

**NOTE: This determination
contains an order prohibiting
publication of some evidence.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 384
3014597

BETWEEN	FLORENCE MURWIRA Applicant
AND	KJ AND PE RADICH LIMITED T/A SUNSHINE CHILDCARE CENTRE Respondent

Member of Authority:	Robin Arthur
Representatives:	Maxwell Rusero, Counsel for the Applicant Alex Shadbolt and Andrea Twaddle, Counsel for the Respondent
Investigation Meeting:	29 September 2017 in Hamilton
Determination:	12 December 2017

DETERMINATION OF THE AUTHORITY

- A. Florence Murwira's employment by KJ and PE Radich Limited did not end by constructive dismissal. Ms Muriwira was, however, unjustifiably disadvantaged by some actions of her employer some weeks before she resigned.**

- B. In settlement of her personal grievance for that disadvantage KJ and PE Radich Limited must pay Ms Murwira \$8,000 as compensation for distress caused by those actions.**

- C. Costs are reserved with a timetable set for memoranda to be lodged if an Authority determination of costs is needed.**

Employment Relationship Problem

[1] Florence Murwira resigned from her position as an early childhood educator at the Sunshine Childcare Centre in Hamilton on 7 April 2017. KJ and PE Radich Limited operates the centre. Ms Murwira, who was a provisionally registered teacher, had worked there for 21 months.

[2] Ms Murwira said her resignation was really a constructive dismissal. This phrase refers to situations where an employee's apparent decision to end the employment, by resignation, was really a foreseeable result of some unfair or unreasonable action by the employer.

[3] Ms Murwira gave notice of her resignation in an email she sent centre director Patricia Radich on 7 April. Ms Murwira wrote she was resigning as she no longer had "the sense of belonging" at the centre. She said this was because she was "singled out" as the only staff member subject to a disciplinary investigation over some events that occurred at the centre on 6 March.

[4] Two parents had reported their children had unexplained injuries after attending the centre that day. Both children had been in two adjoining rooms, called Pukeko and Kea, at the centre. Those rooms share a common outdoor area. They are reserved for 'toddlers', children aged from around 15 to 30 months old. One girl, from Kea room, was reported to have a bump on her head. One boy, from Pukeko room, was reported to have bite marks on him. Ms Murwira was one of the staff on duty in Kea room that day.

[5] Inquiries made by the centre's team leader for the Pukeko and Kea rooms, Theresa Lee, found no explanation for the injuries. She and a supervisor were away from those rooms attending a team leaders meeting during the timespan in which the injuries were believed to have occurred. No incident forms or notes in the centre's accident register recorded any injuries to those two children that day. When Ms Lee asked about what had happened other staff told her Ms Murwira was also not present in the room during the timespan in which Ms Lee thought the bump and the bite injuries most likely occurred. Ms Murwira had gone to do filing work in a storeroom adjacent to Koru room. Koru was a nursery room for children aged between three and 14 months in a separate area on the other side of the centre. Ms Murwira took two other children from Kea with her when she went to Koru. She was said to have spent

up to two hours over at Koru room, its adjacent storeroom and its adjoining outdoor area.

[6] Ms Lee reported this information to centre manager Jamie Woodmass who in turn contacted Ms Radich. Ms Radich then initiated a disciplinary process. A letter prepared by Ms Radich, but sent in the name of Ms Woodmass, told Ms Murwira of an employment investigation. It referred to an allegation of serious misconduct described as “two serious incidents that could involve and be related to your professional misconduct”. It asked Ms Murwira to respond to the allegation that she had put the health and safety of children at risk by an “unexplained absence” from the Kea room. It referred to her employment agreement’s definition of misconduct. One example of misconduct referred to in the definition was “leaving the assigned place of work during working hours without the permission of the employer”. The letter said dismissal could be an outcome of the investigation and a mandatory report to “the Teachers Council” (now called the Education Council).

[7] Ms Murwira was given the letter and suspended from her duties on 9 March. The disciplinary meeting was held on 13 March. Her husband, Fauster Murwira, accompanied her to the meeting as her support person.

