IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 179
ARC 35/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JANE DRADER Plaintiff
AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Defendant

Hearing: 1 and 2 October 2012
(Heard at Auckland)

Counsel: Bryce Quarrie, counsel for plaintiff
Samantha Turner and Simon Clark, counsel for defendant

Judgment: 9 October 2012

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff has challenged a determination of the Employment Relations Authority[1] which found that her dismissal on 29 March 2011 was justifiable because her actions amounted to serious misconduct. She sought a full hearing of the entire matter, reinstatement, reimbursement and compensation. The issues which led to her dismissal arose following a rugby match on a Friday evening and her actions when she returned to work the following Monday.

Factual findings

[2] The plaintiff began to work for the Ministry of Social Development (the Ministry) in 1994 in a variety of roles and, following promotion, was appointed Service Centre Manager in Kerikeri. She had nine staff working under her management. She was a competent and efficient manager and her supervisors spoke

[1] [2012] NZERA Auckland 143.

well of her. There is no evidence of any blemish to her work record until the events in 2011 which led to her dismissal.

[3] On Thursday 3 February 2011 the plaintiff was acting as the relief receptionist when a client of the Ministry came into the Kerikeri Work and Income office accompanied by a woman (who counsel agreed would be referred to as client A). The other client had an appointment, but client A did not. Client A made enquiries concerning a child care subsidy but was told by the plaintiff that she would either need to make an appointment or could sit and wait for a case manager. The plaintiff said it would be a long wait as the office was busy and other clients had appointments and had not yet been seen. The plaintiff provided client A with a form to complete and she was not aware when client A left the office.

[4] Client A returned on Friday, 4 February and the plaintiff was again acting in the role of receptionist for what was anticipated would be a busy day. Her intention was to free up case managers whose time was fully booked for the day. Client A asked for an appointment that day. The plaintiff informed her that they had no available appointments but if she would like to sit and wait, for a considerable time, a client manager might become available. The plaintiff made enquiries in response to client A's questions and arranged for an email to be sent to the childcare co-ordinator to have that person notify the particular childcare centre that the matter of payment was being looked into. The plaintiff did not have the necessary documents to assist client A any further and was under considerable pressure to deal with other clients who were waiting. Client A appeared to be unhappy with the plaintiff's efforts on her behalf. The plaintiff did not see client A leave the centre.

[5] The plaintiff had been hoping to leave the office a little early that evening because she and her husband had organised with two friends to stay at a motel as they had tickets to a rugby game in Kerikeri that evening. The plaintiff was unable to get away from the office until 5.15 pm. When she arrived at the motel, she met her friend, Tania Rakena, but their husbands had already gone to the rugby match which had started at about 5 pm. The plaintiff and Mrs Rakena relaxed over a few beers. The plaintiff's unchallenged evidence was that she had three "stubbies". After the rugby match, the plaintiff and Mrs Rakena were joined by their husbands

and they all set off at approximately 7.40 pm to a premises called the "Rock Salt Bar" to enjoy the rest of the evening. They sat outside, along with other friends and a large crowd of rugby goers.

[6] At approximately 10.30 pm the plaintiff asked a male standing beside her for a light to her cigarette. He replied in the affirmative and provided his cigarette to light the plaintiff's. According to the plaintiff, a female, who the plaintiff could not see at the time, came around behind the male and said to the plaintiff, "That's my fucking man." The plaintiff recognised the person as client A. The following account is taken from a transcript of a recording of a disciplinary meeting with the plaintiff which took place on 14 February 2011, to which I will refer shortly.

> … I remember saying "piss off" whether I said "fucks sakes" or "fuck ya piss off" and then I don't know, I just remember seeing her face and her like this and then all of a sudden I don't know what happened, but I could just feel the blood, warm stuff coming down my face and I think I went and swung at this person and then um, and that was it.
>
> I think they had gone, Tony [Mr Drader] had just come back from the bar, he had, he looked at me and said "what the F has happened". He grabbed my arm because I had just started going crazy and saying "what the bloody…" but I could only see, I don't know the blood that was coming out of my head, it wasn't dripping, it was just pouring out of my head, like it was everywhere … I think the girl and her friends and whoever they were about 10 metres away from us and then Tony still wouldn't let me go as hard out as I was trying to get away from him just saying let me go I want to go and find who done this and from then on he got me and dragged me, walking… pulled me across the street … I was still bloody well swearing and saying "let me go".

[7] There was no issue that client A had struck the plaintiff with a bottle, cutting her above the right eye. Mrs Rakena went over to client A. According to the plaintiff's account she said "What the fuck did you do that to my mate for", another woman punched Mrs Rakena, there was a scuffle and Mrs Rakena was also hit on the head with a bottle by client A.

[8] As Mr and Mrs Drader were returning to the motel, a police car pulled up beside them and a female constable asked if Mrs Drader was alright. She said that she was and, when asked if she knew who assaulted her, she said she knew who it was and that she was a client. The police officer asked if Mrs Drader was going to lay a complaint and Mrs Drader said yes. After ascertaining that Mr and Mrs Drader were alright and were returning to their motel, the police officer left.

