

Non publication order

[1] Under clause 10 of Schedule 2 of the Employment Relations Act 2000, any evidence or information in this determination which may lead to the identification of any child referred to, shall not be published.

Employment Relationship problem

[2] Mrs Autagavia is a qualified early childhood teacher. She was employed as an Early Childhood Teacher by Tiny Town Learning Centres Ltd (“Tiny Town”) pursuant to a written individual employment agreement dated 4 February 2005. At the time of her dismissal on 11 December 2009 she was a Team Leader of Centre 2 on the Pakuranga site.

[3] On 11 December 2008, Paul Wilson who (along with his wife) is the owner and proprietor of Tiny Town, received a written complaint from Reshmi Chand (who was employed in Centre 4) which alleged that on 8 December 2009 she had seen Mrs Autagavia assaulting a child at Centre 2.

[4] Mr Wilson spoke to Ms Chand on the morning of 11 December 2009, who satisfied him that she was a reliable eye witness. Mrs Autagavia was then subjected to a disciplinary process that afternoon, which resulted in her summary dismissal that same day.

[5] Mrs Autagavia has raised a personal grievance claim for unjustified dismissal and she seeks remedies including reimbursement of lost remuneration and compensation for hurt and humiliation. She has also requested that a penalty be imposed on Tiny Town for a breach of good faith; breach of her employment agreement; and for a breach of s.103A of the Employment Relations Act 2000 (“the Act”).

[6] Mrs Autagavia accepted that if she had done what Ms Chand allegedly witnessed, then summary dismissal would have been appropriate. However, she denied the allegations against her and said her dismissal was procedurally unfair and substantively unjustified.

Issues

[7] In order to determine whether Mrs Autagavia's dismissal in this particular case was justified, the Authority is required pursuant to s.103A of the Act to ascertain whether:

- (i) Tiny Town conducted a full and proper investigation into the complaint that Mrs Autagavia had assaulted a child; and
- (ii) The outcome of its investigation disclosed conduct which a fair and reasonable employer would have categorised as serious misconduct; and
- (iii) if serious misconduct was established, would a fair and reasonable employer have summarily dismissed Mrs Autagavia in all of the circumstances at the time the dismissal occurred.

The law

[8] In determining whether Mrs Autagavia's dismissal was justified, the Authority must apply the justification test contained in s.103A of the Act. This states:

For the purpose of s.103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must 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.

[9] In *Lewis v. Howick College Board of Trustees* [2010] NZEMPC 4 the Employment Court held:

Section 103A requires an employer to justify a dismissal by establishing both limbs of the section, what might be called the 'what' and 'how' of the dismissal. Failure to establish either or both of the tests means that the dismissal will not be justified. As the requirement for a fair and reasonable process (the 'how' test), the Court does not look minutely and pedantically to see whether the employer has acted fairly and reasonably to a standard of perfection. Rather, the assessment is one of overall fairness and reasonableness in all of the circumstances of the parties and of the case. Some minor or inconsequential flaw or even flaws that are part of a process that is nevertheless fair and reasonable over all, will not cause a dismissal that is otherwise justifiable in substance to be declared unjustifiable. However a process that is fundamentally, pervasively, and manifestly unfair must and will clearly have that result under s.103A. In the

circumstances, it is likely that the unfairness and unreasonableness of the employer's process will, in turn, have led to it not making a fair and reasonable decision to dismiss on the merits of the allegations against the employee. None of this is novel or remarkable. It is well known and well established employment law.

[10] It is clear that s103A requires the Authority to separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in all of the circumstances at the time. This will include having regard to the contractual arrangements between the parties and the resources available to the employer.¹

[11] The Authority is not entitled to substitute its own decision for that of the employer.² However, it is entitled to evaluate the employer's decision against the objective standard of what a fair and reasonable employer would have done in all the circumstances, which may result in the Authority reaching a different conclusion from the employer.³

Regard must also be had to the particularly harsh consequences of dismissal on employees who are subject to occupational licensing requirements because the loss of occupational registration often meant a loss of their livelihoods.⁴

[12] The Chief Judge in *Lewis* cautioned:

Accordingly, employers of teachers must act to a high standard when their decisions can have these consequences. So, to, independent Courts and Tribunals considering the justification of dismissals of teachers must be conscious of that consequence and the corresponding need to examine such cases with great care.

[13] The standard of proof to be established is the balance of probabilities, with the Court of Appeal in *Honda NZ Ltd v NZ (With Exceptions) Shipwrights etc Union* [1990] 3 NZILR 23 noting that where a serious charge provided justification for dismissal, the evidence in support of it needed to be as convincing as the charge was grave.

[14] Also relevant are the statutory good faith obligations contained in s.4 of the Act. Pursuant to s.4(1A)(c) Tiny Town was required to provide Mrs Autagavia with access to information relevant to the continuation of her employment and an

¹ *Toll New Zealand Consolidated Ltd v. Rowe* unreported, 19 December 2007, Shaw J, Auckland Employment Court AC39A/07.

