for Mr Tai to obtain an authority from Mr Smith allowing the police to provide her with details of his convictions.

[13] Ms Service said that the police record was received sometime after 3 February 2008. It disclosed that in addition to a number of traffic convictions, Mr Smith had drug-related convictions from the previous year and an arson conviction two years previously. Ms Service said she noted, however, that there were no convictions of a violent or sexual nature. Expanding on this observation, Ms Service told the Court that the mechanics' course was planned to run during the first term on Mondays only between 1.00 pm and 2.30 pm. She explained that she had employed other staff in the past who had police records and she had also accepted volunteers with minor convictions. She said she would never have employed a person with a violent or sexual conviction but she believed that staff who have had a rough time in their own life are often able to relate to the students about risky behaviour and the consequences. She explained that one past tutor who had served a prison sentence "was able to discourage the students about their out of course activities and hopefully help them to make better choices".

[14] On Monday, 11 February 2008, Mr Tai called to see Ms Service in her office and explained to her that the first session of the "mechanics' taster course" had gone well. Ms Service said that she was surprised. She had not expected the course to have started on the first day of the education year and she had not completed all the preparation or given the Team Leader full approval to run the course. She noted that Mr Tai was enthusiastic that the course should continue as the first session had been enjoyed by all the students. Ms Service told the Court that her main concern had been in relation to the drug convictions but she felt that that issue could be managed because Mr Tai was the tutor in charge. He would be in attendance at each lesson and he clearly understood that there was to be no drug involvement or mention of drugs at the venue.

[15] Ms Service said that she met with Ms Ward later that same day and they discussed the fact that the list of convictions was longer than she had anticipated. In reference to the same meeting, Ms Ward told the Court that her advice was to cancel the course but given the fact that the course seemed to be going well she did not challenge Ms Service's decision that it should continue. Ms Service told the Court that if Ms Ward, as Team Leader, had been emphatic that she did not wish the course to continue then she would have stopped the course. Ms Service's evidence was that

she told Ms Ward that the class could not return to the venue until she, Ms Service, had completed certain risk management steps.

[16] Ms Service then proceeded to contact Mr Smith's probation officer and she was told by him that it "was fine" for students to visit the premises. She also had Mr Smith sign a Memorandum of Understanding that he would act appropriately around the students. She met with Mr Tai and stressed that he was responsible for the programme each week and for the behaviour of the students. She also sent a letter home to the parents of the students providing them with information regarding the course and advising them that it was being held at the home of Mr Smith who was on home detention. The letter requested the parents sign a consent form for their child to attend the mechanics' course or to contact the YMCA if they were unhappy. Only students for whom consent had been received were allowed to return to the course. Finally, a risk management document was completed which was YMCA standard procedure for activities involving risks. The risks identified related to the students working with mechanical tools and instruments that could cause injury.

[17] The class was able to resume again the following Monday, 18 February 2008. Ms Service said that all parental consents had been received and she visited Mr Smith's home before the students arrived to check out the venue. She then stayed on at the venue and observed the students, their motivation to start tasks and their behaviour. She told the Court how during the previous week she had talked the situation over with the CEO, Mr Tindall, when she had updated him on Education Centre activities:

I briefed Peter again about who Mike Smith was and that he was on Home Detention and that I had spoken with his Probation Officer. Peter had seen the police record. I also talked about having the MOU signed, the parents' consent returned, the normal documentation completed and that Adam was responsible for the programme and the activities while at the venue. Peter was satisfied with this and happy for the programme to proceed.

### **The alleged rape**

[18] After resuming again on Monday, 18 February 2008, the weekly mechanics' course classes continued without incident. The next development in the narrative from Ms Service's perspective occurred on Friday, 28 March 2008 when she had a visit from two police officers who informed her that they were investigating a

complaint made by a young TK3 female student. The student told the police that late one Friday night (after midnight) when she was in an intoxicated state, she and a female friend had visited the address where the mechanics' course was being held. She alleged that she had been raped by two men, one of whom was Mr Smith, the volunteer course provider. Before stopping off at the address the student had been in a vehicle with friends "cruising" some of the central streets in Christchurch. At the time of the alleged rape, the student's female friend had returned to the vehicle which had continued on its way. The police told Ms Service that the incident had apparently occurred on Friday, 29 February 2008 but the student had not reported the matter to them until 27 March 2008. They also told her that the student had first reported the incident to Mr Tai on 3 March 2008 and at that time she had told Mr Tai that the sex was consensual.

[19] Ms Service told the Court that she was horrified to hear about the incident. She continued:

It is a situation that I would never wish on anyone. I felt frustrated that (the student) had visited the venue out of course time and that she had done this in an intoxicated state. At the time I believe that I had done everything to manage the risks to run a valuable activity. It had not occurred to me that a student would return to the venue late at night.

[20] Ms Service then described how she met with Mr Tai and expressed her concern that he had not told her immediately about the incident. Mr Tai confirmed that the student had told him that the sex had been consensual and he was shocked to hear that she "had now changed her story". He explained that the reason he had not informed Ms Service at the time was that he felt he was working in the best interests of the student. Ms Service instructed Mr Tai to immediately cancel the mechanics' course and she also told him to go to the police station and give his statement. They discussed how they would need to speak to Ms Ward, the Team Leader, and ensure that the other students were not told about the incident so as to protect the student's identity.

[21] Ms Service told the Court how she then reported the matter to Mr Tindall:

I informed Peter Tindall, the then CEO, of this situation. I explained how I had found out the information and briefed him again on how the course had

been arranged by Adam and the preparation I had done including the MOU, police check and parents' permissions.

I explained to Peter Tindall that (name of student) had disclosed earlier to Adam and the reason he had given as to why he had not told me immediately. We discussed the fact that it occurred out of course hours, that it did not involve a staff person and that it was in the hands of the police.

Peter and I often met and chatted over the education business and any positives or issues. In these chats I updated him where there was any new information. Peter and I had a good trusting and supportive relationship. Peter agreed with my view that it was in the hands of the police and took no action in regard to this matter and left me to deal with it.

I did not complete an Incident report as this was not an incident occurring in YMCA time. I also knew it was being handled by the Police and therefore did not investigate it further.

[22] Ms Service said that she met with the student and Mr Tai and offered the student the option of moving to another programme but she declined, stating that she did not want to change programmes because she had a good relationship with Mr Tai. Nor did she want "the situation blown up". Ms Service agreed that she would be discreet and respect her wishes. She did not discipline Mr Tai because she felt that he had learned from the situation and it was important that he continue working with the student. She said that Mr Tai had agreed, in hindsight, that he should have advised her immediately about the incident as soon as the student had reported it to him.