[9] The plaintiff's account was that the following day, Saturday, the wound was covered with some suture plasters and she knew she should have gone to the doctor but she did not. She said that she was still a little bit "blown away". Mr and Mrs Drader went home. On the Monday she had to go to work. As her face was swollen, people started asking her about her face and what had happened and people were coming to have a look or to laugh. She stated to her manager at the 14 February disciplinary meeting:

> I just went to my desk, pulled up her name, looked into UCVII for her phone number and I went into the little interview room and rung her and threatened her …
>
> I said "hi, is this [client A]?" And she said "yep". I said "you've let the dogs out now, you'd better watch out", and I hung up.

[10] The reference to UCVII is to a programme of the Ministry which contains confidential information relating to clients and for which authorised access is required. It is common ground that the plaintiff on this occasion did not have any authority to access client A's confidential client records and to take from them client A's unlisted phone number.

[11] The plaintiff was asked what she meant by "You've let the dogs out" and she replied:

> I don't know, I suppose, in that frame of mind, I was thinking that people will know that I've been hit or that you've done this to me and they'll come after you, just say you [inaudible] in other words, you bitch you did this to me, you're gonna [inaudible] and what.

[12] The plaintiff was asked by her manager "So … [in] making the threat and, that sort of thing I mean what, what was your intention?" and she replied "Don't know, I don't know, I honestly don't know. I know this stuff, I know this".

[13] In the course of the disciplinary meeting she was asked why she had not contacted two of her managers who were both in her region on the Monday. She was also asked why she did not ring the manager who was her mentor over the weekend, or on the Monday. She replied:

> It was the furthest thing from my mind, when I got hit and I have never ever been bottled or threatened or anything for 15 years I've been working with

> MSD. I've dealt with mongrels that are bloody harder than bricks and, I don't know, I just couldn't understand how someone could just walk up to you and just because, just bottle you on the head, oh … I, all weekend I was thinking that's my job, I'll probably lose it, public servants are not allowed to be out scrapping and doing all that sort of stuff, I … there was a whole lot of stuff going on in my head, just a whole lot of stuff… what the hell you know and I didn't I just don't know and then on the Monday, what I should have done was just stay home [inaudible] habit, I don't know but I got up and went to work and, seeing people.

[14] Returning to the narrative, at about 11 am on Thursday 10 February 2011, Mrs Drader phoned Graham MacPherson the Regional Director of Work and Income New Zealand, Northland. Mrs Drader asked Mr MacPherson if she could meet with him. She did not tell him what she wanted to discuss but inferred that something had happened. She said that she would be bringing a colleague to the meeting. Mr MacPherson agreed to meet with Mrs Drader and they set up a meeting for about 2 pm that day. As Mr MacPherson was unsure what the meeting was about, and it seemed to be serious, he told the plaintiff that he would want to take notes at the meeting. There was no objection to his note taking.

[15] The plaintiff then gave Mr MacPherson an account of what had taken place in the Kerikeri service centre and her account of the physical altercation with client A at the Rock Salt Bar. She claimed that client A had initiated the physical altercation by striking the plaintiff with a bottle. I find that Mrs Drader told Mr MacPherson that, after leaving the bar, she had wanted to go back but her husband had held on to her and insisted on walking her back to the motel, that she was "pretty wild" at that time, and had used the phrase "where the fuck is that bitch?", explaining that she was pretty "pissed" at the time.

[16] The plaintiff recounted the conversation with the police officer on the way back to the motel and confirmed that at the time of the meeting with Mr MacPherson she had not made a police complaint. At that point I find that Mr MacPherson asked Mrs Drader if there was anything else she wished to tell him. She said there was nothing else. He told Mrs Drader that he would need to seek advice about what she had told him.

[17] The meeting had effectively ended when Mr MacPherson's executive assistant interrupted and asked for him to come outside. Mr MacPherson was told

that the National Office had passed on a complaint about Mrs Drader. He was given a copy and he read it. It was from client A. It set out client A's version of the events on the evening of 4 February 2011. It went on to say that Mrs Drader had contacted client A on Monday 7 February 2011 and, without identifying herself, had said "You better watch yourself, the DOGS are after you". Client A said she hung up the phone and called the Police.

[18] Mr MacPherson's evidence was that what concerned him, in summary, was that, contrary to what Mrs Drader had told him, client A alleged that:

a) Mrs Drader had in fact initiated the fight with her;

b) Mrs Drader had accessed client A's confidential client details from Work and Income's records and her confidential phone number;

c) Mrs Drader then had used these private and confidential details to telephone client A on 7 February 2011 and to threaten her.

[19] Mr MacPherson described himself as being shocked at reading client A's complaint. It appeared to Mr MacPherson that the plaintiff had not appreciated the significance of her telephone call to client A as she had not told Mr MacPherson about it, and this caused Mr MacPherson to question her judgment as a manager.

[20] Mr MacPherson then contacted Clive Kilgour, a Senior Human Resources Consultant and asked how he should proceed. He was advised to tell Ms Drader about the complaint and that a formal process under the Ministry's Code of Conduct (the Code) would begin immediately. Mr MacPherson returned to the room and immediately let the plaintiff know that an official complaint had been received by the Ministry, outlined its contents and told the plaintiff that he was shocked by the complaint and said "I can't believe this".