[8] Following her conversation with Ms Murwira at the 13 March meeting, and some further inquiries Ms Radich then made of a supervisor, Ms Radich decided no disciplinary action was needed. Her query of the supervisor confirmed Ms Murwira was authorised to leave Kea room because she was asked to take some records for filing in a storeroom adjoining Koru room. Ms Radich confirmed this outcome in a letter dated 14 March. Ms Radich wrote that she had established there was no relationship between Ms Murwira’s absence and the accidents involving the two children on 6 March. Instead Ms Radich said there had been a “lack of clarity in communication and a lack of leadership shown by all parties involved”. She did however also describe Ms Murwira as having shown “poor judgement” by being away from the classroom for two hours. The disciplinary meeting ended with Ms Radich confirming Ms Murwira was expected to return to work.

[9] Ms Murwira’s view of what had happened changed as a result of a telephone call from Ms Lee on the evening of 13 March. Ms Lee said she had made the call as a team leader and a friend but much of what she said during the call was clearly made in

her personal capacity rather than as a representative of the employer. She criticised the other staff who had “let two accidents happen” and described calling Ms Murwira to a disciplinary meeting as “not the right way to handle something” and “not fair”. They also discussed how what some staff had said was different from Ms Murwira’s account of what had happened. Ms Murwira questioned how she could work with other staff who had given what she considered were inaccurate accounts of where she was and what she was doing on 6 March. Ms Lee told her to return to work with her “head held high” because Ms Murwira had “nothing to be ashamed of and f**k the bitches”.

[10] Ms Murwira took sick leave for the remainder of that week. She returned to work the following week. Early in the week after that she fainted at work and was taken to hospital. At the end of that week she provided a medical certificate, dated 31 March, stating she was “currently going through significant stress as a consequence of events at her work place”. Her doctor said she was not able to work for 14 working days from 3 April. Allowing for the weekends and three public holidays that fell within that period, this meant Ms Murwira then worked only two further days, on 27 and 28 April, before her employment ended.

[11] Her resignation email, sent on 7 April, asked whether she had been treated differently over the 6 March incidents because of her background, ethnicity or colour. Born in Zimbabwe, Ms Murwira is African. She is now a New Zealand citizen.

[12] The personal grievance Ms Murwira lodged after her employment ended, and her application to the Authority, expanded on the allegation of racial discrimination. As well as being a reason for her suspension and the disciplinary process, she claimed this was also why centre staff had delayed finalising the documentation Ms Murwira needed to complete her professional registration as a teacher. She also said annual leave had been wrongly deducted from her entitlements.

[13] The statement in reply from KJ and PE Radich Limited denied Ms Murwira was treated unfairly, including by any racial discrimination.

The Authority’s investigation

[14] The issues for determination were:

- (i) Did KJ and PE Radich Limited act unjustifiably, to Ms Murwira's disadvantage by:
 - (a) How it dealt with concerns regarding two child injuries at the centre, including by suspending her and conducting a disciplinary inquiry; and/or
 - (b) How it dealt with her teacher registration documentation; and/or
 - (c) Forfeiting annual leave entitlements due to her?
- (ii) If actions of KPRL were unjustified, was Ms Murwira's resignation then reasonably foreseeable so that her employment ended as a constructive dismissal, that is as the result of her employer's actions?
- (iii) If KPRL acted unjustifiably (in respect of disadvantages and/or dismissal), what remedies should be awarded, considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and
 - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (iv) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Murwira that contributed to the situation giving rise to her grievance/s?
- (v) Should either party contribute to the costs of representation of the other party?

[15] Ms Murwira, Mr Murwira, Ms Lee and Ms Radich each gave sworn written and oral evidence for the Authority's investigation. The parties' representatives also provided closing submissions on the issues for determination. As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all the detailed evidence and submissions received.

Order prohibiting publication of some evidence

[16] The names of various children attending the childcare centre were referred to in the written statements and documents and in oral evidence provided for the

Authority investigation. Those names are prohibited from publication in relation to this matter.¹

The disciplinary inquiry – was it unfair?

[17] Three significant flaws marred the disciplinary process Ms Radich initiated on 9 March and completed on 13 March. Although the outcome of that process imposed no direct negative consequence on Ms Murwira, compared to other employees, how she came to be subject to that process and how it was carried out amounted to unfair treatment in all the circumstances at the time.

