

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 396
5584843

BETWEEN IONA WIKAIRA
Applicant

A N D THE CHIEF EXECUTIVE OF
THE DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Rachel Larmer

Representatives: Bryce Quarrie, Counsel for the Applicant
John Rooney, Counsel for the Respondent

Investigation Meeting: 29 October 2015 at Whangarei

Submissions Received: 18 November 2015 on behalf of the Applicant
11 November 2015 on behalf of the Respondent

Date of Determination: 16 December 2015

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Ms Wikaira was employed by the Department of Corrections (the Department) as a Corrections Officer based at the Northland Region Corrections Facility (NRCF) from 28 January 2008 until she was dismissed for serious misconduct on 11 September 2015.

[2] Ms Wikaira was covered by the Collective Agreement for Department of Corrections Frontline Staff (Prisons Based). The key accountabilities of her role were set out in the Corrections Officer job description.

[3] Ms Wikaira was also required to comply with the Department's Code of Conduct (the Code) which she acknowledged receiving by signing for it. Ms Wikaira also acknowledged in writing that if she was unclear at any time about the requirements of the Code or she considered she was at risk of breaching the Code then she should discuss that with her manager.

[4] The Code sets out the standards of behaviour expected of all people who work with the Department. The Code also provides examples of behaviours that conflict with the principles identified in the Code and which the Department considered not acceptable. These included admitting to a criminal offence and engaging in actions that bring the Department into disrepute.

[5] The Department produced evidence to the Authority to show that the Department continually emphasised during staff meetings and briefings the importance of being open and honest and acknowledging mistakes as soon as they occurred. The Code also expressly states that being accountable required an employee to advise their manager of any criminal charge laid against them under any law statute or regulation.

[6] The Department dismissed Ms Wikaira for three breaches of its Code which it says amount to serious misconduct, namely that she had;

- (a) Engaged in "*unlawful action*" because she was charged with the criminal offence of wilful damage on 13 February 2015 to which she plead guilty on 22 April 2015;
- (b) Failed to disclose the criminal charge which was laid against her on 13 February 2015 until 11 March 2015, by which time she had already appeared in the Kaikohe District Court twice;
- (c) Potentially brought the Department into dispute by appearing in the District Court on four occasions and by having a warrant issued for her arrest due to her non-appearance in Court on 12 May 2015.

[7] The arrest warrant was brought to the Department's attention by the police. The Department raised it with Ms Wikaira who in turn raised it with her criminal lawyer who had told her she was not required to attend Court on 12 May. There is no

dispute that the arrest warrant appears to have been issued due miscommunication between Ms Wikaira's criminal lawyer (not Mr Quarrie) and the District Court staff.

[8] Ms Wikaira denies she engaged in misconduct or serious misconduct. She also says that even if her actions did amount to serious misconduct her dismissal was procedurally and substantively unjustified. She seeks reinstatement.

[9] The Department maintains that Ms Wikaira was dismissed after a fair and proper process because the Department concluded on reasonable grounds that Ms Wikaira's actions amounted to serious misconduct. It says that alternatives to dismissal were considered but discounted because it had lost trust and confidence in Ms Wikaira to act appropriately in future. The Department opposes reinstatement.

[10] The catalyst for the disciplinary action was a domestic incident between Ms Wikaira and her stepfather which occurred on 03 February 2015. Ms Wikaira's stepfather laid a Police complaint immediately after the incident alleging that Ms Wikaira had hit and broken his car windscreen. The Police elected to charge Ms Wikaira with the criminal offence of wilful damage.

[11] The personal circumstances that lead up to the domestic incident were discussed in full during the Department's disciplinary process and in the course of the Authority's investigation. I do not restate them here in order to preserve Ms Wikaira's privacy.

[12] Ms Wikaira says she did not engage in "*unlawful action*" (as per the Code) because she had only pleaded guilty to the criminal charge of wilful damage on her lawyer's advice. Ms Wikaira says the fact she was discharged without conviction means her actions were not unlawful, meaning she did not breach the Code.

