

**IN THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

[2013] NZERA Christchurch 245
5382373

BETWEEN KERYN AIKEN
 Applicant

AND THE OTAGO SOCIETY FOR THE
 PREVENTION OF CRUELTY TO
 ANIMALS INCORPORATED
 Respondent

Member of Authority: Christine Hickey

Representatives: Jen Wilson, Counsel for the Applicant
 Rachel Brazil, Counsel for the Respondent

Investigation Meeting: 25 and 26 July 2013 at Dunedin

Submissions received: 16 and 30 August 2013

Determination: 29 November 2013

DETERMINATION OF THE AUTHORITY

A. Keryn Aiken was unjustifiably dismissed.

B. The Otago Society for the Prevention of Cruelty to Animals Incorporated is to pay Keryn Aiken \$12,000 compensation.

Employment relationship problem

[1] Keryn Aiken started working as an animal attendant at the Otago SPCA in September 2009. In December 2009 her main role changed to that of dog handler. She worked full-time. At the relevant time the SPCA had located on its grounds the Dunedin City Council Pound (the Pound). Ms Aiken's duties included caring for Pound dogs, cleaning out the Pound, caring for the SPCA dogs and their compound.

[2] In November 2011 there was an incident which led directly to Ms Aiken's dismissal. It relates to a dog named Shia and a cat called Fabio both under the care of the SPCA. The SPCA considers that in the process of assessing for Shia's suitability for re-homing Ms Aiken seriously traumatised Fabio and brought the SPCA into disrepute. On 12 December 2011 the SPCA dismissed Ms Aiken from her employment.

[3] Ms Aiken claims that she was unjustifiably dismissed and unjustifiably disadvantaged by her suspension. She also claims she was disadvantaged in her employment by her manager Philip Soper, who was the Executive Officer.

[4] Ms Aiken also considers that she has been treated in a disparate manner to other SPCA employees who may have breached aspects of the Animal Welfare Act 1999.

[5] By way of remedy, Ms Aiken seeks:

- Reinstatement to her previous position;
- Compensation for hurt and humiliation relating to both her disadvantage and unjustified dismissal claims;
- Actual lost wages;
- Medical costs;
- Loss of her Kiwisaver contribution;
- Legal costs.

[6] The SPCA resists all the claims. It says that Ms Aiken was justifiably suspended and justifiably dismissed for causing unnecessary distress to Fabio. It also says that Mr Soper did not treat her any differently to any other employees and that she was not treated in a disadvantageous manner. It further says that it is not reasonable and practicable to reinstate Ms Aiken.

[7] The parties attended mediation and had settlement talks but no agreement has been reached.

The issues

[8] The issues Authority needs to determine are:

- (a) Was Ms Aiken unjustifiably disadvantaged in her employment by Mr Soper?
- (b) Was Ms Aiken unjustifiably disadvantaged in her employment by disparate treatment?
- (c) Was Ms Aiken unjustifiably disadvantaged by her suspension?
- (d) Was there a full and fair investigation and disciplinary process undertaken by the SPCA at the conclusion of which a fair and reasonable employer could have concluded that there was serious misconduct on Ms Aiken's part?
- (e) Was the SPCA decision to dismiss Ms Aiken what a fair and reasonable employer could have done in all the circumstances at the time?
- (f) If the decision to dismiss Ms Aiken is found to be unjustified remedies will need to be considered. The Authority needs to determine whether it is practicable and reasonable to reinstate Ms Aiken, and consider what monetary remedies are appropriate including issues of contribution and mitigation.

[9] The justification for an employee's dismissal or any action disadvantageous to an employee is determined under the statutory test in s.103A of the Employment Relations Act 2000 (the Act). The test requires the Authority to decide the question of justification objectively: was the action taken or decision made what a fair and reasonable employer could have done or made in all the circumstances at the time the decision was made or the action taken?

[10] The Authority may not substitute its opinion for that of the employer¹, but in applying the test to the dismissal it must consider whether the SPCA acted fairly in concluding Ms Aiken was guilty of serious misconduct and in particular whether:

¹ *Angus v Ports of Auckland* [2011] EmpC 160

- Having regard to the resources available to it the SPCA sufficiently investigated the allegations against Ms Aiken;
- The SPCA raised its concerns with Ms Aiken before dismissing or taking action against her;
- The SPCA gave Ms Aiken a reasonable opportunity to respond to its concerns; and
- The SPCA genuinely considered Ms Aiken's explanation regarding the allegations before dismissing her.

[11] The Authority may consider any other factors it considers appropriate². The Authority must not determine a dismissal or an action unjustifiable solely because of defect/s in the employer's process if they were minor and did not disadvantage the employee³.

[12] Ms Aiken's employment agreement says that she may be dismissed without notice for serious misconduct. Clause 13.3 defines serious misconduct to include *bringing the employer into disrepute*.

Background to Ms Aiken's claims of disadvantage by Mr Soper

[13] At the end of August 2011 Ms Aiken and Maartje Hyink made a complaint to the SPCA's National Inspector Steph Saunders about a dog, Bass, that had been impounded in the Pound on 16 August 2011. While it was in the Pound the dog had been critically ill from Parvo virus. It had vomiting, diarrhoea and laboured breathing. Ms Aiken and Ms Hyink had tended to the dog by cleaning it, moving it to a clean kennel with clean warm blankets and giving it water. However, the dog was not seen by a vet at all. The dog was picked up by its owners in the late afternoon and died later that evening.

[14] Ms Aiken says that Mr Soper had previously told staff that if anybody went to the National SPCA with a complaint they would lose their job. Mr Soper denies having said that.

[15] Ms Aiken says she was afraid of losing her job because she made the complaint. However, Inspector Saunders assured both staff that their names would

² Section 103A(4)

³ Section 103A(5)

remain confidential from Mr Soper. Another SPCA Inspector, Virginia Pine, spoke to Ms Aiken and Brenda Stuart, the then SPCA office manager, questioned Ms Aiken on behalf of Inspector Pine about what time the Pound manager had visited the Pound on 16 August 2011.

[16] Following the investigation new protocols were agreed between the SPCA and the Pound about what to do when a Pound dog became ill. No disciplinary action was taken against any SPCA staff.

Was Ms Aiken unjustifiably disadvantaged by Mr Soper?

[17] After making the complaint about Bass Ms Aiken says that she began to be treated to her disadvantage by Mr Soper and that he *started to single me out and target me for numerous and sometimes minor things*. She assumes that was because he had worked out that she had made the complaint about Bass. She understood that the investigation by Inspector Pine would have included an investigation into Mr Soper's actions that day.

[18] To be successful in a claim for unjustifiable disadvantage, pursuant to s.103(1)(b) of the Act, an employee must show:

That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[19] There are two limbs to the test for unjustifiable disadvantage as set out in s.103(1)(b): firstly there must be an unjustifiable action by the employer, and secondly that action must have caused disadvantage to the employee.

[20] The test of justification for an employer's action is the same test set out in s.103A that applies to dismissals. I need to look at whether the way that Mr Soper acted in managing Ms Aiken was what a fair and reasonable employer could have done in all the circumstances at the time. I also need to consider the procedural aspects of s.103A(3) as far as they can sensibly be applied to this situation. I consider the specific incidents Ms Aiken complained of one by one below.

[21] Mr Soper says that until Ms Aiken lodged her claims in the Authority he did not know that she had made the complaint about Bass.

[22] Ms Aiken made notes in her personal diary of interaction between her and Mr Soper that she considered unfair and I deal with them now.

When Ms Aiken asked Mr Soper for a padlock for a gate

[23] Ms Aiken says he reacted angrily and told her there was no money in the budget and that because the Pound was closing a staff member would be made redundant.

[24] Mr Soper did not remember that incident and said the SPCA did not supply padlocks for the Pound. He denied ever telling Ms Aiken a staff member would be made redundant as a result of the Pound no longer being co-located with the SPCA. He says that there was staff speculation about what would happen but that the only thing he told staff was there may not continue to be enough work for one of the full time dog handlers and the role may have to become a part-time one. In any event, even if what Ms Aiken says happened did happen, Mr Soper's behaviour was justifiable, did not disadvantage her in her employment and so was not capable of being an unjustifiable action.