[18] The first flaw concerned how Ms Lee, as team leader for Pukeko and Kea room staff, carried out her investigation of concerns over the reported injuries. When Ms Lee got news on 6 March of a parent reporting her daughter had a bump on her head, Ms Lee asked those staff who still at work at the time if they had seen or noticed the girl's injury. Ms Murwira had already left work for the day so Ms Lee had a supervisor telephone her and asked the same question. Those inquiries did not yield any information about what had happened. Later that day Ms Lee also got a report from another parent who said her son had bite marks on him. Ms Lee checked the rooms' incident forms and accident records but found nothing about either event.

[19] On 7 March Ms Lee asked those staff who were at work that day further questions about what they might know of either incident. Ms Murwira was not at work for most of 7 March. She stayed home because her daughter was ill. She did, however, come in to the centre for a regular monthly staff meeting held in the evening. She attended the first hour of that meeting of the whole staff, led by Ms Radich, but left when the group broke into separate meetings for the staff teams in various rooms. Ms Murwira had told Ms Lee she could not stay for her team meeting because she wanted to return home to her ill daughter.

[20] Ms Lee said that Pukeko and Kea rooms' team meeting included a lengthy discussion about how the injuries to the two children had occurred the day before without any staff member noticing. Although Ms Lee and the supervisor were absent during the period this most likely occurred, she said the number of staff rostered in the teaching area at the time was "well within" the adult-to-child ratio required under

¹ Employment Relations Act 2000 Schedule 2 clause 10.

regulations governing the centre's operation. Ms Lee said she had told the staff those two injuries "should never have happened" and it was "very concerning" no one had witnessed them. It was in that context of Ms Lee having made those critical comments of them, staff members then told Ms Lee that Ms Murwira had "gone off the floor at 1pm" and was away about two hours.

[21] Ms Lee's written witness statement suggested she was surprised by that news as she "unaware" that Ms Murwira "had been off the floor at all". However answers to questions asked of her at the Authority investigation showed Ms Lee had known Ms Murwira was not in her usual work area, in Kea room, for at least some of the relevant time during which Ms Lee was also absent. After the team leaders' meeting Ms Lee had left the centre site for a late lunch, around 2.40pm. As she left Ms Lee saw Ms Murwira sitting on the deck area of Koru room. Ms Murwira had called out to Ms Lee and asked if Ms Lee had any filing that needed to be done for Pukeko room. Ms Lee replied she did not and drove out of the premises to go to lunch.

[22] After the 7 March staff meeting Ms Lee sent Ms Radich and Ms Woodmass an email asking to meet to talk about the injury incidents. She also referred to what she called her "discovery" that Ms Murwira "may have gone off the floor" for up to two hours while Ms Lee was away at the team leaders' meeting. Ms Lee said she talked to Ms Woodmass the following morning of 8 March and decided to interview "all staff in the Kea and Pukeko room, including [Ms Murwira], to query her absence from the room". She then talked to two staff who had been on duty in Kea room and two from Koru room. However Ms Lee then carried out no further interviews that day or later days. She did not interview two of the staff who had been working in the adjoining Pukeko room (where one of the injured children had been) or Ms Murwira. Ms Murwira was not at work on 8 March because her daughter was still ill.

[23] Later on 8 March Ms Lee gave Ms Woodmass and Ms Radich her notes from talking to four staff she had interviewed. Ms Radich said Ms Lee told her she had not spoken to Ms Murwira and Ms Lee had said this was because she was "increasingly concerned" about Ms Murwira's "absence from the floor" on 6 March. Ms Radich then decided to conduct a disciplinary investigation of Ms Murwira's conduct.

[24] The flaw with the inquiry Ms Lee had carried out on the employer's behalf, to that stage, was its early and narrow focus on Ms Murwira's conduct. Without also

conducting initial interviews with the two Pukeko staff and Ms Murwira, on the same information-gathering basis as had occurred to the four staff that were talked to, an open-minded employer could not know whether other concerns might also be identified and require some further inquiry of other staff as well. At the team meeting on 7 March Ms Lee had been very critical of the staff who had been present in the rooms on 6 March for not noticing how the children came to be injured. Somewhat conveniently, comments those staff then made turned Ms Lee's attention to questions about someone who was not there.