[13] The Department does not accept that interpretation of the Code. It says one of the specific examples set out in the Code includes "*admitting*" to a criminal offence, which the Department says Ms Wikaira did by pleading guilty.

[14] Ms Wikaira admits that while she did not disclose the criminal charge to the Department until after her second District Court appearance on 11 April that did not breach the requirement in the Code to advise her manager of "*any criminal charge*" because she did not realise she had been charged with a criminal offence until 11 April 2015.

[15] The Department did not accept that explanation. It says that by the time Ms Wikaira disclosed the criminal charge she had attended the police station, had been charged with a criminal offence, had been summoned in writing to appear in the Kaikohe District Court, had signed the police issued summons to acknowledge she knew she was required to attend Court or a warrant could be issued for her arrest, she had appeared the District Court twice and on each occasion had been bailed, she had signed a Bail Notice which acknowledged she was aware that a summons could be issued if she did not appear in Court.

[16] The Department was also concerned that Ms Wikaira had called in sick on the day of her first Court appearance on 25 February which it says suggested she wanted to conceal her attendance at Court. She denies that.

[17] After disclosing the criminal charges on 11 March Ms Wikaira was placed on paid special leave which on 13 April converted to a paid suspension. Ms Wikaira advised the Department that she would be “*vigorously defending*” the criminal charge. The Department asks her to keep it informed of developments.

[18] On 22 April Ms Wikaira emailed Mr Michal Rongo, Custodial Systems Manager of NRCF (who at the material time was the Operations Support Manager) and informed him she had appeared in Court that day (her third Court appearance) and had entered a guilty plea and applied for a discharge without conviction.

[19] At her District Court appearance on 22 April Ms Wikaira was advised she had to attend Court on 12 May 2015. However, her criminal lawyer subsequently told her she was not required to attend that day, so in accordance with that advice she did not appear in Court.

[20] On 12 May Ms Wikaira emailed Mr Rongo to advise that her Court appearance had been adjourned until 26 May. On 20 May the Department heard from the Police that there was an active warrant out for Ms Wikaira’s arrest due to her failure to attend Court on 12 May. This was not Ms Wikaira’s fault it was her lawyer’s mistake.

[21] On 26 May Ms Wikaira appeared in the Kaikohe District Court for the fourth time and was granted a discharge without conviction.

[22] On 04 June the Department commenced an employment investigation into the three allegations which ultimately resulted in findings of serious misconduct and Ms Wikaira's subsequent dismissal.

[23] Ms Wikaira was interviewed in person by the investigator on 16 June and was sent a draft of the investigator's report on 24 June. Ms Wikaira's lawyer provided written feedback on the draft investigation report. This feedback was then sent to Mr Rongo who finalised the employment investigation report then and sent the final report to Ms Wikaira on 06 July to provide her feedback by 13 July.

[24] On 11 August Mr Rongo provided Ms Wikaira (in writing) with his preliminary views stating that:

- (a) the three allegations had all been proven;
- (b) the three allegations were considered to be serious misconduct;
- (c) he was viewing dismissal as the appropriate sanction.

[25] Ms Wikaira was invited to provide feedback on these preliminary views before a final decision about these matters was made. On 20 August Mr Rongo, Ms Wikaira and her lawyer met to discuss the preliminary report. After considering this feedback Mr Rongo wrote to Ms Wikaira on 11 September advising her:

- (a) The three disciplinary allegations against her were upheld;
- (b) The disciplinary allegations amounted to serious misconduct; and
- (c) She was dismissed on four weeks' notice.

[26] Mr Rongo's dismissal letter also responded to the various matters that Ms Wikaira had raised during the disciplinary process.

Issues

[27] The following issues are to be determined:

- (a) Was Ms Wikaira's dismissal justified?
- (b) If not, what if any remedies should be awarded?

(c) What if any costs should be awarded?

Was Ms Wikaira's dismissal justified?

[28] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether the Department's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Ms Wikaira was dismissed.¹

[29] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith requirements in s.4(1A) of the Act and each of the four procedural fairness tests set out in s.103A(3) of the Act. Failure to do so is likely to fundamentally undermine the ability of an employer to justify its actions and/or dismissal.