[21] Mr MacPherson's evidence, which was not challenged on this point, and which I accept, was that the plaintiff admitted that she was still angry on the Monday after the altercation, so she accessed client A's confidential client records without

authorisation to get her contact details, telephoned client A and threatened her. Because of the plaintiff's admissions Mr MacPherson considered it was important to close the meeting so that the plaintiff could go and get independent advice. He considered the allegations were extremely serious and, in light of the admissions, he advised the plaintiff that the matter would need to be investigated with a formal meeting and he did not want to continue discussing the complaint in an informal meeting. He gave Ms Drader a copy of the complaint so that she could seek advice.

[22] Mr MacPherson sent a letter to the plaintiff that same day which included another copy of client A's complaint. It confirmed that the nature of the complaint was very serious including:

> - fighting with/assaulting [client A], including making threats;
>
> - using offensive language (i) during your altercation with [client A], (ii) during [client A]'s visit to the Kerikeri office on 4 February; and (iii) during a subsequent phone call you are alleged to have made to [client A] at home on 7 February; and
>
> - accessing [client A]'s client record without legitimate business purpose to obtain her contact details.

[23] The letter said that client A had stated that she had made a formal complaint with the New Zealand Police and that the plaintiff was required to advise the Ministry if she was charged. It referred to the Code and stated that the plaintiff would be aware that if the substance of the complaint was proven, the plaintiff would have committed a serious breach of that Code. It warned that in the absence of a satisfactory explanation, she might face disciplinary action up to and including dismissal. She was advised of her entitlement to have representation at a meeting and was strongly advised to do so.

[24] Mr MacPherson met with the plaintiff on the afternoon of 10 February 2011 and gave her the letter in person. She read it but did not raise any questions. The letter advised that a disciplinary meeting would be held on Monday 14 February 2011.

[25] At the meeting on 14 February 2011, the plaintiff was represented by her then lawyer. The meeting was recorded. The account I have referred to above was taken

from a transcript of that recording. The manager I have previously referred to at that meeting was Mr MacPherson. At the commencement of the meeting Mr MacPherson outlined the matters of concern which were:

a) The plaintiff's interaction with client A at the Kerikeri Service Centre on 3 and 4 February 2011;

b) The altercation between the plaintiff and client A on the evening of 4 February 2011 and the apparent differences in accounts, which Mr MacPherson described as the "opposing versions";

c) The plaintiff's unauthorised access to client information from the Ministry's client records;

d) The plaintiff's admission that she made a threatening telephone call to client A on 7 February 2011.

[26] The first matter, that is to say the interactions at the Kerikeri service centre on 3 and 4 February 2011, was not the subject of a finding of misconduct on the plaintiff's part and therefore I will not refer to this again.

[27] Mr MacPherson read out his notes of his meeting of 10 February 2011 and neither the plaintiff nor her lawyer took any issue with their content and, in particular, the description of the call to client A as being in the nature of a threat.

[28] It is common ground that at the meeting, the plaintiff's lawyer told Mr MacPherson that the plaintiff had suffered humiliation, shock, embarrassment, tearfulness, stress and a state of helplessness. He claimed that she did not know what she was doing at the time. No mention was made of any medical condition, such as concussion and no medical information was provided to the defendant or referred to.

[29] Mr MacPherson told the plaintiff that he was struggling to understand why she had accessed client A's information and had telephoned her to threaten her. He reminded the plaintiff that she had said that she was still angry on the Monday, so

she had called client A. He asked the plaintiff if she had done anything to action the threat, but was assured that the plaintiff had not done anything.

[30] Mr MacPherson also expressed his concern that the plaintiff had not brought the matter to his attention before Thursday 10 February 2011. The plaintiff had previously said that she was waiting for Mr MacPherson and another manager to come back into the region but Mr MacPherson pointed out that both of them were in the region on the Monday and that the other manager had actually phoned the plaintiff that day on a different matter but the plaintiff had not alerted her to the incident.

[31] The plaintiff's lawyer raised a concern that the defendant did not have a policy on what to do if an employee was assaulted outside of work and that nothing was written down about that matter. Mr MacPherson replied that the laws of the land would cover it. The plaintiff's lawyer indicated that he had statements from witnesses to the incident and stated that he would have to speak to his client about that as they were looking at legal action. Mr MacPherson asked the lawyer if those statements would be helpful to whomever the decision maker was. The lawyer initially replied that he would have to talk to his client about that first because they were looking at legal action. Later in the meeting, he stated that the information he had got was unrelated and he would have to go back to the witnesses and ask for their approval and had not yet got their consent. The statements were not provided.

[32] The meeting was then adjourned for approximately five minutes to allow the plaintiff and her lawyer to discuss matters but no further questions were asked when the meeting resumed. Mr MacPherson explained that a transcript would be provided and that the plaintiff would be able to access support, advice and counselling if required.

[33] Mr MacPherson explained to the meeting that the disciplinary decision was to be made by the Regional Commissioner, Jan Rata, along with Human Resources and the National Manager. The plaintiff would have the opportunity to meet with Ms Rata. The meeting was then concluded.

[34] Mr MacPherson's evidence was that following the disciplinary meeting, he was concerned that the plaintiff's conduct was of such seriousness that dismissal was within the range of possible disciplinary outcomes and, in terms of the Ministry's delegations for dismissal, it was for the Regional Commissioner to make the decision. He therefore drafted a referral document, dated 21 February 2011, in which he outlined the allegations, the complaint from client A and the Ministry's concerns about Ms Drader's conduct and her responses at the meeting on 14 February 2011. Under the heading "Conclusion" in that report, Mr MacPherson stated:[2]

> **There are several levels of serious misconduct here.**
>
> **Setting aside who may have started the fight, Jane has been involved in a serious physical altercation with a client in a public place with her behaviours, by her own admission, more than likely influenced by alcohol.**
>
> **In addition, Jane has admitted that she accessed confidential client information without authorisation and then used that information to contact [client A] and threaten her. This is an extremely serious breach of our Code of Conduct. Jane had no legitimate reason to access [client A's] client records and there is no doubt that her access was solely for the purpose of contacting [client A] and threatening her.**
>
> …
>
> **These behaviours fall well short of the professional standards of behaviour expected of all Ministry staff; but especially those holding management positions (as is the case here). Jane's actions have fallen well short of the standards expected of Public Service management and raise serious questions about her judgement and suitability for ongoing employment. Further, her actions have the potential to bring her colleagues and the wider Ministry into disrepute. I refer you to the sections from the Code of Conduct quoted above.**
>
> It is especially concerning that even after fighting with [client A] and being injured, Jane attempted to return to the Salt Rock Café to "sort the client out". It appears that only the intervention of Jane's husband prevented escalation and the likelihood of further and potentially more serious injury.

[35] Mr MacPherson's report also confirmed that at the 10 February meeting the plaintiff had not disclosed the fact that she had accessed client information and had phoned client A. The plaintiff had only admitted this when specifically questioned on the point after the break in the meeting when Mr MacPherson received a copy of client A's complaint, and so became aware of the issue. He concluded:

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[2] Emphasis original.

> I feel that the Ministry can no longer have trust and confidence in Jane Drader whose actions have significantly undermined the employment relationship.

[36] It is of considerable concern that a copy of that document was not sent to the plaintiff or her lawyer, although they were advised that a report was being sent on to Ms Rata.

[37] Unbeknown to Mr MacPherson at the time of preparing that report, Ms Rata had arranged to see client A on 16 February 2011. Ms Rata's evidence of this meeting is taken from her brief of evidence and some oral evidence, all of which I accept. Ms Rata met with client A and client A's mother, as a support person. Client A relayed her story in her own words, repeating in substance the complaint she had made in writing on Wednesday 9 February 2011. Client A had a physically swollen and red face and there was swelling around the bridge of her nose. She said that she had been hit by the plaintiff and also by the plaintiff's friend.

[38] Client A was adamant that she took the threat the plaintiff had made during the telephone call on 7 February 2011 very seriously. As a result of that call, client A said she feared for her and her children's safety. She was concerned that she and her children were in danger of being attacked by members of the Mongrel Mob as she believed that that was what the plaintiff was referring to when she said words along the lines of "the dogs are after you". Client A told Ms Rata that as a result of the plaintiff's threats:

a) she and her children were no longer living in their own home;

b) she was afraid to get out of the car when she went into town;

c) she felt she could no longer walk in the street;

d) she would no longer go into a retail outlet where she understood the plaintiff's friend worked;

e) she would not go into the Kerikeri Work and Income service centre;

f) she got alarmed when she saw a car she was not familiar with;

g) she would not answer the telephone.

[39] In supplementary evidence, Ms Rata explained that client A, in a combination of words and dramatic gestures, indicated that whenever she heard a car out on the street she was concerned that her house would be shot at.

[40] At the end of the meeting Ms Rata asked client A if there was anything she could do to ease her fears. Client A said that a face to face meeting with the plaintiff, so that she could confirm whether the threat held any substance, would be helpful. Ms Rata said she would arrange such a meeting with the plaintiff.

[41] Ms Rata stated that client A's mother telephoned her on Monday 21 February 2011 to advise that the plaintiff was charging client A with assault and had taken a Protection Order out against client A. Her mother said that in light of this client A wanted Ms Rata to know that client A no longer felt that a meeting with the plaintiff was appropriate.

[42] Ms Rata gave evidence that she had taken full notes of her interview with client A and had had those notes transcribed.

[43] None of that material was ever provided to the plaintiff or her representatives. There is also an issue as to whether or not Ms Rata ever informed the plaintiff or her representatives that such a meeting with client A had ever taken place.

[44] It was Ms Rata's evidence that at the disciplinary meeting she convened on 22 March 2011, at which Ms Drader was present with her husband and her lawyer, she told Ms Drader that client A had a different view of what had taken place to that of Ms Drader. She claims to have told them that she had met with client A and client A had repeated her concerns, as outlined in her written complaint. The plaintiff and Mr Drader state that Ms Rata did not disclose that she had met with client A and, in fact, denied doing so.

[45] Ms Rata's evidence was that she had then asked the plaintiff what she had meant by "you've let the dogs out". The plaintiff's lawyer had responded that it meant that "the flood gates are now open". Ms Rata asked whether they were sure it was not a gang reference. The plaintiff responded that it was not but that she was concerned that her family had said they were going to get client A for the plaintiff. Ms Rata then said that client A believed it was a gang reference, that Client A took the threat very seriously and feared for her safety.

[46] There appeared to be no issue that there was a discussion about whether or not what the plaintiff had said to client A on the telephone call was a gang reference. I prefer Ms Rata's account in relation to what was said about her meeting with client A, which received some support from a letter dated 18 April 2011 in which the plaintiff's lawyer requested copies of:

> … all notes or documents pertaining to Work and Income representative discussions with the complainant [Client A] and or other persons in respect of the investigation into [client A]'s complaint.

[47] The plaintiff's lawyer was not called to deal with this conflict which I resolve in favour of the defendant, even though it was a matter that was expressly pleaded in the plaintiff's statement of claim. What, however, is equally clear, is that apart from the references I have made above, that is all Ms Rata told the plaintiff and her representatives about her interview with client A, and client A's mother, a matter to which I will return.

[48] At the 22 March meeting, the plaintiff's lawyer said he could provide medical records if they were required about the plaintiff's injury but Ms Rata told him that was not necessary as she accepted that the plaintiff had been hurt in the altercation. The lawyer also said he could provide statements from witnesses to the altercation. Ms Rata said she told him she was not disputing that there was an incident but explained it was not relevant to the employment issue who started it, as she was more concerned about the plaintiff's behaviour afterwards.

[49] The meeting, unlike that of 14 February 2011, was not recorded and no transcript was available. Further, Ms Rata had not taken notes at the meeting which could have been typed up. This is unfortunate as there were some conflicts as to

precisely what was said at the meeting. It is, however, accepted that Ms Rata raised her concerns about the plaintiff's delay in not advising the Ministry about the altercation until six days after it took place.

[50] At the meeting Ms Rata discussed the plaintiff's earlier statement that she had been angry on the Monday. This contrasted with the lawyer's written account on the plaintiff's behalf. The lawyer's written submissions were that the plaintiff had accessed client A's records and then used that information to telephone her to bring to client A's attention that other people in the community might be trying to find her to harm her. The lawyer had asserted in his letter of 20 March 2011:

> By Sunday, it was common knowledge in the community that a Work and Income Service Manager had been assaulted by a client and as a result there was a huge concern that people were going to take matters into their own hands and deal with [client A] in an unsavoury manner.

[51] The letter goes on to explain that if anyone physically attacked client A, the plaintiff was concerned there was a high chance that she would be held responsible and that a complaint would have been laid with Work and Income. It states:

> So as to avoid this and knowing she was taking some risk by breaching the Code of Conduct she contacted [client A] to bring to her attention that some people may be trying to find her in order to harm her. In other words Ms Drader knew that if [client A] was not made aware of this she would come into harm's way.

[52] The lawyer claimed that the plaintiff had not been provided with the opportunity to discuss this. The letter also submitted that the plaintiff had never in her life been subjected to or witnessed violence and that:

> No recognition was given to her as to the fact that she was suffering from trauma.

[53] Ms Rata questioned the plaintiff at the meeting about her expressed concerns that her family would get client A for the plaintiff, and that, if this was true, why she had not spoken to her managers about her concerns so that they could take appropriate action to protect client A's safety. There was no response.

[54] Ms Rata's evidence was that after the meeting she considered all of the plaintiff's responses and the written material and determined the plaintiff's

explanations were not satisfactory. The plaintiff was an experienced manager, had been involved in a physical altercation with client A in a public place, and in Ms Rata's view, regardless of who had started the incident, the plaintiff had admitted that she had to be restrained by her husband so she would not go after client A. Ms Rata considered the plaintiff's action in relation to the physical altercation with client A appeared to be known in the community and had put the Ministry's reputation at real risk. In her view it had also damaged the plaintiff's reputation and credibility in the workplace and the community as a leader of integrity.

[55] Ms Rata referred to the Ministry's zero tolerance policy on unauthorised access of client records, which was said to have been widely known and understood throughout the Ministry. On the basis of the plaintiff's admissions of the unauthorised access to client A's records and the threatening telephone call, Ms Rata concluded that there had been a serious breach of the Ministry's expectations of a manager's role.

[56] Ms Rata referred to inconsistencies in the plaintiff's explanation as to whether or not she had threatened client A or had warned client A. She concluded that if the plaintiff's concerns about client A's safety were genuine that she would have expected the plaintiff to have advised her manager to take the appropriate steps. She said in evidence:

> Based on her earlier admissions, the words she actually used, her failure to identify herself on the call, and Client A's account of the conversation, I considered that this was not credible and on the balance of probabilities, [I] concluded that she had in fact threatened Client A.

[57] Ms Rata also considered the six day delay in the plaintiff advising her manager and the fact she initially did not mention accessing the records or the phone call until told of client A's written complaint.

[58] Ms Rata was also concerned that the plaintiff had attempted to deflect responsibility for her actions by blaming client A, or the lack of a Ministerial policy as to what was to occur if there was an incident outside office hours. She found the plaintiff:

> … also showed a total lack of understanding or acceptance of why these actions were taken so seriously and the consequences, and potential consequences of her actions. She also showed a lack of empathy towards Client A and failed to acknowledge what she had subjected her to.

[59] Ms Rata arranged to meet the plaintiff on 29 March 2011 to advise her of the decision, which was that dismissal was the appropriate outcome. The letter handed to the plaintiff at the meeting on 29 March 2011 stated:

> This dismissal results from a client complaint which, in brief, concerned a fight in a public place with a client; your accessing that client's confidential record without authorisation; and you phoning that client and making threats.
>
> …
>
> For the record I note that you did not disclose the unauthorised accessing and allegedly threatening phone call when you first met with your manager (Mr MacPherson) and such admission was only made by you once the specific details of the client complaint became known to you.
>
> As Regional Commissioner I have carefully considered all the relevant material provided; including your service record and explanations, and have determined that your actions are so serious as to have permanently damaged the Ministry's trust and confidence in you. On that basis the Ministry has concluded that we have no option other than to terminate your employment.
> …
> I am very disappointed that your employment with the Ministry of Social Development has had to end in this manner.

[60] The plaintiff raised a personal grievance and has been continuing to claim that her dismissal was unjustifiable and that she should be reinstated, reimbursed for her lost wages and compensated for her distress, humiliation and injury to feelings.

[61] The plaintiff's counsel, Mr Quarrie, and counsel for the defendant, Ms Turner, both agreed that the relevant law, for the purposes of s 103A of the Employment Relations Act 2000 (the Act), is as at 29 March 2011. The wording of s 103A was changed with effect from 1 April 2011, but those legislative changes do not apply to the present case. Section 103A therefore, for the purposes of this case, reads as follows:

> **103A Test of justification**
>
> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer

> acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[62] Both counsel accepted that the pre-1 April 2011 s 103A was correctly interpreted by this Court in *Air New Zealand Ltd v Hudson*[3] and *Air New Zealand Ltd v V.*[4] In the latter case, the full Court held[5] that "in all the circumstances" in s 103A of the Act echoed the wording of the Arbitration Court in *Wellington Road Transport IUOW v Fletcher Construction Company Ltd*,[6] where the Court held:[7]

> In each case the Court considers all of the circumstances. In a list not meant to be exhaustive … the Court considers: the conduct of the worker; the conduct of the employer; the history of the employment; the nature of the industry and its customs and practices; the terms of the contract (express, incorporated and implied); the terms of any other relevant agreements, and the circumstances of the dismissal.

[63] Ms Turner argued strenuously that the defendant had acted fairly and reasonably, citing from *Chief Executive of Unitech Institute Of Technology v Henderson*,[8] that:[9]

> … fairness and reasonableness must be assessed broadly and not by the application of inflexible principles by minute and pedantic scrutiny. Put another way, even if in some instances over a long process, the employer might be found to have failed to meet all ideal standards of a fair and reasonable employer, this will not necessarily mean that the resultant dismissal that may itself have been justified, will thereby be declared to have been unjustified and that remedies should be awarded accordingly.

[64] In terms of process, Ms Turner submitted, citing *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*[10] which was applied in *Hardie v Round*,[11] that the following rights were afforded to the plaintiff:

a) She was aware of the specific allegations of misconduct which she was required to answer;

b) she was aware of the likely consequences if the allegations were established;

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[3] [2006] ERNZ 415.
[4] [2009] ERNZ 185.
[5] At [30].
[6] [1983] ACJ 653.
[7] At 666.
[8] [2007] 4 NZELR 418.
[9] At [56].
[10] (1990) ERNZ Sel Cas 582 at 594-595.
[11] (2008) 8 NZELC 99, 317 at [21].

c) she had an opportunity to refute the allegations and to explain or mitigate her conduct; and

d) she received an unbiased consideration of her explanations.

[65] I find, however, that there are some considerable difficulties for the defendant in the procedure that was adopted and that this had substantive consequences.

[66] First, the plaintiff was not provided with a copy of Mr MacPherson's report, on which the evidence clearly established, Ms Rata had relied heavily. Mr MacPherson conceded that, in at least one respect, there was no clear direct evidence to support his conclusion that Mr Drader had had to hold his wife down to prevent her returning to the Rock Salt Bar and escalating the incident by "sort[ing] the client out". That conclusion, I find, formed part of Ms Rata's conclusions that the plaintiff was guilty of serious misconduct.

[67] I find that the plaintiff should have had the opportunity of considering Mr MacPherson's report, in order to be able to respond specifically to the matters contained in it.

[68] Neither Mr MacPherson nor the plaintiff and her representatives were ever told of the substance of Ms Rata's interview with client A. Her observations of client A's injuries and client A's account of how she received them, influenced Ms Rata and her findings that both the plaintiff and client A were injured in what she concluded was a fight, as opposed to an unprovoked serious assault with a bottle upon the plaintiff by client A. Further, client A, in a very compelling way, had told Ms Rata of the serious consequences she suffered as a result of the telephone call from the plaintiff. These were not spelt out to the plaintiff at any stage, and yet Ms Rata was able to conclude that the plaintiff showed no remorse for the serious consequences her actions had caused client A.

[69] In addition, client A was prepared to meet with the plaintiff and that may have at least sorted out the difficulties between client A and the plaintiff, even if it left serious issues regarding the plaintiff's unauthorised access of the defendant's computer system and her telephone call to client A. The advice from client A's mother that Ms Rata acted upon was also never put to the plaintiff for clarification

and does not appear to have been a correct account of what took place. An important opportunity to mitigate some of the consequences to client A of the plaintiff's telephone call was therefore missed.

[70] Ms Rata in support of her findings said she regarded the plaintiff's actions of fighting in a public place and swearing, affected the reputation of the defendant and the plaintiff's own reputation. The accounts of client A and the plaintiff were irreconcilable and Ms Rata took the view that it was for the Police to deal with such issues. Because of that, she appeared to reject the account she received from both the plaintiff and Mr Drader, that client A was guilty of an unprovoked assault with a bottle.

[71] That view apparently led Ms Rata to reject the offer from the plaintiff's then lawyer of affidavits to support the plaintiff's account. Ms Rata, from her interview with client A, understood that client A may also have had statements supporting her version, again a matter that was not put to the plaintiff. In these circumstances, it was not open to Ms Rata to reach a firm conclusion regarding the incident that was unfavourable to the plaintiff. This she clearly did, as is recorded in the dismissal letter and in her evidence to the Court.

[72] If Ms Rata was going to reach a conclusion regarding the incident, then she was obliged to hear the plaintiff's full explanation, and supporting affidavits, which were offered to her.

[73] Ms Rata's actions in rejecting the offer of the affidavits may be contrasted with Mr MacPherson's attempt to obtain them at the 14 February meeting. These efforts were rejected by the plaintiff's then lawyer. Mr MacPherson made the point at that meeting, that they could assist the decision maker in reaching a proper conclusion. I entirely agree.

[74] Although a lesser matter, it is unfortunate that, in contrast to Mr MacPherson's recording of the 14 February meeting, no attempt was made to record, or even take notes, at the critical 22 March meeting at which there were some

conflicts as to precisely what was said. Those conflicts could have been resolved by proper notes.

[75] For these reasons, I find that the defendant's conclusion that the plaintiff was guilty of serious misconduct in relation to the incident on the Friday night, was not one which a fair and reasonable employer would have reached in all the circumstances of the case.

[76] I turn now to the defendant's findings, based on the plaintiff's admissions, that she was guilty of unauthorised access to the defendant's confidential records, obtained an unlisted phone number, went into a private interview room and made a telephone call which the plaintiff conceded, on at least two occasions, amounted to a threat.

[77] Ms Turner cited the Court of Appeal's decision in *Chief Executive of the Department of Inland Revenue v Buchanan (No 2),*[12] where it was held that a breach by an employee of an employer's policies and procedures contained in a code of conduct, may justify a dismissal.[13] In that case, the employees had accessed records of family, friends and acquaintances in breach of the Inland Revenue's code of conduct. She cited the following passage from the Court of Appeal judgment:

> [36] In our view, the correct approach is to stand back and consider the factual findings made by the Authority and evaluate whether a fair and reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus justifying dismissal. We do not agree with the Chief Judge that a failure to establish wilfulness creates a presumption that the conduct is not serious misconduct. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach. …

[78] Ms Turner correctly submitted that, as in the *Buchanan* case, the Ministry's Code was drawn to the employee's attention and she had received training on it. The plaintiff was in a managerial position and required to ensure the Code was complied with by her staff.

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[12] [2005] ERNZ 767 (CA).
[13] At [38].

[79] I accept Ms Turner's submission that the plaintiff had a contractual obligation to comply with the Code and that the defendant, as New Zealand's largest government Ministry, must have policies and procedures in place to ensure client information is protected. I also accept Ms Turner's submission, which is clearly founded on evidence, that the plaintiff's breaches of the Code were deliberate. Whilst there was no direct provision in the Code dealing with conduct in the public arena, the position was entirely different when dealing with access to the defendant's confidential information. The Ministry has a zero tolerance policy which states that:

> Staff found to have… misused client information will be dismissed.
> …
> Staff should ensure that they only access client records with proper authority and that they meet the requirements of our Code of Conduct.
> …
> As senior members of staff managers are expected to lead and model appropriate behaviours …

[80] I accept Ms Turner's submission that Ms Drader was a manager who had no authority to access client records for the reasons she accessed them, that she misused the client information to telephone and threaten client A and, that as a manager, she did not lead or model appropriate behaviour.

[81] Further, the situation was exacerbated by the plaintiff's failure to mention the accessing of the records or the phone call when she first approached Mr MacPherson. This matter only came out as a result of the complaint by client A.

[82] The plaintiff was unable to offer any satisfactory explanation for her conduct other than the belated account that she was traumatised as a result of the injury she received on the Friday night. That may well have been so, but, contrary to Mr Quarrie's submission, that was not apparent in her conduct or her statements to the defendant, until the plaintiff's lawyer raised it for the first time in his letter of 20 March. It was, unfortunately for the plaintiff, unsupported by any medical evidence which could, and indeed should, have been obtained during the course of the weekend, prior to the Monday on which the plaintiff clearly breached the Code.

[83] From her evidence before the Court, supported by her husband and friends, I can see the force of the argument that the plaintiff may well have been traumatised

by the blow or even concussed. But that was not an explanation that the defendant, as a fair and reasonable employer, would have perceived from any of the exchanges with the defendant, until the belated advice on 20 March 2011. That was too late, inconsistent and unsupported by medical evidence. At the earlier meetings of 10 and 14 February 2011, her only explanation appears to have been that she was still angry at client A on the Monday and embarrassed by the disfigurement client A had visited upon her, and that this had led to her actions. Trauma or concussion properly presented would have explained the inexplicable, because in all other respects the plaintiff had presented as a quietly confident manager whose actions on the Monday were entirely out of character.

[84] I reject Mr Quarrie's submission that the defendant ought to have been aware of this and to have enquired into it, for the reasons I have given. Also there is evidence that Mr MacPherson did try, in a very caring manner, to ascertain the true reasons for the plaintiff's actions. He did this on 14 February 2011 without success and without obtaining any clues that might have given him pause to consider whether the plaintiff was traumatised or concussed on the Monday.

[85] Taking into account the circumstances known to the defendant by 22 March 2011, I have no doubt that a fair and reasonable employer would have reached the conclusion that Ms Rata knew that she had no authority to access client A's confidential record and had telephoned client A and made a serious threat.

[86] The plaintiff's subsequent account that the phone call was a warning is inconsistent with her earlier acceptance that it did amount to a threat. I have no doubt, objectively viewed, that what she said to client A was a threat and client A properly so regarded it.

[87] The position, however, was exacerbated, from Ms Rata's point of view, by the interview she had with client A, who referred to the Mongrel Mob. It was common ground at the hearing that the emblem of the Mongrel Mob is a dog. It was therefore not unreasonable for client A to have drawn the inference that the Mongrel Mob had been let loose on her. This, however, was another aspect which should

have been made clear by Ms Rata to the plaintiff by giving her a copy of the transcript of Ms Rata's interview with client A.

[88] I do not accept the defendant's contention that that interview was a private matter between client A, as a complainant, and the Ministry, when it was a basis of the disciplinary action against the plaintiff and was taken into account in reaching the conclusion of serious misconduct. It also undermined Ms Rata's view that the plaintiff showed a total lack of understanding or acceptance of the potential consequences of her actions and her lack of empathy for what she had subjected client A to. The plaintiff was never properly informed about these matters.

Conclusion

[89] Because of the matters that I have found, the situation becomes more finely balanced than at first glance. It may well have been open to the Court to conclude that because of the failures in relation to the finding of serious misconduct by the plaintiff of fighting in a public place and aspects of the plaintiff's alleged lack of remorse for the consequences of her actions on the Monday, that the decision to summarily dismiss her was not one that a fair and reasonable employer would have reached.

[90] The difficulty with that conclusion is that the admitted misconduct on the Monday, which I find was serious and in breach of the zero tolerance policy properly imposed by the defendant on its employees would have amounted to contributory conduct in terms of s 124 of the Act, and resulted in a finding that disqualified the plaintiff from any remedies. In particular, it would have disqualified her from the remedy, that she primarily sought, of reinstatement.

[91] The situation is similar to that in *Kaipara v Carter Holt Harvey Ltd*[14] where the Chief Judge stated:

> [69] Because it arose in this case, it is appropriate to comment here on the position where, despite dismissal being justified on the merits of the case, procedural failings are so numerous and/or substantial that it is argued that the second leg of the s 103A test is not met and that dismissal should

[14] [2012] NZEmpC 40.

> therefore be declared to have been unjustified. In such circumstances it is often argued (as it was as a fall-back position for CHH in this case) that the grievant's contributory conduct was so substantial in terms of s 124 of the Act that even though the Court might find dismissal to have been unjustified procedurally, no remedies should be granted. This is sometimes termed, especially by the Authority, as a 100 per cent deduction from remedies for contributory conduct.
>
> [70] There may, however, come a point where an employee's contributory conduct is so significant that it is simply not appropriate to make a finding of unjustified dismissal, however infelicitous may have been the procedural defects leading to the dismissal. Rather than pursuing a convoluted path of declaring a pyrrhic victory of unjustified dismissal but then awarding no remedies for that, the better course may be to simply conclude that dismissal was justified in spite of process failures.

[92] I conclude that the better course in this case is to find that the dismissal is justified, in spite of process and substantive failures in relation to one of the grounds of serious misconduct, because the defendant discharged the burden of showing that a fair and reasonable employer would have dismissed the plaintiff for serious and wilful breaches of the Code of Conduct. The challenge therefore fails and must be dismissed.

Remedies

[93] Because of the conclusion that the challenge fails, it is not necessary to fully consider the matter of remedies. However, in deference to Ms Turner's thorough submissions that the 2010 substitution[15] of s 125, which came into force on 1 April 2011 should apply to dismissals before that date, I make the following *obiter* comments. Ms Turner invited me to reconsider and not follow the Court's decisions in *Gwilt v Briggs & Stratton New Zealand Ltd*[16] and *Allen v C3 Ltd.*[17] Whilst I could see the force in Ms Turner's arguments, I offer the view that the compelling reasoning in the *C3* case, following the *Gwilt* decision, and the general presumption against retrospectivity would have led me to apply those decisions, should that have been necessary.

[94] I also observe that in a case such as the present where there is proven serious misconduct for the purposes of s 124, that this would have had a major impact on the

[15] Employment Relations Amendment Act 2010.
[16] [2011]NZEmpC 140.
[17] [2012] NZEmpC 124.

remedy of reinstatement, regardless of which legislative provision applied. I note that the Court of Appeal in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*,[18] in dealing with the practicability of reinstatement, under the former version of s 125 noted that in applying that test there were elements of reasonableness: see also the full Court decision in *Angus v Ports of Auckland Ltd.*[19]

Costs

[95] Costs are reserved and if they cannot be agreed the first memorandum should be filed and served within 30 days of the date of this judgment.

B S Travis
Judge

Judgment signed at 4.15 pm on Tuesday 9 October 2012

[18] [1994] 2 ERNZ 414 (CA) at 416.
[19] [2011] NZEmpC 160 at [65]..