[25] The second flaw comprised how Ms Radich had Ms Woodmass begin the disciplinary investigation by suspending Ms Murwira. Ms Murwira got no proper opportunity to comment on whether such suspension was appropriate or necessary. Ms Murwira was simply presented with the letter outlining the allegations, described as serious misconduct, and told she was suspended on pay. Ms Radich's evidence was that she considered suspension necessary due to the "seriousness and nature of the concerns". It was a view that, fairly, had to be open to at least some prior discussion with the affected worker before making a decision about suspension. There was no real or identified risk to anyone's safety from Ms Murwira staying at work during the investigation period, if she had wished to do so. Ms Radich accepted there was no suggestion at any stage that Ms Murwira had caused the injuries to either child. Neither was there anything to suggest Ms Murwira knew those injuries had occurred but had not followed the appropriate procedures to record and report them. Rather, put simply, the allegation was that her being out of the room made keeping an eye on all the children more difficult for the remaining staff, so it was more likely a child could get hurt without someone noticing. The notions that, if she had stayed at work until the 13 March disciplinary meeting, Ms Murwira might have influenced other staff over their accounts of what happened or she might not have got sufficient time to prepare for that meeting, could readily have been managed in other ways.

[26] The third flaw concerned how Ms Murwira was given information about what other staff said she did or did not do on 6 March. Ms Lee gave notes of her interviews of four staff to Ms Radich. Those notes comprised just over a page of typed text and gave the name of each staff member. On 10 March Ms Murwira was sent a one-and-a-half page document with a summary of what seven unnamed staff members, labelled A to G, were reported to have said about what they had seen Ms Murwira do on 6 March. It was not clear from Ms Radich's evidence how statements were taken

from those three further staff members or who had gathered those reported comments from them. However it was clear that it was Ms Radich who decided to anonymise summaries of the statements of those seven staff. She had no satisfactory explanation for why she did so. In answer to questions at the Authority investigation she confirmed no staff member had asked for confidentiality about what they said. Even if they had, having Ms Murwira respond to anonymous accounts was not consistent with the obligations of good faith and fairness on an employer conducting a disciplinary investigation of serious misconduct allegations. In the absence of any real and substantial risk to the safety of informants, the worker subject to those allegations is entitled to see who has said what about him or her. One reason for knowing the identity of any informants is so the worker can properly comment on whether there is any other motivation someone might have to make unfounded adverse comments about that worker.

[27] As it happened Ms Murwira was able to work out, from what was said about where she was and what she was doing, the identities of most (but not all) of those seven staff. However it was not something she should have had to deduce or guess.

[28] Those flaws in what was done, and how it was done, were more than minor defects in the process and resulted in Ms Murwira being treated unfairly. Ms Radich is a former secondary school principal and a very experienced education manager. Her business had the means to do better.²

[29] Instead Ms Murwira was suspended and put through an anxious wait for three days before attending a disciplinary meeting that was then quite quickly found to be unnecessary. The supervisor who Ms Radich spoke to on 13 March had, according to Ms Lee's note of a discussion with her on 8 March, already said that Ms Murwira left Kea on that supervisor's express instructions. There was no basis for an allegation of an "unexplained absence" by Ms Murwira. While there might have been a legitimate concern about how long she was out of the room, a discussion with her, not a disciplinary meeting, was the reasonable first step. Ms Lee and Ms Radich had found simply talking with every other staff member about events of that day was an adequate means of inquiry. There was no sufficiently good reason such initial

² Employment Relations Act 2000, s 103A(3)(a) and (5).

inquiries could not also have been made of Ms Murwira when she returned to work on 9 March rather than instigating a disciplinary process.

[30] The action focussing solely on Ms Muriwira was, in all the circumstances, a disproportionate response that amounted to an unjustified disadvantage.

[31] However Ms Murwira's allegation that she was treated differently on the grounds of her race or national origin, and so had a personal grievance on the grounds of racial discrimination, was not established to the necessary evidential standard of the balance of probabilities. She said she was treated differently and unfairly because she was African. Mere assertion was not sufficient to sustain that claim. What distinguished Ms Murwira from other staff, who themselves came from a range of racial or cultural backgrounds, was that she was not in her usual work area at the time of the incidents. That was the defining characteristic or circumstance that led to a focus on her. While, compared to how others were treated, that focus on her was unfair, it was not racial discrimination.