Mr Soper asked for petrol money

[25] Ms Aiken says that one time after using the SPCA on-call vehicle for her own part-time business, Moggys, Mr Soper asked her for some petrol money towards the use of the SPCA's vehicle. She agreed and made a donation of \$10. Ms Aiken says she had an understanding that when she was on-call she was entitled to make fair use of the SPCA vehicle if she had any Moggys work to do. Mr Soper agrees but says that when Ms Stuart became employed she kept a closer eye on the SPCA costs. Mr Soper considered that Ms Aiken's personal use was excessive on that occasion. Mr Soper asked Ms Aiken to reduce her personal use of the vehicle for Moggys work and to make a donation.

[26] Mr Soper's actions were not capable of amounting to an unjustified action causing Ms Aiken disadvantage in her employment. It was reasonable for the SPCA to ask Ms Aiken to keep personal use of its vehicle to a minimum and to make a donation for petrol use.

13 September 2011

[27] Mr Soper approached Ms Aiken at the beginning of her shift in the Pound and was angry that there was no water for the dogs in the exercise area. She says he mentioned the Animal Welfare Act. She says because it was unusual for him to go to the dog areas so early in the morning she felt he was checking on her.

[28] Mr Soper says he had received a complaint from a volunteer about a lack of water for the SPCA and the Pound dogs. He went down early in the morning to check on the situation. He says he reminded both dog handlers to ensure there was enough water for the dogs. That was a reasonable thing to do in all the circumstances and caused no disadvantage to Ms Aiken in her employment.⁴

14 September 2011

[29] Mr Soper *yelled* at Ms Aiken for having an SPCA dog in the cab of the SPCA vehicle after she had taken the dog to the vet. Two other dogs were in cages at the back of the truck. At the time the policy allowed dogs belonging to staff to travel in the SPCA truck cab.

[30] Mr Soper denies ever having *yelled* at Ms Aiken about an SPCA dog travelling in the cab of the SPCA vehicle. However, he was concerned about the potential for cross-contamination of Parvo virus between Pound dogs and SPCA dogs. He says the interior of the truck could not be satisfactorily disinfected and so dogs should not travel in there. He was also concerned for the safety of staff dogs. He did tell Ms Aiken not to allow SPCA dogs to travel in the cab.

[31] I accept Mr Soper's evidence. His action caused no disadvantage to Ms Aiken in her employment and was justified in all the circumstances.

27 September 2011

[32] Mr Soper told Ms Aiken that her own dogs should not run around the SPCA grounds. She says she was on her lunch break and supervising her dogs for their exercise and toileting and that she had done so previously without any problems.

[33] Mr Soper agreed that he did speak to Ms Aiken about her dogs running around because he had a complaint from a member of the public that one of Ms Aiken's dogs

⁴ It is not evidence that Mr Soper was treating Ms Aiken and Ms Hyink in a disparate manner.

had charged at them. He said that employees were able to bring their dogs to work as long as the dogs remained confined; that was the policy. He says that Ms Aiken and Lisa Gerard breached the policy by letting their dogs out unrestrained in their breaks and he had to speak to both of them at times.

[34] I accept Mr Soper's evidence. His action caused no disadvantage to Ms Aiken in her employment and was justified in all the circumstances.

5 October 2011

[35] There were three *unpleasant incidents* that concerned Ms Aiken.

[36] First, Ms Aiken says Mr Soper *yelled* at her saying that members of the public who took SPCA dogs for a walk were not carrying doggie bags.

[37] Mr Soper says that if he was giving instructions to the dog handlers while they were working in the dog compounds he had to raise his voice to be heard. He says he had a number of times asked Ms Aiken to make sure that members of the public walking SPCA dogs tied the doggy bags to the lead. However, he received a complaint via the Dunedin City Council that SPCA dog walkers were not carrying doggy bags. He again reminded Ms Aiken that she must ensure that dog walkers tied the bags to the leads so they were in full view. I accept Mr Soper's evidence. His action caused no disadvantage to Ms Aiken in her employment and was justified in all the circumstances.

[38] Secondly, Ms Aiken says Mr Soper accused her of *stealing from the SPCA petrol account*. She pointed out that she had been off work at the relevant time and another worker was on-call at the time and *Phil immediately changed his attitude to the issue*.

[39] Mr Soper says that he asked Ms Aiken about the petrol money as a part of an investigation he and Ms Stuart were undertaking into who had made a purchase of petrol. I accept Mr Soper's evidence. His action caused no disadvantage to Ms Aiken in her employment and was justified in all the circumstances.

[40] Thirdly, Ms Aiken says: *Later that day Phil again yelled at me, demanding that I attend to a customer who was waiting at the office. ...I was on dog duties [and not office duties that day]*.

[41] Mr Soper says that because Ms Aiken was in the office at the time and a customer was there he asked her to serve the customer. He says he would not have yelled at her because the customer would have heard him and that would have *given the wrong impression of the SPCA*. I accept Mr Soper's evidence. However, even if his tone of voice was less than ideal his action caused no disadvantage to Ms Aiken in her employment and was justified in all the circumstances.

12 October 2011

[42] Mr Soper asked Ms Aiken again why her dogs were running around. She was supervising her dogs while she was on a break. Another employee's dogs were also running around. Mr Soper says he did speak to Ms Aiken again because he had already told her the dogs should not be running around. He says he also spoke to the other staff member. I accept Mr Soper's evidence. His action caused no disadvantage to Ms Aiken in her employment and was justified in all the circumstances.

17 October 2011

[43] First, Ms Aiken says Mr Soper accused her of falsifying her timesheet. She had made a mistake over claiming for a sick day. Mr Soper says he frequently had to check with staff to ensure their timesheets had been correctly filled out. He denies he accused her of falsifying her timesheet. I accept Mr Soper's evidence. His action caused no disadvantage to Ms Aiken in her employment and was justified in all the circumstances.

[44] Secondly, Ms Aiken says Mr Soper *yelled* at her because she was cleaning out the drains without gloves on. The drains contained, amongst other things, dog excrement. Ms Aiken considered the gloves provided were not long enough so she did not use them. She says staff had to provide their own long gloves.

[45] Mr Soper says he had to raise his voice to be heard as Ms Aiken was working in the dog compound. He says he instructed Ms Aiken to stop what she was doing because cleaning out the drains with her bare hands was unsafe. His expectation was that staff would use either a hose or a shovel to clear the drain and that is why long gloves were not supplied. Employees were not expected to buy their own protective gloves. I accept Mr Soper's evidence. Mr Soper may or may not have raised his voice to Ms Aiken but, even if he did, his action caused no disadvantage to Ms Aiken in her employment and was justified in all the circumstances.

[46] There are other notes in Ms Aiken's diary for 17 October which I mention for completeness:

Staff meeting

No instructions on how to clean pound

Argument with Phil

Pet rolls

Poo and gravel!

[47] I heard evidence that Ms Aiken disagreed with Mr Soper's instructions to the dog handlers to monitor the amount of dog roll fed depending on the dog's level of activity. He says he had noticed some dog roll left in the dogs' bowls and thought that less should be fed to them since they were not all eating it all. Ms Aiken construed this as an instruction to feed the dogs less, did not agree with the instruction and did not comply. She was critical of Ms Hyink's compliance with the instruction. Ms Aiken also says that as a consequence some dogs unnecessarily lost weight. Once Mr Soper gave a further instruction to increase the amount of dog roll used Ms Aiken is critical of Ms Hyink's compliance with that instruction.

[48] The other listed matters were areas of disagreement from time to time between Ms Aiken and Mr Soper. For example, Mr Soper says that gravel in the dogs' compound was replaced when the SPCA could afford to do so. Ms Aiken believed it should be replaced more often. However, this argument between Mr Soper and Ms Aiken is not evidence of any poor treatment of Ms Aiken by Mr Soper.

19 October 2011

[49] Mr Soper checked the main sewage sump which was blocked after heavy rain. He found a dog's toy ball in there and blamed Ms Aiken for that. He *threw the excrement covered ball in my direction*. Mr Soper originally understood the complaint to be that he threw the ball at Ms Aiken. However, Ms Aiken acknowledged that there was a fence between them and he did not throw the ball over the fence.

[50] Mr Soper says that part of his job was to check the effluent pump and he often found objects, including tennis balls which the dogs played with in the effluent pump. A blocked effluent pump meant that effluent could overflow into the surrounding

paddocks. He had told volunteers and Ms Aiken and Ms Hyink previously, more than once, to ensure that all objects were picked up before the compounds were cleaned.

[51] Mr Soper says he did speak to Ms Aiken about having found another tennis ball in the effluent pump. She was the dog handler working that day. However, he says:

I never threw the ball at her as stated as she was inside the compound fencing and I was outside and I never leave any objects removed from the tank on the ground ...

[52] Even if Mr Soper was angry and frustrated at finding another tennis ball blocking the effluent pump and thrown the ball in Ms Aiken's general direction, because there was a fence between them, I do not consider that it was an action that was so serious as to cause her any disadvantage in her employment.

Allegations of breach of policy

[53] On 25 October 2011 Mr Soper handed Ms Aiken a letter containing two allegations that Ms Aiken had breached SPCA policy.

[54] The SPCA had received two written complaints about Ms Aiken's behaviour. One was from Ms Hyink and the other was from Donna Hurring, who was the Animal Supervisor at the time. The first complaint was that Ms Aiken had smoked in an SPCA vehicle, the golf cart. Ms Aiken admitted she did that.

[55] The second complaint was that Ms Aiken had put her dogs in the cab of the on-call vehicle, when they were supposed to be on the back. The policy on dogs in vehicles had recently been changed and staff had been notified orally at a staff meeting. Ms Aiken says she did not hear that the policy had been changed.

[56] A disciplinary meeting was held in relation to both matters on 28 October 2011. Both parties had legal representation. The result of the disciplinary meeting was that no disciplinary action was taken against Ms Aiken and that the SPCA would put their new policies about smoking and dogs travelling in vehicles in writing. Ms Aiken went on holiday after the meeting.

[57] On 7 November 2011 Ms Aiken was given the newly updated policy document and asked to sign it. She considered the new vehicle policy may have constituted a change in the terms and conditions of her employment and said that she

wanted to take it home to read it. Ms Aiken took the policies to her lawyer, Jen Wilson, for advice. She was asked several times by Mr Soper if she had signed the policy. On 21 November 2011 she told him she had taken the policy to her lawyer so he was aware she was taking advice on the policy.

[58] Nothing further happened in relation to this before Ms Aiken was suspended. In all the circumstances nothing about the allegations or how they were addressed by the SPCA amounted to an unjustified action causing disadvantage to Ms Aiken in her employment.

Was Ms Aiken unjustifiably disadvantaged by disparate treatment?

[59] The legal test in assessing whether an employer has subjected an employee to disparity of treatment so as to render a dismissal unjustified is set out in the Court of Appeal case of *Chief Executive Officer v Buchanan (No 2)*⁵. This is also the appropriate test to apply when considering whether disparity of treatment can amount to an unjustified disadvantage. The Authority must consider whether:

- (a) There was a disparity of treatment;
- (b) If so, whether there is an adequate explanation for the disparity; and
- (c) If not, is the dismissal justified despite the existence of disparity?

Was Ms Aiken treated unjustifiably compared with Ms Hyink?

[60] Ms Aiken says that a DCC dog ranger made an official complaint about Ms Hyink's lack of care for dogs in the Pound in July 2011. Ms Aiken claims the SPCA took no action regarding this official complaint.

[61] Mr Soper says that that he had asked the DCC dog ranger if she wished to take the complaint any further or whether it was satisfactory that he talked to Ms Hyink. The dog ranger agreed that a suitable resolution was that both she and Mr Soper should talk to Ms Hyink, which they did. I do not understand that there was ever a complaint made against Ms Aiken by a DCC dog ranger or anyone outside of the SPCA.

⁵ [2005] ERNZ 767

[62] There was a disparity of treatment but it is adequately explained by the fact that the situations were not comparable.

Complaints made by Mr Legg and Ms Aiken

[63] Anthony Legg, who worked at the SPCA for part of the time Ms Aiken was employed, gave evidence that he (and Ms Aiken) had made complaints about Ms Hyink's treatment of dogs, including of his own dog Dali. He considered that Mr Soper *would generally brush off our complaints*. He also said that he considered that Ms Aiken was *unfairly targeted* by Mr Soper.

[64] Mr Soper says that Mr Legg did make complaints about Ms Hyink but:

...they were always days or weeks after the incident happened. While I had no proof that they happened I always spoke to Maartje about them.

[65] Mr Soper dealt with Mr Legg's complaints about Ms Hyink in a way that was generally justifiable. However, Ms Hyink's alleged treatment of Dali was at least as serious as Ms Aiken's treatment of Fabio. It is surprising that a formal disciplinary process was not used which would have investigated the complaint. To that extent the allegations were treated in an unjustifiably disparate manner. However, any disadvantage to Ms Aiken from this has been overshadowed by her dismissal and I will deal with remedies for the disadvantage along with a consideration of remedies for unjustified dismissal.

Should Mr Soper have been formally disciplined or dismissed for the Bass incident?

[66] Ms Aiken alleged that Mr Soper fell short of the Animal Welfare Act provisions in relation to Bass' lack of care in August 2011 yet was not dismissed. Mr Soper says that he felt very bad about how long Bass suffered and takes some responsibilities for it although he had sought an assurance, and been given it by the Pound manager, that the owners were coming in to take Bass to the vet. He says he was shocked when he returned to the SPCA and found that Bass was still in the Pound. Ms Aiken considers that she has been treated more harshly and in a disparate manner to Mr Soper in relation to her alleged breach of the Animal Welfare Act provisions.

[67] I consider that the SPCA has an adequate explanation and acted reasonably in not dismissing Mr Soper because the responsibility for Bass' care once he was so

obviously ill was not clearly enough delineated between the SPCA and the Pound at the time. That was remedied by new protocols.

Was Ms Aiken subject to disparate treatment compared with Ms Gerard?

[68] Ms Aiken also alleged that she was treated in a disparate manner to Ms Gerard. I do not find that to be the case in relation to their personal dogs running around the SPCA grounds because I accept Mr Soper's evidence that he also spoke to Ms Gerard, not just Ms Aiken, about that.

[69] Ms Aiken also considers that although she was taken through a disciplinary process in part about having her dogs in the cab of the SPCA vehicle Ms Gerard acted the same and was not disciplined. Mr Soper says he was notified by Ms Hurring of Ms Aiken's dog/s in the cab but not of Ms Gerard's dog/s in the cab.

[70] Ms Aiken did go through an investigation and disciplinary process for having her dogs in the cab but she was not subject to any disciplinary action. If Mr Soper was not aware of Ms Gerard's alleged breach he could not be expected to address it in any way. That explanation for disparity of treatment is adequate and there was no unjustified disadvantage to Ms Aiken arising out of this.

Background to the dismissal

The Shia incident

[71] One of Ms Aiken's duties as a dog handler was to assess dogs for their suitability for re-homing, or adoption. There was an assessment form that was used for assessing dogs for their suitability for adoption. Any dog that was not suitable for re-homing/adoption would eventually be put down. The SPCA made those kinds of decisions about its own dogs but not about DCC Pound dogs.

[72] It was usual to assess a dog for its behaviour towards cats by walking it on a lead past the front of a caged area of the SPCA's adoption cattery. Another method of assessment commonly used was to walk the dog on a lead past one of the SPCA's resident cats who roamed free and so were able to easily escape if the dog showed any untoward interest in them.

[73] There was conflicting evidence about whether those methods of assessment were at the relevant time contained in a written SPCA policy or not. I am satisfied

that if the policy did exist at the time it was not sufficiently drawn to staff attention and that Ms Aiken did not know that the policy set out the only methods of acceptable assessment. She did know that they were the usual methods of assessment.

[74] Shia had been in SPCA care for a number of months and had previously had two assessments. Some volunteers had concerns about Shia's reaction to cats and no final decision had been made about whether she could be safely re-homed. If a dog could not be safely rehomed it was highly likely to be euthanised.

[75] During November 2011 Ms Aiken was away from work for some days on sick leave. She says that was because she became stressed and unwell due to Mr Soper's unfair targeting of her at work.

[76] Ms Stuart was second in command to Mr Soper. On Friday 18 November 2011 Ms Aiken rang to catch up on what had been happening at work before she returned, which she intended to do the following day. Ms Stuart advised Ms Aiken that there had been a decision, made in conjunction with Ms Hurring, that Shia should be reassessed. Ms Stuart explained that it had been decided that Ms Aiken and Ms Hurring would both be present during the assessment of Shia so that they could make a decision about whether Shia could be rehomed or not. Ms Hurring was not going to be at work until Monday 21 November 2011 and Ms Stuart says she told Ms Aiken that the assessment was to take place that day.

[77] Ms Aiken worked over the weekend of 19 and 20 November 2011. She decided to undertake a further assessment of Shia with the assistance of some volunteers. Ms Aiken was concerned that Shia might be put down for what she considered to be silly reasons. She knew that other staff members and some volunteers were concerned about Shia's behaviour around cats.

[78] Ms Aiken sought the assistance of Hanna Coppinga, a volunteer working in the cattery and Tom, another volunteer. Ms Aiken explained that she wished to *test Shia for compatibility with cats*. She asked Ms Coppinga which cat she *thought would be OK around a dog*⁶. Ms Coppinga suggested a cat called Fabio. Ms Aiken and Tom entered to corridor at the back of the cattery with Shia. Ms Aiken asked some members of the public to wait outside while she undertook an assessment. Shia was on a lead and muzzled. Tom had Shia's leash.

⁶ Hanna Coppinga's evidence.

[79] Ms Copinga brought Fabio out into the corridor in her arms at the other end of the corridor to Shia. It is unclear whether Fabio was aware immediately that Shia was there. Fabio jumped out of Ms Copinga's arms, over her shoulder and went in the opposite direction to Shia. Ms Aiken picked up Fabio and carried him close to Shia intending to put him on the ground in front of Shia. However, Fabio jumped out of Ms Aiken's hands only inches off the floor. Shia lunged at Fabio and Fabio climbed up the corridor wall to get away. Shia leapt up on her hind legs after Fabio. Fabio leapt over Shia's head and went towards the door to the outside. Shia went to pursue him although was restrained by Tom.

[80] Ms Aiken instructed Tom to put Shia in the kitten room, which is through a door from the corridor. I am satisfied that Shia was put in the enclosed safety area in the kitten room.

[81] Ms Aiken retrieved Fabio and comforted him and put him back in the adult cats' room. Ms Aiken then asked Tom to bring Shia back into the corridor and she, Ms Copinga and Tom had a discussion. During that time two members of the public who had been in the kitten room walked out along the corridor past them and into the adult cats' area. Shia remained on the lead and muzzled the entire time.

[82] After a few minutes Ms Aiken, Tom, Shia, and Ms Copinga went back into the kitten room. They remained in there for about eight minutes during which time a number of members of the public went in and out of the kitten room. Shia, Tom, Ms Copinga and Ms Aiken then all left the cat area through the corridor.

[83] Ms Aiken worked as usual for the next few days before going on her rostered days off. Ms Aiken did not attempt to hide what had happened in relation to Shia's assessment and drew attention to it by telling another staff member about what had happened and asking her if she had seen the events on the CCTV monitor.

[84] The CCTV footage was initially viewed because of concerns about Shia's behaviour and what that would mean for a decision about her future.

Suspension, allegations and process leading to dismissal

[85] However, after a number of people, including Sharon Stark Lont, a solicitor and a member of the SPCA's staffing committee, had viewed the CCTV footage, it was decided to suspend Ms Aiken from her employment and to instigate disciplinary

action for serious misconduct, including a potential breach of the Animal Welfare Act 1999. Ms Aiken was not consulted about her potential suspension.

[86] On 24 November 2011, a day when Ms Aiken was not at work, she was delivered a letter suspending her on full pay during the investigation. The letter was signed by Mr Soper, although written and prepared by Ms Stark Lont and an associate of her firm, Melinda Broek. The letter advised Ms Aiken that the SPCA considered that she caused:

... a cat to become unnecessarily distressed while carrying out an assessment of Shia.

... You should be aware that the SPCA is treating this as a serious disciplinary matter and will be considering whether this incident amounts to serious misconduct. There is a possibility that you may be dismissed as a result.

If our interpretation of the video footage is correct, your actions also potentially amount to a breach of sections 10 & 11 of the Animal Welfare Act 1999 which makes it an offence to fail to ensure that the behavioural needs of an animal are met in accordance with good practice⁷. This incident could also bring the SPCA's reputation into disrepute.

[87] Ms Aiken was invited to a meeting on 29 November 2011 to view the CCTV footage and to give her response to the allegations.

[88] Ms Aiken was shocked by her suspension and particularly about the serious allegations against her relating to the Animal Welfare Act. She became distressed and her mental health deteriorated rapidly and severely. On 28 November 2011 she sought assistance from the Emergency Psychiatric Services at Dunedin Public Hospital because she was having suicidal thoughts.

[89] Ms Aiken was too unwell to attend the proposed meeting on 29 November 2011 and continued to receive medical assistance and counselling after that consultation and remained on medication for depression and anxiety up to the date of the investigation meeting.

[90] On 29 November 2011 Ms Broek wrote to Ms Wilson asking her to confirm whether she was acting for Ms Aiken and asking her to advise when a meeting could be arranged.

⁷ A conviction for a breach of section 12 renders a person liable to imprisonment for a term not exceeding 12 months or a fine not exceeding \$50,000 or both.

[91] On 1 December 2011 Ms Broek wrote to Ms Wilson again that unless they received Ms Aiken's response to the 29 November 2011 letter by the end of the following day:

...the SPCA will have no option but to review its position with a view to considering Ms Aiken as having abandoned her employment.

[92] Ms Wilson responded to the letter on the same day stating that as already advised Ms Aiken had been quite unwell. She offered to provide written proof of that as soon as possible. She wrote that once Ms Aiken was well enough they would arrange to see the CCTV footage and arrange a time to meet. She notified the SPCA that Ms Aiken considered the suspension to have been unjustified, as well as being unnecessary.

[93] On 2 December 2011, Ms Broek wrote to Ms Wilson notifying her that on the previous Sunday Ms Aiken *had been well enough* to drop some kittens off at the Haven and asked that Ms Aiken not come to the Haven while suspended. The letter also said that unless the proposed disciplinary meeting was able to be arranged before the following Wednesday, 7 December 2011:

... Ms Aiken's suspension will continue but in accordance with your advice that she is unwell she shall have to rely on her sick leave, paid suspension shall cease as of that date.

We ... put you on notice that abandonment of employment may well be the conclusion we shall reach if this matter is not resolved within the short term.

[94] Ms Wilson says that because of the SPCA's insistence on Ms Aiken taking sick leave⁸ and threatening to treat her as if she had abandoned her employment they agreed that Ms Aiken would make a written response to the allegations rather than attend a meeting in person.

[95] On Friday, 9 December 2011 Ms Wilson sent the SPCA a letter enclosing:

- (a) A letter and consultation notes from the Emergency Psychiatric Services psychiatrist who saw Ms Aiken confirming that she had been seen on 28 November 2011 and confirming that there was an ongoing problem with her health;

⁸ Ms Aiken had no paid sick leave allowance left.

- (b) A copy of what she described as Ms Aiken's initial written response to the allegations of serious misconduct;
- (c) A copy of an email statement from Ms Copping and asked that before the SPCA made any decision it consider Ms Aiken's response and Ms Copping's email. Ms Copping's email said that:

...contrary to our expectations Fabio was unfortunately frightened of Shia. He escaped from my arms ... No physical harm was done to Fabio and the fear was only temporary.

[96] Ms Wilson also asked for clarification of the allegation that there was potentially a breach of the Animal Welfare Act; specifically which aspect of Shia's assessment was alleged to be in breach. She asked that this be clarified for Ms Aiken before any decision was made by the SPCA.

[97] Ms Wilson's letter also raised concerns that Ms Aiken had about Mr Soper's harsh treatment of her disparity of treatment towards her compared with Ms Hyink.

Letter of dismissal

[98] On 12 December 2011 Ms Broek sent the SPCA's decision letter concluding that Fabio was seriously traumatised as is evidenced by the video and that members of the public were clearly visible on the video. The letter did not respond to the request of specifics about the Animal Welfare Act allegation and did not make a decision about that allegation. Ms Aiken's employment was terminated for serious misconduct.

[99] On 16 February 2012 Ms Wilson raised personal grievances that Ms Aiken had been unjustifiably disadvantaged by her suspension and during her employment by Mr Soper's treatment of her. She also raised a grievance of unjustified dismissal.

Was Ms Aiken unjustifiably disadvantaged by her suspension?

[100] The test for whether an employer's action is justifiable is set out in s.103A of the Employment Relations Act 2000; that is, was the decision one a fair and reasonable employer could have made in the particular circumstances at the time the decision to dismiss was made?

[101] Suspension of an employee must be based on a contractual or statutory right. Clause 15.1 of Ms Aiken's employment agreement contains a right to suspend or exclude her from SPCA premises when an investigation was in place.

[102] Ms Stark Lont says that it was necessary to suspend Ms Aiken while the investigation and disciplinary process took place because she was very worried that there could be a complaint made about the Shia incident and so the SPCA could not afford to have members of the public seeing Ms Aiken still at work. Ms Stark Lont also says that it is important for the SPCA to adhere to very high standards of animal welfare and therefore it holds its staff to high standards; *SPCA staff must be scrupulous*.

[103] When deciding whether to suspend an employee pending a disciplinary investigation an employer must comply with the rules of natural justice⁹. Natural justice requires that a person is given an opportunity to be heard before a decision is made about them. In *Tawhiwhirangi v Attorney General* Goddard CJ, in a matter relating to the opportunity of an employee to be heard prior to being suspended from employment held that:

*...the matter must be looked in a sensible, flexible, and reasonable way to ascertain what are the requirements of fairness on the particular occasion in the particular surrounding circumstances.*¹⁰

[104] There may be genuine reasons for suspending an employee while an investigation is undertaken, such as a safety risk or a risk that the employee would tamper with evidence. However, an employer must usually consult an employee and involve her in the decision of whether or not to suspend her.

[105] Ms Wilson submits that the suspension was punitive and carried out in an unfair way. In addition, the way the suspension was imposed was in breach of natural justice. She submits it was also unnecessary.

[106] The allegations against Ms Aiken were of behaviour which took place on and were known of by other SPCA staff from 19 November 2011. Ms Aiken worked again without any issues for the next few days. There were no previous instances of her apparently mistreating any animal.

⁹ *Tawhiwhirangi v. Attorney-General* [1993] 2 ERNZ 546

¹⁰ *Ibid*, at 559

[107] On the other hand the SPCA is a public organisation wholly dependent on donations and grants many of which come from members of the public. I consider that the reason behind suspending Ms Aiken, how it might look to a complaining member of the public to see her working there during an investigation and disciplinary process, was a substantively justifiable reason.

[108] However, Ms Aiken was not consulted about the proposed suspension. The decision to suspend her was made before she was made aware that there had been any allegations of misconduct made against her. The SPCA did not comply with the rules of natural justice or with any of the requirements set out in s.103A of the Act.

[109] In *Angus and McLean v Ports of Auckland* the full Court of the Employment Court held that failure to meet any of the four tests in s.103A of the Act is likely to result in a dismissal or disadvantage being unjustified¹¹.

[110] Ms Aiken's suspension disadvantaged her in her employment by making her feel 'on the back foot' especially in the face of a serious allegation that she may have breached the Animal Welfare Act. I consider the defect in the process was more than minor and resulted in Ms Aiken being treated unfairly.

[111] In all the circumstances the decision to suspend Ms Aiken, in relation to the way it was made, was not one that could have been made by a fair and reasonable employer. However, the unfairness to Ms Aiken in being suspended without natural justice being observed has been overtaken by her dismissal and it is not appropriate to consider separate remedies additional to those for her dismissal considered below.

Was Ms Aiken unjustifiably dismissed?

Having regard to the SPCA's resources was there a sufficient investigation?

[112] There was no investigation undertaken by the SPCA beyond watching the CCTV footage which does not have any audio.

[113] Ms Stark Lont did not consider there was any need to undertake any further investigation because she decided that the video footage was sufficient to prove that Ms Aiken had caused Fabio to be seriously traumatised, and because members of the public had seen a dog in the cattery the SPCA's reputation was brought into disrepute.

¹¹ [2011] NZEmpC 160, at paragraph [26].

[114] I acknowledge that the SPCA is a small organisation with limited resources. However, I do not consider that the investigation was adequate. Ms Copping should have been interviewed about how Fabio was after his return to the adult cat room and for the rest of the day. Tom should also have been interviewed. It would not have taken a great deal of extra resources to interview them. However, neither of them was interviewed for their assessment of the level of distress suffered by Fabio.

[115] I do not consider that simply viewing the CCTV footage was a sufficient investigation to lead to the conclusion that Fabio was *seriously traumatised*.

Were the SPCA's concerns put to Ms Aiken before it decided to dismiss her?

[116] The allegations put to Ms Aiken were that Fabio became *unnecessarily distressed* which could amount to an offence against the Animal Welfare Act, and that the incident could bring the SPCA's reputation into disrepute. Ms Stark Lont and Ms Broek drew up the letter of allegation for Mr Soper to sign.

[117] However, the dismissal letter said:

- Fabio was *seriously traumatised*;
- Ms Aiken's behaviour amounted to grave and serious misconduct;
 - One of the kittens developed snuffles shortly after Shia's visit to the kitten house – with the implication that stress from the dog being in the kitten house caused the illness. This was not put to Ms Aiken for her response;
 - There were members of the public clearly visible on the video;
 - Ms Aiken had a long history of absences from work. This was not put to Ms Aiken for her response;
 - There was recent disciplinary action involving Ms Aiken and she has not signed the policy about dogs in cars. This was not put to Ms Aiken for her response. If it had been she may have returned the signed policy;

- Ms Aiken had on occasions promised medical certificates that have never arrived. This was not put to Ms Aiken for her response.

[118] At the investigation meeting Ms Stark Lont said that the matters referred to in the dismissal letter, such as the kitten getting snuffles, other than the two allegations put to Ms Aiken, were just background and did not form part of the decision to dismiss her.

[119] However, at the investigation meeting it became clear that Ms Stark Lont also considered that:

- Shia being in the kittenry, whether or not in the enclosed safety area, would have caused distress to the kittens; and
- Ms Aiken had deliberately disobeyed a lawful and reasonable instruction from Ms Stuart not to conduct any further re-assessment on Shia until the Monday when she was to conduct it alongside Ms Hurring.

[120] Those concerns/conclusions were not put to Ms Aiken for her response and were not even recorded in the dismissal letter as conclusions that the SPCA had reached, although it had.

[121] Ms Aiken says that she understood, based on her conversation with Ms Stuart, that an assessment of Shia was to take place on the Monday conducted by both herself and Ms Hurring. However, she did not understand that Ms Stuart instructed her not to do any further reassessment of Shia over the weekend and before the Monday assessment. She was entitled to have that explanation taken into account before any decision was made by the SPCA, however, the concern was never put to her.

[122] Ms Stark Lont also considered that Fabio was frightened twice; the first time being when he escaped from Ms Copinga's arms. Ms Stark Lont says that the outcome could have been different if Ms Aiken had stopped the assessment at that point and not put Fabio directly in front of Shia. The allegation that Fabio was twice frightened by Shia was never put to Ms Aiken.

[123] In making a decision about whether or not to dismiss an employee an employer is entitled to take into account an overview of the employee's work history, such as any earlier disciplinary matters. However, it is a fundamental requirement

that any allegations that will be taken into account in making a decision should be put to an employee for their response.

Was Ms Aiken given a reasonable opportunity to respond to the SPCA's concerns?

[124] It was unfortunate that Ms Aiken's state of health precluded a face to face meeting within the few weeks after her suspension for her to put her responses to the SPCA. Nonetheless, in all the circumstances I conclude that she was given a reasonable opportunity to respond to two allegations only: unnecessary distress to Fabio and the SPCA's reputation.

[125] Ms Wilson asked for more specificity about the allegation of a potential breach of the Animal Welfare Act which was never provided so Ms Aiken was unable to respond specifically to that.

[126] The SPCA's other concerns were never put to Ms Aiken – failure to follow a lawful and reasonable instruction, distress allegedly caused to the kittens, a kitten getting snuffles, and failures to provide medical certificates. Because so many of the SPCA's concerns were never put to Ms Aiken it follows that she was not given a reasonable opportunity to respond to them.

Did the SPCA genuinely consider Ms Aiken's explanation before deciding to dismiss her?

[127] Ms Stark Lont and John Keenan of the staffing subcommittee ran the disciplinary process. Ms Stark Lont and Mr Keenan made the decision that Ms Aiken should be dismissed after discussion with Mr Soper.

[128] Ms Stark Lont says that Ms Broek drew up the letter of dismissal and signed it on her instructions. Ms Stark Lont is not sure if she checked the letter before it was sent out. She agreed that the disciplinary process related to the smoking and the animals in vehicles policies should not have been mentioned because there was no disciplinary action taken against Ms Aiken.

[129] The SPCA could not have given genuine consideration to Ms Aiken's explanations because she had only had a limited opportunity to put any explanation forward when so many of the SPCA's concerns were never put to her.

Did the SPCA investigate and consider Ms Aiken's complaints of disparity of treatment and disadvantage by Mr Soper's treatment of her?

[130] Ms Wilson's letter of 9 December 2011 raising the two concerns that Ms Aiken had about her employment were not investigated and not taken into account before the decision to dismiss her was made.

[131] Once those allegations had been made the SPCA was clearly put on notice that Ms Aiken considered that there were other employment relationship problems, particularly in relationship to Mr Soper's management. The allegation of disparity of treatment was relevant to the SPCA's decision about how to treat Ms Aiken in relation to the Shia incident. However, it was never taken into account. That in itself was unfair because it meant the entire factual matrix relating to Ms Aiken's employment was not considered before the SPCA decided to dismiss her.

[132] The procedural defects in the investigation and disciplinary process were more than minor and led to Ms Aiken being treated unfairly. Therefore, the decision to dismiss Ms Aiken for serious misconduct was not a decision that a fair and reasonable employer could have made in all the circumstances at the time. Ms Aiken was unjustifiably dismissed and is entitled to remedies.

Could a fair and reasonable employer have concluded that Ms Aiken's behaviour amounted to serious misconduct?

[133] Although I have already determined that Ms Aiken was unjustifiably dismissed on procedural grounds of unfairness it is useful to examine the substantive basis for the dismissal.

[134] It is surprising that clause 13 of Ms Aiken's employment agreement does not include any mistreatment of animals in its definition of serious misconduct. However, because of the type of organisation the SPCA is, any mistreatment of animals must be capable of amounting to serious misconduct for which summary dismissal is a possible outcome.

[135] However, the difficulty for the SPCA in fairly concluding that Ms Aiken's behaviour caused Fabio to become *seriously traumatised* (rather than *unnecessarily distressed*) lies in its failure to interview anyone who had contact with Fabio after the Shia incident. There was simply no evidence the SPCA had that Fabio was seriously traumatised. Therefore, that was not a conclusion that a fair and reasonable employer

could have made. In addition, the issue of Fabio being seriously traumatised was never put to Ms Aiken for her explanation.

[136] The second allegation apparently found proved by the SPCA was that the incident could have brought the SPCA's reputation into disrepute. I conclude that because the letter of dismissal recorded that the SPCA found as a fact that *there were members of the public clearly visible on the video*.

[137] Clause 13 in its definition of serious misconduct requires an employee to have behaved in a way that is *bringing the employer into public disrepute*.

[138] The CCTV video footage shows that members of the public were not present in the corridor when Fabio attempted to escape from Shia; which was the behaviour complained of. There were members of the public who saw Shia in the cattery area. However, the fact that Ms Aiken brought a muzzled dog on a lead into the cattery was not an allegation put to her for her response. There were no complaints from the public or from the volunteers present that day about the Shia incident or about a dog being in the cattery. Therefore, although Ms Aiken's unorthodox assessment of Shia's response to cats had the potential to bring the SPCA into disrepute it did not do so. Ms Aiken did not bring her employer into disrepute and a fair and reasonable employer could not have concluded that she did.

[139] The allegation that Ms Aiken's behaviour could have amounted to a breach of sections 10 and 12 of the Animal Welfare Act was overstated and not stated with sufficient specificity. Chief Inspector Pine was consulted by Mr Soper before the allegation letter was sent out and gave her opinion that the treatment of Fabio was capable of constituting a breach of the Act. However, it was only at the investigation meeting that it became clear that that no further or serious consideration had been given to prosecuting Ms Aiken for an animal welfare offence. Ms Pine said that she would not have instigated a prosecution and although in her opinion there was a breach it was at the minor end of a scale of breaches. However, it is clear that in making the decision to dismiss Ms Aiken the fact that there was a breach of the Act, which is a criminal offence, was assumed to be correct and taken into account. Actually the SPCA did not bring a prosecution and will not do so and it was unfair and unreasonable to consider that Ms Aiken had committed a breach of the Act.

[140] Evidence relied on by an employer in support of an allegation that amounts to a criminal offence, such as a breach of the Animal Welfare Act, must be commensurate with the seriousness of that allegation. The evidence in this case could not meet that high standard because of the inadequate investigation.

Was there sufficient consideration of alternatives to dismissal?

[141] A fair and reasonable employer would not decide to dismiss an employee for serious misconduct without considering whether dismissal was the appropriate and necessary penalty, and if it was not what alternatives might be available by way of penalty.

[142] The SPCA considered dismissal was the only acceptable outcome because it believed Ms Aiken had seriously traumatised Fabio; a conclusion based on an insufficient investigation. Ms Stark Lont says that the key issue meaning dismissal was the correct outcome was that Ms Aiken displayed no remorse and made no acknowledgement that Fabio *was terrified*. She says that if Ms Aiken had demonstrated any remorse then maybe a final warning could have been given. However, no alternative outcomes were considered at the time of making the decision to dismiss. A fair and reasonable employer would have considered alternative disciplinary action before deciding on dismissal.

Remedies

Reinstatement

[143] Ms Aiken believes that because Mr Soper is no longer employed at the SPCA she can be successfully reinstated. Her ultimate career goal is to undertake animal inspectorate training through the SPCA. Ms Wilson submits that nothing short of reinstatement at the SPCA could compensate Ms Aiken for her unjustified dismissal. She submits that because there are very few positions available in animal welfare work in Dunedin anything less than reinstatement will leave Ms Aiken substantially disadvantaged. I understand that Ms Aiken has undertaken voluntary work with animals since her dismissal but Ms Wilson submits Ms Aiken:

...has remained fearful of a prosecution for breach of the animal welfare act and has been very reluctant to disclose the fact and reasons for her dismissal.

[144] Reinstatement is a discretionary remedy that the Authority may provide for if it is reasonable and practicable to do so. If reinstatement is awarded it should be to the employee's former position or to a position no less advantageous to the employee¹².

[145] The Employment Court has given some guidance on how issues of reasonableness and practicability are to be assessed:

*...not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, ... the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although ...evidence considered when determining justification for dismissal ...may also be relevant to the question of reinstatement.*¹³

[146] In considering reasonableness, the effect of reinstatement of Ms Aiken on other employees of the SPCA may be considered, but is not determinative.

[147] The meaning of "practicable" in the context of reinstatement, applied by the Employment Court, was affirmed by the Court of Appeal in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School (NZEI)* as¹⁴:

*Whether ... it would not be practicable to reinstate [Ms Aiken] involves a balancing of the interests of the parties and the justices of their cases with regards not only to the past but more particularly to the future. It is not uncommon for this Court..., having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully.*¹⁵

[148] Reinstatement is strongly opposed by the SPCA. The main objection is that Ms Aiken held a negative view of the SPCA during her employment even before her suspension and retains such a view. Ms Brazil submits that this was demonstrated by photographs presented by Ms Aiken in these proceedings which she alleged showed substandard conditions for animals in SPCA care which were taken by her years before there were any employment relationship problems. Ms Aiken's evidence was that there were poor and unhygienic conditions at the SPCA before but her work and

¹² Section 123(1)(a)

¹³ *Angus and McKean*, *ibid.* at paragraph 66.

¹⁴ [1994] 2 ERNZ 414 (CA)

¹⁵ This was also affirmed by the Court of Appeal in *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at paragraph 2.

initiative improved conditions. Ms Aiken's claimed sole responsibility for a number of improvements and innovations is disputed by the SPCA. Mr Soper acknowledged that she did instigate some improvements for the dogs herself and from her own pocket, such as dog toys.

[149] Since Ms Aiken was dismissed the SPCA has been restructured, partly as a result of the Pound no longer being located on the same land. Sophia McSkimming is the new Executive Officer. Ms McSkimming says that the role of dog handler no longer exists. Instead, all staff rotate between three different roles; looking after the dogs, looking after the cats and working in the office doing administration and reception duties.

[150] Ms Aiken cannot be reinstated to her former position of dog handler. However, she says that when she first began at the SPCA her role was a mixture of the same three duties: cat care, dog care and office/administrative work. She has experience in all three areas and believes that she could undertake the role. She does not consider the new roles to be less advantageous to her than her former position.

[151] Ms Aiken says that she would welcome what Ms McSkimming says are the more stringent performance guidelines now in place for staff.

[152] I consider it would be reasonable to reinstate Ms Aiken. However, the question of whether it is practicable in the sense of being feasible to carry out in action and especially the issue of re-establishing a positive mutually respectful employment relationship requires further consideration.

[153] Ms McSkimming says that if Ms Aiken had applied for reinstatement within the first 12 months after her dismissal it may have been easier to reintegrate her into the organisation. However, if Ms Aiken is reinstated now, it is likely to be at the cost of another employee's job.

[154] When unjustified dismissal has been found a consideration of whether or not another employee might lose their position if the applicant is reinstated is not determinative of whether or not the applicant should be reinstated.

[155] However, I consider it relevant that the SPCA is a not for profit organisation reliant on donations and has limited funds and resources to expend on the process that would be necessary to reinstate Ms Aiken, particularly that would also require a

consideration of restructuring the organisation to create a role for Ms Aiken. It is also relevant that the SPCA is a relatively small employer.

[156] Ms Aiken's evidence was critical of the SPCA in a number of respects not related to her unjustified suspension and dismissal. It demonstrates that she often believed that her way of caring for animals was the correct way, and probably the only acceptable way. My view is strengthened by Mr Soper's evidence, which I accept, that when he was Ms Aiken's manager he found her difficult to manage because she:

...would often ignore instructions...Keryn would not accept her behaviour was wrong which made it hard to get her to follow instructions

I suspect Keryn's reason for feeling I targeted her and not others was because I had to keep reminding her of the rules.

[157] However, he acknowledges:

Keryn's work ethics were good at the start of her employment ...

[158] There is no suggestion that Ms Aiken was a poor employee overall. My impression is that her drive and passion for the animals meant that sometimes she found it difficult to accept management decisions which, amongst other considerations, had to be made in line with the limited budget the SPCA operates under.

[159] Ms Aiken also had, and retains, a negative view of her former colleague Ms Hyink. Ms Hyink is still employed by the SPCA. In response to questioning Ms Aiken admitted her involvement, along with other SPCA staff or volunteers, in one or more prank calls to Ms Hyink on a New Year's Eve while Ms Hyink was on call. Ms Aiken characterised these calls as jokes and calls to wish Ms Hyink a Happy New Year. Ms Hyink found the calls unsettling instead and did not characterise them as friendly. However, Ms Aiken believes she will be able to work alongside Ms Hyink again. She told the Authority she would do so by ignoring aspects of Ms Hyink's work she did not agree with.

[160] Ms Hyink alleged that Ms Aiken had been involved in posting an uncomplimentary comment about her on Facebook. Ms Aiken denied that. The comment did not name Ms Hyink and was posted on or from Mr Legg's Facebook

page. I accept that Ms Aiken is not responsible for the Facebook comment in that she did not post it.

[161] Ms Hyink says that Ms Aiken's return to the workplace would cause her stress. She was visibly upset at the prospect of Ms Aiken's return and said she would possibly need to look for another job:

*Keryn's allegations against me have caused me a deal of stress
...tension between Keryn and I made it not a nice working
environment for me.*

[162] I acknowledge that Ms Aiken had good working relationships with a number of other staff, such as Mr Legg and Ms Hurring, and with the volunteers. However, her ongoing disapproval of Ms Hyink is troubling. I have considered whether mediation might assist the SPCA and Ms Aiken to re-establish an employment relationship with the necessary trust and confidence. But I am especially concerned about the lack of a positive working relationship between Ms Aiken and Ms Hyink. The lack of trust between Ms Aiken and Ms Hyink is deep and goes back a long way. The SPCA operates with a small paid staff and it would be difficult to ensure that Ms Hyink and Ms Aiken's work shifts did not coincide.

[163] I have considered Ms Aiken's age, which is now 42, and the fact that she has spent much of her working life working with animals. While it is true that the SPCA is likely to be the main animal welfare organisation in Dunedin it is clear, from Ms Aiken's CV alone, that there are alternative roles working with animals, from veterinary practices to catteries and kennels, that she could be employed in when she is well enough to work full-time. Ms Aiken's evidence disclosed that at least one person with whom she had worked while at the SPCA was willing to write a positive reference for her.

[164] I understand that Ms Aiken considers that reinstatement is the only acceptable remedy. However, this determination should go some way to assuaging the impact of the unjustified dismissal on her future employment prospects. Ms Aiken has not previously in any way mistreated an animal in SPCA care or in her personal care, or been accused of doing so. She had not undertaken an assessment of any other dog in that way. She set out in writing what her reasons were for undertaking the assessment in the way she did. Her intention was to prevent Shia's death if it could be prevented. She tried to ensure that the cat least likely to be spooked by Shia was selected. Her

intentions were good although she showed a lack of judgment and could be said to have elevated Shia's welfare over Fabio's. None of the SPCA witnesses were critical of Ms Aiken's care of animals overall and it is clear that she cares deeply for them.

[165] However, having taken everything into consideration, I find that the SPCA and Ms Aiken are not in a position to re-establish the kind of relationship of trust and confidence that is imperative in an employer/employee relationship. Therefore, I do not consider it practicable to reinstate Ms Aiken to a role at the Otago SPCA.

Lost wages

[166] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Amcor of the whole or any part of wages Ms Aiken lost as a result of her grievance. If I find that Ms Aiken lost wages as a result of her grievance s.128(2) of the Act provides that I must order the SPCA to pay Ms Aiken the lesser of a sum equal to her lost remuneration or to 3 months' ordinary time remuneration.

[167] The SPCA submits that Ms Aiken should not receive lost wages because of her inability to work for health reasons.

[168] Receipt of a sickness benefit means that an employee is unable to work. The only way that the SPCA would be liable to pay Ms Aiken lost wages is if her health deterioration and consequent inability to work were caused by the SPCA's unjustified treatment of her.

[169] Ms Aiken has a history of depression which was under control with treatment from her general practitioner at least until about October 2011.

[170] Ms Aiken says that earlier in her employment one of her kittens went missing and that caused her depression to worsen for a time. She says she shared the difficulties she was having with colleagues at the time but that her health returned to a stable level.

[171] Ms Aiken did not disclose her history of depression to the SPCA when she applied for work. She says she did not consider it relevant because she felt it would not impact on her work. On the application form Ms Aiken had to fill in when applying for her role she was asked if she suffered from *Nervous Disorder/Anxiety Problems*. She circled *No*. Ms Aiken says that until her suspension and dismissal she had no anxiety symptoms but became anxious once the allegations were made.

The term 'nervous disorder' is not a diagnosis of depression. Overall, I do not think any criticism can be made of Ms Aiken in not disclosing her depression at the time she applied for the role.

[172] Mr Soper says that he did not know about Ms Aiken's mental health difficulties. If he had known how Ms Aiken would react:

I would have called her in with a support person to explain. I never meant to cause additional distress and had no idea Keryn would react as she did given her personality at work always came across as strong and assertive.

[173] Ms Aiken suggested that the SPCA should have known she was in a vulnerable state because at the meeting on 28 October 2011 she was too upset to speak for herself part of the time and was visibly emotional. I do not accept that is sufficient to put her employer on notice that she was unwell. A number of employees find disciplinary proceedings after complaints from fellow employees emotionally difficult to deal with.

[174] Ms Aiken says the worsening of her mental health, leading to her being unable to work, is directly attributable to her unjustified suspension and dismissal. Ms Aiken has remained on the sickness benefit and has not been employed, except for Moggys work, since her dismissal.

[175] Ms Aiken says that prior to the Shia incident her mental health had deteriorated because of her concerns that Mr Soper was acting unjustifiably to her disadvantage in her employment. However, those claims were unsubstantiated. She had taken some time off because of her health. Ms Aiken judged herself well enough to return to work on 19 November 2011 and worked that day and subsequent days until her rostered days off during which she was notified of her suspension. However, there is no medical evidence of the state of her condition at that point.

[176] Ms Aiken's evidence was genuine and heartfelt. However, I received very little supporting objective medical evidence. The first document is a copy of the letter from the psychiatrist who saw her on 28 November 2011 at the Emergency Psychiatric Service at Dunedin Public Hospital. Ms Aiken was referred there by her general practitioner. The psychiatrist acknowledged a long history of depression and referred to a *crisis at work*; which was the letter notifying her of the allegations and her suspension. He described her as being *devastated* by the suspension. There is no

mention of the Animal Welfare Act allegation which is the precise aspect to which Ms Aiken attributes her mental health state at that time and up to the investigation meeting.

[177] The second possibly relevant supporting document is a letter from Ms Aiken's general practitioner certifying that she was unfit to resume work for a period of 19 days from 6 December 2011. He gave no reasons.

[178] There is no more recent medical or psychological objective evidence.

[179] There is insufficient necessary medical or psychological evidence to support the contention that the unjustified actions of the SPCA caused Ms Aiken's health to deteriorate to the point that she was unable to work, or seek work, and had to go on the sickness benefit on which she remained until the investigation meeting. Therefore, the SPCA is not liable to pay lost remuneration or employer Kiwisaver payments.

[180] There was no evidence of medical costs sought by Ms Aiken. However, the SPCA is not liable to pay her medical costs in any case.

Compensation

[181] Ms Aiken has applied for significant compensation for what is submitted to have been enormous stress, distress and humiliation from her suspension and her dismissal. Ms Wilson submits that the compensation should be at the higher end of the type of compensation that could be awarded and submits that the range of up to \$27,000 suggested by the Court of Appeal in *NCR (NZ) Corporation Limited v Blowes*¹⁶ should be raised to account for the effect of inflation over the past 8 years.

[182] Ms Wilson submits and Ms Aiken gave evidence that the allegation she may have breached the Animal Welfare Act was the most distressing allegation for Ms Aiken. That is partly because any conviction under the Animal Welfare Act would have been fatal to her ambition to become an SPCA inspector, and probably to any ongoing employment with animals.

[183] No prosecution was brought against Ms Aiken for any breach of the Animal Welfare Act, although the letter of dismissal did not address that and Ms Aiken was

¹⁶ [2005] 1 ERNZ 932

not formally told that no prosecution would be forthcoming. In a letter dated 14 December 2011 Ms Aiken wrote to the Ministry of Agriculture and Fisheries enquiring about whether the Shia incident could give rise to an offence under the Animal Welfare Act. She wrote that *the SPCA is not taking any prosecution action*. However, I am satisfied that she meant that to date no prosecution had been taken.

[184] Ms Aiken told me her:

..main concern about the animal welfare allegations was that my reputation was destroyed and that's what destroyed me. We were very unclear what they were saying [about a breach of the Animal Welfare Act].

[185] Ms Wilson submits that the negative effect on Ms Aiken was increased because at no time prior to the investigation meeting did the SPCA indicate that it would not pursue a prosecution. Instead, she submits that in attaching sections of the Animal Welfare Act to its Statement in Reply the SPCA hinted that it considered that Ms Aiken may have engaged in the more serious offence of baiting. Ms Wilson and Ms Aiken took that inference because of the inclusion amongst attached documents of a copy of section 29 of the Animal Welfare Act entitled *Further Offences*. The section makes it an offence for a person to encourage, aid, or assist in the fighting or baiting of any animal. On the attached copy the words *or baiting* have been circled. I accept that was puzzling and possibly misleading at the very least, and was worrying to Ms Aiken.

[186] It was not until the investigation meeting that it became totally clear that the SPCA would not proceed with any prosecution against Ms Aiken.

[187] I accept that the allegation of a breach of the Animal Welfare Act and possible criminal proceedings facing Ms Aiken were an aggravating factor that exacerbated the amount of distress and anguish she suffered beyond the other allegations made.

[188] Ms Aiken says she was also:

..very embarrassed and humiliated that the SPCA staff, some volunteers and the DCC Dog Control Staff knew about my firing and the reason for it. [a dog control officer] said that the DCC Dog Control Officers were told not to talk to me during my suspension.

[189] In the absence of what would have been necessary medical evidence of the non-economic loss that Ms Aiken has suffered I do not consider that I can make an award in the upper range approaching \$27,000 or more as Ms Wilson submits.

However, I accept that Ms Aiken was deeply humiliated by the unjustified suspension and unjustified dismissal, particularly the Animal Welfare Act breach allegation, and I consider it reasonable that the SPCA pay Ms Aiken \$12,000 compensation.

Contribution

[190] Section 124 requires me to consider the extent to which Ms Aiken's behaviour contributed towards the situation that gave rise to her personal grievance, and, to reduce the remedies that would otherwise have been accorded accordingly.

[191] According to the Employment Court:

Not every element of blameworthy conduct on the part of an employee that contributes to a dismissal that is subsequently found to be unjustified should be reflected in remedy reduction. To do otherwise would expect standards of perfection of work performance by employees that are simply unrealistic in most workplaces...the Authority and the Court should take a robust and realistic attitude to what occurs in workplaces and not scrutinise pedantically and critically every slight deviation for the ideal or even the norm.¹⁷

[192] Ms Aiken's behaviour on 19 November 2011 was blameworthy because she did not consider what effect the assessment she carried out might have on the cat chosen or how members of the public might view the incident. However, I do not consider it to be so blameworthy that it should be reflected in remedy reduction.

Costs

[193] Costs are reserved. The parties are encouraged to agree on costs. If that is not possible Ms Aiken may make an application for costs, within 28 days of this determination and the SPCA should respond within 14 days after that.

Christine Hickey

Member of the Employment Relations Authority

¹⁷ *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178, at paragraph [78].