

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 210
3014600

BETWEEN JANE BARNES
Applicant

AND CANTERBURY WESTLAND
KINDERGARTEN
ASSOCIATION INC
Respondent

Member of Authority: Helen Doyle

Representatives: Allan Halse, advocate for the Applicant
Michael O'Flaherty and Tony Herring, counsel for the
Respondent

Investigation Meeting: 28 and 29 November 2018

Submissions Received: 12 December 2018 and 10 January 2019 from the
Applicant
18 December 2018 from the Respondent

Date of Determination: 10 April 2019

DETERMINATION OF THE AUTHORITY

- A Jane Barnes was unjustifiably disadvantaged by actions of the Canterbury Westland Kindergarten Association Inc.**
- B Jane Barnes was not unjustifiably dismissed from her employment.**

C The Canterbury Westland Kindergarten Association Inc is ordered to:

(i) Exercise its discretion about Ms Barnes' claim for disregarded sick leave under the collective agreement giving due weight to relevant considerations within two weeks of this determination. Leave is reserved for either party to return to the Authority.

(ii) Pay to Ms Barnes the sum of \$30,000 without deduction for compensation under s123 (1)(c)(i) of the Employment Relations Act 2000.

(iii) Reimburse to Ms Barnes the lost benefit of the employer contribution to the superannuation scheme under section 123 (1)(c)(ii) of the Employment Relations Act 2000. Leave is reserved to return to the Authority if there are any issues about quantum.

(iv) The issue of costs is reserved and a timetable set for an exchange of submissions.

Employment Relationship Problem

[1] Jane Barnes commenced as an employee with the Canterbury Westland Free Kindergarten Association in 1983, undertaking short and then long term relieving. On 1 July 1993 Ms Barnes was appointed to a permanent position at MacFarlane Park Kindergarten in Christchurch, now called Kidsfirst Kindergarten MacFarlane Park.

[2] I shall refer to the Canterbury Westland Free Kindergarten Association Inc as the Association or the Kindergarten in this determination.

[3] Ms Barnes has two employment relationship problems that she wishes the Authority to resolve.

Unjustified actions causing disadvantage

[4] The first employment relationship problem is that Ms Barnes says there were unjustified actions on the part of the Association that caused her disadvantage. These followed complaints by Ms Barnes from in or about May 2015 that she had been bullied by her Head Teacher. I shall refer to the Head Teacher as X.

[5] Ms Barnes says that having identified that she felt unsafe in her workplace, and that her health was being impacted, the steps subsequently taken by the Association were inadequate to keep her safe in the workplace. She went on sick leave from 18 May 2015 and did not return to work before her employment was terminated on 23 May 2018 for reason of medical incapacity.

[6] There was an investigation by an external investigator into Ms Barnes bullying complaints in June and July 2015.

[7] The investigation outcome was that the bullying complaints were not substantiated. Ms Barnes says that the investigation into the bullying was not a full and fair investigation as required by the Association's bullying policy. Ms Barnes said that she was advised of the investigator's recommendations as they applied to her but was not provided with a copy of the investigation report. She says that she felt isolated and unable to give her view of the situation.

[8] Ms Barnes instructed Culturesafe to represent her in or about September 2015 and on or about 29 September 2015 the first communication occurred between the Association and Mr Halse.

[9] Mr Halse, in response to the Association expressing concerns about the nature of Ms Barnes' medical diagnosis, her prognosis in terms of her ability to return to work and the quality of the medical certificates, provided an email dated 1 December 2015 to the Association's Human Resources Manager and an undated letter from Ms Barnes' doctor. The letter from the doctor confirmed that the medical certificates supplied were according to standard medical practice in accordance with the Medical Council and Medical Association. The doctor advised that Ms Barnes has Post Traumatic Stress Disorder (PTSD) secondary to stresses she had experienced from bullying in the workplace. It stated that she is making excellent progress towards recovery however a return to the same work environment would be extremely detrimental to her health.

[10] On 27 April 2016 her doctor stated in a medical certificate of the same date:

This is to certify, that the patient described above, was seen on 27 Apr 2016. Jane is definitely suffering from Post Traumatic Stress Disorder. She has immediate recurrence of symptoms when she has to have anything to do with the environment and the people where the bullying initially occurred. Jane remains unfit for a further period of 90 day(s) from 27 Apr 2016.

[11] While Ms Barnes was on sick leave a return to work plan was suggested on the basis of placement on an advice and guidance plan at another kindergarten. Ms Barnes saw that as a form of performance management and felt there was a pre-determined plan to manage her, rather than address any basis for the issues that she had.

Unjustified dismissal

[12] The Association commenced a process in or about 13 April 2018 as to whether Ms Barnes was capable of returning to work. On 23 May 2018 Ms Barnes' employment was then terminated for reason of medical incapacity.

[13] Ms Barnes says that her dismissal was unfair and procedurally unjustified.

[14] She says that the mandatory report to the Education Council made by the Association constituted further bullying.

Remedies sought

[15] Ms Barnes seeks \$35,000 compensation for humiliation and loss of dignity. She also seeks reimbursement of sick leave from the time that she went off work in terms of the collective agreement that covered her work at the time of her dismissal until the date of the determination.¹ She seeks reimbursement of the loss of the benefit of superannuation, a payment equivalent to a redundancy payment for termination of career prospects in the sum of \$33,732.31 and costs.

[16] There are two remedies in the statement of problem that the Authority is not empowered to order. The first is a reference, and the second an amendment to a mandatory report lodged with the Education Council. The remedies the Authority is empowered to order are contained in s 123 of the Employment Relations Act 2000 (the Act) and those matters are not provided for in that section.

The Association's reply

[17] The Association in its statement in reply did not accept that there had been a grievance

¹ Kindergarten Teachers, Head Teachers and Senior Teachers Collective Agreement 1 June 2017–31 May 2019

of unjustified disadvantage raised within the 90 day statutory timeframe.

[18] The Association gave its view of the problem in its statement in reply in the event that the disadvantage grievance was raised within time and the Authority found in an earlier determination that it had been raised within the statutory timeframe.²

[19] The Association denied that it had breached any of its obligations. It said that full consideration was given to all matters raised and an independent investigator appointed upon receipt of a written complaint from Ms Barnes that she had been bullied by X. Further, that the Association continued to provide Ms Barnes with support, including attempting to reintroduce her into the workplace whilst she was away on sick leave. It does not accept a causal link between the bullying, response of the Association and any medical diagnosis.

[20] The Association in an addendum to its statement in reply lodged after the dismissal does not consider that the second amended statement of problem lodged by Ms Barnes raised a personal grievance of unjustified dismissal. It says in any event the dismissal of Ms Barnes was not unfair or procedurally unjustified. Further, that she was provided with reasons for termination, but did not provide any feedback or information to show that she would be in a position to return to work and was invited on no less than ten occasions to meet and provide feedback but refused to participate on each occasion.

[21] The Association did not accept that the mandatory Education Council report it submitted after termination of the employment relationship constitutes further bullying.

The issues

[22] The Authority needs to consider the following issues:

- (a) What are the material documents in this matter?
- (b) Were the actions of the Association those a fair and reasonable employer could have undertaken in all the circumstances when Ms Barnes complained of bullying?
- (c) If there were actions on the part of the Association that were unjustified, did

² *Barnes and Canterbury Westland Kindergarten Association Inc* [2018] NZERA Christchurch 31

they cause Ms Barnes disadvantage in her employment?

- (d) Was Ms Barnes' dismissal for reasons of medical incapacity unjustified?
- (e) Does the Education Council report constitute further bullying?
- (f) If there are found to have been actions that were unjustified then were they causative of Ms Barnes' subsequent diagnosis?
- (g) If there is a finding that actions were unjustified and/or the dismissal was unjustified, then what remedies are appropriate?

What are the material documents?