Professional registration documentation – was it unfairly delayed?

[32] As a provisionally registered teacher Ms Murwira had various tasks and projects to complete for the assessment process that would enable her to be granted full professional registration. Three years was allowed for that process although it could be completed sooner.

[33] Ms Woodmass was initially a mentor assisting Ms Murwira with preparation for the registration process but this task was transferred to Ms Lee. Ms Murwira said she had completed the necessary documentation by December 2016 but Ms Lee had not done enough to help her finish that process by the time Ms Murwira resigned. She said this was in stark contrast with what happened with her supervisor who was also working through the same registration process at the time. She said the supervisor's assessment folder was also completed by December but Ms Lee had assisted the supervisor to complete the process without delay. Again Ms Murwira alleged different treatment of her was due to racial discrimination.

[34] The evidence did not establish that allegation was, more likely than not, the true reason for the delay in completing documentation to assist Ms Murwira's

registration. There were other differences that, more likely, adequately explained what had happened.

[35] Firstly, the supervisor was closer to the deadline by which her particular assessment process had to be completed and had finished preparing the necessary documentation. Secondly, Ms Murwira was away on extended leave in Zimbabwe during January 2017, visiting her mother after her father's death in November 2016. No progress could have been made in that time. Thirdly, Ms Murwira's assessment folder had to be referred to Ms Woodmass to sign off some of its earlier content when Ms Woodmass had been Ms Murwira's mentor. Ms Woodmass had then identified some amendments and additions that Ms Murwira needed to complete, so progress to complete that part of the process was in Ms Murwira's hands.

[36] Against that background, Ms Murwira had not established to the necessary evidential standard of probability that she was treated unfairly by how Ms Lee and Ms Woodmass dealt with her registration assessment documentation.

Annual leave entitlements – were they improperly reduced?

[37] Ms Murwira's statement of problem said six days of her annual leave entitlement were wrongfully deducted during the period she was on "stress leave" before her resignation. Her witness statement had not set out further details of her concerns about alleged shortcomings in payment of her leave entitlements but submissions prepared on her behalf for the investigation meeting expanded this claim. Those submissions suggested 14 days of her annual leave entitlement had been "forfeited" and some of the centre's leave records appeared to have been signed by her when they were not.

[38] During the Authority investigation meeting some time was spent going through the wages records and how they compared to the leave application records. It was not necessary to set out all the details. There were days Ms Murwira said she had requested be taken as leave without pay. However the wage records showed she was paid for some of those days, with a resulting reduction in her annual leave entitlement. Some of the leave records recording those transactions were not in her handwriting. Rather, they were probably completed in her absence on leave. However, from the detailed discussion at the investigation meeting, Ms Murwira had not established she was ultimately 'short-changed' by those arrangements. She was paid for some days

she said she had wanted to take as leave without pay. This meant her remaining annual leave entitlement was lower than she expected at the end of her employment but this was because she already been paid for some days she had expected to be in that tally. Standing back, she appeared, overall, to have been paid the equivalent of her annual leave entitlement for her period of service.

What caused Ms Murwira to resign?

[39] Ms Murwira's claim her resignation was really a constructive dismissal had to be considered against the conclusions about the extent to which she was unfairly treated or her employer had breached duties owed to her. Her claims regarding annual leave and professional registration documentation were not established as such breaches. She had, however, established the disciplinary process she underwent unjustifiably disadvantaged her.

[40] Such a disadvantage was a breach of duty by her employer that Ms Murwira said caused her to resign. However all the circumstances leading to her resignation notice of 7 April had to be examined, not just the disciplinary process that ended on 13 March.³ Mere delay between those two dates will not necessarily sever the causal relationship between the disadvantage and her resignation but other factors or events might. In Ms Murwira's case there were three such circumstances that, on the balance of probabilities, were of greater import in her decision to give notice of resignation and go ahead with that resignation:

- (i) What was said during her discussion with Ms Lee in their phone conversation on the evening of 13 March; and
- (ii) Ms Murwira's upset at the reported content of what her co-workers had said about what she did on 6 March; and
- (iii) Ms Murwira's upset that Ms Radich did not attempt to dissuade her from resigning.

