

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 38
ARC 54/12**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN BRUCE TAIAPA
 Plaintiff

AND TE RUNANGA O TURANGANUI A
 KIWA TRUST T/A TURANGA ARARAU
 PRIVATE TRAINING ESTABLISHMENT
 Defendant

Hearing: 25 and 26 February 2013
 And by written submissions filed on 4 and 6 March 2013
 (Heard at Gisborne)

Appearances: Gregory Bennett, advocate for plaintiff
 Elizabeth Inger, counsel for defendant

Judgment: 18 March 2013

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This is a challenge by hearing de novo to a determination¹ of the Employment Relations Authority delivered on 25 July 2012 that Bruce Taiapa was dismissed justifiably by his employer, Te Runanga O Turanganui A Kiwa T/A Turanga Ararau Private Training Establishment (to which I will refer in shorthand as Turanga Ararau).

[2] I have concluded that the Employment Relations Authority correctly found that Mr Taiapa was dismissed justifiably. Although this has been a hearing de novo, I have come to that same conclusion for essentially the same reasons as did the Authority. Rather than repeat those, I adopt them so that for a full understanding of the case, the Authority's determination should be read in conjunction with this

¹ [2012] NZERA Auckland 252.

judgment. I focus particularly on some aspects of the case which were either not emphasised in the Authority or have arisen for the first time on this challenge. The judgment is, nevertheless, one given on all the facts of the case which have been considered independently by the Court. The applicable statutory test for justification of dismissal is that now set out in s 103A of the Employment Relations Act 2000 (the Act) because Mr Taiapa's dismissal occurred after that provision came into effect on 1 April 2011. The test is whether the dismissal, and how the employer went about effecting that, were what a fair and reasonable employer could have done and how, in all the relevant circumstances at the time. There are also four particular statutory criteria of which the employer must satisfy the Court before it is able to justify its dismissal of Mr Taiapa.

[3] The defendant is a charitable trust which provides educational, social, and other like services on contracts to the Ministry of Social Development. The plaintiff was employed as a programme supervisor of Specialist Youth Services in Gisborne.

[4] It is probably not an exaggeration to say that the sport of Waka Ama is one of Mr Taiapa's passions. He has been long and deeply involved in the sport and, in 2011, coached several local teams. Not only had Mr Taiapa's annual leave been used up entirely by attending Waka Ama competitions, but he was also, by March 2011, overdrawn on his sick leave account by 10.5 days.

[5] In addition to his job with Turanga Ararau, Mr Taiapa and his partner ran a Child Youth and Family Services (CYFS) home in which a government department placed children and young persons without homes.

[6] From 28 March to 1 April 2011, the New Zealand Secondary Schools Waka Ama Championships were held at Rotorua. Mr Taiapa's domestic partner, Cath Deacon, sought the defendant's approval to Mr Taiapa taking five days' leave from Monday 28 March to Friday 1 April 2011. The reason for the lateness of this request (made two working days before the start of the leave requested) was said by Ms Deacon to have been because CYFS had required Mr Taiapa and Ms Deacon to take a week's leave before the end of March 2011 from running their CYFS home. Turanga Ararau's Operations Manager, Winifred Ruru, passed on the leave request to

its manager, Sharon Maynard, who discussed it with Mr Taiapa on the morning of Friday 25 March 2011. Ms Maynard was reluctant to approve the leave requested both because Mr Taiapa was needed at work by Turanga Ararau during that period and also because he had already taken three blocks of leave in the past 12 months and not only had no annual leave left but 'owed' his employer leave that he had taken.

[7] Ms Maynard offered to write to CYFS to explain that their direction would affect adversely Turanga Ararau's operations and what was Mr Taiapa's primary job. Her intention in proposing this was to try to persuade CYFS to delay their requirement for Mr Taiapa to take leave until later in the year at a time when he would not be required to run courses for Turanga Ararau. Mr Taiapa did not accept Ms Maynard's offer but, rather, pressed his request for leave without pay.

[8] As a compromise, Ms Maynard proposed that Mr Taiapa take leave from Wednesday 30 March 2011, one day of which would be paid and two days without pay but that he would have to work on Monday 28 and Tuesday 29 March 2011 because there was no-one who could cover his work during an absence. The offer of leave on pay to which he was not strictly entitled was meant to reflect the hard work he had then recently put into participation in Te Matatini, the National Kapa Haka competitions.

[9] Ms Maynard was herself taking leave from 2 pm on Friday 25 March 2011 and asked Mr Taiapa to respond to her proposal before then. When he did not do so, she assumed that he would be at work as usual on the following week and would not be taking leave at all.

[10] Mr Taiapa did come to work on Monday 28 March 2011 but went home mid-morning after telling Ms Ruru that he was suffering from a longstanding calf injury for which he had consulted his doctor on the previous Friday and in respect of which his doctor had directed him to take two days' leave. By Mr Taiapa's later account to his employer, however, he said that he had taken his students for a beach walk on the morning of Monday 28 March 2011 and it was in the course of this exercise that his calf muscle was injured. In any event, Mr Taiapa left Gisborne with his domestic

partner and other family members (and was seen doing so by another staff member) on the late morning of Monday 28 March 2011, and travelled to Rotorua where he attended the Waka Ama Championships.

[11] Ms Maynard returned to work on Tuesday 29 March 2011. Ms Ruru told her that Mr Taiapa was on sick leave, having advised Ms Ruru at about 9 am on Monday 28 March 2011, that a longstanding physical injury had prompted his doctor, on Friday 25 March 2011, to say that he needed two days off work. Ms Ruru had told Mr Taiapa that he was to provide a medical certificate to confirm this explanation on his return to work which Ms Ruru anticipated would be on Wednesday 30 March 2011.

[12] On the morning of Tuesday 29 March 2011, Ms Ruru, at Ms Maynard's request, attempted to contact Mr Taiapa to inquire whether he might be able to work on light duties, but was unable to contact him. Another employee told Ms Maynard that Mr Taiapa had been seen leaving Gisborne on Monday 28 March 2011.

[13] Further information came to Ms Maynard's notice on Wednesday 30 March 2011 when another staff member told her that Mr Taiapa might be found in Rotorua at the Waka Ama Championships. Ms Maynard later saw a photograph taken at that event and posted on the internet social medium known as Facebook which portrayed Mr Taiapa there. That caused Ms Maynard to remember a letter she had received a few weeks earlier from a Waka Ama fundraising representative stating that Mr Taiapa and Ms Deacon would accompany two competing teams to the championships at Rotorua that year.

[14] The combination of these events made Ms Maynard suspect that Mr Taiapa may have been misusing sick leave. Mr Taiapa did indeed travel to and stay at Rotorua (and then at Mt Maunganui for another sports event in which a family member was competing) for the Waka Ama Championships for the working week from Monday 28 March to Friday 1 April 2011.

[15] On Monday 4 April 2011 Mr Taiapa consulted a general medical practitioner at his local medical centre and obtained a note stating that he was and had been

medically unfit for work from 28 March 2011 and that he should be fit to resume work on 7 April 2011. The certificate gave no further detail about Mr Taiapa's condition. Ms Deacon left a copy of this doctor's certificate on a desk at his work. Mr Taiapa then returned to work on 7 April 2011.

[16] On Mr Taiapa's return to work, Ms Maynard and Ms Ruru began to investigate the circumstances of his absence. They did so between 7 April and 12 May 2011 but largely without being able to ascertain from Mr Taiapa why he had not followed the employer's correct procedures in seeking leave without pay and why he had not responded on 25 March 2011 to Ms Maynard's offer of a compromise. Ms Maynard had met with Mr Taiapa on 25 March and 7 April 2011. She made notes of those meetings and provided these to Mr Taiapa, requesting that he advise her of any inaccuracies in, or omissions from, those notes. Mr Taiapa did not comment on them. These initial inquiries focussed on why Mr Taiapa had not responded to Ms Maynard's compromise offer of leave made to him on 25 March 2011.

[17] The exchanges at these meetings can be summarised as a series of denials, alternating explanations for his absence, and challenges by Mr Taiapa (and his domestic partner who accompanied him to the meetings) to the employer's entitlement to go behind his explanations and/or with the doctor's certificate.

[18] By 25 May 2011 Ms Maynard had concluded that Mr Taiapa had not either co-operated with, or been honest with her in, her inquiries so that she then commenced a formal disciplinary process, writing to him setting out the information she had, and explaining her specific concerns about the genuineness of his sick leave. She requested to see correspondence from CYFS directing that he and Ms Deacon had to take leave, proof of his visit to his doctor on 25 March 2011 as he had claimed, and further information from his doctor about the nature of the injury or illness which had led to the 4 April 2011 medical certificate. Ms Maynard offered to contact Mr Taiapa's doctor and/or CYFS's manager directly if he would permit her to do so.

[19] Ms Maynard advised Mr Taiapa that taking sick leave for non-genuine reasons could, in her view, constitute serious misconduct and that purporting to take

leave which had previously been declined could be found to be purposely dishonest. Mr Taiapa was advised that summary dismissal was a possible consequence and was encouraged to attend the forthcoming disciplinary meeting with a support person or representative.

[20] Mr Taiapa attended the disciplinary meeting on 1 June 2011 with Ms Deacon as his support person. The meeting was recorded and a transcript made which the parties accept was an accurate record. In the course of the meeting Ms Deacon said that she had, and held up, a letter which she claimed related to Mr Taiapa's doctor's appointment on 25 March 2011 but she declined to give it, or a copy of it, to Ms Maynard.

[21] On 23 June 2011 Ms Maynard summarised her preliminary findings that Mr Taiapa had engaged in serious misconduct and that his summary dismissal was a likely outcome. She set up a meeting on 1 July 2011 to provide Mr Taiapa with an opportunity to present any further relevant information and requested specifically more medical information about his doctor's appointments on 25 March and 4 April 2011.

[22] During the meeting on 1 July 2011 Mr Taiapa gave a different account of events than he had at the meeting on 28 March 2011 when he told Ms Ruru that he required time off for a long-term calf injury about which he had seen his doctor on 25 March 2011. On 1 July 2011 Mr Taiapa claimed for the first time that he had taken sick leave as a result of injuring himself while taking his students on a four kilometre walk on the morning of Monday 28 March 2011.

[23] The Authority's determination records that Mr Taiapa told the Authority Member at its investigation meeting that on Monday 28 March 2011 he was suffering from gout but did not want to admit this. The Authority found that Ms Maynard had identified no fewer than 52 different explanations for relevant events, many of which were contradictory and which were given by Mr Taiapa over the period from 24 March 2011 to 25 May 2012 when Ms Deacon and Mr Taiapa filed their witness statements with the Authority.

[24] After considering Mr Taiapa's and Ms Deacon's explanations and accounts, Ms Maynard concluded that Mr Taiapa had so misconducted himself in his employment that he was to be dismissed. Ms Maynard's conclusion was that Mr Taiapa had misused his sick leave entitlements for ulterior motives and had so misled, deceived and refused or failed to cooperate with the employer that it had lost the necessary trust and confidence it expected to have in him. Mr Taiapa was dismissed summarily.

A breach of the New Zealand Bill of Rights Act 1990?

[25] This is one of the new issues referred to at the outset of this judgment which was either not put before the Employment Relations Authority or at least was not dealt with in its determination.

[26] The plaintiff's claim is that the effect of the employer's decision which led to his dismissal was that he was not allowed to recuperate from his ill-health, for which he was certified by his doctor as being unfit for work, in Rotorua. Put another way, the plaintiff's case is, more broadly, that an employer should not be permitted to dictate where a sick or injured employee recuperates by dismissing that employee for travelling to and recuperating at another place. The statutory underpinning for this submission is said to be s 18(1) of the New Zealand Bill of Rights Act 1990 (NZBORA) which affirms citizens' rights of movement within New Zealand.

[27] The submission is misconceived for a number of reasons.

[28] The first is that the NZBORA, while affecting public law relationships between the state and citizens, does not determine the private law rights and obligations of employers and employees, at least those operating in the non-State sector such as these parties.

[29] Next, it is not correct to say that Mr Taiapa was dismissed because he chose to recuperate on sick leave away from his home. The significance of that geographical question lies in the strength and veracity of the employer's suspicion that his authorised absence from work may not have been for reasons of sickness.

[30] I would observe that, as a matter of principle, and without reliance on the NZBORA, if an employee qualifies to take sick leave from employment for genuine reasons, it is not open to the employer to either dictate where the employee is to take the sick leave or to dismiss or disadvantage unjustifiably the employee for having done so elsewhere than at the employee's usual place of abode. The purpose of sick leave is to permit an employee to recuperate and return to work without undue disadvantage. Hence, some sick leave may be taken on pay, other sick leave may be without pay but, if it is reasonable, without the employee being dismissed or otherwise losing his or her employment. As was adverted to in this case, there may be any one or more of many reasons why an employee will recuperate from illness or injury at another location: for example, the employee's family or whanau may live elsewhere and their presence may assist considerably in both physical and spiritual elements of recuperation. What is important is that such information is made known to the employer who or which might seek it and who or which, of course, has a very real stake in an early and full recuperation.

[31] This principle is not to be confused, however, with what an employee may be doing during a period of sick leave, irrespective of where the employee may be. As the decided cases and experience of human affairs show, if an employee's activities during a period of sick leave do not appear to be consistent with recuperation, this may justify inquiry by the employer to determine the genuineness of the illness or injury. In this case, Mr Taiapa's presence at a sporting event in which were competing teams that were coached by him, caused the employer, reasonably, to have a suspicion that Mr Taiapa may not have been ill or ill in the way that he had advised his employer required recuperation on sick leave. So the employer was entitled to inquire further about those matters and, pursuant to s 4 of the Employment Relations Act 2000 (the Act), Mr Taiapa was obliged to respond to those inquiries actively and constructively. His responses, or the absence of them, were not permitted to deceive or mislead his employer or to have the potential to do so: s 4(1)(b).

[32] So it is not, as claimed, a matter of Mr Taiapa being sanctioned for exercising his rights of movement within New Zealand guaranteed to him by the NZBORA.

Rongowai

[33] I use this single word as a shorthand for what was addressed in the evidence as the Maori tikanga of identifying and treating physical and spiritual maladies in an individual. Mr Taiapa's claim was that the defendant failed to deal with him in this manner as it was, or should be, obliged to have done. He says that had it done so, he could not have been dismissed justifiably.

[34] The evidence now discloses that, in the period leading up to Mr Taiapa's absence from work at the end of March/beginning of April 2011, there were several things going on in the plaintiff's life which, together, caused him to be unwell in a very broad sense. These included a recurrence of his longstanding gout and upsetting events affecting members of his immediate family which affected Mr Taiapa adversely. The plaintiff was reluctant to speak of these circumstances, not least to the women who were his managers and those who assisted them, and were responsible for, or contributed to, his subsequent dismissal.

[35] It would not have been unreasonable at all to have expected the defendant, as a Maori organisation founded on and governed by tikanga, to have treated Mr Taiapa's "sickness" accordingly. Indeed, it may have acted unjustifiably if it had not. But the critical factor had to be its awareness of those issues. It had none, or at least an insufficient awareness of them because neither Mr Taiapa nor anyone else took any step to make his employer aware, even indirectly or obtusely. He did not, for example, respond to the defendant's questions and expressions of concern by indicating that there were serious matters concerning him or others that he did not think it appropriate to discuss with his managers. Rather, he, and particularly his partner Ms Deacon, adopted a strategy of refusing to discuss them at all on the grounds that they were his business alone. "What I do and why, is my business alone" (the sort of reply that Mr Taiapa made not infrequently to his employer's inquiries) was not helpful to his cause.

[36] The defendant cannot now be criticised for failing to do what it had no idea it might have needed to do, because of the responses adopted by Mr Taiapa and Ms Deacon on his behalf. The defendant says that these are issues which have either

been invented or discovered conveniently by Mr Taiapa since his dismissal or, if they were present earlier, only identified by him belatedly. It does not really matter whether that is so because even assuming that the issues were there, Mr Taiapa had an obligation, both under s 4 of the Act and as a matter of general fairness, to bring them to his employer's notice before he could reasonably expect the employer to deal with them in the holistic and sympathetic way he advocated.

[37] It is very regrettable that if these multiple issues combined to bring about Mr Taiapa's "sickness", he or Ms Deacon, who represented him actively, did not bring them to the employer's attention appropriately. The consequences of that failure, however, cannot fairly be on the employer in personal grievance proceedings.

Representation

[38] Mr Taiapa relied significantly on his domestic partner, Ms Deacon, when attending meetings and otherwise dealing with the employer's investigations. Further, the first request to take leave was made not by Mr Taiapa himself but by Ms Deacon. His case now appears to be that only he could make such a request for leave and that the employer ought not to have relied upon what Ms Deacon told it, certainly at the outset and perhaps even during her participation in investigative meetings as Mr Taiapa's support person.

[39] Ms Deacon had been, and was known to people at Turanga Ararau as, Mr Taiapa's partner for many years. She had, herself, formerly worked there. She was, and was known to be, a strong influence in his life.

[40] It was not, therefore surprising to the management of Turanga Ararau that Ms Deacon asked for leave on behalf of Mr Taiapa. It was likewise reasonable for the employer to have assumed, unless and until told to the contrary by him, that she did so on his behalf and with his authority.

[41] It was likewise at the employer's investigatory meetings. Mr Taiapa was invited to bring a representative or support person and, on each occasion, he came with Ms Deacon who participated, sometimes significantly, at these meetings

speaking in support of Mr Taiapa. It was also reasonable in these circumstances for the employer to assume that she spoke for him on each occasion. It is artificial and unreasonable for Mr Taiapa to now assert that what Ms Deacon said and did should not be held against him.

Sick leave

[42] I agree with what Judge AA Couch said in a 2006 judgment of this Court about the nature of sick leave and the importance of mutual trust and confidence between employers and employees in its use.² Sick leave taken by an employee, whether paid or unpaid, is a benefit for the employee and incurs a loss for the employer. Employers expect such losses although they are not always predictable and, in most cases, not attributed to any fault by the employer or by the employee. An epidemic of winter illness, for example, will often see a significant use of sick leave by both individual employees and across a workforce and few could quibble with its use in these circumstances.

[43] Despite modern requirements for employees to substantiate (usually by doctors' certificates) long-term or excessive sick leave, its taking and granting still depend upon mutual trust and confidence. An employee's assurance of the employee's use of sick leave for proper purposes will usually be accepted at face value by the employer. Sick leave is a facility to be used when needed and not a mechanism to augment annual leave.

[44] It follows that deliberate misuse of sick leave entitlements may constitute serious misconduct in employment depending on all the relevant circumstances.

Unjustified dismissal?

[45] This must be analysed in terms of s 103A of the Act in which the following tests are to be applied "on an objective standard", namely whether the employer's actions (the dismissal), and how the employer acted, were what a fair and reasonable

² See: *Griffith v Sunbeam Corporation Ltd* WC13/06, 28 July 2006 at [145].

employer could have done in all the circumstances at the time the dismissal occurred.

[46] Next, in so determining, s 103A(3) provides for particular considerations that must be examined by the Court. These are “(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing ... the employee.”

[47] Next, under subs (3)(b), “whether the employer raised the concerns that the employer had with the employee before dismissing ... the employee.”

[48] The next consideration under subs (3)(c) is “whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing ... the employee.”

[49] And, finally, under subs (3)(d), “whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing ... the employee.”

[50] Under, s 103A(4) the Court may consider any other additional factors that it considers appropriate.

[51] Under s 103A(5) the Court is not permitted to determine that the dismissal was unjustifiable “solely because of defects in the process followed by the employer if the defects were ... minor; and ... did not result in the employee being treated unfairly.”

[52] I now examine each of these factors individually.

Section 103A(3)(a)

[53] This first consideration requires an assessment of “the resources available to the employer”. The defendant is a charitable trust which relies on government funding for its existence. It employs 30 full-time equivalent staff. At all material times it was a member of a regional employers’ association with access to expert

human resources and employment law advice which it sought and used towards the end of the process that resulted in Mr Taiapa's dismissal. The assessment of the sufficiency of the employer's investigation of the allegations against Mr Taiapa must be made in light of those available resources.

[54] I am satisfied that the employer undertook a sufficient investigation of Mrs Maynard's concerns about Mr Taiapa's leave that eventually became "allegations" against him as those investigations progressed. Information was gathered from others who had played a part in events relevant to the concerns/allegations. Attempts were made to augment or confirm that information. The employer's investigation lasted a number of weeks and significant parts of it were recorded in writing. The defendant conducted inquiries and made decisions commensurate with the resources available to it.

Section 103A(3)(b)

[55] The next consideration is whether the employer raised its concerns with Mr Taiapa before dismissing him. I am satisfied that it did so, both orally face to face at meetings and formally in writing with one exception (its non-disclosure of its awareness of the Facebook photograph) with which I deal shortly. There is no suggestion that the employer withheld any relevant information from Mr Taiapa or delayed unduly providing relevant information to him.

[56] From a relatively early stage of its preliminary investigations, the employer was aware of a photograph posted on a social media website page known as Facebook which showed Mr Taiapa at the New Zealand Secondary Schools Waka Ama Championships at Rotorua which took place during the first five days or so of his absence. Other information in the employer's possession confirmed for it when and where the photograph had been taken. Mr Taiapa was shown in the photograph smiling, gesturing 'thumbs up', and sitting on outdoor 'bleacher' seating with a number of young people.