The Collective Agreement

[23] Ms Barnes' work was covered by the Kindergarten Teachers, Head Teachers and Senior Teachers Collective Agreement 1 June 2017 to 31 May 2019 (the collective agreement). The main provision referred to in the collective agreement is in clause 4.3 of appendix 2. The clause is about disregarded sick leave. It provides as follows:

15. Disregarded Sick Leave

Sick leave not exceeding an overall aggregate of two years may be granted by the employer in circumstances where an illness can be traced directly to the conditions or circumstances under which the teacher is working, or where an injury suffered by the teacher in the discharge of duties occurred through no fault of the teacher, and where payment has not been made by the Accident Rehabilitation and Compensation Insurance Corporation. Leave granted under this sub-clause will not be debited from the employee's sick leave entitlement.

Policy: Bullying in the Workplace

[24] A document that was provided for the first time during the Authority investigation meeting was the policy of the Association about bullying in the workplace. Ms Barnes had been provided with a copy of this at a meeting on 19 May 2015.

[25] The rationale of the policy was a Board commitment to supporting a working environment where every employee has the right to be treated with dignity and respect, and where individuals know that decisive actions will be taken to deal with the allegations

of bullying.

[26] The policy defines bullying as a continual and relentless attack on other people's self-confidence and self-esteem. It sets out what bullying behaviour includes but is not limited to as below:

Shouting, abusive language, hostility and even physical violence

Threatening behaviour

Constant unreasonable criticism

Constant put downs

Humiliating the individual in front of other people

Making demeaning remarks

Withholding information or resources

Starting rumours or gossiping about the individual

Undermining the individual and encouraging other to 'gang up' against the individual

[27] The bullying policy provides procedures where an employee feels they have been the subject of bullying behaviour by one of their colleagues for contact in the first instance being to the Education Service Manager or the Manager Human Resources. Steps are then to be taken to protect the complainant from the person alleged to be bullying them to ensure the complainant is not victimised.

[28] The person alleged to be perpetrating the bullying is to be given an opportunity to respond in writing and advised of their employment rights.

[29] A full and fair investigation is to be carried out either by the Manager – Education Delivery or the Manager – Human Resources or both. Where appropriate it can be carried out by an independent consultant.

[30] The findings of the investigation under the policy are to be communicated separately to both the complainant and the accused person with both given the opportunity to comment on the findings of the investigation.

[31] A detailed report of the investigation will be given to the Chief Executive, appropriate

action will be undertaken and the outcome of the investigation advised in writing to the complainant and the accused person.

Were the actions of the Association those of a fair and reasonable employer when Ms Barnes complained of bullying?

How should this be assessed?

[32] The first claim brought by Ms Barnes is that she was unjustifiably disadvantaged in her employment. Section 103(1)(b) of the Act provides for a disadvantage grievance:

that the employee's employment, or 1 or more condition 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; or ...

[33] The Employment Court in *FGH v RST*³ confirmed that an employer's failure to provide a workplace that meets health and safety requirements and a failure to address bullying in the workplace may be grounds for an unjustified disadvantage claim. The judgment recognises in turn they may be relevant to an assessment of justification under s103A of the Act where a personal grievance is alleged.

[34] As Mr O'Flaherty correctly submits the role of the Authority is to apply the justification test in s103A of the Employment Relations Act 2000 (the Act) and objectively assess whether what the Association did and how it did it was what a fair and reasonable employer could have done in all the circumstances. The Association could also be expected as a fair and reasonable employer to comply with the obligations of good faith.

[35] The Association's bullying policy under *Purpose* recognised workplace bullying is not only unacceptable and inappropriate but that it could harm the health of employees and affect the reputation of Kidsfirst Services. The policy referred to bullying being unlawful with reference to three Acts. One was the Health and Safety in Employment Act 1992 which applied until 3 April 2016. After that date the obligations that applied were those in the Health and Safety at Work Act 2015.

³ *FGH v RST* [2018] NZEmpC 60 at [191] and [201]

[36] The Court of Appeal in *Attorney-General v Gilbert*⁴ stated that the duty to take reasonable steps to maintain a safe workplace is also a term now implied by common law into employment contracts, in recognition of their special nature. There was reference to the position being reached in other common law jurisdictions with the duty implied to maintain a safe workplace informed and explained by legislation.

[37] In *Gilbert*⁵ the standard of protection provided by the Health and Safety in Employment Act was described as:

The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of “all practicable steps”. What is “reasonably practicable” requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s.19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligations. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer’s obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[38] It was stated in *FGH v RST*⁶ that although these findings were expressed a considerable time ago they remain an accurate and useful summary of the obligation for the period up to 3 April 2016.

Background against which justification of actions fall to be assessed

[39] X was appointed as Head Teacher at the Kindergarten in the last term of 2014. At the

⁴ *Attorney-General v Gilbert* [2002] 2 NZLR 342, [2002] 1 ERNZ 31 (CA)

⁵ Above n 4 at [83]

⁶ *FGH v RST* above n 3 at [197]

material time in or about April/May 2015 the Kindergarten had two main teachers: Ms Barnes and X. A third teacher provided cover including over lunch breaks and some teacher aide hours were provided by another teacher. A good working relationship between Ms Barnes and X was therefore important. The Association took some care to ensure that the right person was appointed. There were no difficulties of note in the relationship between Ms Barnes and X for the last term in 2014.

[40] An Education Service Manager was Ms Barnes' manager at the material time. I did not hear from that manager and shall describe her in this determination as the ESM. The ESM had professional leadership responsibilities for staffing and undertook staff appraisals; reviewed kindergartens and provided feedback.

[41] During the first term of 2015 Ms Barnes had concerns about some of her interactions with X. Some of these concerns were raised with the ESM.

[42] There was a term break from 3 April to 19 April 2015. Concerns were then raised again with the ESM by Ms Barnes and these are referred to in the formal complaint that Ms Barnes made that I shall come to shortly.

[43] Ms Barnes explained in her oral evidence that she had raised concerns with the ESM about interactions with X on 30 April 2015 on which day there was a jump rope event. She said that she advised the ESM that she felt like she was in an "abusive relationship" with X. She said that the ESM suggested that she write a reflection on it. The reflection was provided by Ms Barnes in her written evidence but its context was unclear to the Authority until Ms Barnes gave oral evidence. Ms Barnes in her evidence said that she sent the reflection document to the ESM by email. That was therefore new information for the Authority. Those who gave evidence for the Association said they were unaware of the reflection document.

[44] Mr O'Flaherty in his final submission says that there is no evidence the reflection document was ever provided.

[45] The reflection document sets out in a detailed fashion what Ms Barnes says occurred between her and X on 30 April 2015 and how she felt about it. It states that Ms Barnes had been struggling with the situation for several months and a feeling that there is pressure being

applied to force her out of her job. Ms Barnes writes, amongst other matters, in the four page document:

I'm tired of jibs and put downs. I am tired of feeling like I'm walking on egg shells, of everything being my fault, of being verbally assaulted if I dare to have a different opinion, of being ridiculed, questioning everything I say – to anyone – in case I may have caused offence. Yes there will be times I do, I am not perfect, but surely it's not always me? I'm feeling battered and unsupported and very, very alone.

[46] Some of the behaviours detailed in the reflection document are amongst those defined as bullying behaviour in the Association's bullying policy although Ms Barnes did not use the word bullying.

[47] At the end of the reflection Ms Barnes noted *here endeth my reflection – and my entire weekend!*

[48] Given the passage of time between April/May 2015 and the Authority investigation meeting in late November 2018 I have considered whether there was any consistent evidence closer to the time about provision of the document. When Ms Barnes was interviewed as part of the investigation into her complaint of bullying the notes of her interview record about the 30 April events *the ESM suggested I write a reflection on it*. It was not explored further with Ms Barnes by the investigator whether a reflection was written and if so whether it could be provided.

[49] I have weighed in concluding whether it is more likely than not that Ms Barnes provided her ESM with the reflection document that the ESM facilitated a meeting between X and Ms Barnes a few days later on 5 March. The ESM would have needed to have understood the concerns and a fair and reasonable employer could be expected to have asked for the document to understand the concerns properly in order to address them particularly given Ms Barnes' description of the relationship as abusive. I conclude given it is more likely than not that she did provide the ESM with the reflection document.

[50] On 5 May 2015 the facilitated meeting between Ms Barnes and X took place and the ESM. There is limited information about what was said and done. Ms Willetts in her evidence said that it was a meeting where both parties shared their feelings and emotions and agreed to actions and strategies for moving forward. The ESM in her interview at the

investigation into bullying said:

I agreed to facilitate between Jane and X; Jane clearly showed how she felt – she was very upset and emotive; X responded.