[41] Full details of the first of those circumstances, the phone conversation, were available because, unknown to Ms Lee, Ms Murwira recorded it. A transcript of the recording was among documents provided for the Authority investigation. While such secret recordings are not to be encouraged or necessarily admitted as evidence, this one was admitted for three reasons. Firstly, Ms Murwira was a party to their private

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 2 NZLR 415 (CA) at 419.

communication, so she could lawfully record it.⁴ Secondly, the transcript was the best evidence about an event that proved central to the issue of whether Ms Murwira's resignation three weeks later amounted to a constructive dismissal. And, thirdly, its contents ultimately favoured the company's case rather than Ms Murwira, so the company was not unfairly disadvantaged by how Ms Murwira came to produce that evidence.

[42] After the disciplinary process ended on 13 March Ms Radich had authorised Ms Lee, as team leader, to contact Ms Murwira about arrangements for her return to work at the centre. However what Ms Lee said during her evening phone call to Ms Murwira clearly went beyond that role. It included content and comments she clearly made on the basis of her personal friendship with Ms Murwira rather than in her role as her team leader.

[43] Some of what Ms Lee said to Ms Murwira was clearly different from what she said in her sworn witness statement to the Authority about what had happened and how she carried out her inquiries of staff. She told Ms Murwira that she:

knew straight away that you misunderstood [the supervisor] but so that yes you might have been over there, but it was under the rest of the girls watch, back there that they did not phone you to call your back, and that they let two accidents happen without even seeing them or writing them down.

[44] In her sworn witness statement Ms Lee said she had, during her inquiries of staff, "become increasingly concerned about Florence's unexplained duration of absence" and that she "simply did not understand what Florence could have been doing away from her Kea room ... for two hours". As already noted earlier in this determination, Ms Lee did know at least something of that absence. Around 2.45pm Ms Murwira, while standing on the porch of Koru room, had spoken briefly with Ms Lee.

[45] Ms Lee also told Ms Murwira she had interviewed "the whole team, every single person that was there". This determination has already noted that was not correct.

⁴ Crimes Act 1961 s 216B(2)(a).

[46] Some of what Ms Lee said during her 13 March phone call made it clear that she and Ms Woodmass had instructions from Ms Radich to ensure Ms Murwira was able to return to work with a minimum of fuss and with any necessary support from her team leader and the centre manager.

[47] However other parts of what Ms Lee said, more in a personal capacity than as team leader, bluntly blamed Ms Murwira's co-workers for what had happened in recent days. This led to the second relevant circumstance – Ms Murwira's disappointment over what two co-workers, in particular, had said. She said two workers had suggested they did not know where she was and had not accurately reported two phone calls she made to staff in Kea room. She said she had asked but was told she was not needed back in the room. In her oral evidence she said she "expect[ed] we should have been on the same page ... [and I] didn't know how I was going to work with people who said they didn't know where I was and they did". Ms Murwira said she talked with some of those staff on her return to work, with one denying she had said what was reported to Ms Murwira. Ms Murwira also learned from those discussions that no other staff members had been suspended over the 6 March incidents and two staff who had been on duty in Pukeko room had not been interviewed. Ms Murwira said she came to the view that she had been "set up" by all seven of the staff whose anonymised comments had been provided to her in the disciplinary process.

[48] Those concerns led to Ms Murwira giving her notice of resignation by email on Friday, 7 April, in which she asked why she was "singled out", saying she had been embarrassed and no longer felt a sense of belonging at the centre. Her email ended with Ms Murwira saying she was resigning "to focus on myself and my family" and her last day of work would be 28 April. However, in her oral evidence, Ms Murwira said she had meant the email to be "a test to see how valuable I was at [the centre]". She had not necessarily intended it to be taken as a resignation. She said she expected "an instant reply" from Ms Radich and for Ms Radich to come and see her and ask if they could sit down and talk. Instead Ms Murwira got what she said was "a bye see you later" email. Ms Radich had replied on the next working day, Monday 7 April, with an email acknowledging Ms Murwira's resignation and thanking her for her work. Two days later Ms Radich also sent Ms Murwira a letter responding to the concerns she had expressed about the disciplinary process. It

suggested Ms Murwira could comment further once she had considered what that letter said. Ms Murwira did not respond to the letter or make any request to discuss its contents with Ms Radich.