[30] During the Authority's investigation meeting Mr Quarrie conceded that the Department had fulfilled its obligations under s.4(1A) of the Act by disclosing relevant information and giving Ms Wikaira an opportunity to comment on it before she was dismissed. Mr Quarrie also conceded that the Department had met the procedural fairness tests in s.103A(3)(a) and (b) of the Act.

Did the Department comply with s.103A(3)(c) of the Act?

[31] Section 103A(3)(c) requires the Authority to assess whether the Department gave Ms Wikaira a reasonable opportunity to respond to its concerns before she was dismissed.

[32] Ms Wikaira says that the Department breached the requirements of this section because Mr Rongo issued his preliminary decision before he had met with Ms Wikaira in person. I do not accept that breached s.103A(3)(c) of the Act.

[33] Ms Wikaira met with Mr Rongo in person on two occasions. The first meeting occurred on 09 April and it involved the Department's proposed suspension of Ms Wikaira.

[34] During this meeting Ms Wikaira provided detailed information about the incident with her step-father and about the significant personal stresses and events

¹ Section 103A(2) of the Act.

leading up to this incident. This was the same version of events that Ms Wikaira repeated throughout the disciplinary process. I therefore consider that Mr Rongo was well aware of Ms Wikaira's personal situation and about her views on the originating incident.

[35] Ms Wikaira had also met personally with the investigator, and had provided written feedback on the draft investigation report before it was submitted to Mr Rongo.

[36] Ms Wikaira's lawyer had also written to Mr Rongo providing further comments on Mr Rongo's investigation report (ie the version he had finalised after reviewing the investigator's draft investigation report and Ms Wikaira's initial feedback), I am satisfied Mr Rongo properly considered all of this information before he issued his preliminary findings on the disciplinary allegations. I do not accept he had to meet with Ms Wikaira in person again before doing so.

[37] Ms Wikaira's second meeting with Mr Rongo occurred on 20 August. Ms Wikaira attended with her husband (also employed by the Department) and her lawyer. Ms Wikaira therefore had another opportunity to provide feedback in person to Mr Rongo on the matters of concern.

[38] The Authority was provided with a lengthy transcript from this meeting which shows that Ms Wikaira provided detailed comments and submissions which during the Authority's investigation meeting she confirmed were accurately and comprehensively set out in the dismissal letter dated 11 September.

[39] I am satisfied that the manner in which the Department conducted its disciplinary process was in accordance with its Code and with the Terms of Reference which were issued on 04 June. I find that in these circumstances Ms Wikaira could have been in no doubt of the Department's concerns and the potential outcome of the process.

[40] I consider that Ms Wikaira's email to Mr Rongo on 11 March shows she was aware her ongoing employment could be in jeopardy as a result of the criminal charge because she asks for a letter from the Department to give the Court which says that. I am satisfied on the balance of probabilities that the Department met its obligations under s.103A(3) of the Act

Did the Department comply with s.103A(3) of the Act?

[41] Section 103A(3)(d) of the Act requires the Authority to assess whether the Department genuinely considered Ms Wikaira's explanation before dismissing her.

[42] I am satisfied that the Department did genuinely consider Ms Wikaira's explanation. The fact that Mr Rongo considered Ms Wikaira's explanation to the issues of concern to be unsatisfactory does not mean he failed to genuinely consider her position.

[43] Mr Rongo presented as a measured and credible witness. I am satisfied to the required standard that he kept an open mind throughout the process and did not reach a final decision until after the second face to face meeting with Ms Wikaira on 20 August 2015.

[44] I find that Mr Rongo appears to have carefully considered and weighed all of the evidence, the requirements of the Code, the various investigation reports, together with all of the feedback, explanations and submissions Ms Wikaira provided before making a final decision.

[45] I am satisfied that Mr Rongo's preliminary letter of 11 August sets out his initial view of Ms Wikaira's explanations and that the dismissal letter addresses the various matters which were raised by Ms Wikaira prior to her dismissal.

[46] Mr Rongo's evidence was supported by Ms Crabbe, Senior Human Resources Adviser NRCF, who advised Mr Rongo during the disciplinary process. Ms Crabbe's evidence was that Mr Rongo very carefully considered and weighed all of the evidence and was slow to come to a decision because he was taking his time to thoroughly consider all of the information.

[47] Ms Crabbe also corroborates Mr Rongo's evidence that he was well aware of the very serious consequences a dismissal was likely to have on Ms Wikaira and it was not a decision that he took lightly.

[48] I am satisfied that Ms Wikaira's explanations were received and properly considered a number of times throughout the disciplinary investigation process. The

fact that the Department was not persuaded by the matters raised by Ms Wikaira does not mean that her input was not genuinely considered or appropriately weighed.²

[49] I am satisfied on the balance of probabilities that the Department has complied with its obligations under s.103A(3) of the Act.

Predetermination

[50] Ms Wikaira submits that Mr Rongo had predetermined the dismissal. She relies on two pieces of evidence to support that submission. The first is the fact that he issued preliminary views without having met her face to face (I have dealt with that above and do not accept that submission).

[51] Ms Wikaira also relies on the evidence of her husband, Mr Duran Ngakuru who is also currently employed by the Department, about a conversation which he says occurred with Mr Rongo at an (unspecified) early part of the process.

[52] Mr Ngakuru filed a statement immediately before the Authority's investigation meeting. Mr Ngakuru alleges Mr Rongo told him that Ms Wikaira could not come back to work because it was "*a sackable offence here at this site.*" When questioned by the Authority Mr Ngakuru was vague on details as to when this conversation occurred and what the context of it was. I therefore consider that Mr Ngakuru's evidence was not sufficiently detailed to support the proposition that was being put forward.

[53] Mr Rongo does not recall the conversation and he told the Authority he doubts that it took place. Mr Rongo says he recalls a conversation around the time that Ms Wikaira was placed on special leave and then suspended. Mr Rongo said this was initiated by Mr Ngakuru and was in the context of a discussion about the proposed suspension.

[54] Mr Rongo says that Mr Ngakuru asked about other staff who had received warnings but not been dismissed after being charged with criminal offences and suggested these examples meant Ms Wikaira was likely to be able to come back to work. Mr Rongo said he told Mr Ngakuru that because Ms Wikaira's conduct was potentially unlawful (i.e. it involved a criminal charge being laid against her) it could still be a sackable offence.

² *Hallwright v. Forsyth Barr Ltd* [2013] NZEmpC 202.

[55] In terms of resolving this conflict I have preferred to Mr Rongo's account of these events. The matters Mr Ngakuru referred to could, and should, have been raised with the Department immediately if considered relevant so I consider that the failure to do so until 26 October calls his evidence into question. Mr Ngakuru also has a personal vested interest in Ms Wikaira returning to work because they are married so her job loss directly impacts him in many ways.

[56] I also consider that Mr Ngakuru's explanation for not providing this information during the disciplinary process or in accordance with the timetable for the exchange of evidence prior to the investigation meeting was unsatisfactory.

[57] I do not accept that the evidence established that Mr Rongo had pre-determined the outcome. Mr Rongo's letter of 11 August made it clear that he was sharing his preliminary view only with Ms Wikaira which would not be finalised until after she had provided any further feedback, submissions or information that she wished to provide. I am satisfied that that occurred.

Bias

[58] Ms Wikaira claims that Mr Rongo was biased against her because he was under pressure from higher management to dismiss her. I find that the evidence did not support this serious claim.

[59] Mr Rongo's evidence satisfied me that he had conducted a careful and unbiased consideration of all of the disciplinary information. This included the preliminary disciplinary investigation report, the feedback that had been provided on the preliminary report, the final report, all relevant documentation that was available at that time, Ms Wikaira's comments, feedbacks and submissions regarding the allegations and the information that was available regarding the Court proceedings.

[60] Mr Rongo strongly denied that any pressure was exerted on him or that there was any element of predetermination. This evidence was corroborated by Ms Crabbe who told the Authority that she saw Mr Rongo give serious and considerable consideration to the entire matter because he discussed various aspects of Ms Wikaira's explanation with Ms Crabbe throughout the process. That evidence is consistent with the Authority's impression of Mr Rongo's evidence.