[51] Ms Barnes performance appraisal had not been undertaken and Ms Barnes said that she had been waiting to do this since November 2014. There was some discussion about when this should be completed at the facilitated meeting. The completion of an appraisal was a requirement for teacher registration.

[52] In her interview undertaken with the investigator Ms Barnes referred to the response from the ESM that she was to “*talk to her ie my abuser*”. She contrasted that in her interview with the quite different process for children complaining. She stated in her interview about that meeting amongst other matters:

I half felt supported by [ESM] but at the end of the day, I didn’t feel supported. Then X handed ESM her written clarifying statements at the end of the day so I knew they’d talked about it.

Complaint of bullying

[53] On 15 May 2015 the Association Human Resources Manager, Karyn Willetts, was alerted by the Manager of Education Delivery to a complaint of bullying by Ms Barnes about X.

19 May 2015 meeting

[54] On 19 May 2015 Ms Barnes and her support person W met with Ms Willetts, the ESM and the Manager - Education Delivery to discuss her complaint. Notes from this meeting were produced for the first time at the Authority’s investigation meeting by Ms Barnes. Ms Barnes said that she asked for and was provided with a copy of the notes taken by the Association at that meeting. The Association could not locate their notes. I am going to set out in some detail what the notes provide. There are three full pages and a few lines on a fourth. Objectively assessed this meeting was very important.

[55] The first page of the notes record Ms Barnes saying that she could not stay in the environment and that it was unsafe for her and for the children. She referred to an incident the

previous Friday where X was unhappy about something she had done and “she ‘raged’ at me about the child, in front of the child”. She said that she had very deep concerns about things that X has been doing in the kindergarten and that it was untenable for her to work there anymore. Three specific issues are then referred to in the notes. The first is that “X loses the plot” and “rages at me”. The second is that X is off the floor a lot and Ms Barnes is responsible for all the children. The third issue was referred to in more length in the subsequent written complaint when Ms Barnes said that she had told the ESM about this on 30 April 2015. Ms Barnes had asked for the return of her DVD which was in X’s possession. The notes record that X had said to Ms Barnes “Give it to you as a goodbye gift” and that Ms Barnes had asked “Are you going somewhere?” X responded “no but you may be”.

[56] The ESM is recorded in the notes as confirming during the meeting that the ESM had been involved in lots of phone calls lately. There is a note about care taken with X’s appointment because of Ms Barnes’ concerns around others she had worked with. There is a note about improvement in the kindergarten being needed. There is reference to coping with change and that the ESM has not pushed as hard as she would have liked. The ESM is recorded as saying that she has a concern around how Ms Barnes copes with change and that they had discussed a lot of different ways about working. The notes record the ESM says that [X and Ms Barnes] are definitely different people but “think a lot of synergies”. The ESM talks about an element of pressure for X coming on and that she is keen to see the Kindergarten move forward and that it needed a permanent person. The ESM is recorded as saying that she was surprised to hear Ms Barnes use the word “bullying”, but not surprised that things had come to a head.

[57] Ms Barnes responds to issues that she is not coping with change by saying that she was not opposed to change but needed direction and that “I would trust her if she gave me the information - like deliberately not telling me stuff”.

[58] The ESM is recorded as saying that planning has been an issue since a previous Head Teacher’s time and that it has been difficult in the past to get Ms Barnes on board for planning.

[59] Ms Willetts is recorded as asking what Ms Barnes wants to happen and Ms Barnes replies that she can’t go back there for the sake of her health and the sake of the children. She

explains that the children pick up on the tension and become unsettled.

[60] Ms Willets again is recorded asking “what do you want to happen” and Ms Barnes responds with “I don’t know”. The notes record her saying “I want to be able to express myself in such a way – don’t want to be the one to blame - just think we are incompatible”.

[61] There is some discussion about why tensions have started. The ESM is recorded as stating that she has expectations of improvement in quality at the Kindergarten and that it sounds like X is now starting to implement changes.

[62] The notes record Ms Barnes saying in response to statements by the ESM that “I am hearing that ‘I am wrong’ from you. I have a lot of difficulty in expressing what is going on”. Ms Barnes is recorded as saying that she can’t be in an environment where she can’t say anything.

[63] The notes record Ms Barnes saying about X “Forceful with tone, voice + manner ..felt aggressive, felt like I was being pounded with words. We don’t often converse”. The notes record that Ms Barnes feels suicidal and essentially her job is finished because she can’t go back to work with X and that she needs to take her sick leave and decide on the next step. It is recorded that she said “I can’t go back to work with X”. Whilst there is reference to needing some space the notes do record that Ms Barnes said she was open later to maybe going somewhere else.

[64] Ms Barnes said in her oral evidence that Ms Willetts stated about three times that her permanent position is at MacFarlane Park and asked what it was she wanted. Ms Willetts said in her oral evidence that it was not the practice to transfer someone because they did not get on but that she did not believe she would have said that three times.

[65] Ms Barnes was crying at the end of the meeting. There was a break and then Ms Barnes was provided with the bullying policy.

[66] She was told to put her concerns, if she wished, more formally in writing. The notes suggest that the Association had already decided to get an external investigator involved if a complaint was received. Ms Barnes recalls being unable to say what it was that she wanted at the meeting and it was only several days later when she advised Ms Willetts that she wanted

help.

[67] Ms Willetts said that it was difficult to comprehend the actual content of Ms Barnes' complaint from the meeting of 19 May but there was a broad description of what behaviour was of concern. Further Ms Barnes had already brought several incidents to the attention of the ESM. I accept that as much specificity as possible about dates and behaviour when there is a bullying complaint is important. It was however left to Ms Barnes whilst on sick leave to decide if she wished to formalise her complaint of bullying having expressed that she felt both unsafe and suicidal. I accept that did not stop Ms Barnes from proceeding with and formalising her complaint but the bullying policy did not require the complainant make a complaint in writing.

Continuing sick leave and communication of formal complaint

[68] Ms Barnes remained on sick leave after the meeting.

[69] On 27 May 2015 Ms Willetts telephoned Ms Barnes to see how she was doing, ascertain whether she would be returning to work and what she had decided to do about the complaint. Ms Barnes advised she would be extending her sick leave and had decided to put in a formal complaint.

[70] On 22 June 2015 Ms Willetts wrote to Ms Barnes about medical certificates and anticipated return to work dates. The letter also stated that once Ms Barnes was medically cleared there would need to be a meeting to discuss the relationship with X, changes that have occurred in the Kindergarten to date and those still to occur and in consultation with the ESM the preparation of a plan for on-going professional development and work within the Kindergarten. The letter also advised that the Association would not expect Ms Barnes to return to work until the complaint had been resolved as it would be inappropriate for her to be in the Kindergarten whilst that was being resolved and there was mention of alternative temporary work arrangements needing to be arranged. Further there was reference to completion of the appraisal that was described as long overdue and needing to be addressed with urgency.

[71] On 2 June 2015 Ms Barnes wrote a six page letter of complaint about X.

[72] The start of the written complaint succinctly summarises the situation from Ms Barnes'

perspective. Firstly that despite complaint there was no improved change in the behaviour of X. Secondly there is an acknowledgement by Ms Barnes that she is not perfect and that there should be an acceptance of difference amongst staff. She wrote that the intimidation is beyond what anyone should be exposed to and that she was left to pursue this as she did not want anyone to be subject to that type of intimidation.

[73] On 26 June 2015 Ms Willetts noted receipt of the complaint in an email of the same date and that Ms Barnes would not be expected to partake in an investigation until she was cleared as medically fit.

Instruction not to discuss complaint and to stay away from the Kindergarten

[74] On 2 July 2015 Ms Willetts wrote a letter to Ms Barnes in which she again acknowledged receipt of the complaint in relation to alleged bullying. She advised that the complaint was being taken seriously and a full and fair investigation would be undertaken. The letter advised that she had contacted an external investigator who would begin her investigation immediately. Ms Barnes however would not be expected to participate until she was medically cleared.