[49] The concerns caused by Ms Lee's comments during their 13 March phone conversation and Ms Murwira's disappointment with her co-workers were not actions of her employer. As such they were not breaches or failures forming part of a chain of causation for a constructive dismissal.

[50] Neither was Ms Radich's failure to respond as Ms Murwira expected to her resignation email. Ms Murwira may have found Ms Radich's response clinical or cool but the law holds employers only to standards of fairness, not kindness.⁵ At the time she sent that email Ms Murwira was still an employee with her own good faith obligations to be active and communicative in maintaining a productive employment relationship.⁶ If she did not mean to resign, or was only thinking about doing so if she did not have a satisfactory conversation about her concerns with Ms Radich, Ms Murwira needed to more plainly state what she needed rather than hope Ms Radich might guess what she really wanted. If she had asked to meet and talk about her concerns, as Ms Murwira said she had really wanted, and Ms Radich had ignored that request, the assessment of the employer's actions might be different. However, on its face, Ms Murwira's 7 April email said her decision had been made. Ms Radich simply accepted and respected her choice.

Was the disciplinary disadvantage sufficient to establish constructive dismissal?

[51] Evaluating a breach of duty, as a potential factor in an alleged constructive dismissal, is an assessment of fact and degree. While she was disadvantaged by the disciplinary process, it was clear at its completion that Ms Murwira's explanation was accepted and her employment was secure. Having unequivocally ended the disciplinary process, with no sanction, there was no dismissive or repudiatory conduct by the employer. On an objective standard, the disadvantage of having been through that unnecessary process was not so serious that it was reasonably foreseeable Ms Murwira would not be prepared to keep working under those conditions.⁷ Rather, other concerns Ms Murwira had as a result of talking to Ms Lee and some co-workers,

⁵ *Wellington Road Transport IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, 87.

⁶ Employment Relations Act 2000, s 4(1A)(b).

⁷ *Auckland Electric Power Board*, above n 3, at 419.

which were not actions of her employer, caused her to resign. Consequently, she had not established her resignation was really a constructive dismissal.

Remedy for unjustified disadvantage

[52] As the employment did not end by constructive dismissal, the remedy of lost wages was not available. Compensation under s 123(1)(c)(i) of the Act was the remedy available to Ms Murwira for the unjustified disadvantage she incurred through the disciplinary process.

[53] She was humiliated to discover she alone among the staff on duty on 6 March was subject to a disciplinary inquiry. She was embarrassed and felt a loss of dignity as a result. The allegation she was in some way responsible, at least indirectly, for two children suffering injuries at the centre was inherently hurtful for an early childhood educator. This was compounded by the prospect, as advised in the disciplinary letter, that the investigation had to be reported to the Education Council under its mandatory reporting requirements for instances of possible serious misconduct.⁸ This meant the disciplinary inquiry potentially threatened not only her present job but her prospects of continuing to work elsewhere in the industry. The resulting anxiety contributed to the injury to her feelings and, due to what happened and how it was done, her sense of humiliation and loss of dignity. It warranted an award of \$8,000 as compensation.

Any reduction of remedies for contributory conduct?

[54] Reduction of such remedies may be required for blameworthy conduct by the employee.⁹ The length of time Ms Murwira was away from her usual work area on 6 March was potentially such conduct. However in its disciplinary process, her employer decided spending that amount of time in another area doing filing work amounted to only poor judgement, not conduct requiring a sanction. On the same reasoning, no reduction of the remedy was required here.

Costs

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

⁸ Education Act 1989, s 394.

⁹ Employment Relations Act 2000, s 124.

[56] If they are not able to do so and an Authority determination on costs is needed Ms Murwira may lodge, and then should serve, a memorandum on costs by no later than Friday, 26 January 2018. From the date of service of that memorandum KJ and PE Radich Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[57] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰

Robin Arthur
Member of the Employment Relations Authority

¹⁰ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].