[61] I accept Mr Rongo's evidence and Ms Crabbe's evidence that the disciplinary outcome was a decision that Mr Rongo made himself without pressure or expectations being placed on him from anyone else in the Department.

Improper motivation

[62] Ms Wikaira says the Department targeted her for dismissal because it was unhappy about the amount of time she had previously had off work on ACC. I do not accept that this was a relevant factor in the disciplinary process. I accept the Department's evidence that its concern arose solely because Ms Wikaira was charged with, then plead guilty to, a criminal offence.

Disparity of treatment

[63] The Department disclosed information regarding how others in similar situations had been dealt with. I am satisfied from this information that there was no disparate treatment. The one incident that did not result in dismissal did not also involve a failure to disclose the criminal charges at the earliest opportunity which was a significant factor in the Department's decision to dismiss Ms Wikaira so I do not consider it sufficiently similar.

Could a fair and reasonable employer have concluded that Ms Wikaira had engaged in serious misconduct?

[64] The Department must genuinely believe on reasonable grounds that Ms Wikaira's actions amounted to serious misconduct. It is well established that serious misconduct is conduct which fundamentally undermines the trust and confidence inherent in the employment relationship.

[65] It is not for the Authority to step into the employer's shoes and decide what it would have done. Rather the Authority's inquiry is into whether or not it was open to a fair reasonable employer to have concluded that Ms Wikaira had engaged in serious misconduct based on the information that was available to the Department at the time.

[66] This involves an objective assessment. The Authority is not permitted to substitute its own subjective view. A harsh dismissal may still nevertheless be fair and reasonable and therefore a justifiable dismissal.

[67] I am satisfied that the three disciplinary allegations (admitting to a criminal charge, failing to disclose the criminal charge at the time it was laid, and potentially bringing the Department into disrepute by appearing in the District Court multiple times) were all matters which amounted to a breach of the Code.

[68] The Department's objectives include reducing reoffending and maintaining public safety. To ensure those objectives are met the Department sets clear expectations for its employees in its Code.

[69] Ms Wikaira had been provided with a copy of this Code and she had signed that she had read and understood it. It was also available to her on the intranet. I find that the Department could reasonably have concluded that Ms Wikaira was (or should have been) aware of her obligations under the Code.

[70] Ms Wikaira had acknowledged in writing on the Code when it was issued to her that she understood that a breach of the Code may lead to disciplinary action, including dismissal. Ms Wikaira had also acknowledged (by signing her copy of the Code) that if she was unclear about the requirements of the Code or considered she could be at risk of breaching them then she needed to raise it with her manager.

[71] The Code expects a very high standard of professional and personal behaviour and requires the Department's employees to (among other things) comply with the law at all times and role model high standards of integrity, presenting themselves in a way that enhances the credibility and supports the Department's success.

[72] The Code states that examples that fall below the accepted standard including engaging in "*actions that are unlawful*" which involves undertaking any form of unlawful behaviour (whether at work or off duty). An example was given beside this item to identify that it included "*admitting or being convicted of an offence*".

[73] It is clear that the first disciplinary allegation was a breach of the Code because Ms Wikaira did engage in conduct which resulted in her being charged with a criminal matter (wilful damage) which she pleaded guilty to. A criminal charge is an unlawful action.

[74] I do not accept Ms Wikaira's position that she did not engage in any unlawful action because her guilty plea was entered upon advice of her criminal lawyer, Mr Blakely. Ms Wikaira says she did not do anything wrong because she engaged in the

conduct which gave rise to the wilful damage charge in self-defence. That position was open to her to run before the District Court but after taking legal advice she decided to plead guilty.

[75] I am satisfied that a fair and reasonable employer could have concluded that an employee who pleads guilty to a criminal charge is accepting that their actions were unlawful.

[76] In terms of the allegation that Ms Wikaira failed to declare the charge at the time it was incurred, it is accepted as a matter of fact that Ms Wikaira was given a summons by the Police on 13 February 2015. This identified that she had been charged with wilful damage of her stepfather's car and that she was required to appear at the Kaikohe District Court on 25 February 2015.

[77] Ms Wikaira says that she was not aware that this was a criminal matter because she did not read the documents properly. She says that she did not become aware that she had been charged with a criminal offence until after her second District Court appearance on 11 March. I find that it was open to a fair and reasonable employer to have concluded that Ms Wikaira's explanation about that was unsatisfactory and not credible.

[78] At the Police station on 13 February Ms Wikaira had signed an acknowledgment of receipt of the criminal charge and summons. The summons was very clear that she had to attend at the Kaikohe District Court on 25 February, which she did. Ms Wikaira also says that she consulted a lawyer prior to her first appearance in the District Court and she was legally represented at both her Court appearances.

[79] These actions were inconsistent with Ms Wikaira's explanation that she did not know she had been charged with a criminal offence. Why attend Court and instruct a criminal lawyer if she was not aware she had been charged with a criminal offense?

[80] At the Court appearance on 25 February Ms Wikaira was bailed. She was issued with a Notice of Bail which identified the criminal charge number and specified the criminal charge of wilful damage. This should have put Ms Wikaira on notice that she was involved in a criminal matter, even if her lawyer had not already informed her of that.

[81] The Notice of Bail states that the criminal charge had been adjourned and that Ms Wikaira had been granted bail and was required to attend the Court on 11 March. Bail conditions were imposed and these were recorded clearly in the Notice of Bail. The Notice of Bail also recorded that failure to attend Court could result in a warrant for her arrest being issued. Ms Wikaira signed the Notice of Bail acknowledging that she had received a copy of the Notice of Bail and understood the conditions of her bail.

[82] I consider these documents, and Ms Wikaira's actions in engaging a lawyer to represent her, and her appearances in the District Court fundamentally undermine her evidence that she did not know she had been charged with a criminal offence.

[83] The Code clearly states that an employee must advise a manager of any criminal charge that is laid against them under any law, statute or regulation. I therefore find that a fair and reasonable employer could have concluded that Ms Wikaira's actions in failing to disclose her criminal charges until after her second Court appearance on 11 March (almost a month after being charged) breached the Code.

[84] I also consider that given the nature of Ms Wikaira's role as a Corrections Officer and the particular nature and environment of the Department, the failure to disclose a criminal charge at the earliest opportunity is conduct which is capable of being viewed as serious misconduct. It goes to the heart of trust and confidence for someone in her position.

[85] The Code identifies that disciplinary action may arise if an employee engages in conduct which adversely impacts on "*reputational issues*" which includes actions that bring the Department into disrepute or negatively affect the public perception of Corrections or the Government. It is a matter of fact that Ms Wikaira had four Court appearances and that one warrant for her arrest was issued.

[86] I again consider that Ms Wikaira's role and the nature of the employment environment that the Department operates in means it was open to the Department to fairly and reasonably have concluded that multiple District Court appearances by a Corrections Officer and the issuing of an arrest warrant against an employee are inconsistent with the Department's stated objectives and do potentially bring the Department into disrepute.

[87] The Kaikohe District Court is a small local Court so it is likely that Ms Wikaira was known to those working in the Court system and/or those who attended Court, including the media, on the days of her appearances.

[88] I accept the Department's position that Ms Wikaira's discharge without conviction, whilst a factor which was carefully considered, did not result in the three disciplinary allegations being re-categorised as misconduct rather than serious misconduct. I consider that view was open to them on the information available at that time.

[89] I am satisfied, on the balance of probabilities, that the Department was entitled to view Ms Wikaira's actions as amounting to serious misconduct and it did genuinely hold the view that her actions in connection with the three disciplinary allegations did amount to serious misconduct.

Was dismissal within the range of responses?

[90] I do not accept Ms Wikaira's submissions that dismissal was not within the range of responses available to a fair and reasonable employer.

[91] I accept Mr Rongo's evidence that Ms Wikaira's admission of guilt to a criminal charge and her failure to be open and honest about it from the outset resulted in a complete loss of trust and confidence in her ability to carry out her role in accordance with the high levels of integrity required from the Department staff.

[92] I accept Mr Rongo's evidence that dismissal was not an outcome which he arrived at lightly. He was mindful of the adverse consequences that it would likely have on Ms Wikaira, so he did specifically consider alternatives to dismissal, but ultimately concluded dismissal was the appropriate sanction.

[93] Mr Rongo told the Authority that he was concerned about Ms Wikaira's integrity. He did not accept that she had not realised she was facing criminal charges until 11 March. She attended at the Police Station. She had been given a summons, she had engaged a lawyer and appeared in Court on two occasions and she had signed a Notice of Bail and acknowledged she understood her bail conditions.

[94] Mr Rongo says that as a Corrections Officer Ms Wikaira dealt with the criminal justice system on a day-to-day basis. He considered that Ms Wikaira should

have had sufficient information or access to resources, including management, to have assisted her to understand that being summonsed to Court to appear and being issued with a Notice of Bail notice were matters that needed to be raised with the Department at the earliest opportunity.

[95] Mr Rongo was also concerned about Ms Wikaira calling in sick when attending her initial Court hearing and he specifically raised this with her in his preliminary view letter. Mr Rongo says it seemed to indicate that Ms Wikaira had sought to hide the charges from the Department. Ms Wikaira also told the Department she would be vigorously defending the charges, then pleaded guilty without informing the Department of her change in view or reasons behind it.

[96] There was also information before the Authority that suggested that Ms Wikaira's lawyer had suggested that she raise her situation with her employer in order to obtain assistance from the Department in applying for a discharge without conviction. Ms Wikaira's email communications identify that she was aware that her ongoing employment may be in jeopardy as a result of the criminal charge against her.

[97] I find that Mr Rongo was entitled to view Ms Wikaira's decision to take sick leave for her first Court appearance instead of advising the Department she needed time off to attend Court was an aggravating factor which adversely impacted on the Department's assessment of trust and confidence issues.

[98] I find that the dismissal letter of 11 September sets out in detail why the Department had lost all trust and confidence in Ms Wikaira's ability to make sound decisions around setting an example and complying with the law, together with exercising good judgement.

[99] It was for those reasons that dismissal was considered to be the appropriate outcome. Mr Rongo was also concerned that despite Ms Wikaira's Court appearances and her guilty plea, she failed to understand or acknowledge how these could adversely impact on the Department's reputation, particularly in a town as small as Kaikohe.

[100] Mr Rongo specifically considered placing Ms Wikaira on leave without pay for a period of time and imposing lesser sanctions such as transferring her to another site and issuing final written warnings, but says he ultimately had lost trust and confidence in Ms Wikaira's ability to exercise sound judgement and decision making,

so he did not consider alternatives to dismissal appropriate in these particular circumstances.

[101] I find that Mr Rongo did not enter into the decision to terminate Ms Wikaira's employment lightly. I am satisfied that Mr Rongo carefully considered all of the information that was available at that time before concluding that serious misconduct had occurred and that dismissal was the appropriate outcome.

[102] I am satisfied that dismissal is justified because it was within the range of responses that were available to a fair and reasonable employer in all of the circumstances and it was arrived at after a fair and proper disciplinary process had been conducted.

Outcome

[103] I am satisfied that the Department's dismissal of Ms Wikaira for serious misconduct was procedurally and substantively justified. Accordingly Ms Wikaira's personal grievance claim does not succeed.

What if any costs should be awarded?

[104] The Department as the successful party is entitled to a contribution towards its actual costs. It has 14 days within which to file costs submissions, Ms Wikaira having 14 days within which to file any response with the Department having a further three working days within which to reply.

[105] If the Department applies for costs then Ms Wikaira is invited to file an affidavit setting out her personal and financial situation regarding her ability to pay an award of costs if she wants these factors to be taken into account by the Authority when it is assessing costs.

[106] Both parties are also invited to identify any factors which they say should result in the Authority's notional daily tariff (currently \$3,500) being adjusted.

Rachel Larmer
Member of the Employment Relations Authority