² *X v. Auckland District Health Board* [2007] 1 ERNZ 66

³ *Air New Zealand v. Hudson* [2006] 1 ERNZ 415

⁴ *Lewis v. Howick College Board of Trustees* unreported 19 January 2010, Colgan CJ ARC 82/08

opportunity comment on it before making a decision that adversely affected the continuation of her employment.

Individual employment agreement

[15] One of the relevant factors to consider is the contractual arrangements the parties entered into, because a fair and reasonable employer would have complied with the obligations it had set itself.

[16] Appendix C of the Staff Handbook, which formed part of Mrs Autagavia's individual employment agreement, states:

Termination:

Where termination of employment is justified, the staff member will be interviewed, with your chosen representative accompanying you should you wish, to hear their side of the story, with the final decision being made after the hearing. [...] (emphasis added)

Suspension:

Where incidents need to be investigated, a staff member may be put on suspension while all the facts are being gathered. The staff member will be recalled to a meeting between themselves and the complex manager. Reinstatement, warning procedures or termination may result from the outcome of the investigation. (emphasis added)

Disciplinary code and procedure:

When a staff member has transgressed in a manner which could warrant explosion or dismissal, a disciplinary hearing is to be convened in order to decide on the appropriate course of action to be taken. This action will follow the procedures set out below.

Disciplinary investigation

Alleged contravention by a staff member of Tiny Town house rules

Investigation:

1. *Gathering of information and evidence*
2. *Checking and verification of evidence of the alleged contravention*
3. *Voluntary statement by alleged transgressor*

Investigation decides on one of the following courses of action

1. Additional investigation by complex manager
2. *No disciplinary action*
3. Call for disciplinary hearing
4. *Suspension, with or without remuneration while awaiting hearing*

Progress to be assessed by the Managing Director

If not charged within 14 days resumes service with backdated remuneration

(emphasis added)

Background

[17] Tiny Town owns and operates a number of early childhood Centres. Four of their Centres are based on the same site in Pakuranga. Centres 1-4 are adjoining and Centre 5 is located across the road. Each Centre has its own separate facilities with a shared entrance, reception, and parking area. Staff work in a particular Centre and take their lunch and have rest breaks inside the Centre they are working in.

[18] Mrs Autagavia was one of the five staff working in Centre 2 and Ms Chand was one of four or five staff working in Centre 4 on the day of the incident. Centre 3 (which was adjoining Centres 2 and 4) also had four or five staff on duty that day. Each Centre is about 30 metres wide. Centres 1-4 have adjoining outdoor play areas which are separated by a fence which is approximately a metre or so high.

[19] The fence is made of metal pipes. Each pipe is around 2 inches wide and the pipes are spaced approximately 10cm apart. About every metre along the fence is a larger metal anchor pipe which is about four times the size of the middle pipes. Someone can stand in the outdoor playground of Centre 1 and look over the fence to the outdoor playgrounds of Centres 2, 3 and 4. Children playing outside are visible from other the Centres, but children inside are not.

[20] There are two versions of Ms Chand's complaint; the complaint she typed herself and provided to Mr Wilson ("her complaint") and the version that Mr Wilson had retyped to remove four of the six paragraphs ("the redacted complaint").

[21] At the time of the alleged incident Ms Chand was assisting a child on play equipment in the raised bark area in the outdoor playground of Centre 4. In her complaint she says she looked over at the kitchen area of Centre 2 (which is situated

near the outside glass doors) and saw Mrs Autagavia walk up to the sink where a boy was on tip toes trying to reach into the sink area. Her complaint records that this occurred at around 3.20pm on Wednesday 8 December 2009.

[22] Her redacted complaint records:

Silia grabbed the child aggressively by the arm and gave him one whack on his back with an open palm. She then proceeded by pulling the child's ear while pushing the child towards the door. The child's ear was screwed upward as the child was still on his toes as he was bullied and escorted out into the play area in tears and screaming which I could hear.

[23] Mrs Autagavia denies that she was ever at the sink with a child that day.

[24] Ms Chand told the Centre 4 Team Leader Miralini Anandabafkaran what she had seen and pointed out the child who at that time was sitting outside beside Mrs Autagavia. Ms Anandabafkaran told Ms Chand that if she had seen something she was concerned about she could tell management.

[25] Ms Anandafkaran did not tell Ms Chand to take the matter further or to make a complaint, she merely told her that she could (not should) raise any concern she had with management. Ms Anandafkaran said that she did not take any action herself because she had not seen the incident and it had occurred at another Centre.