[75] Ms Barnes was instructed in the letter not to discuss the complaint with anyone other than her immediate support network. She was instructed not to discuss with any of the parties mentioned within the complaint or those that may have been witness to the alleged bullying as they may be contacted in due course as part of the investigation. This was written to include all staff at the Kindergarten as well as parents of children attending. She was advised that any attempt to engage in conversation about matters raised with any party or otherwise will be considered undermining of the investigation and disciplinary action may be taken. Additionally Ms Barnes was instructed not to visit the Kindergarten at all until the investigation had been resolved and that if she needed anything from the Kindergarten she was asked to contact Ms Willetts. Ms Willetts thanked Ms Barnes for putting the concerns in writing and stated that she realised that it was not an easy process for her to undertake.

[76] I accept a fair and reasonable employer could instruct that those involved in a complaint not talk about it with those involved because of a risk of influencing what may be said in a subsequent investigation. Ms Barnes was not only directed not to talk to anyone at the Kindergarten about her complaint but she was also instructed not to visit the Kindergarten

at all. She lived a short distance from the Kindergarten and said that she felt isolated from the Kindergarten and the community and I accept her evidence on that matter. Ms Barnes was asked to return her keys/computer and camera at some stage.

Appointment of an investigator

[77] Following the written complaint the Association contacted the New Zealand Educational Institute (NZEI) to obtain a recommendation of an investigator. The recommended investigator was a person I shall call V from a consultancy. Ms Willetts explained that the Association had not needed an external investigator previously and wanted to seek advice from Ms Barnes' union.

V lacked skill to investigate workplace bullying

[78] Mr Halse submits that V lacked the skill to investigate the alleged workplace bullying. V's evidence was that she had undertaken a number of investigations. Importantly whilst the Association may have asked an independent consultant to undertake the report it was not absolved of any further responsibility. The Association on receipt of the investigation report still had to consider it carefully and satisfy itself in terms of its policy that the report followed a full and fair investigation into the complaints.

No terms of reference for the investigation

[79] One of Ms Barnes' complaints about the investigation process was the absence of terms of reference. Ms Willetts said no written terms of reference were provided to the investigator as the Association wanted the report to speak for itself and did not want to limit the investigation. Her evidence was that V was asked to investigate the complaint and provide recommendations whether bullying had occurred and if anything could be done for the future.

[80] V described her brief in her investigation report as:

- (a) Interviewing the parties involved to establish the facts, included but not limited to: dates, times, location, persons present and any other factual information on any and all incidents of alleged bullying.
- (b) Interviewing any relevant persons outlined within the complaint and any others that may arise during the course of the investigation, collation of dates, times, location, persons present and any other factual information on any and all of the incidents of alleged bullying.

[81] Ms Barnes because she was unable to discuss her complaints and was required to remain away from the Kindergarten was potentially more disadvantaged by the absence of terms of reference. Terms of reference would have been prudent but the bullying policy did not require them and I do not therefore conclude their absence unjustified.

What documentation did V have for her investigation?

[82] The investigation report states that the documentation provided included the bullying complaint from Ms Barnes, acknowledgement of the complaint from Ms Willetts and notes from recent meetings with Ms Barnes. On questioning V she could not be clear what meeting notes she was provided with. V said in her oral evidence that she was not provided with the Association's bullying policy or the reflection document about the 30 April 2015 incident referred to above. The reflection document was mentioned by Ms Barnes in her interview as I have set out earlier but V did not explore that further or request a copy.

[83] The Association should have provided V with a copy of the Association's bullying policy. That was the policy that the Association provided to Ms Barnes and she properly understood that the investigation would be undertaken in terms of the policy.

Methodology

[84] The methodology set out in the investigation report was to identify two key aspects in relation to the bullying allegation. The first was whether the complaint fits within the Worksafe New Zealand definition of bullying. This is found in a guideline document from Worksafe New Zealand about Preventing and Responding to Bullying (Worksafe guidelines).⁷ Secondly whether the allegations are corroborated by other parties or documentation.

[85] V did not have a copy of the Association's bullying policy that had its own definition of bullying as a continual and relentless attack on other people's self-confidence and self-esteem. Nevertheless V concluded in her investigation report that four of the behaviours complained of fitted within the definition of bullying in the Worksafe guidelines. Although the question was asked for the fifth complaint in the investigation report it is was not clearly

⁷ Worksafe New Zealand "Preventing and Responding to Workplace Bullying: The Guidelines", first published in February 2014. These have subsequently been updated in March 2017 but that was after the date of the investigation in this matter.

answered either way. In reading the report as a whole I conclude that the behaviour complained of in the fifth complaint was in all likelihood found to fit within the Worksafe guidelines definition of bullying as well.

[86] V focussed her investigation reasonably narrowly on five complaints from Ms Barnes' letter of complaint dated 2 June 2015. These were incidences referred to on 19 March 2015, 22, 23 and 30 April 2015 and 14 May 2015. There was reference to other issues raised in Ms Barnes' letter of complaint that did not indicate exact dates or times of incidents. There were six general trends identified at the start of the investigation report but the body of the report and conclusion concentrated on the five incidents referred to above and no real conclusions were reached about trends. The trends included X asking children if they are coming back to see her as opposed to both X and Ms Barnes (us). A further trend was X cutting Ms Barnes off when she was trying to talk to her and a complaint that Ms Barnes tried to give input but was ignored and that she found it difficult to say anything.

Who was interviewed?

[87] V interviewed four individuals as part of her investigation into the complaint. X and the ESM were separately interviewed on 7 July 2015. K was an extra teacher who provided cover at the Kindergarten and she was interviewed on 9 July 2015. Ms Barnes, once medical clearance was provided, was interviewed on 14 July 2015. The order of interview was somewhat unusual but explained on the basis because Ms Barnes was not well enough initially to be part of the process.

Verification of interview notes

[88] The interview notes were to be verified as part of the process as accurate by those interviewed. Ms Barnes did propose some changes when she was provided with the interview notes. Ms Barnes had copied into her written evidence an email that she had received from a consultant at V's office attaching her interview notes and asking that she make sure that they captured the 'essence' of her conversation.

[89] Ms Barnes responded by email that she had reworked the notes. What did seem unchanged in the interview notes supplied by V was a question about "Do you remember her tone?" Ms Barnes wrote that she heard "Do you remember your tone?" It was on that basis

she had answered. She wrote in her email that if V was asking about X's tone she would have answered along the lines of 'snarky' or 'patronising'.

[90] I was unable to conclude with any degree of certainty that proposed changes were incorporated and there are some differences between the notes contained as part of Ms Barnes' written evidence and those provided by V as part of her evidence. I find this is a further example of the challenges faced by Ms Barnes with little knowledge of the investigation process, being unwell and outside the workplace.

Outcome of the bullying investigation

[91] It was set out in the report under conclusions the views of all four of those interviewed. Ms Barnes "very much felt bullied by X" and that the examples given did fall under the Worksafe bullying definition. It was concluded that Ms Barnes had personalised a number of interactions with X and she described the situation in the context of a personal not professional relationship.

[92] X's view set out in the conclusion to V's report was that Ms Barnes had not taken well to being managed and that is the source of the complaints. It was set out that X was extremely frustrated by Ms Barnes' resistance to change. There was an acknowledgment set out that X has not always handled situations well and does regret being reactive at times.

[93] Although the ESM and K were interviewed in addition to X and Ms Barnes it was confirmed that neither were witness to the complaints. Their views were set out in the report.

[94] K described the situation between Ms Barnes and X as tense although she had never experienced issues with the way X had spoken to her or treated her. Further that X had brought some positive changes to the Centre.

[95] The ESM's view was that she had given X a mandate to make changes to the Kindergarten to ensure issues in the ERO report would be addressed and X was acting in the best interest of the Kindergarten and was challenging Jane in her professionalism. The ESM, it is recorded, stated she had spent time working with Ms Barnes to get her to address the issues back to X.

[96] It was concluded that "none of the allegations of bullying as defined by Jane (and

Worksafe NZ) have been substantiated therefore the finding is that the allegations of bullying brought by Jane towards X are not upheld”.

[97] There were four recommendations in the report. Three applied to Ms Barnes and the fourth solely to X.