## **The new CEO**

[23] Mr Peter Tindall was employed as the Chief Executive Officer of the YMCA in Christchurch between October 2006 and July 2008. He then left New Zealand and returned to the United Kingdom. His replacement was Ms Josie Samantha Ogden-Schroeder, who took up her position as CEO on 6 July 2008.

[24] Prior to her appointment, Ms Ogden-Schroeder had been a Senior Manager with the YMCA having the responsibility for Wainui Park and Youth & Outdoors. She had been in full-time employment with the YMCA since July 2000. She holds a BA and an LLB degree. Prior to her appointment at Wainui Park, Ms Ogden-Schroeder had served three years in the New Zealand Police.

[25] There was evidence of alleged rivalry and of a rather strained relationship at times between Ms Ogden-Schroeder and Ms Service but, apart from noting the fact that Ms Service had also been one of the applicants for the CEO's position, I did not find that evidence particularly helpful or relevant to the issues I have to determine.

### **The anonymous complaint**

[26] The next development occurred almost 20 months after the incident relating to the mechanics' course. Ms Ogden-Schroeder told the Court that on Thursday, 29 October 2009 she received "an anonymous" telephone call from a woman called "Gail" who did not wish to divulge her surname. She said that the woman told her about the alleged rape incident back in early 2008 and she "was threatening to go to Close Up and stuff." The woman claimed to be a friend of the victim's mother.

[27] On 3 November 2009, Ms Ogden-Schroeder tried to contact Ms Service but she was not available and so she spoke to Ms Ward, the Team Leader of TK3. She said Ms Ward confirmed that such an incident had occurred and that the information the anonymous woman had disclosed was true but she was unable to talk about it further. Ms Ward told Ms Ogden-Schroeder that she wanted to meet with Mr Scott present and she asked Ms Ogden-Schroeder not to tell Ms Service about the meeting. Ms Ogden-Schroeder agreed and she put off speaking to Ms Service until after she met with Ms Ward again on 20 November 2009. Mr Scott was not available as he was off work on sick leave.

[28] Ms Ogden-Schroeder said that at the meeting on 10 November 2009 Ms Ward had confirmed many of the details provided by the anonymous caller and had added more details. Ms Ogden-Schroeder was concerned in that Ms Ward "was obviously involved and the potential was that she was sanitising the events".

### **Meeting with Ms Service**

[29] The following day, Wednesday, 11 November 2009, Ms Ogden-Schroeder met with Ms Service. She told the Court that she rang Ms Service and asked if she could come to her office for a quick chat (they worked from different buildings). Referring to the same meeting, Ms Service told the Court that she had no idea what

the meeting was going to be about. She said that Ms Ogden-Schroeder asked her about the student (referring to her by name) but she (Ms Service) could not recall the name and she pointed out that she had over 100 students at any one time on a number of programmes and she would need to check past class lists. Ms Ogden-Schroeder then mentioned that it was about a mechanics' course in early 2008 and that prompted her memory.

[30] Ms Service continued:

There was an expectation that I should remember all the facts and a sense of interrogation. I found this meeting difficult as I was totally caught on the spot being expected to remember details that were 20 months old. I tried to honestly answer her questions but my recall was not clear. Josie asked me what I felt about the situation. I answered the best I could considering that I was totally unprepared, trying to recollect the situation, looking for documentation while feeling under pressure and also like I was on the witness stand. I produced some notes which assisted a little and which Josie took from my office and did not leave me with a copy. She asked me what I could have done better. My answer was that I wished I had kept better notes as I could not find information easily to help me prompt my memory. I was told that this was serious and that she was going to investigate it.

She stated that she would talk to Jonelle and Steve but first asked me to arrange for Adam to meet with her the following Tuesday at 3 p.m. (Now reading Josie's notes I see she had already met with Jonelle but did not tell me this). I do not feel this was an honest action instead it seems to me she was ambushing me.

[31] Ms Ogden-Schroeder said that, because of her concerns over "Roz's responses and the documents supplied" she believed the situation was potentially serious enough to warrant a full and formal investigation. She added:

The meeting was not long. I would estimate about 10-15 minutes. I did not delve into further details because Roz was flustered with the questioning. I was aware that I would need to investigate further and in order to aid me with that I took what paperwork Roz was able to find on the issue. I told her at that stage that I felt the issue was really serious, and that I thought I should have been told about it. Roz was amazed that I regarded it serious and that I was raising it after such a long time.

[32] Both women made notes of the meeting on 11 November 2009. They are reasonably consistent with one exception which assumed some significance and was closely scrutinised by both counsel. At one point during the conversation, Ms Ogden-Schroeder asked Ms Service whether she had spoken to Mr Tindall about

the incident at the time. The relevant passage from Ms Ogden-Schroeder's typed notes reads as follows:

I asked if Roz had spoken to Peter Tindall about it – not sure – can't remember? I asked if Roz had been to see (the student's) mother/family? Roz not sure – can't remember?

Ms Service, in her handwritten notes, records the exchange in these terms:

...

J. (Josie) - did I talk to family.

R. (Roz) - I don't think so – staff were in contact. (The student back @ course (sic). I wanted to move her to TK2 – she not want to move. Adam willing to work with (student).

J. - Did you talk to Peter Tindall

R. - Roz did not answer this.

...

[33] In cross-examination Ms Service was asked why she had not answered the question and she replied:

Because I remember that I was busy looking in my files and looking for things and I remember not actually answering that question at that time. I remember not answering it.

[34] Ms Service said that as Ms Ogden-Schroeder left her office on 11 November 2009 she turned to her and asked: "Are there any more skeletons in the closet?" Ms Service said that she felt "confused, attacked and in an emotional turmoil". As she had been requested, Ms Service then arranged for Mr Tai to meet with Ms Ogden-Schroeder on Tuesday, 17 November 2009. For her part, Ms Ogden-Schroeder arranged to meet with the student's family that same evening. She told the Court that she acknowledged that the YMCA was responsible for what had happened and she apologised to the family.

[35] Among the documentation produced in evidence was an email from Ms Ogden-Schroeder to the YMCA Executive Committee dated 14 November 2009 (sent after the one preliminary meeting with Ms Service on 11 November 2009) advising them, in her words, "of my knowledge to date". The contents of that email

were relied upon by Mr Goldstein to support his proposition that Ms Service had never been given a fair disciplinary hearing. Counsel contended that Ms Ogden-Schroeder had prejudged Ms Service's guilt before she had been given proper opportunity, with the assistance of counsel or other representative, to answer the charges and explain her side of the story. The particular passages in the email which Mr Goldstein relied upon in this regard read as follows:

I feel that there has been some fairly obvious breaches of the employment relationship by both Roz and Adam.

...

She (Ms Service) has not demonstrated the judgment that I would have thought was basic considering her role and experience. She also appears to have been woeful in her ability to manage Adam's performance.

...

I question the honesty of some of her statements at the initial meeting also – but this is subjective.

Having now spoken to the victim in all of this, I am quite certain that the rape would not have occurred if it were not for the poor judgments and decisions made by the YMCA (ie: Roz).

...

I believe this incident is an example of serious negligence in carrying out that duty of care.

...

I wonder what else goes on if this is an example of how Roz manages a serious incident at the centre?

...

[36] The meeting Ms Service had arranged between Mr Tai and Ms Ogden-Schroeder for 17 November 2009 was unable to proceed because Mr Tai was on sick leave that day. Ms Service told the Court:

On Tuesday 17 November I phoned Josie to inform her that Adam was sick and unable to attend the arranged meeting. She sounded unperturbed about this and then requested that I meet with her after my staff meeting that day instead. I went to her office with no idea of the reason for this meeting. I started the meeting on a positive note with a brief about an advisory group meeting I had attended that day.

Josie put the files I had given her on her desk. She told me that this incident was serious, that it could cost me my job. She stated that I was stood down for two days on full pay. I was stunned. I said that I felt this was “over the top”. I tried to explain that the incident was out of course time, that it had occurred last year and the Police had dealt with it.

Josie stopped me talking and stated it was not the time to explain. She did not want to hear what I wanted to say. I then got up to leave as I felt she did not wish to hear my opinion. Josie insisted that the meeting was not over and again stated that I was stood down for two days on full pay – and what did I have to say about that. I was stunned and frustrated that I was not being given a voice so my answer was that she was my boss.

She instructed me to not talk to my staff or the students, to clean out my personal belongings from my office and to give her my key. I immediately felt that I was being banned from my office. Being told to take my personal belongings made me feel like I was not going to return. That I had been fired. She gave me the notes I had given her on 11 November and the copy of her notes of her investigation.

I left her office feeling stunned. I did not expect the meeting to finish up with a suspension. I felt I had not been able to speak, only able to answer her specific questions related to her standing me down and to meet her in two days. I had no idea that my employment would be at risk and had not been advised that this could be the case or that I could take a support person with me. I left distressed as to what my staff would be told, what work needed to be attended to and that I was forbidden to contact them.

I returned to my office and looked around at what had been my world for seven years. I was unsure what to pack but had been told to take all my personal belongings so started to pack my personal books, knickknacks, pictures etc. This took some time as I was so stunned that I could not think straight or function well. I was unable to clearly remember all the bits and pieces that were personal to me. I had some important projects on the go and felt confused as to what would happen to them. Eventually I left, locked my door and dropped my keys back at the head office. This was exceptionally difficult as I felt unable to talk to reception as I was confused, humiliated and felt ashamed.

I was made to feel like a criminal unable to talk to my staff. I went from managing 18 staff to not having any contact. This created a huge empty space. I was in the process of negotiating contracts, applying for funds for projects, writing budgets and proposals for 2010, and preparing for staff salary increases as well as preparing for the NZQA Education audit. I felt suddenly numb, stunned, confused and lost.

[37] Referring to the meeting of 17 November 2009, Ms Ogden-Schroeder confirmed that she had had a separate meeting with Ms Service and with Mr Tai and she had “read from a prepared script” (prepared by the YMCA lawyer). She said the purpose of the meetings had been to explain that she had completed an initial investigation and had concluded that the issues raised were potentially serious and

that she had decided to formally investigate their involvement in the incident. She continued: “I explained that because the matter was serious I preferred to suspend them and I gave them both the opportunity for input into the proposed suspension before I suspended. I ultimately decided to suspend them both. I set up future meeting dates and advised them to get representation. The meeting with Roz was relatively fast and stuck closely to the script. Roz did not take notes. During the meeting Roz began to explain the incident, I tried to stop her.”

### **The dismissal**

[38] After the meeting on 17 November 2009, Ms Service instructed Mr Goldstein in the matter and on 19 November Mr Goldstein wrote to Mr Zwart, who he knew was acting for the YMCA, raising a personal grievance in relation to his client’s suspension. Mr Goldstein alleged that Ms Service had been “ambushed” in relation to the meetings of both 11 November and 17 November in that she had not been told what the meetings were going to be about and she had not been given any opportunity to have representation at the meetings. He noted that the employment agreement did not give the YMCA authority to suspend and he claimed that the decision to suspend his client had clearly been predetermined. Mr Goldstein also noted in his letter that since the initial meeting of 11 November 2009 his client had had time to reflect on what happened back in February/March 2008 and he went on to state:

I have been instructed to make it quite clear that at the time the (name of female student) issues arose, which was in February/March 2008, my client fully briefed Mr Tindall, the then CEO. Mr Tindall took no action against my client and in fact was very supportive.

Plainly Mr Tindall took the view that disciplinary action against my client was not required.

This matter was fully resolved one and a half years ago. Your client cannot now seek to re-open the matter in such circumstances.

[39] Mr Zwart replied to Mr Goldstein’s letter the same day. He denied that Ms Service had been “twice ambushed” as alleged. He said the first meeting on 11 November 2009 had been “an initiating meeting to determine whether an investigation was necessary” and the second meeting on 17 November 2009 had been “to confirm the decision to investigate fully.” Mr Zwart said:

We acknowledge Ms Service's changed position regarding her advice to the preceding CEO, Mr Peter Tindall. In the absence of a further opportunity to discuss this matter with Ms Service and/or Mr Tindall, that position is not accepted at face value. The Board advises that Mr Tindall was normally fastidious about reporting significant issues. The Board as a whole had no knowledge of this issue until put to them by Ms Ogden-Schroeder.

[40] Further correspondence passed between the two legal advisers and they both attended a meeting with their respective clients on Wednesday, 25 November 2009 when the issues were further discussed. That meeting was then adjourned to allow Ms Ogden-Schroeder to speak to the Probation Officer and to try to make contact with Mr Tindall in the United Kingdom. A further meeting was convened for Monday, 7 December 2009. In the meantime, the YMCA Board of Trustees held a board meeting on Monday, 30 November 2009. Ms Ogden-Schroeder had prepared a written report for that board meeting which was produced in evidence. Mr Goldstein contended that the report provided further confirmation that Ms Ogden-Schroeder had already "made her mind up in regard to the plaintiff's continued employment". The passage relied upon by counsel reads:

I am of the opinion that Roz not only exercised very poor judgment, but also failed to report the incident upwards, to follow up in a manner which I would have thought was appropriate considering the seriousness of the allegations, and fundamentally was negligent in carrying out her duties as a Senior Manager.

[41] Prior to the meeting scheduled for Monday, 7 December 2009, Mr Goldstein received by way of email from Mr Zwart a copy of comments made by the Probation Officer, Mr Twaddle, and a copy of an email exchange between Ms Ogden-Schroeder and Mr Tindall. The evidence was that Mr Goldstein had been sent a copy of the email exchange between Ms Ogden-Schroeder and Mr Tindall at 9.00 am on Monday, 7 December 2009. He responded immediately by email asking Mr Zwart if the meeting scheduled for that day could be rescheduled for Thursday to enable him to consider the emails further with his client. He also requested "a record of what Josie said when she spoke to Mr Tindall". It transpired that Ms Ogden-Schroeder had made no notes of her 15 – 20 minute telephone conversation with Mr Tindall but she was relying upon an email she had sent to Mr Tindall after their conversation and his response. The request Mr Goldstein had made for an adjournment was refused and so the meeting proceeded. Discussion took place in relation to the emails and the meeting then adjourned for 5 to 10 minutes. When the

meeting resumed, Ms Ogden-Schroeder informed Ms Service that she no longer had trust and confidence in her and a further short adjournment was then taken to allow Ms Service to make an input into penalty. When the meeting was reconvened, Ms Service was summarily dismissed.

[42] In relation to her dismissal on 7 December 2009, Ms Service told the Court that Mr Zwart read from a typed document announcing the findings and it appeared to her that the document had been prepared before she gave her explanation in response to the emails. She said she had the strong impression that the outcome had been determined before the meeting. She added:

I was shocked that I was dismissed for something that had happened more than a year and a half ago in circumstances where my CEO at the time was fully aware of the situation and had supported me and had taken no action against me. I felt that when this matter arose the police were involved and it related to something that occurred outside of the YMCA's control.

[43] In response to a written request from Mr Goldstein, Mr Zwart, in a three-page letter dated 9 December 2009, set out the reasons for Ms Service's dismissal. I will not repeat the whole of the letter but in the first section Mr Zwart deals with the claim by Ms Service that she fully briefed Mr Tindall at the time the issues in question arose and he, as CEO, took no disciplinary action against her but was, in fact, very supportive. In response to that claim, Mr Zwart said:

1. In our view it is therefore most likely that Roz did not tell Peter Tindall of this situation or that it (sic) she did she did not fully brief him of the seriousness of the situation. We have reached this decision because:
  - i) Peter Tindall has stated that he has no recollection of having discussed any allegation of rape between a volunteer and a student.

[44] Five other points were listed in roman numerals under paragraph 1 of Mr Zwart's letter but the point just stated about Mr Tindall's recollection was the most significant. The other points noted were more along the lines that Mr Tindall did not advise the Executive Committee or the Board about the incident either verbally or in writing and others involved such as the tutors had no knowledge of Mr Tindall having been advised. In her evidence, Ms Ogden-Schroeder conceded that there was an error in Mr Zwart's letter in relation to the knowledge of the tutors.

Ms Ogden-Schroeder confirmed that in one of her interviews with Ms Ward, the Team Leader, she had told her that Ms Service mentioned to her at the time of the events that she (Ms Service) had reported the matter to Mr Tindall.

### **Peter Tindall's involvement**

[45] The issue of Mr Tindall's involvement became quite pivotal. The President of the YMCA, Mr Edward Heald accepted that if Mr Tindall had been aware of what had happened and known what went on but had decided for whatever reason not to take disciplinary action against Ms Service, then that would have been a decision he, as CEO, would have been entitled to make.

[46] Mr Tindall did not participate in the Authority's investigation nor did he appear as a witness before the Court. The evidence was that, after several attempts, Ms Ogden-Schroeder succeeded in making telephone contact with him in the UK at approximately 10.00 pm on Friday, 4 December 2009. She said they spoke for about 15 – 20 minutes and she then sent him an email with her understanding of the conversation. Her email read:

Hello Peter,

Good to talk to you on the phone. Thanks very much for your help.

Would you mind sending me a brief email just confirming what you said you recalled from early last year. I appreciate it was a long time ago –

1. That you do vaguely recall a conversation at some point with Roz about a person who was on home detention but was assured that the person had no convictions that would be of concern. That you thought drug offences would be inappropriate.
2. That you had talked to Roz on various occasions about Adam and his drug use outside of work.
3. That you have no recollection of hearing about an incident of alleged rape of a student from the course, by a person engaged as a volunteer of the Education centre.
4. That something that serious, you think you would have certainly communicated to the Executive Board.
5. That if the conversation had occurred, there would be a paper trail – notes on staff files etc.

It would be great if you could just confirm that this is a fair summary.

Many thanks and again, my regards to you and your family.

Josie

[47] Mr Tindall responded by email which records:

**Sent: Saturday, 5 December 2009 12:15 a.m.**

Hi Josie

That is a fair summary of our conversation.

I wish I could be 100% sure of exactly what was and was not said, as Roz and I usually discussed her concerns in a fair amount of detail, but with the passage of time I honestly can't remember any detailed conversations about the type of offence referred to, and so in the absence of any paper or electronic record (which I would always have strongly recommended were made at the time precisely to provide an audit trail if required), I cannot confirm that such a conversation did take place.

Hope that helps.

With best wishes,

Peter

[48] Immediately following Ms Service's dismissal on 7 December 2009, Mr Goldstein gave notice to Mr Zwart that he had been instructed to file an urgent application with the Authority seeking his client's immediate reinstatement to her former position. Referring to this development in her evidence, Ms Ogden-Schroeder told the Court:

On December 7 after the decision had been made to terminate and we had been advised of the intention to initiate a grievance we wrote to Peter Tindall setting out our view of the facts of the case and asking him to provide a full affidavit in answer to specific questions. He provided an affidavit on 10 December but has repeatedly refused any further response to the YMCA.

[49] The lengthy email to Mr Tindall requesting an affidavit was actually written by Mr Zwart. Mr Zwart summarised the relevant events that had occurred back in January/February/March 2008 and then requested Mr Tindall's response to a number of issues. One of those issues was:

7. Do you agree with Roz' statement that "*at the time the (student's name) issues arose, which was in February/March 2008, (Roz) fully briefed (you) the then CEO. (You) took no action against (Roz) and in fact was very supportive*".

[50] What Mr Tindall said in his responding affidavit became the subject of considerable attention during the course of the hearing. As it was not challenged by either side, I set out the relevant provisions of the affidavit in full, commencing from paragraph 4 where he referred to the telephone conversation with Ms Ogden-Schroeder on 4 December 2009:

4. We discussed the incident in a conversation that I would estimate lasted between 15 and 20 minutes, and following that Josie sent me an e-mail summarising the conversation and asked me to confirm that it was a fair summary of our discussion which I did. The call was unexpected and was the first communication I had received concerning the incident. We did not discuss any detailed statements provided in relation to the case, other than (sic) Josie's description of events which included a reference to Roz's statement that she had discussed the matter with me at the time.

5. I frequently discussed matters relating to the Education Services provided by the YMCA with Roz and provided her with support during my time as CEO. On reflection since the phone call, I would have thought it likely that Roz 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, that 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. Regrettably I cannot recall exactly when this conversation took place, nor any further details of conversations at the time or later, either in relation to the incident in question or any other specific matters.

7. During my notice period I did meet with Guy with the exception of his absence on holiday as noted above, so that there would be continuity as Josie took up the role of CEO. I would have advised Guy and the Board of any significant on-going risks to the YMCA at the time of my departure but not necessarily of any issues that had arisen during my term and were deemed closed and presenting no continuing risk to the YMCA or any of its members or service users.

## **Discussion**

[51] There was no dispute about the relevant legal principles applicable to a case of this nature. The test for determining whether the plaintiff's suspension and subsequent dismissal were justified is the same in each case. It is the test for justification as set out in s 103A of the Employment Relations Act 2000 (the Act). The issue of justification is to be determined on an objective basis by considering whether the employer's actions, and how the employer acted, were what a fair and

reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[52] In *Air New Zealand Ltd v V*,<sup>2</sup> the Full Court considered the meaning and application of s 103A, concluding relevantly that the section required the Court to determine the question of justification of an employer's decision on an objective basis. The obligation to justify a dismissal or action is on the employer who has to show that the decision was fair and reasonable in all the circumstances prevailing at the time it was made, judged against the objective standard of a fair and reasonable employer. It is not the standards that the Authority or the Court might apply had they been in the employer's position but rather what these bodies conclude a fair and reasonable employer in the circumstances of the actual employer would have decided and how those decisions would have been made. The section encompasses not just the employer's inquiry and decision about whether misconduct has occurred and its seriousness, but also an inquiry into the employer's ultimate decision in the light of that finding.

[53] The principal submission made on behalf of the plaintiff was that the issues involved in the case had been resolved and dealt with 20 months earlier. It was contended that the plaintiff had then fully explained what had occurred to Mr Tindall, the CEO, and Mr Tindall, being aware of the incident and the events surrounding it, took no action against her but was "supportive". It was contended that, in these circumstances, the defendant was precluded from revisiting its earlier decision. In the alternative, the plaintiff submitted that, even if the defendant was entitled to reinvestigate the incident, the suspension and dismissal were substantively unjustified and the investigation itself was procedurally unjustified because it was conducted in an unfair and prejudicial manner with the outcome being predetermined.

[54] In response to the plaintiff's principal submission, Mr Zwart submitted that there was no evidence that Mr Tindall had "investigated the conduct" 20 months earlier and, in any event, Mr Tindall's actions did not "prohibit the subsequent investigation by the employer. This is particularly so when the unchallenged evidence is that the Board were not aware of the incident." Mr Zwart placed reliance

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<sup>2</sup> [2009] ERNZ 185, (2009) 9 NZELC 93, 209, (2009) 6 NZELR 582.

on the majority decision of the Labour Court in *Northern Clerical etc IUOW v Goodman Fielder Wattie (NZ) Ltd*<sup>3</sup> which he claimed was analogous to the present case subject to his reservation that Mr Tindall had not investigated the case or given the plaintiff any assurance that no action would be taken against her. Mr Zwart also submitted that the time delay of 20 months, “although significant”, did not render the defendant’s dismissal decision an unreasonable one. In this regard, counsel placed reliance on the decision of Chief Judge Goddard in *Petersen v Board of Trustees of Buller High School*.<sup>4</sup> Finally, in relation to the plaintiff’s other allegations, Mr Zwart reviewed the evidence in some detail and submitted that the suspension and dismissal were both substantively and procedurally justified. He strongly denied Mr Goldstein’s submissions that Ms Ogden-Schroeder had displayed bias and predetermination and that her investigation had been carried out in an unfair and prejudicial manner. Referring to the observations made by Ms Ogden-Schroeder in her emails and report to the Board, Mr Zwart submitted that her comments were opinions on the facts at that stage and “not final determinations”.

[55] One of the interesting observations made by the Authority Member in his determination was that there was a basic “difference of philosophy” between Ms Ogden-Schroeder and Ms Service. He described Ms Service as a “pragmatist” and commented that:<sup>5</sup>

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 it’s only obligation was to be responsible during class time.

Turning to Ms Ogden-Schroeder he described her as: “an idealist who took her responsibilities very seriously and who sought to impose very high standards on the organisation that she leads.”<sup>6</sup> I respectfully agree with those observations. Although the Court did not have the advantage of hearing evidence from Mr Tindall I suspect, from all I heard and read about Mr Tindall, that his philosophical approach as CEO would have been more akin to that of Ms Service rather than to that of his successor.

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<sup>3</sup> [1989] 1 NZILR 697.

<sup>4</sup> [2002] 1 ERNZ 139.

<sup>5</sup> At [22].

<sup>6</sup> At [23].

[56] Having considered all the evidence very carefully, as well as counsel's submissions, I have come to the clear view that Ms Service did, in fact, keep Mr Tindall informed of all relevant developments at the time that they occurred and that Mr Tindall as CEO, being fully aware of the incident and the surrounding events, was supportive of Ms Service and did not deem it necessary to instigate any disciplinary action against her. In other words, he basically shared her view that, given the highly unusual circumstances of the case and the fact that the incident happened well outside of class time, it was not the YMCA's responsibility. Pivotal in their decision was the fact that the matter was in the hands of the police.

[57] For the record, I accept the evidence that Ms Service gave in relation to all her contacts and communications with Mr Tindall. I also prefer Ms Service's evidence in relation to the question Ms Ogden-Schroeder had asked her at their initial meeting on 11 November 2009, namely, whether she had talked to Mr Tindall about the matter. I accept that Ms Service was taken completely by surprise over the allegations raised at that meeting, some 20 months after the event, and she was desperately trying to find some note or documentary evidence in her file so she did not answer the question. The true position was clarified by Mr Goldstein in his letter to Mr Zwart of 19 November 2009.

[58] One point that Mr Zwart emphasised repeatedly in his submissions was the fact that there was no evidence that Mr Tindall had carried out an "investigation" into the incident and there was no evidence that he had reported the matter to the YMCA Board or executive members. In my view, however, the most likely explanation for both these observations is that Mr Tindall, sharing Ms Service's philosophical outlook, simply did not see any responsibility on the part of the YMCA for what had happened and so there was no need for an internal investigation. Such a reaction would be consistent with the statement made in the concluding paragraph of his affidavit, namely, that he would have advised "the Board of any significant on-going risks to the YMCA at the time of my departure but not necessarily of any issues that had arisen during my term and were deemed closed and presenting no continuing risk to the YMCA or any of its members or service users." The obvious implication from this statement in its context is that, in so far as the defendant's CEO was concerned at the relevant time, the matter was closed. Mr Zwart also

emphasised the fact that Mr Tindall had no recollection of an alleged “rape” but the evidence was that there was confusion at the time over whether there had, in fact, been a rape or whether the sexual acts had been consensual. Mr Smith was never prosecuted for rape.

[59] One interesting aside was that after her dismissal, and not before, Ms Service was able to make email contact with Mr Tindall in the United Kingdom. Much later, on 2 June 2010, she forwarded him a copy of the determination of the Authority dated 28 May 2010. Relevantly, in his email in reply dated 4 June 2010, Mr Tindall said:

Thanks for the update. I’m glad things were found in your favour, even if it was significantly tempered in the reduction in the award.

I really couldn’t have said anymore than I put in the affidavit anyway – and on reading the findings, it is interesting that the view clearly expressed is that your own account should have carried more weight anyway.

In other words, Mr Tindall expressed no element of surprise over the Authority’s acceptance of Ms Service’s evidence. I find his reaction consistent with his affidavit evidence that he simply could not remember any more than what he stated in his affidavit but he certainly was not challenging any part of Ms Service’s recollection of the events.

[60] I briefly refer now to the two authorities relied upon by Mr Zwart. In the *Goodman Fielder Wattie* case the grievant, a wages clerk in a division of the respondent company, deducted a sum of money from a fellow employee (her ex-boyfriend) which she claimed was owing to her and direct credited it to her own bank account. The incident was reported to a manager (but not her direct manager) and he, noting the money had been repaid, decided to take the matter no further. Three months later, the grievant’s line manager found out about the issue and dismissed her for misconduct. Judge Travis, delivering the judgment of the majority, held that the three months was not a delay on the part of the employer as the line manager was not aware of the incident until immediately before the dismissal. He went on to hold that even if the actions of the manager who decided to take no action could be attributed to the employer, it would not render the later dismissal unjustified given the fact that the wages clerk had previously received a final warning and also

having regard to the seriousness of a pay clerk making unauthorised deductions for her own benefit. In my view, that case can clearly be distinguished on its facts. There can be no question that Mr Tindall, as the CEO, was the responsible representative of the employer.

[61] In the *Buller High School* case an ex-pupil laid a complaint of sexual impropriety against the applicant teacher some 22 years after the event. The Board of Trustees set up a committee to investigate the complaint and the teacher was summarily dismissed for serious misconduct. A complaint had previously been made to the school's principal at the time of the alleged relationship in 1976 but on investigation at that time, the pupil retracted the allegation and the applicant's employment was affirmed. One of the issues before the Court was the allegation by the applicant that it was "inherently unfair" for him to have to answer in respect of alleged conduct on his part 22 years earlier. Again, that case can be distinguished on its facts. The new complaint against the applicant was much wider than the original complaint in 1976 and included the applicant's behaviour subsequently in relation to another female complainant. In the present case, there were no significant new material facts that had emerged over the 20 month period between Mr Tindall's involvement and Ms Ogden-Schroeder's investigation.

[62] What happened in the present case is that the incident in question was appropriately brought to the attention of the employer by the employee and the employer, through its CEO at the time, determined that the matter had been handled adequately by the employee and no disciplinary action was necessary. Some 20 months later a new CEO, from a different background and with different values and expectations, heard about the historical incident and proceeded to re-open the matter through a formal disciplinary investigation. In my view except in exceptional circumstances, which do not exist in the present case, such action is inherently unfair and unjust and is not the type of conduct that a fair and reasonable employer would embark upon. It is not without significance that Ms Ogden-Schroeder's very first note about the phone call from the "anonymous" woman was headed: "Notes re: Complaint about *historical incident* involving YMCA Education Centre" (emphasis added).

[63] Mr Zwart submitted that the s 103A justification criteria had to be determined based on all the circumstances and the knowledge of the employer at the time of the dismissal. He stressed that as at 7 December 2009 (the date of dismissal) the YMCA believed, based on Ms Ogden-Schroeder's one telephone conversation with Mr Tindall, "that Peter Tindall had been partially informed, but that he had not been fully informed. They believe for example that he did not know of the alleged rape." In reply, Mr Goldstein submitted that Mr Tindall's email response did not "prove a negative as submitted by Mr Zwart. It merely states that he could not recall or remember being advised of an incident of alleged rape." Mr Goldstein goes further and submitted that a fair and reasonable employer would not have undertaken the interview with Mr Tindall in the way that Ms Ogden-Schroeder did. As counsel expressed it, she "failed to provide him with any information in writing and caught him on the hop. A fair and reasonable employer would have provided him with written information and then asked for a detailed response. The defendant did this after the dismissal."

[64] I accept Mr Goldstein's submissions in this regard. There was no transcript recorded of the 4 December 2009 telephone conversation. I think it likely that the answers given to questions asked in a cold-call telephone communication of this nature relating to an historical incident will almost inevitably take their flavour from the direction the caller is leading the discussion.

[65] As the *Air New Zealand Ltd v V* case affirmed, the s 103A test of justification encompasses an employer's inquiry as well as the ultimate decision based on such an inquiry. In other words, an employer is obliged to conduct a fair and full investigation before reaching any decision to dismiss and if, for whatever reason, it decides to cut short that investigation and rush to judgment then it must bear the consequences. That is effectively what the defendant was guilty of in the present case. It had before it the very clear assertion made by Mr Goldstein on the plaintiff's behalf that she had kept Mr Tindall fully informed of the events that had happened 20 months previously. Ms Ogden-Schroeder also had confirmation from Ms Ward that Ms Service had told her at the time of the events that she had reported to Mr Tindall. Instead of accepting these statements in good faith at their face value, the employer preferred to draw conclusions adverse to Ms Service from the cold-call

telephone conversation with Mr Tindall and his vague and ambiguous email response. After the dismissal, the employer proceeded to obtain affidavit evidence from Mr Tindall. The affidavit evidence was helpful to the plaintiff's case. I agree with Mr Goldstein that a fair and reasonable employer would have held off making the ultimate decision to dismiss until it had received an affidavit or more compelling evidence from Mr Tindall.

[66] The parties to an employment relationship are expected to pay more than lip-service to their obligation under s 4 of the Act to deal with each other in good faith. A high degree of trust and confidence should be reposed by an employer in an employee with almost 20 years' experience in senior management roles. But that was obviously not the situation in the present case. Instead of accepting the plaintiff's account of the historic events, the employer opted to act on the vague and ambiguous recollections of its former CEO obtained in questionable circumstances through what Mr Goldstein fairly described as an ambush telephone call.

[67] Given my conclusions on this aspect of the case, it is not necessary for me to deal with the other issues that were the subject of comprehensive submissions by both counsel. Without going into any detail, therefore, I nevertheless record that, if necessary, I would have upheld the plaintiff's complaint that, in terms of the s 103A criteria, both the suspension and the dismissal were substantively and procedurally unjustified. It is crucial in any investigation of an historical incident which may result in grave consequences for an employee that the employee is given adequate time (making proper allowance for the lapsed time since the event) in which to consider the allegations, research files or other relevant documentation and take advice before responding. That simply did not happen in the present case. The evidence shows that by the time the plaintiff's legal counsel had become involved, Ms Ogden-Schroeder, as the investigator, had already formed fixed views which were not to change. Those are not the actions of a fair and reasonable employer.

## **Contribution**

[68] It follows from my findings and conclusions in upholding the plaintiff's challenge that this is not the type of case where it could be said that the plaintiff had

contributed in any way to the situation giving rise to her personal grievances and, accordingly, I make no reduction under s 124 on account of contributory behaviour.

## **Remedies**

[69] Although the plaintiff did not seek to challenge the remedies ordered by the Authority, the defendant in response sought a full hearing de novo which meant that all the findings of the Authority, including the orders made as to remedies, were at large. Before making any deduction for contribution, the relief granted by the Authority comprised \$20,000 for wages lost, \$18,000 in compensation for non-economic loss together with costs and the Authority application fee. Those figures would have been based on the evidence presented at the Authority's investigation on 18 March 2010.

[70] There was significant evidence called on behalf of the plaintiff in this Court in relation to the nature and extent of her lost remuneration, lost benefits and non economic loss. Her claims in respect of lost remuneration and her non economic loss have increased significantly since the Authority's determination. I deal with each in turn.

## **Economic loss**

[71] For lost remuneration the plaintiff seeks, pursuant to s 123(1)(b) of the Act, the sum of \$60,309.93. At the time of her dismissal on 7 December 2009, she was earning \$66,726 a year or \$1283.19 a week gross. She claims the loss of her weekly earnings for a period of 50 weeks less three weeks' wages for the period she was briefly reinstated by an order of the Authority. The amount claimed, therefore, represents 47 weeks' loss of earnings at \$1293.19 per week making the total of \$60,309.93.

[72] In cross-examination, Mr Zwart obtained a concession from Ms Service that for a period during the winter she had helped out on a voluntary basis at a ski area, when required. She told the Court that she was not paid for the work but it gave her "some sanity and some time to get away". The more substantial challenge the

defendant made to the claim for loss of earnings was that the plaintiff had “abandoned reinstatement” and thus failed to mitigate her losses.

[73] The background to the reinstatement saga was that after her dismissal, Ms Service had applied for interim reinstatement and her application was granted. The Authority Member in the determination before the Court dated 28 May 2010 records what then happened:

[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 was 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.

[74] Against that background, particularly the recorded finding by the Authority Member that the “YMCA was vociferous in its submissions that Ms Service could not return to work in its workplace”, I find counsel’s submissions about her having “abandoned reinstatement” quite extraordinary. In all events, Ms Service gave detailed evidence as to the reason why she decided not to pursue reinstatement including evidence about “an atmosphere of division, distrust and suspicion that had occurred” since her dismissal. She told the Court, “I felt that if I continued I would

be exacerbating the situation and in the interests of the young people, the students, the staff and my beliefs I felt it untenable to continue.” She was not challenged on any of this evidence nor were the two medical specialists who were called as witnesses on her behalf. Given her considered decision not to pursue her claim for permanent reinstatement, which was understandable having regard to the strong reaction from the YMCA, Ms Service’s further decision not to remain on garden leave was both understandable and responsible.

[75] The first of the two medical specialists called on behalf of the plaintiff was Dr Sue Hamer, a highly qualified medical practitioner who had seen the plaintiff on 22 February 2010, 22 April 2010 and 28 July 2010. Dr Hamer told the Court that in February the patient was suffering from stress relating to her dismissal, she was tearful, not sleeping well and not able to think clearly. She was struggling to understand what had happened. Her self-esteem had been affected. The doctor confirmed that she was unfit for work at that stage and “will remain so until this matter is resolved”. The doctor added:

I think the employer’s actions are totally responsible for her current state. She has coped with ongoing problems from her post concussion syndrome in the past without ever having any symptoms of depression and has been able to hold down a job with no problems. Her employer’s actions have left her feeling bewildered and unsupported. She doesn’t know what lies in the future and how she will be able to get another job.

[76] The Court also heard evidence from Dr Kay O’Connor who holds a doctorate in psychology and counselling training. Dr O’Connor told the Court that she had sessions with Ms Service in November and December 2009 and again on 15 February 2010. In a report dated 24 February 2010, Dr O’Connor stated:

I would be very worried were Roz to return to work at the same site of the YMCA because of the damage the organisation has done to her reputation and collegial relationships with staff in the past three months.

[77] As I have stated, none of this evidence was challenged and the submission by defence counsel that the plaintiff “has lost all right to lost earnings beyond the date that she abandoned reinstatement” is rejected. It is the type of submission which, when made in open Court, can only go to aggravate the harm and humiliation the plaintiff has already had to endure.

[78] Returning, therefore, to the plaintiff's claim for loss of earnings, Dr Hamer noted in April 2010 that Ms Service had been looking for work but had not found any. She said that she had been doing "a little bit of voluntary work and trying to do some exercise to manage stress." The doctor said that when she last saw Ms Service in July 2010 she recorded that, although she was still suffering from ongoing stress relating to the case, she was actively looking for work and the doctor opined that finding another job would assist her in moving on.

[79] The evidence from Ms Service herself was that she had applied for over 45 different positions and in some cases she had been shortlisted. She speculated that the most likely explanation for her failure to obtain other employment was the fact that her area of expertise was specialised and the opportunities were few and far between. She noted that one of the difficulties was that many job application forms specifically ask whether an applicant has been dismissed and she had never tried to hide that issue. She also suspected that prospective employers may have been discouraged because two articles about her case had appeared in *The Press* in Christchurch and these articles were able to be googled on the Internet via her name.

[80] In spite of making all reasonable efforts, therefore, to obtain other employment, Ms Service has been unsuccessful. In other words, as a direct consequence of her unjustified dismissal, she has been out of work for the full period claimed. In all the circumstances, I consider this to be an appropriate case for an award of the full amount claimed and, in the exercise of my discretion under s 128(3) of the Act, I award the plaintiff the sum of \$60,309.93 on account of her loss of wages.

[81] Under her employment agreement, the plaintiff was entitled to an allowance of \$520 per annum or \$10 per week. Under that head she seeks to recover the sum of \$470 as money lost as a result of the grievance and that claim is also allowed. The total amount awarded, therefore, pursuant to s 123(1)(b) is \$60,779.93.

### **Non-economic loss**

[82] The plaintiff seeks awards for humiliation, loss of dignity and injury to feelings in the sum of \$10,000 on account of her unjustified suspension and \$30,000

on account of her unjustified dismissal. Both claims are made pursuant to s 123(1)(c)(i) of the Act.

[83] In a report dated 24 February 2010, Dr O'Connor outlined the traumatic effect the YMCA's dismissal had had on Ms Service:

When I saw her in February (15/02/2010), she was still maintaining herself well, but the effects of what the YMCA has done and especially how they have acted are undermining her sense of worth and the validity of the relationships she had valued in the YMCA. She was still having difficulty sleeping and deflecting anxiety. The tight rein she has kept on her emotions has prevented her from expressing the anger at the injustice of the YMCA's actions and the grief of the loss of her professional work coupled with realistic concern at the effects of her dismissal on any likely new employer. The ongoing stress of the past three months are (sic) putting great pressure on her physical and psychological wellbeing. My concern is that self discipline may well not be able to prevent ill health.

[84] Following the next consultation on 31 August 2010, Dr O'Connor noted that Ms Service's "determination to stay well was carrying her through circumstances involving high stress." She concluded: "The actions of the YMCA have had inevitable results, and have severely limited her chances of finding a position which matches her abilities and experience. Professional reputation is easily impaired, and it is crucial for those who work in education and welfare. In my opinion, Roz is ready to fulfil the specifications of a position comparable to that which she had held in the past."

[85] The Court also heard compelling evidence from the plaintiff's husband and her two children about the practical and emotional effects her dismissal has had on her. At the conclusion of her own evidence, the plaintiff told the Court:

I have found it difficult to maintain my sense of self worth. I have tried to retain some daily routine but find the constant effort of looking for employment depressing. I desperately want to find fruitful employment, to regain some sense of who I am and to be able to provide for my family. This employment situation with the YMCA is constantly on my mind and continually exacerbates my feelings of humiliation, loss of dignity and injury to feelings.

[86] Mr Goldstein submitted that this was "one of those rare cases where a significant award of compensation was totally justified because of the dramatic effect the dismissal has had on the plaintiff". He submitted that the defendant's

failure in the dismissal process to recognise and acknowledge her long service “further exacerbated” the plaintiff’s hurt feelings.

[87] I accept these submissions but given the close proximity in time between the unjustified suspension and the unjustified dismissal I do not consider it appropriate to make separate awards under each head. The total amount I, therefore, award for humiliation, loss of dignity and injury to feelings on account of both the unjustified suspension and the unjustified dismissal is \$25,000.

[88] The plaintiff claims the sum of \$9038.36 for loss of benefit under s 123(1)(c)(ii), namely the loss of the use of a car provided by the YMCA. The amount is based on a proportion of \$10,000 which it is claimed is the annual value of the use of a motor vehicle. It was put to Ms Service by Mr Zwart that the car was given to her for work-related purposes only but she pointed out that under the provisions of her employment agreement special provisions related to the personal allocation of vehicles to managers. Under those provisions, she had the use of the car during weekends and holidays for use within a distance covered by one full tank of petrol. She was unchallenged in her response and so the claim for the loss of this particular benefit is accepted.

[89] Finally, the plaintiff seeks compensation for the loss of a further benefit, namely, the four percent employer contribution to her KiwiSaver Fund for the period she has been off work. Clause 34 of her employment agreement entitles her to such contribution and I order accordingly.

## **Summary**

[90] The plaintiff succeeds in her challenge and is entitled to compensation in respect of her unjustified suspension and dismissal. I find that there was no contributing behaviour on the part of the plaintiff.

[91] Pursuant to s 123(1)(b) of the Act, the plaintiff is awarded reimbursement of wages and other money lost as a result of her unjustified dismissal grievance in the sum of \$60,779.93.

[92] As compensation for humiliation, loss of dignity, and injury to feelings on account of both the unjustified suspension and the unjustified dismissal, the plaintiff is awarded, pursuant to s 123(1)(c)(i) of the Act, the sum of \$25,000.

[93] As compensation for loss of monetary benefits, the plaintiff is awarded pursuant to s 123(1)(c)(ii) of the Act \$9038.36 plus an amount equal to four percent of the employer contribution to KiwiSaver Fund during the period she has been off work. It is expected that counsel will be able to reach agreement on the KiwiSaver Fund contribution figure but leave is reserved, if necessary, to come back to the Court.

[94] The plaintiff is also entitled to costs and reasonable disbursements. If agreement cannot be reached between counsel on this issue, then leave is granted to Mr Goldstein to file submissions within 28 days and Mr Zwart is to have a similar period in which to respond.

A D Ford  
Judge

Judgment signed at 2.30 pm on 9 February 2011