[57] It was not until substantially later in its investigation process, however, that the defendant first disclosed to Mr Taiapa that it knew of this photograph. Mrs

Maynard's explanation for not disclosing its existence to him earlier was that the defendant wanted Mr Taiapa to tell her where he had been during the period of his leave. He had declined to do so and, indeed, once hinted enigmatically that he may have been on a boat on Lake Taupo.

[58] Although, ideally, the employer should have disclosed its knowledge of this photograph and its significance to Mr Taiapa at an earlier stage, not doing so falls within the exception allowed by s 103A(5). The omission was both minor and did not result in Mr Taiapa being treated unfairly.

Section 103A(3)(c)

[59] I am satisfied that the employer gave Mr Taiapa a reasonable opportunity to respond to its concerns before dismissing him. The plaintiff was provided with reasonable opportunities to consider his position and, where appropriate because of the increasing seriousness of it, was advised of his entitlement to take his own advice and be represented at meetings. The recordings of the most significant meetings which were transcribed accurately, illustrate that Mr Taiapa, both himself and through his partner Ms Deacon, took those opportunities at all relevant times. The meetings were not simply question and answer sessions but involved free-flowing dialogue including questions of, and explanations by, the employer.

Section 103A(3)(d)

[60] The plaintiff disputes whether the employer genuinely considered his explanation in relation to the allegations against him before taking the decision to dismiss. Mr Taiapa says that the evidence shows that even at a preliminary stage of its investigation into its concerns, the employer's Mrs Maynard had made up her mind that Mr Taiapa had taken sick leave to which he was not entitled and had thereby misconducted himself seriously in his employment.

[61] I do not agree. As Mr Bennett conceded in his final submissions, the employer had sound initial grounds for suspicion that Mr Taiapa had taken leave to

which he was not entitled. Those reasonable suspicions arose from a combination of a number of factors:

- the request for unpaid leave made by Ms Deacon but which was not corroborated by information from CYFS as requested by the defendant.
- the absence of any response by Mr Taiapa to Mrs Maynard's offer of a compromise solution which included an entitlement to take both paid and unpaid leave;
- its awareness that, despite Mr Taiapa advising the employer that he had to have two days' leave to recuperate from a longstanding and aggravated calf muscle injury, he was in Rotorua at a sporting event;
- the bland and uninformative nature of the doctor's certificate to the employer without explanation after his return from Rotorua; and
- even then, the different explanations or excuses for his absence proffered by Mr Taiapa.

[62] These suspicions were sufficient to justify the employer seeking further information and clarification of them from Mr Taiapa. He did not assist in that exercise by adopting a combination of strategies including saying that it was none of the employer's business, declining to agree to or even consider the provision of further medical information from his doctor to the employer, and the disclosure of yet further explanations for his absence. What Mr Bennett submitted was the employer's predetermination of Mr Taiapa's serious misconduct was, in my assessment, rather its frustration at Mr Taiapa's refusal to clarify or explain matters. Eventually, and reasonably, Mrs Maynard resorted to advising Mr Taiapa that if he would or could not assist the employer in explaining its concerns, it would have no alternative but to conclude that they were well founded. That is not the same as predetermination or a failure to consider the grievant's explanations with an open mind. Rather, it was a well signalled process of deduction that the employer would

apply in the absence of a credible explanation by Mr Taiapa. In these circumstances it is unsurprising that the employer accepted as correct what were initially suspicions.

Decision

[63] I agree with the Employment Relations Authority, although on a case heard by me that was not precisely the same, that a reasonable and fair employer could have dismissed Mr Taiapa as Turanga Ararau did and in the manner that it did so. Although the giving of this decision automatically sets aside the Authority's determination³ this Court's judgment is to the same effect that Mr Taiapa did not have a personal grievance against Turanga Ararau.

[64] The defendant is entitled to a contribution towards its costs on the challenge. Very unfortunately for him, Mr Taiapa does not seem to have been able to secure alternative employment since his dismissal and the subsequent emergence of a physical condition that has made obtaining work more difficult. It appears, also, that Mr Taiapa and Ms Deacon have ceased operating the CYFS home referred to in this judgment so that Turanga Ararau may wish to consider attempting to resolve the question of costs directly with Mr Taiapa through his advocate.

[65] The parties may therefore have the period of two calendar months from the date of this judgment to attempt to settle questions of costs, failing which the defendant may apply by memorandum for an order, in which case Mr Taiapa may have the period of one month following within which to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 11.30am on Monday 18 March 2013

³ See s 183(2) of the Act.