[98] The first recommendation was made on the basis that Ms Barnes had made it clear that she did not feel safe or supported at the Kindergarten and could not in her mind return and work with X. The recommendation was that the employer work through a managed exit with Ms Barnes. This was suggested by her support person when interviewed by V. It was noted with this recommendation that Ms Barnes would need the opportunity to visit the Kindergarten and remove her personal belongings and that this should be supervised and when X is not present.

[99] The second recommendation was on the basis that Ms Barnes and X had indicated that the orientation was not a structured process and the roles and responsibilities of Teacher and Head Teacher not clearly established. It was written that had X had more support then she would not have had to take the lead from Ms Barnes and the boundaries would have been clearer at the start. The recommendation was that the roles and responsibilities and formal orientation process be reviewed and documented for all parties working at the Kindergarten.

[100] The third recommendation was that for Ms Barnes to be able to continue in a teaching role she would need a performance review for her registration to be undertaken by the ESM rather than X.

The Association receives the report

[101] On 5 August 2015 the Association received the investigation report from V and reviewed the report. Ms Willetts said that the conclusion was that the investigation had been thorough and there were references to the Worksafe definition of bullying.

Findings relayed to Ms Barnes

[102] The Chief Executive of the Association Sherryll Wilson wrote to Ms Barnes by letter dated 6 August 2015. The purpose of the letter was set out to formally advise of the outcome of the investigation undertaken by V. It was noted that the investigation concentrated on five

specific areas, corresponding to the allegations made and some more general issues. Ms Wilson stated in her letter that the investigator had undertaken what was considered to be a thorough investigation especially given the complications around the introduction of X as the new Head Teacher and Ms Barnes' long history with the Kindergarten and the community.

[103] The finding that the allegations of bullying were not upheld was set out in the letter.

[104] The three recommendations set out above were included. It was noted in Ms Wilson's letter that any recommendations relating directly to X will not be disclosed to Ms Barnes, as any that related specifically to her would not be disclosed to X.

[105] It was set out that it was now appropriate to work with Ms Barnes regarding the first recommendation above (the managed exit) and what that would mean for her and the staffing at the Kindergarten. It was noted that the suggestion of a managed exit had come through as something raised by Ms Barnes' support person. Ms Barnes was invited to a meeting on 11 August 2015 and was also advised that the other recommendations could be discussed at that time. The ESM and Ms Willetts were to attend on behalf of Ms Wilson. Ms Barnes was again reminded that the matter was confidential and she was not to discuss the outcomes with anyone else other than her support person. That included employees of Kidsfirst, parents, the wider Kindergarten community and the general public.

[106] It was surprising I find for V to set out as a recommendation a managed exit even if Ms Barnes' support person had raised the issue. That is something usually to be left for discussion at a later time between the employer and the complainant. In the letter of 6 August 2015 the focus for the meeting is on that recommendation of a managed exit. There is no reference to any other recommendations for the future aside from a performance appraisal. There is nothing about what reasonable steps could be taken to manage the clear relationship difficulties between X and Ms Barnes to ensure a safe workplace.

[107] The Authority was provided for the purposes of its investigation with the interview notes for those interviewed by V. Aside from her own interview notes these had not previously been supplied to Ms Barnes. The interview notes of the ESM support that Ms Barnes' manager had some significant concerns about Ms Barnes returning to the Kindergarten and teaching children. This could have contributed to the focus on the managed

exit.

[108] The bullying policy required the findings of the investigation to be communicated to both the complainant and the accused person with an opportunity for them to comment on the findings.

[109] This step was overtaken and the final step in the bullying policy implemented with the involvement of the Chief Executive and the advice of the outcome of the investigation in writing to both the complainant and the accused person. The meeting proposed by the Association was not suggested as one in which Ms Barnes would have an opportunity to comment on the findings and that was not in accordance with the bullying policy.

Meeting 13 August 2015

[110] A meeting duly took place on 13 August 2015 and not 11 August with Ms Barnes and her support person Pastor, E Karlsen. The Pastor wrote a letter about his view of the meeting. I have not given that letter weight as I did not hear from him and Ms Barnes was able to give evidence about the meeting. Ms Willetts and the ESM attended for the Association. Ms Barnes advised at the meeting that she was challenging the fullness of the investigation process. She was asked to address her concerns about the process with V as the Association was not a party to how the investigation was carried out and “did not hold any paperwork”. Although there were no notes provided from this meeting Ms Barnes said in her evidence the ESM made further critical comments. These included that Ms Barnes had had a history of not getting on with people and had raised concerns six years previously about another employee. Ms Barnes in her written evidence noted that she was not the only person to do so.

[111] Ms Willetts could not really recall when asked by the Authority why she had not undertaken an assessment herself again into the fullness of the report once concerns were raised by Ms Barnes. Ms Barnes who was supported at the meeting but not represented was sent to enquire on her own with an investigator whose role at least as far as Ms Barnes was concerned was objectively assessed at an end.

[112] Ms Barnes’ email that she sent to V’s consultancy that same day 13 August 2015 is revealing. In the email Ms Barnes refers to the investigation V carries out and states that she had only just found out that she was allowed to contact V with questions about the

investigation. She writes “I was wondering if V could let me know which witnesses she talked to as [Ms Willetts] wasn’t sure”. I find it more likely given that email sent to V’s consultancy on 13 August 2015 that Ms Barnes was told that Ms Willetts could not recall who was interviewed. That information was readily available from the investigation report.

[113] V’s consultancy promptly responded to Ms Barnes on 14 August 2015 with the names of those who were interviewed. It was further stated that after reviewing V felt that there was no need to call on other witnesses as she had enough information to make a decision.

[114] Both V’s brief as set out earlier and the methodology as set out in her report required her to interview relevant persons outlined within the complaint. I do not accept that it is enough given the brief and methodology as Mr O’Flaherty submits to rely on the fact that Ms Barnes did not suggest witnesses to V or follow up further with her after provision of the names of those interviewed. Ms Barnes was never told who would be interviewed. She had raised her concerns about the fullness of the investigation, was still on sick leave and at that time without representation. It was the Association’s obligation to consider the fullness and the fairness of the investigation in light of concerns being raised.

Would it have made a difference if the Association had followed up and perhaps asked to re-open the investigation after Ms Barnes expressed concern?

[115] V did not interview some of those referred to in Ms Barnes complaint that were present for some of the incidents. These individuals included Hūhana-Suzanne Carter who was at that time employed by the Association as a Māori Adviser. Ms Carter gave evidence to the Authority about an incident that Ms Barnes complained about – the jump rope event and her impression about some of the team dynamics and inter-personal relationships at the Kindergarten.

[116] In her evidence to the Authority Ms Carter said that she was present at a Hui with staff at the Kindergarten on 2 March 2015. Ms Carter recalled mentioning to X that she did not hear the words “us, we, or team” when listening to her statements. She said that it felt demeaning to those other staff present. Ms Carter said that she was present on 30 April at the jump rope session. That was one of the five incidents investigated by V. Ms Carter said that she observed Ms Barnes leading this activity and working with children and whanau present. She felt that X was disengaged from the session and she left Ms Barnes to lead the activity

unassisted even when asked to retrieve some name tags. Ms Carter said that she assisted Ms Barnes and considered X's "non-cooperation" with the activity an attempt to undermine the work of Ms Barnes. The name tag or label issue was specifically referred to in Ms Barnes' complaint although that aspect was not referred to in V's investigation report rather there was concentration on the P.A. system being too loud.

[117] Ms Carter said in her oral evidence that she was concerned about the relationship at the Kindergarten between staff and particularly between X and Ms Barnes and that Ms Barnes told her she felt she was in "an abusive relationship" and that she did not have a voice with X. She said that she spoke to the ESM and the Manager - Education Services who said that they were aware of and would be addressing the issues. She said that she was concerned about Ms Barnes' health and well-being as Ms Barnes had mentioned to her she felt suicidal. Her time frame for the discussion with management about her concerns was, she recalled, about a fortnight after 30 April 2015. When questioned by Mr O'Flaherty as to her memory of the events some three years prior Ms Carter was unshaken in her evidence that she could recall the events.