[26] Ms Chand said she planned to tell the receptionist, Ngaire Evans however, as she left work Mrs Evans was busy with other parents, so decided not to say anything that day. Mrs Evans noticed Ms Chand as she was leaving and asked if she was okay, to which Ms Chand replied *no not really but I will talk to you in the morning*. Despite that raising a good opportunity for her to share her concerns, she decided not to.

[27] Ms Chand told Mrs Evans what she had seen the next morning, and Mrs Evans told to make a written complaint. Ms Chand went home to write her complaint dated 9 December 2010 and handed it to Mrs Evans later that morning. Mrs Evans put it on Mr Wilson's desk, but did not contact him to advise there was a serious issue involving an alleged assault on a child.

[28] Mr Wilson was not at work on 8, 9 or 10 December 2009. He therefore did not see the complaint until the morning of 11 December 2009.

[29] Mr Wilson spoke to Ms Chand that morning about her complaint and as a result of that discussion concluded that she was a reliable eye witness. Mrs Autagavia was called to a meeting that afternoon, but was not given any advance notice of the meeting, or told what it was about, or provided with any information prior to the meeting.

[30] Before meeting with Mrs Autagavia, Mr Wilson had Ms Chand's complaint re-typed so that only two out of the original six paragraphs remained. Ms Chand's signature was also removed. Mr Wilson said he did this for privacy reasons because he wanted to keep Ms Chand's name confidential and because he did not consider some comments she had made about the workplace were relevant to the investigation.

[31] The redacted complaint removed;

- (i) Complainant's name and signature;
- (ii) Information about the relationship the complainant had with Tiny Town;
- (iii) The request by the complainant to stay anonymous and the reasons for that;
- (iv) Where the complainant was standing when she witnessed the incident;
- (v) The date of the incident;
- (vi) The time of the incident.

[32] In the disciplinary meeting Mrs Autagavia was asked to read the redacted complaint and then respond to it.

[33] It is common ground that Mrs Autagavia asked who had made the complaint, the child's name, and when it had occurred. Mr Wilson told her that the incident had occurred on 8 December 2009 (he did not give a time), but that she would not be given the name of the child or eye witness.

[34] After a meeting which lasted between 7-15 minutes (depending on whose version I adopt), Mr Wilson adjourned with Mrs Evans for about 5 minutes. During the adjournment he called his wife and decided to end Mrs Autagavia's employment.

Mr Wilson then resumed the meeting and informed Mrs Autagavia that she was summarily dismissed that day. Her request to take a copy of the complaint with her was denied.

[35] Mrs Autagavia says that she was escorted off the premises so quickly she did not have time to collect all of her personal items, which included her guitar and teaching resources and other documentation.

[36] Mrs Autagavia said that some time after her dismissal she saw a former colleague who said they had found Ms Chand's complaint letter on the ground at the Centre and because they saw Mrs Autagavia's name on it they had read and retained it. This person provided Mrs Autagavia with a copy of the redacted complaint to read and Mrs Autagavia made a handwritten copy of it, then returned the original to her former colleague.

[37] Mrs Autagavia did not see the full version of the complaint until she after she had filed her personal grievance claim, and her personnel file was disclosed to her representative.

Determination

[38] Section 103A requires me to consider *how the employer acted*. After doing so, I have concluded that Tiny Town's investigation and decision making process breached natural justice, statutory good faith obligations, and its own policies, and was so fundamentally flawed no fair and reasonable employer would have conducted itself in the way it did.

[39] In a serious matter like this where the allegations are denied and the outcome could preclude the employee from working in their chose career, a fair and proper process is critical to ensure that the allegations have been properly investigated and tested.

[40] The Court in *Lewis v. Howick College Board of Trustees* recognised that a deficient process could result in an unfair outcome. It stated:

It is difficult if not impossible to separate neatly procedural and substantive justification for dismissals although s.103A requires that these be assessed separately. As happens, not infrequently, the employer's failure or refusal to follow a fair and reasonable process

leading to a decision to dismissal is not only a personal grievance in itself, but leads to a substantively unfair or unreasonable dismissal.

[41] The nature of the allegations meant Tiny Town needed convincing and sufficiently compelling evidence before it could fairly and reasonably conclude that serious misconduct had occurred. I find that due to the serious deficiencies in Tiny Town's investigation, the evidence on which it relied had not been properly tested or assessed, which means it is unable to justify the substance of its decision.

[42] Tiny Town has not justified its decision because;

- (i) Mr Wilson did not have all relevant information available to him before he made the decision to summarily dismiss.
- (ii) It breached its s4(1A) good faith obligations by not providing Mrs Autagavia with all relevant information or an opportunity to comment on it before she was dismissed.
- (iii) Mr Wilson accepted Ms Chand's allegations at face value and did nothing to test her version of events by, for example, checking with other possible witnesses.
- (iv) The disciplinary process breached natural justice requirements.
- (v) The investigation was fundamentally flawed.
- (vi) It breached its own procedures.
- (vii) Mrs Autagavia was not advised of, or given her right to exercise, her right to representation.
- (viii) The way in which the allegations were raised with Mrs Autagavia deprived her of an opportunity to properly respond to them.
- (ix) Mr Wilson predetermined the outcome.
- (x) Mr Wilson was improperly influenced by concerns about Mrs Autagavia's prior conduct which had not been previously raised with her and which were without merit.

[43] These pervasive and fundamental flaws were so serious that the legitimacy and correctness of Tiny Town's conclusion that serious misconduct had occurred is called into question. It cannot be said that if Tiny Town had adopted and applied a fair and reasonable process, it would still have come to the same conclusion it did.

[44] I now turn to look at the various procedural deficiencies in Tiny Town's investigation.

Confidentiality of complainant

[45] Ms Chand's written complaint stated:

I want to state that I wish to stay anonymous as this is a difficult situation as I work alongside this colleague, namely Silia and many others. [...]

Please I stress again I do very much wish to be anonymous, however I will discuss it with the management in a private and professional manner of any questions which they may have.

[46] Mr Wilson said that when he met with Ms Chand on the morning of 11 December 2009 one of the questions he asked her was why she wanted her name kept secret. Ms Chand said she was concerned, although she did not work in Centre 2 with Mrs Autagavia, because some of her colleagues in Centre 4 were friends with her.

[47] Mr Wilson thought that was acceptable reason for keeping Ms Chand's name confidential. He says he was not concerned about granting confidentiality because he had asked Ms Chand if she had any issues with Mrs Autagavia, and Ms Chand told him she did not. He accepted that was the case, without making any independent inquiries about that.

[48] The notes of the disciplinary meeting record that Mrs Autagavia asked at least twice who had made the complaint. She was never given that information. This precluded her from providing any information that may have suggested an improper motive for Ms Chand's complaint.

[49] Because Mrs Autagavia did not know who had made the allegations against her, she was simply not in a position to provide Mr Wilson with any information as to why a complaint might have been made against her. During the Authority

investigation meeting Mrs Autagavia referred to two incidences which had occurred between her and Ms Chand which had caused them both some upset at the time. This was relevant information which Mr Wilson did not obtain as part of his investigation.

[50] Mr Wilson was not aware of these incidences because Mrs Autagavia did not know that Ms Chand was the complainant. Instead of properly investigating whether there had been previous issues between Ms Chand and Mrs Autagavia, he relied solely on Ms Chand's assurance there was not. That may not have given him the full picture.

[51] In a case where it is just a complainant's word against the employee's denial, a fair and reasonable employer would have inquired into possible motives for the complaint, which would then have been a factor when assessing credibility. No appropriate inquiries were made in this case.

[52] Mr Wilson said that he tried to convince Ms Chand to allow her name to be given to Mrs Autagavia when he met with her on 11 December 2009. Ms Chand says Mr Wilson did not try to convince her to let her name be put forward. She said that while she was reluctant for that to occur, if Mr Wilson had pressed the issue she would have agreed, because she stood by what she had seen.

[53] If Mr Wilson was concerned about Ms Chand and Mrs Autagavia working in close proximity to each other, he could have exercised his contractual right to suspend Mrs Autagavia until the complaint had been resolved. That would have kept Mrs Autagavia away from the workplace and her colleagues. Mr Wilson had no explanation for why he had not considered suspension.

[54] I find that it was unreasonable and inappropriate for Mr Wilson to have given Ms Chand confidentiality in the circumstances that existed at the time that he made that decision. It hampered Mrs Autagavia's ability to fully respond to the allegations against her.

Rewriting of Complaint

[55] It was also inappropriate and unacceptable for Mr Wilson to re-type Ms Chand's complaint in order to delete four paragraphs from it. This removed much of the critical information which would have enabled Mrs Autagavia to properly understand the concerns, such as the name of the eye witness, the date and time of the

incident, and the location of the eye witness when observing the actions complained about.

[56] Such action was in breach of Tiny Town's s.4(1A) duty of good faith under the Act. Tiny Town clearly had relevant information available to it, which was not provided to Mrs Autagavia to comment on.

Inadequacy of notes

[57] Mr Wilson did not make any notes (not even rough jottings) of his conversation with Ms Chand on the morning of 11 December 2009. That is astonishing given the serious nature of the allegations and the fact that the purpose of his meeting was to understand her complaint and assess her credibility.

[58] Any information he gleaned from this meeting was not shared with Mrs Autagavia. This left her unable to respond to matters which were known to Mr Wilson as the decision maker, but not to her. It is a fundamental breach of the requirements of natural justice and another breach of Tiny Town's s.4(1A) good faith obligations.

[59] I also record my view that the notes taken by Mrs Evan of the disciplinary meeting were woefully inadequate, which I discuss in more detail later.

Investigation

[60] The sum total of Mr Wilson's investigation involved speaking to Ms Chand about her complaint. Although Ms Chand's complaint records that she told her team leader and another colleague about what she had seen, and she had obviously spoken to Ngarei Evans about the incident, for some unexplained reason Mr Wilson did not interview any of these potential witnesses.

[61] A fair and reasonable employer would have interviewed all potential witnesses in a matter as serious as this one. Failure to do so meant he was unlikely to have all relevant information available to him before he made the decision to dismiss. For example, there was a conflict of evidence between the team leader and Ms Chand which may have influenced his decision on Ms Chand's credibility. I discuss in more detail later.

[62] Ms Anadabafkaran is the Team Leader for Centre 4, so I would have expected Mr Wilson to have questioned her about why she took did nothing about Ms Chand's allegation that Mrs Autagavi had assaulted a three year old child.

[63] It was also unusual that Mr Wilson did not treat Mrs Evans as a potential witness, but instead involved her by asking her to take the notes of the meeting with Mrs Autagavia. The notes record Mrs Evan's personal view of Mrs Autagavia's explanation and demeanour, which is odd if her role had indeed been solely as a note taker. The notes are also of a very poor quality.

[64] Mr Wilson and Mrs Evans adjourned together and Mr Wilson admits discussing the outcome with her at that time. I consider it likely that Mrs Evans influenced Mr Wilson by sharing her views that Mrs Autagavia had previously mistreated children, that Ms Chand was a reliable witness and that Mrs Autagavia's explanation was unsatisfactory. As a potential witness, this influence on the decision maker was inappropriate because it was not something Mrs Autagavia had an opportunity to respond to.

Contractual disciplinary procedure

[65] The contractual disciplinary code and procedure anticipates a two stage process, the first part of which involves a disciplinary investigation after which a decision is made about what course of action to follow. One option at that stage is for Tiny Town to *call for disciplinary hearing*. The procedure makes it clear that the third step in the investigation process involves a *voluntary statement by the alleged transgressor*.

[66] Tiny Town appears to have run these two stages together. There was only one meeting with Mrs Autagavia and she was required to give her explanation at that time. She was not asked to make a *voluntary statement*. Mr Wilson did not appear to appreciate what the procedure required of him. There was no evidence that he had progressed through the three steps outlined in the investigation part of the procedure.

[67] It appears that the meeting on 11 December 2010 was an attempt by Mr Wilson to get Mrs Autagavia to make a *voluntary statement* in terms of the third limb of the investigation procedure. I say that because she was not advised of her right to representation, given any information, provided with specific disciplinary concerns or advised of possible disciplinary consequences arising from the meeting which are all

features that would be associated with a disciplinary hearing, but not necessary a pre hearing disciplinary investigation.

[68] In which case, at the conclusion of the meeting Mr Wilson had to decide on one of the following options;

- (i) Additional investigation;
- (ii) No disciplinary action;
- (iii) Call for disciplinary hearing;
- (iv) Suspension, with or without remuneration while awaiting hearing.

[69] Although implementing a summary dismissal was not one of the options available at that point in the procedure, that is what Mr Wilson did.

[70] If I am wrong, and the meeting on 11 December 2010 was in fact the disciplinary hearing (as Mr Wilson seemed to think was the case), then Tiny Town did not comply with its disciplinary investigation process.

[71] Another breach of contract occurred because Mrs Autagavia was not interviewed with her chosen representative, as provided for under the termination clause in Appendix C. That clause also states *the final decision [on termination] will be made after the hearing*. In this case it appears that a final decision was made after the disciplinary investigation, and without a hearing having occurred.

Meeting on 11 December 2009

[72] The manner in which the meeting on 11 December 2010 was conducted was unfair. Mr Wilson merely passed Mrs Autagavia the redacted complaint and asked her to comment on it. He did not actively engage with Mrs Autagavia by asking specific questions, but instead just sat back and expected her to talk.

[73] Mrs Autagavia says the meeting lasted 7-10 minutes. Mr Wilson says it was 10-15 minutes. The meeting notes are of poor quality. They look like rough jottings and consist of disjointed and partial sentences. It is not clear what questions were asked or by whom, or what answers were given or by whom.

[74] Mrs Autagavia's evidence was that she asked a number of questions and made a number of statements during this meeting which are not reflected in the notes. These included asking who wrote the complaint, what was supposed to have happened, that she didn't have any idea of what had happened, that she didn't understand the complaint, that she wanted to know who said it, that she didn't do it, that she had nothing to do with it, that she had never handled a child like this in her life, that she wanted to know who the staff member was that had done this, that she wanted to know who the child was.

[75] Mrs Autagavia said that the notes inaccurately record *asked if it was new boy* when she had asked *who the boy was* [child in complaint], not if it was the new boy. This is significant because Mr Wilson placed weight on the fact that she had correctly identified that the new boy was the child involved, which he believed she would only have know because she had done what Ms Chand alleged.

[76] If Mr Wilson had been engaging with Mrs Autagavia in an active and constructive manner (as required by s4(1A)(b)) he should have asked her why she thought it was the new boy because that was a factor which influenced his decision making. Had he done so the error would have been picked up at the time.

[77] Mrs Autagavia was not given a copy of the notes, nor did she review them, or have an opportunity to comment on or amend them before she was dismissed. This was unfair particularly in light of the serious consequences that resulted.

[78] Mr Wilson and Mrs Evans denied Mrs Autagavia's version of the meeting but neither of them were able to provide any other details of what was discussed at the meeting outside of what was recorded in Mrs Evans' unsatisfactory notes.

[79] I prefer Mrs Autagavia's account of that meeting. The notes for the explanation part of the meeting (before she was advised of her dismissal) consist of 13 lines of mostly half sentences, some of which consist of only three words. The parties agree that there was more discussion than this, but neither Mr Wilson or Mrs Evans were able to tell me what was said or by who.

[80] This is contrasted with Mrs Autagavia's evidence in which she said she did most of the talking and explained to me what she said. I consider her version of what was discussed is more reliable because these were important matters to her and she was able to provide specific details, whilst the others could not.

[81] Mrs Evans and Mr Wilson both accept that the notes were not a full record of what had occurred. Mr Wilson's statement describes the notes as recording *the flavour of the conversation if not the detail*. This was a crucial meeting. Mrs Autagavia's ongoing employment and possibly future childcare career was at stake. A fair and reasonable employer would have ensured that an accurate record was kept of such an important meeting.

[82] When making his decision to dismiss Mrs Autagavia, Mr Wilson was heavily influenced by what he says was Mrs Autagavia's failure to deny the allegations. Mrs Autagavia's evidence was that she did deny them. She said in her statement that she told Mr Wilson;

Who write this? [sic] What's happen? [sic] Look, I haven't got any idea what happen. I don't understand what this is? I want to know who said that? I didn't do this. I got nothing to do with this. I'm sorry but I swear I have never handled any child like this in my life. [...].

[83] Mrs Evans' notes record *no idea when happened – what child; cannot help us – wants to know staffs [sic] name; cannot remember doing that*.

[84] I find on the balance of probabilities that Mrs Autagavia did deny the allegations. She could be excused for not being eloquent in her denials. English is her second language, she was in a highly stressful situation, she was unrepresented, and had effectively been blindsided by the complaint. It is also important that she did not have basic details such as the time, day, or child involved which could have assisted with her recall of events.

[85] Even if I had found that she did not deny the allegations, it was incumbent on Mr Wilson to raise that with her as a factor which was influencing his decision so that she had an opportunity to address it. He was not entitled to sit there as a proverbial sponge but had a duty under s4(1A) of the Act to be responsive and communicative. Fairness required him to put significant and tentative conclusions to her to respond to.⁵

[86] Mr Wilson and Mrs Evans stayed in the room whilst Mrs Autagavia read the complaint for the first time. She was not given any privacy to collect her thoughts or

⁵Ibid 2

to seek assistance, advice or support. The complaint should have been provided to her to take away and reflect on and she should have had a proper opportunity to prepare her response and carefully consider the information against her before being required to provide her explanation.

Other inquiries

[87] There is no evidence about how or when Mr Wilson identified the child involved in the incident. Ms Chand's complaint merely referred to a boy. However, Mr Wilson knew it was the *new boy* whose first day at the Centre was the day of the incident. Despite this there was no evidence that Mr Wilson had factored in the problems that can sometimes occur when a child is first settling in to the Centre.

[88] Clause 2.43 of the Staff Handbook states:

[i]f the parents/child relationship has been good – the child will react adversely (crying, sometimes screaming) for 3 / 4 weeks until the child knows in their heart that Mum/Dad is going to return and pick them up. This may take some time for the realisation to sink in. The child will quite often come to a climax of reaction and then settle quite happily. (emphasis added)

[89] Although this could potentially have explained any distress the child may have been exhibiting, it was not a matter that was explored. Mrs Autagavia did not know who the child was, so she could not raise this as a potential factor to be considered.

Corroborating evidence

[90] Mr Wilson did not make any attempt to obtain evidence which may have corroborated Ms Chand's account. He did not contact the child's parents to discuss how their child's first day at the Centre had gone or to see if the child had been distressed or had complained about how he had been treated. This could have provided an opening for discussion of any issues and was a missed opportunity.

[91] There was no parental complaint.

[92] The incident occurred around 3.20pm which is when parents started collecting their children. No attempt was made to determine what time the child was picked up or what the child's mood was like at the end of the day. If he had been as distressed

as Ms Chand said he was, and if he had been screaming and crying loudly for 10-15 minutes, it is possible he was still exhibiting some signs of this prior distress at around the time he left the Centre.

[93] There was no discussion with the child. There was no attempt to observe the relationship between Mrs Autagavia and the child. None of the Centre 2 staff were asked about their observations of the child on the day of the incident or subsequent to it, or whether they had any feedback on how the child and Mrs Autagavia had been relating to each other over the two and a half days since the incident occurred.

[94] Mr Wilson did not interview the other staff at Centre 2 to see if they had seen or heard anything untoward or if they had any concerns about the way in which Mrs Autagavia was relating the child in question or even to the other children in the Centre.

[95] If the child was suffering the distress Ms Chand says she observed, then it would have been surprising if none of the staff in Centre 2 (or even Centre 3) had noticed it. Mrs Autagavia asked Mr Wilson to talk to her colleagues, but he considered it unnecessary to do so. If find that a fair and reasonable employer would have made those inquiries.

Predetermination

[96] An employer is required to consider the employee's explanation with an open mind, but that did not occur in this case. Mr Wilson appeared to have formed the view that Mrs Autagavia was guilty of assaulting a child at an early stage.

[97] I find that an adjournment of five minutes, which included Mr Wilson's telephone conversation with his wife, to consider the outcome in a matter such as this was entirely unsatisfactory and suggests the dismissal was predetermined.

[98] Mr Wilson also accepted that he did not give Mrs Autagavia any detail about the complaint because he believed that she already knew what had happened, because she did it. This also indicates predetermination.

Improper factors

[99] I find that Mr Wilson's decision to dismiss was influenced by improper factors. It was a breach of good faith for Mr Wilson to rely on previous untested

suspicious involving matters which had never been raised with Mrs Autagavia and which she had no opportunity to comment on.

[100] Whilst giving evidence Mr Wilson candidly admitted that he was concerned that Mrs Autagavia had been mistreating children but that he had not had enough evidence previously to do anything about it. He accepted that suspicion had coloured his view of the present matter.

[101] Mr Wilson was unable to provide me with any specifics as to when these alleged concerns about mistreatment arose or what he did about them. He could recall only one incident which had involved a staff member reporting that they had heard a smack and then a short time later the sounds of a child crying. He was not sure when this occurred, and no investigation was undertaken because a written complaint was not received. It was unclear why this was attributed to Mrs Autagavia.

[102] Mr Wilson said that Mrs Evans had details of the other incidents he considered amounted to mistreatment of children.

[103] Mrs Evans gave evidence about other incidents which she believed indicated that Mrs Autagavia may have been mistreating children prior to this incident. These had not been raised with Mrs Autagavia.

[104] I closely Mr Wilson and Mrs Wilson about each of these incidents and am satisfied that none of them disclosed conduct which could fairly or reasonably be considered as mistreatment by Mrs Autagavia of children. On the basis of the limited evidence available to Mr Wilson and Mrs Evans about these alleged incidents, a fair and reasonable employer would not have concluded that Mrs Autagavia had a history of mistreating children. I find that the fact Mr Wilson had prior unsubstantiated allegations of mistreatment in mind improperly influenced his decision.

Reliability of eye witness account

[105] Mr Wilson did not appear to have critically assessed Ms Chand's decision not to raise her concerns on the day of the incident. She reported witnessing an assault on a child which had apparently left her distressed, so it was odd that she did not disclose that immediately so action could be taken. Ms Chand's explanation that she did not say anything because Mrs Evans was busy, despite her having addressed Ms Chand as she left, warranted careful consideration.

[106] Mr Wilson uncritically accepted the accuracy of Ms Chand's account. He did nothing to check it by reviewing her location or reconstructing events to assess what sort of view she would have had from here she was standing.

[107] I conducted a site visit to review the distance from which Ms Chand observed the alleged incident, and to see how clear her line of sight was. Ms Chand was standing 30-40 metres away from where she says she saw Mrs Autagavia. Ms Chand was standing in the raised bark part of the playground and supervising the children playing on the equipment around her.

[108] Ms Chand was viewing events from a diagonal angle and had a partial view only of the end of the Centre 2 kitchen. Because of the angle she would only have been able to see a small area which was about half the width of a normal doorway. The inside of the kitchen area was darker than the outside area, which made visibility more difficult.

[109] The child was shorter than the metal fence, so it follows that at least part of Ms Chand's view of the child must have been obstructed by the fence. Whether that comprised her ability to see clearly was not something Mr Wilson should have, but did not, inquire into.

[110] Mr Wilson stated in evidence that he knew Ms Chand to be a person particularly sensitised to abuse issues, but he did not appear to have factored that into his assessment of her credibility.

[111] Ms Chand's account of the incident had also changed by the time she gave evidence to the Authority. She raised new allegations for the first time which involved even more blameworthy and sustained mistreatment by Mrs Autagavia of the child.

[112] Although it was not mentioned in her complaint, or presumably in her conversation with Mr Wilson on 11 December 2009, Ms Chand described seeing Mrs Autagavia take the child to the sandpit and then forcibly holding him down beside her as the child attempted to get away numerous times. Ms Chand stated that the child was screaming and crying loudly for about ten minutes as Mrs Autagavia refused to let him leave her side.

[113] There is a conflict between Ms Chand and her team leader. Ms Anandabaskaran said Ms Chand pointed out Mrs Autagavia and the child, who were sitting beside each other on the sandpit, but that she did not hear any noise, much less the loud crying and screaming Ms Chand described.

[114] It is also curious that none of the four other staff working in Centre 2 did anything about the fact that a child who was new to the Centre that day had been crying and screaming for 10 minutes. I also note that the five staff in Centre 3 which was immediately adjacent to Centre 2 did not take any steps or appear to be concerned by anything that had occurred that day.

[115] These anomalies should have been properly explored and assessed by Mr Wilson because they may have raised questions about the accuracy of Ms Chand account of the incident. It is evidence which a fair and reasonable employer would have obtained in the course of a proper investigation.

Unpaid public holiday entitlements

[116] Mrs Autagavia has claimed for four public holidays, plus 8% annual leave accrual on that amount. There was insufficient evidence presented to support this claim, so I make no order.

Remedies

[117] Mrs Autagavia was unjustifiably dismissed and is entitled to remedies.

Mitigation of loss

[118] I find that Mrs Autagavia properly mitigated her loss.

[119] She was only out of work for 8 weeks over the Christmas and New Year period, which is often a difficult time for an employee to find a new job.

Lost remuneration

[120] Mrs Autagavia has claimed lost remuneration of \$8,000 being 40 hours a week @ \$25 an hour for 8 weeks. I accept that she did lose 8 weeks remuneration as a result of her unjustified dismissal. Tiny Town is ordered to pay Mrs Autagavia \$8,000 pursuant to s.128 of the Act for lost remuneration.

Section 123(1)(c)(i)

[121] Mrs Autagavia went to work as normal on 11 December 2009, but before the end of that day she had been dismissed for assaulting a child at the Centre she was the team leader of. Her unjustified dismissal occurred shortly before Christmas last year.

[122] Despite having worked for Tiny Town for five and a half years, Mrs Autagavia's employment was summarily terminated after a 7-15 minute meeting. Mrs Autagavia said she was rushed off the premises so quickly she did not have time to collect all of her personal effects and belongings.

[123] She was subsequently also humiliated to be given a copy of Ms Chand's complaint by a former colleague who had found it lying on the ground outside the Centre after Mrs Autagavia's dismissal.

[124] The facts of Mrs Autagavia's unjustified dismissal are particularly humiliating given the type of the industry and her childcare career. The allegations against her were so serious they essentially amounted to criminal allegations. The allegation of assault on a child by an early childcare teacher, which I have found unjustified, will nevertheless leave an inevitable taint on Mrs Autagavia's career and reputation.

[125] Mrs Autagavia sought medical attention and reported trouble sleeping and elevated blood pressure which she attributed to her unjustified dismissal. She described feeling shocked, betrayed and used. Mrs Autagavia's son provided evidence about his observations of his mother before and after her dismissal.

[126] I am satisfied that Mrs Autagavia suffered hurt and humiliation as a result of her unjustified dismissal. This was compounded by a former colleague presenting her with the written complaint which she had only ever been allowed to briefly view, but was never provided with a copy of by Tiny Town, and by the haste with which she was seen off the premises.

[127] I consider that the award of \$8,500 pursuant to s.123(1)(c)(i) of the Act is appropriate to compensate her.

Contribution

[128] Mrs Autagavia denied the incident outright. In order to find that she has contributed to her grievance I would need to find that she engaged in blameworthy

conduct. Because of the deficiencies I have identified with the investigation and dismissal process, I am not satisfied on the balance of probabilities that Mrs Autagavia contributed to grievance, so no reduction in remedies is appropriate pursuant to s124 of the Act.

Penalty

[129] I decline to award a penalty for a breach of the employment agreement or of breach of good faith. I view these matters as part of the unjustified dismissal claim and Mrs Autagavia has been awarded remedies for that.

[130] There is no jurisdiction to award a penalty for a breach of s.103A of the Act, as has been requested by Mrs Autagavia.

Costs

[131] Mrs Autagavia was successful and is entitled to a contribution towards her costs.

[132] The parties are encouraged to resolve costs themselves. If that is not possible, the applicant has 14 days within which to file a costs memorandum. The respondent then has 7 days within which to file a memorandum in response. Prior leave is required for any departure from this timetable.

Rachel Larmer
Member of the Employment Relations Authority