[118] Another complaint that was witnessed involved an allegation that X belittled Ms Barnes in front of a dishwasher repairman and then made statements in a very aggressive manner and Ms Barnes "wondered if she was going to hit me". V in her report when considering whether the dishwasher complaint was supported by other evidence wrote that X "does agree that she got upset in her discussions with Jane; however this was a result of Jane's verbal barrage when they met at the end of the day" and that "the conversation was initiated by Jane not X". V wrote in the report that there were only the two involved in the discussion and therefore no-one can substantiate the complaint. X's statements appear to have been preferred. That exchange was however it seems witnessed by a third party, the dishwasher repairman.

[119] Ms Barnes also referred in her complaint to an incident at which a parent was present on 27 March 2015 and another interaction at mid-term with another parent. I accept that different but not insurmountable challenges present themselves with involving parents than with the interviewing of employees and external repair persons.

[120] Objectively assessed had the Association asked for the investigation to be re-opened and even if only Ms Carter and the dishwasher repairman had been interviewed or asked to

provide a written response then it could have made a difference to the findings and/or recommendations.

Letter from Association to Ms Barnes dated 14 August 2015

[121] By letter dated 14 August 2015 Ms Willetts wrote to Ms Barnes and copied in the ESM. She confirmed in the letter that Ms Barnes would contact V directly to discuss her concerns with regard to the investigation process.

[122] She stated that whilst the Association would not be averse to negotiating an agreed exit package if that was her wish her starting point was so far removed from what could be provided that it made negotiating in that regard fruitless.

[123] There was an acknowledgment in the letter that Ms Barnes had been certified as medically unfit to attend work until 25 September 2015 and she would not be attending work during that period. The collection of keys from Ms Barnes and the opportunity for her to collect her personal belongings over the weekend was set out.

[124] Ms Barnes was asked to advise of her state of health and ability/inability to return to work by 18 September 2015 and there was reference to rescheduling the meeting about formalising the appraisal process for teacher registration that expired in November 2015.

Ms Barnes personal items

[125] Ms Barnes provided as part of her written evidence an email that she had sent to Ms Willetts, dated 29 July 2015, that she was concerned that she had been advised from a member of the community that her stuff had been packed up and put in the shed. Ms Barnes said that Ms Willetts indicated she would be very angry if that was the case and sent the ESM out to investigate. She then telephoned Ms Barnes back to say that her items had been stored in a cupboard. Ms Barnes said that when she went to collect them they had in fact been in the shed. Ms Willetts did not accept that she was aware that was the situation.

[126] Ms Barnes was distressed about that matter but I cannot conclude with any certainty what occurred with her personal items and whether they were in fact placed in the shed.

What happened next?

[127] Ms Barnes continued on sick leave supported by medical certificates.

[128] I am not going to explore the events between September 2015 and the dismissal in the same level of detail as I have the earlier events at this point. The focus I find in resolution of this employment relationship problem should properly be on the events before September 2015. Ms Barnes was not represented at that time. The events subsequent and particularly those after Mr O'Flaherty was instructed were focussed on whether there could be a return to work, whether a grievance was raised within the statutory time frame and then whether the relationship should be terminated. Ms Barnes remained untrusting of the Association and unwell.

[129] Mediation was proposed by Mr Halse in November 2015 and the Association agreed to that. Return to work was proposed under an advice and guidance work plan in April 2016 to another kindergarten. No agreement about that was reached because Ms Barnes considered she was being performance managed and set up to fail. The Association denied that. There was the Authority investigation into the preliminary issue and a further mediation.

[130] Ms Barnes said in her evidence that she was distressed by continued interaction with the Association and requests. Her doctor said that contact by the Association after the investigation report caused Ms Barnes a re-emergence of self-blame and suicidal thoughts. The Association said that they struggled to deal with the matter and support Ms Barnes because of Mr Halse's involvement.

[131] Mr O'Flaherty in his submissions placed some weight on Ms Barnes' answer to the Authority's question why she did not resign. I conclude that both parties may well have had reasons for continuing the relationship on as long as they did however that I find is more a matter for consideration if the Authority gets to the point of remedies. The same applies to Ms Barnes' email to Mr Halse about her doctors 26 April medical certificate.

[132] One matter that I have paused on is Mr O'Flaherty's submission that the return to work proposed on an advice and guidance plan and at another Kindergarten was the action of a fair and reasonable employer. There may I accept be good reasons for this to satisfy teaching requirements given the significant time away from work. It is part of the factual background that the ESM had expressed concerns about Ms Barnes in her interview with V about the bullying complaints. These concerns that the ESM had were never put to Ms Barnes

and she would have been unaware of them until she received a copy of the interview notes for the Authority process in 2018. I can understand why such a proposal even in the absence of this knowledge would have appeared to Ms Barnes as if it was performance management. That view would only have been strengthened when Ms Barnes made a Privacy Act request for information from ACC after her claim had been declined and was given an email dated 18 September 2015 from Ms Willetts to her representative.

[133] The email must have been provided with other information to ACC from the Association. There was no objection to it being included in documents to the Authority and I have taken any issue of privilege to have been waived when it was provided to ACC. A question was asked in the email by Ms Willetts of the Association representative whether they had to put Ms Barnes back in that kindergarten. There was reference to having to have an appraisal meeting that “will be bad” and putting Ms Barnes on an action plan which would include having her work elsewhere to see better practice and whether that could be implemented straight away.

[134] Ms Willetts in her evidence about this said that she was chasing Ms Barnes for a medical certificate and the performance appraisal had not been undertaken. She did accept in her evidence to the Authority that Ms Barnes may have tried to request an appraisal earlier than May 2015 and been met by resistance. That accorded with Ms Barnes’ evidence. Ms Willetts said in her evidence that if there is no evidence to meet the criteria for appraisal then an action plan is put in place.

[135] I find that the email objectively assessed supports an already formed view that a performance appraisal undertaken of Ms Barnes would not be satisfactory. I was supplied with a series of previous performance appraisals undertaken of Ms Barnes. From my assessment earlier appraisals in 2007, 2008, 2011, 2012 and 2013 contained positive comments about Ms Barnes under professional knowledge and professional relationships and values. The appraisal undertaken in 2009 I found too hard to read and I could not find the 2010 appraisal amongst the others provided.

[136] For the period before termination there was sensibly some steps taken to resolve matters by Mr O’Flaherty and Mr Halse. There were significant trust issues to overcome because of the earlier events and the Association had I find views about performance that I find resulted in firm views about any return to work. Ms Barnes was also very unwell.

Matters could not be resolved.

[137] I turn now to conclusions about unjustified actions.

Conclusions unjustified actions

[138] Ms Barnes told her ESM on 30 April 2015 that she felt unsafe and she was in an abusive relationship with X. The reflection document set out in some detail the exchanges that occurred that day and some more general concerns. It seems to have been given little genuine consideration because it raised serious issues from Ms Barnes' perspective about the relationship with X and how she was feeling.

[139] Although a facilitated discussion can be an appropriate first step where there are relationship difficulties the 5 March 2015 meeting did not resolve issues between X and Ms Barnes. It could, objectively assessed, have been an inadequate step given the extent to which Ms Barnes considered the relationship had deteriorated.

[140] Ms Barnes complained then to the Manager – Education Delivery saying that she had been bullied. There was a meeting promptly called and that was commendable but Ms Barnes was then made to feel at the 19 March meeting that she was wrong and to blame for the situation she was complaining about.

[141] In circumstances where the ESM had clear views about X and Ms Barnes it was appropriate and the action of a fair and reasonable employer to engage an external consultant to undertake the investigation. I accept that once the written complaint was received the Association moved quickly to an investigation and that was the action of a fair and reasonable employer.

[142] I have not found a lack of consultation about the investigator or the absence of terms of reference for the investigation unjustified. I accept that the investigation was not on all fours with the Employment NZ website as submitted by Mr Halse but that does not necessarily make it unjustified and I have not undertaken a detailed assessment therefore on that basis. The Association was still required on receipt of the investigation report to satisfy itself that a full and fair investigation had taken place.

[143] I set out below what was unjustified and not the actions of a fair and reasonable

employer.

[144] It was an unjustified action to suggest that Ms Barnes was somehow responsible for any relationship issues at the 19 May meeting before the bullying complaint had been properly investigated and in the knowledge that she was unwell and feeling unsafe. A fair and reasonable employer could be expected to recognise the vulnerability of an employee when a complaint of bullying is made. They could be expected to be supportive and refrain from pointing out perceived shortcomings and from expressing surprise at a complaint that had been made in accordance with the Association's bullying policy. It was not supportive and pending an investigation inappropriate because it could suggest a view has already been formed about the veracity of the complaints. The notes objectively assessed do support a basis for Ms Barnes' statement that she was hearing [from her manager] that "I am wrong". Ms Barnes described in her written evidence leaving the meeting feeling "thoroughly battered".

[145] How that meeting was conducted and what was said was not the action of a fair and reasonable employer. In light of the advice that Ms Barnes felt suicidal and unsafe at the end of the meeting and was visibly distressed the only follow up support was one telephone call on 27 March 2015. It was not enough to leave matters for that period of time on the basis that Ms Barnes had a support person present at the meeting. Ms Barnes I accept felt isolated and unsupported.

[146] It was an unjustified action to fail to provide the external investigator with a copy of the Association's bullying policy.

[147] It was an unjustified action to focus on the recommendation of a managed exit for Ms Barnes from the investigation report.

[148] It was an unjustified action to fail to give Ms Barnes an opportunity to comment on the findings of the report as required in the bullying policy before the report was given to the Chief Executive and the outcome advised.

[149] It was an unjustified action to fail to provide the investigation report to Ms Barnes to enable proper comment. Mr O'Flaherty refers in submissions to a redacted copy being provided shortly after its provision to the Association. Ms Barnes did not accept she received

a copy of the report. Mr Halse in a letter dated 30 November 2015 to Ms Willetts advised that he had reviewed the information provided by the Kindergarten to Ms Barnes and it appeared that she did not seem to have been provided with a copy of the report. Ms Willetts then responded by letter dated 3 December and stated amongst other matters that she was of the understanding that she had previously sent Mr Halse a copy of the report following his request on 13 August 2015. She attached the report. Mr Halse was not Ms Barnes' representative at the 13 August meeting. That supports in my view that in fact the earliest the investigation report was provided was 3 December 2015.

[150] It was an unjustified action for the Association to fail to satisfy itself that the report followed a full and fair investigation by V when Ms Barnes raised concerns at the 13 August 2015 meeting about the fullness of the investigation. A fair and reasonable employer could have been expected, as part of that assessment, to have considered whether relevant persons in the complaint who may be able to corroborate the incidents had been interviewed. There could and should have been questioning of V as to why relevant witnesses mentioned in the complaint were not interviewed in any assessment of the fullness and fairness of her investigation. An investigation of a bullying complaint that is not full and fair will not provide a complainant with a safe workplace.

[151] It was an unjustified action to expect Ms Barnes to raise issues about her concerns with V directly. It was a failure to act in accordance with good faith obligations and be active and constructive and responsive and communicative at the 13 August 2015 meeting about the witnesses interviewed when that information was readily available from the report itself. Ms Barnes was left to obtain that information herself. There was no clear follow up with her in any formal way about her concerns or interactions with V.

[152] I find that all these actions disadvantaged Ms Barnes in her employment and resulted in her feeling not only bullied in her employment but unsupported, isolated and unheard.

[153] Ms Barnes has made out her grievance that she was unjustifiably disadvantaged and is entitled to consideration of remedies after I reach findings about the alleged unjustified dismissal claim.

Was Ms Barnes' dismissal for reasons of medical incapacity unjustified?

[154] The dismissal was not the main focus of the Authority investigation because

Ms Barnes, although given the opportunity, did not participate in the process.

[155] I accept that a personal grievance was raised within the statutory timeframe in the second amended statement of problem.

[156] Ms Barnes had been on sick leave since 18 May 2015 with no clear date of return. Options for return to work had been discussed and there was no medical clearance to return. Ms Barnes was invited to a meeting to discuss the matter and respond. There was then no uptake by her or Mr Halse to attend a meeting or respond in writing when it was made clear a possible outcome was termination. There was no response to a preliminary decision.

[157] I find that a fair and reasonable employer could have dismissed Ms Barnes for reason of medical incapacity on 23 May 2018 in all the circumstances. The process for the dismissal was fair and reasonable.

[158] I do not find that the termination of Ms Barnes employment for reasons of medical incapacity was unjustified.

Mandatory Education Report – bullying?

[159] The Education Report which I understand from the Association was mandatory caused distress to Ms Barnes because it set out aspects of competence that the Association was unhappy with, referring to a long absence and lack of appraisal or ability to observe practice. The report also stated a belief of the Association from the medical certificates that Ms Barnes was suffering from PTSD and medically unfit and should not be teaching our youngest children at least until medical clearance.

[160] It was somewhat unclear given that the dismissal was for reasons of medical incapacity why there was reference to aspects of competence that the Association was dissatisfied with as the long absence probably speaks for itself in terms of any appraisal.

[161] It was however a mandatory report. I could not be satisfied that it contained other than genuine concerns on the part of the Association even if they caused distress to Ms Barnes. I do not conclude bullying therefore.

Is there a causal link between bullying and unjustified actions found and the medical diagnosis?

[162] The medical evidence was received the day before the investigation meeting. Mr O'Flaherty agreed to proceeding on the basis suggested by the Authority that there would be an opportunity for the Association if it wished to call evidence in response. That was helpful and prevented an adjournment. Mr O'Flaherty later advised the Association did not intend to call further medical evidence.

[163] Ms Barnes' doctor gave evidence that after a medical condition in 2014 that was stressful for Ms Barnes, particularly because there was at the same time issues with the Earthquake Commission (EQC), she was by mid-2014 her usual cheerful bouncy self and in late 2014 there was a settlement reached with EQC.

[164] He said that on 18 May 2015 Ms Barnes saw his locum as he was on holiday and he reproduced notes taken at the time. These notes record that Ms Barnes had been under workplace stress with perceived bullying from a senior staff member. Ms Barnes was recorded as not sleeping well, some thought of suicide but no intent. Ms Barnes did not consider she was depressed and she had been catching up with a counsellor. She said she would like some time off work to consider options and may leave permanently.

[165] The doctor said that he saw Ms Barnes on 29 May 2015 and spoke about her being under pressure at work. The notes record that Ms Barnes talked about the bullying and said that she was anxious and fearful. The notes record breathlessness and heart racing in thinking about the situation, loss of appetite, low motivation, poor sleep, poor concentration, low energy and unable to do craft work that was a major enjoyment. There was reference to Ms Barnes feeling sick at the thought of returning and at driving past the area and there was a fear of leaving the house and she was unable to apply for other work.

[166] At subsequent consultations the doctor said that Ms Barnes revealed a bullying complaint had been made, important people were not interviewed at the investigation of the complaint and due to the lack of support from her employer she was feeling considerably worse. A diagnosis of PTSD was then made. I find that this was notified to the Association in or about December 2015⁸ and not as Mr O'Flaherty submits made for the first time in April 2016.

[167] The doctor said the four symptoms that Ms Barnes was suffering from were classic

⁸ Email from Mr Halse to Ms Willetts dated 1 December 2015

symptoms of PTSD. These were reliving the event, avoidance, change in personality and re-emergence of suicidal thoughts when contacted by her workplace. A symptom of PTSD can be self-blame and blame from others therefore can inflame the situation.

[168] I have weighed the evidence of Ms Carter that she was concerned about Ms Barnes' health and well-being and state of mind in or about April 2015 and reported this to the ESM. The reflection document also provides evidence of clear distress as at April 2015. There is also the distress and reference to feeling unsafe and suicidal at the 19 May 2015 meeting at the end of which Ms Barnes was tearful.

[169] I find evidence to support a causal link between the diagnosis of PTSD, the bullying allegation and the subsequent unjustified actions of the Association in dealing with the complaint.

Disregarded sick leave

[170] The Authority has concluded that Ms Barnes has a personal grievance. One of remedies available is reimbursement of wages or other money owing under s 123(1)(b) of the Act. A claim has not been made under that section for the period Ms Barnes was on sick leave and not receiving an income. The Authority cannot therefore consider any loss of wages under that head.

[171] Ms Barnes seeks instead a contractual payment for disregarded sick leave from 18 May 2015 as set out in clause 4.3 in the collective agreement.

[172] The disregarded sick leave provision sets out materially for present purposes that sick leave not exceeding an overall aggregate of two years may be granted by the employer in circumstances where an illness can be traced directly to the conditions or circumstances under which the employee is working. The clause also refers to injury but I find illness is the appropriate part of the clause to consider in the circumstances.

[173] Illness is not defined in the collective agreement. It is however defined in a dictionary definition as a disease, ailment or malady.⁹

[174] Mr O'Flaherty in his submission states that the clause requires the exercise of

⁹ New Zealand Oxford Dictionary Edited by Tony Deverson and Graeme Kennedy

discretion by the employer and is not mandatory. I accept that the words “may be granted” support that submission. The exercise of discretion must include a consideration of relevant factors. Ms Barnes first raised a claim under this section or at least using the words disregarded sick leave at the meeting on 13 August 2015 as part of a package put forward to resolve the issues. It was declined in a letter of response by Ms Willetts primarily on the basis of the parties being too far apart with expectations of an exit package. A further claim was made in the original statement of problem and the two subsequent amended statements of problem under the provision.

[175] I find that despite requests by Ms Barnes directly and then in the statement of problems lodged on her behalf a question remains whether the discretion to pay disregarded sick leave was ever properly exercised by the Association. It is more likely than not that it was seen as part of an overall package of remedies and rejected on a financial and affordability basis. That would be I find an improper exercise of the discretion because it is not a relevant factor for consideration under the disregarded sick leave provision. Primarily the relevant factor in the exercise of the discretion to grant disregarded sick leave is whether the illness can be traced directly to the conditions or circumstances under which Ms Barnes was working.

[176] Ms Barnes is entitled to have her application for disregarded sick leave properly considered by the Association. Any sick leave is capped under the provision at an overall aggregate of two years.

[177] I find that the Association failed to properly consider and exercise its discretion about Ms Barnes’ claim for disregarded sick leave.

[178] As I have found that the claim for disregarded sick leave was not properly considered I intend to order that the Association comply with its obligations and exercise its discretion about disregarded sick leave giving due weight to relevant considerations within two weeks from the date of this determination. It should then advise the outcome of the exercise of that discretion to Ms Barnes. Leave is reserved for either party to return to the Authority if required about this matter.

Compensation

[179] Ms Barnes seeks the sum of \$35,000 under this head. I am only considering the claim for compensation with respect to the unjustified disadvantage claim. I find the impact of the unjustified actions and resulting disadvantage was far reaching and causative of Ms Barnes becoming seriously unwell, unable to work and reliant on a benefit . Ms Barnes described significant anxiety, feelings of being excluded from the Kindergarten and community and of being blamed. She felt her concerns about the investigation by V were ignored and the stress and anxiety have been ongoing. Ms Barnes in her written evidence puts it this way “I am still waiting for a complete investigation to be carried out”.

[180] Ms Barnes had worked at the Kindergarten for 23 years, lives close by and her work was a very significant part of her life. It was work as supported by a statement in her bullying complaint letter dated 2 June 2015 that she loved. I noted her pride in talking about a successful day with the children in Arthurs Pass that she had been an instrumental part of. Ms Barnes at the time she made the complaint and following felt excluded from a large part of her life and unsupported by the Association.

[181] Ms Barnes’ confidence and self-esteem was impacted by a view that she was to blame. She started to doubt herself and her doctor said she was no longer the same positive person. In 2016 I do weigh that she felt able to enrol in a computer programme design course.

[182] Mr O’Flaherty submits that the claim under this head is excessive and unsupported and that Mr Halse “has picked the sum out of the air”. I disagree. The Employment Court has in recent cases made compensatory awards that are not inconsistent with the amount sought in this case for compensation.¹⁰

[183] I find that an appropriate award subject to any issue of contribution for compensation for the unjustified actions that caused disadvantage is an award at the higher range in the sum of \$30,000 without deduction in all the circumstances of this case.

Claim for loss of benefit of superannuation

[184] The loss of superannuation benefits can be claimed under s 123 (1)(c)(ii) of the Act. The only evidence for this claim was an amount in the statement of problem of \$18,000 although at the Authority investigation Ms Barnes referred to a sum of \$27,000. I understand

¹⁰ *Stephen Roach v Nazareth Care Charitable Trust Board* [2018] NZEmpC 123 and *Waikato District Health Board v Archibald* [2017] NZEmpC 132

from Ms Barnes that contributions were paid into the Government Superannuation Fund.

[185] Whilst I have found a causal link between the unjustified actions and bullying and the PTSD I find on the balance of probabilities that link weakened over the time off on sick leave. The undated medical certificate provided in December 2015 was reasonably positive about recovery from PTSD symptoms however between April and May 2015 there was reference to continued interactions with the Association exacerbating PTSD symptoms for Ms Barnes.

[186] The Authority has weighed the continuation of the employment relationship, at least from May 2016, which necessitated contact from time to time between Ms Barnes, the Association and respective advisors. The evidence supports that the PTSD symptoms continued or worsened as a result of that rather than the initial bullying and actions. I have also weighed that there was no treatment plan or specialist intervention after April/May 2016. Counselling appears to have taken place only for a short period in or about May 2015.

[187] Mr O'Flaherty placed emphasis on an email Ms Barnes sent to Mr Halse on 27 April 2015 that was provided to the Authority as an attachment to the statement of problem. He suggested that comments about the 26 April 2015 medical certificate by Ms Barnes - *I think you'll like what [Doctor] wrote* and later *Hopefully they will now decide they can dispense with my services and terminate my employment* raises an ulterior motive for providing the certificate being termination giving rise to the ability to bring a case. He also suggests that the doctor was coached.

[188] I am not of the view that there is an ulterior motive or that the doctor was coached about the medical certificate. The evidence supported that PTSD been diagnosed earlier and the Association had been advised about that on 1 December 2015 by Mr Halse. The email from Ms Barnes read in its entirety supports the challenges that ongoing contact presented for her with the Association. She refers to high blood pressure and attributes that to the Association and its advisors. Ms Barnes' evidence was to the effect that she did not resign because she thought that may impact on her ability to bring a claim to the Authority. That would not in fact have been the case.

[189] Given the views as set out above I intend to limit any claim under this head to reimbursement of employer contributions to the superannuation fund for one year between 18 May 2015 and 18 May 2016 as a benefit Ms Barnes might reasonably have been expected

to obtain. I do not imagine it will be too difficult for the Association to obtain figures for this. I do reserve leave for either party to return to the Authority if there is difficulty about this.

Claim for future loss of income

[190] There was no evidence in support of this claim and I do not intend to make any award under this head.

Contribution

[191] I do not find that Ms Barnes contributed towards the situation that gave rise to the personal grievance. She was cooperative with the Association at the time she made her complaint of bullying and during the investigation. Mr O'Flaherty raises matters about Mr Halse and obstructive and uncooperative conduct, delays and failing to interact. Those concerns relate to matters other than those that I have found gave rise to the personal grievance. I do not find that Ms Barnes contributed towards the situation that gave rise to the personal grievance and there is to be no reduction of the awards.

Orders Made

[192] I order the Canterbury Westland Kindergarten Association Inc to:

- (a) Exercise its discretion under the disregarded sick leave provision of the Collective Agreement with regard to relevant factors within two weeks of the date of this determination with leave reserved for either party to return to the Authority.
- (b) Pay to Jane Barnes without deduction the sum of \$30,000 being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.
- (c) Pay to Jane Barnes the lost benefit of the employer contribution to the superannuation fund from 18 May 2015 to 18 May 2016 under s 123 (1)(c)(ii) of the Employment Relations Act 2000. Leave is reserved for either party to return to the Authority if difficulties arise with quantum.

Costs

[193] I reserve the issue of costs. Mr Halse has until 24 April 2019 to lodge and serve submission as to costs and Mr O'Flaherty has until 8 May 2019 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority