IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 155
CRC 22/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WILLIAM STUART CLARK Plaintiff
AND	IDEA SERVICES LIMITED Defendant

Hearing:	27-29 June 2011 (Heard at Invercargill)
Appearances:	Damien Pine and Jessie Lee Parker, counsel for plaintiff Paul McBride, counsel for defendant
Judgment:	16 August 2013

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] William (Nobby) Clark appeals by challenge (hearing de novo) against the determination of the Employment Relations Authority dated 7 May 2010[1] that he was dismissed unjustifiably as the Southland/Gore Area Manager of Idea Services Limited (ISL), a subsidiary of the disability services provider known as IHC. After Mr Clark raised his grievance and the Authority determined it, ISL was placed under statutory management. This change of legal status, which took effect on 5 October 2010, meant that Mr Clark's proceeding against the company could not be continued without the consent of ISL's statutory manager: s 42(1) of the Corporations (Investigation and Management) Act 1989. On 21 October 2010 ISL's statutory manager consented to the continuation of the proceeding.

[2] The questions for decision by the Court (Mr Clark's dismissal having been acknowledged by the defendant) are:

[1] ERA Christchurch CA112/10, 7 May 2010.

- whether the dismissal was justified pursuant to s 103A of the Employment Relations Act 2000 (the Act) (as that section was prior to 1 April 2011); and

- if so, remedies to which Mr Clark should be entitled including compensation for salary lost from dismissal until the date of the Court's decision, compensation for humiliation, loss of dignity and injury to feelings in the sum of $30,000, compensation for lost benefits (loss of private use of the employer's motor vehicle), and costs.

[3] I regret the delay in issuing this judgment. That has come about because of additional pressures on the Court's already stretched judicial resources following the Christchurch earthquakes. I apologise to the parties for that delay. For the purpose of this judgment, I have re-read and reconsidered all of the evidence, exhibits and submissions as well as my own notes taken at the hearing.

[4] I confirm the (permanent) non-publication orders made at the start of the hearing on 27 June 2011 as follows:

> Pursuant to clause 12 Schedule 3 of the Employment Relations Act 2000 there will be an order that no person is to publish the names or any other identifying details of:
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> 1. those persons who are service users of the defendant's services; and
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> 2. members of staff of the defendant other than those who may be witnesses in the proceeding and in particular in respect of personal information relating to those other staff members.[2]

[5] ISL is a substantial charitable organisation that assists and supports people with intellectual disabilities to live in their communities. It is a nation-wide organisation that has a corporate managerial structure (of which Mr Clark was a part) that includes general and specialist management, the latter including employment relations expertise. ISL employs large numbers of staff and has numerous detailed

[2] The following members of the staff of the defendant whose identities are not covered by the non-publication order are Tracey Louise Ramsay, Gerald Ward, Cynthia Rose Andrews, Barbra Michelle Kelly and Graeme Ross Maden.

policies and procedures with which that it expects its employees to comply, in many cases strictly.

[6] ISL's employment relationships are not solely two-dimensional. Integral factors in them are the persons with disabilities they support (known as service users) and, in addition, there are strong employment related relationships with service users' families. ISL describes itself as a customer-focused organisation in the sense that its existence and operation in all respects addresses the needs and wishes of service users and their families. Sometimes, however, in dealings with its employees, who include managers such as Mr Clark who have rights and interests arising out of those employment relationships, there may be tensions with that client-centred ethos that must be reconciled with employment law rights and obligations. As in most employment relationships, there must be a balance between these sometimes competing philosophies and legal obligations. ISL cannot be solely service user-focused at all costs, and at the expense of its employment relations' obligations. That said, however, the case must be decided by applying employment law to the particular circumstances of both parties.

Relevant facts

[7] The starting point for determining relevant facts is the reasons given by the defendant shortly before dismissing Mr Clark. Although he was not formally dismissed until the following day, these are set out in a letter dated 27 April 2009 over the hand of Tracey Ramsay, the General Manager for the Central/Southern Regions of ISL and speak for themselves as follows:

> **My findings**
>
> … I have concluded that there are several behaviours of yours that have seriously undermined my (and IDEA's) trust and confidence in you. The following are examples of how I formed my view:
>
> 1. Not following IDEA policies and procedures known to you – (Proposal for a change of living situation). As a result of your not following this policy, I received a number of complaints from Ministry of Health, Standards and Monitoring (External Audit agency) and two family members. Your actions put IDEA in breach of our contractual obligations with the Ministry of Health. That is itself an extremely serious matter.

2. Communication and behaviour with families and others that compromises the organisation's reputation, standards and contractual obligations. You told your manager and other senior staff who do not report to you that you did not agree with my investigation of the complaints. At no point during our discussions re the complaints did you inform me that you disagreed with the actions required. Families have alleged when meeting with you they felt not listened to and intimidated. WellNZ staff also report ongoing difficulties working with you. I conclude that the nature of your communications falls well outside the minimum standards of professionalism required by your role.

3. Speaking about me in a way that discredits the organisation. You have acknowledged that you have referred to me as "She who must be obeyed" and other staff have reported to me that you also use the phrase "My mistress has spoken". I accept those reports as accurate. When examples of this behaviour were brought to my attention in July 08, I had informed you that speaking about me or others in this manner was unacceptable behaviour, and instructed you that it was not to occur again. Your actions are therefore a repetition of conduct that had previously been specifically raised with you.

4. Not following instructions from me. Following the [P] complaint I asked that you did not share the details of the complaint relating to Cindy Andrews with her. I understand from Cindy that you did tell her and you also said to her that you would not do as I had asked. I accept Cindy's description of the events. Again, your action was what you had specifically been instructed not to do.

5. There are a range of matters relating to your decision making and judgement that I have raised with you during these meetings. Those include your decision to instruct the CSM to inform the [P] family that their daughter was moving; e-mailing the [L] family saying that you would not be moving their son in the near future, and then two weeks later e-mailing [them] saying you were moving their son. I had previously explained to you that topics sensitive to families and especially the [L] family require face to face meetings.

6. As you appeared to be annoyed with my investigation into the complaints, you chose to share details that were between you and I with your [CSMs] and other senior staff. You then suggested to me to postpone the actions required to resolve the complaints for a couple of months. This indicates to me that you have little understanding of the seriousness of your behaviour that resulted in the complaints, and your inability/refusal to take direction from me.

7. Feedback from you at the meeting on Tuesday leaves me with little, if any, confidence about our ability to repair the relationship and your commitment to continue to work for the organisation. You talked about an intention to subpoena families and people with an intellectual disability. This strikes at the heart of the organisation's values. You continue to identify what you consider my mismanagement of the issues and have appeared to take little responsibility for your own actions and behaviours relating to these matters.

> When those matters are considered individually and cumulatively, I have concluded that the relationship of trust and confidence that I need to have in you as a very senior manager operating remotely from me, has been destroyed by your actions. Put differently, neither I nor Idea Services can, on the basis of your recent actions, have any confidence that you will perform the requirements of your role in a proper fashion in future.
>
> **Outcome**
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> Given my findings above, dismissal (which might include summary dismissal) is one of the outcomes that remains open. It is an outcome that I am seriously considering.
>
> Before I make a final decision on the outcome, I do need to consider whether any other sanction could be appropriate. For this to occur, it seems to me that I would need to be convinced by you that your recent past actions were an aberration, and that your future actions will be quite different. At this point I have real questions about that.
>
> Before I make a final decision on outcome, I seek to have your input on this issue alone. I invite you to provide me with any further information that you wish to provide, and which might influence my decision by showing that restoration of the employment relationship is not only realistic [and] attainable, but is likely to be workable going forward. Once you have had an opportunity to do that, then I will make and communicate my final decision.

[8] Following a short meeting between the parties on 28 April 2009 Mr Clark was dismissed summarily. This was confirmed in writing by Ms Ramsay on 1 May 2009 in which she elaborated on the grounds set out above as follows:

> The reasons for this were the findings documented in my 27 April letter, together with my conclusion after we met on 28 April that, in all the circumstances, I could not see any way of restoring the required high level of trust and confidence in you as a senior manager, or other realistic alternatives. Part of that consideration was your role working largely independently and remotely from me. Another was your actions that had given rise to the issue in the first place. I also note that you presented nothing further for me to base any view that restoration of [a] relationship was possible, let alone likely.

[9] The defendant's grounds for dismissal may be summarised as follows:

- Failing or refusing to follow policies;
- compromising ISL's reputation, standards and contractual obligations by communications with, and behaviours towards, families and others;

- disparaging Mr Clark's manager and thereby discrediting the organisation contrary to instructions;

- not following instructions about disclosure of complaint details;

- conducting sensitive communications by email rather than in face to face meetings;

- conveying inappropriate information to other staff;

- not having a sufficient appreciation of the seriousness of his behaviour that resulted in complaints and his inability or refusal to take directions from his immediate manager;

- being unable to provide confidence to the employer about repairing the parties' relationship and a commitment to continuing to work for ISL;

- continuing to identify his manager's mismanagement of issues and failing to take responsibility for his own actions and behaviours; and

- individually and cumulatively, an absence of trust and confidence in him as a very senior manager operating remotely.

The facts

[10] Although having an extensive background in management of large governmental and non-governmental organisations, Mr Clark was in a managerial role at ISL for only a relatively short time before he was dismissed. The ethos and corporate culture of the defendant was quite different to those previously experienced by Mr Clark and, with the benefit of hindsight, he was probably not an easy 'fit' within the defendant's structure. Indeed, again with the inestimable benefit of hindsight, ISL may now be surprised that it appointed Mr Clark to the position it did, but that is not the issue for decision in this case.

[11] In the early days of his employment with ISL, in mid-May 2008, Mr Clark arranged for the publication of advertisements for casual/relief Community Service Worker (CSW) staff. These came to the notice of ISL's National Human Resources Manager, Scott Gwynn, who communicated with Mr Clark by email expressing his "serious concerns about the detail and grammatical content of the advertisement" and asking that it be withdrawn from publication and not repeated. Mr Gwynn's view was that Mr Clark's form of advertisement was unprofessional, contained errors and presented ISL in a poor light. The information contained in the advertisement was also said to have potentially exposed ISL to personal grievances. Mr Gwynn offered the services of his team to assist Mr Clark on matters of staff recruitment and reminded him of the defendant's policy that its national recruitment coordinator was responsible for placing all vacancy advertisements.

[12] Mr Clark responded comprehensively to Mr Gwynn (copied to his immediate manager, Ms Ramsay). The plaintiff agreed with some of Mr Gwynn's criticisms and disagreed with others. It is unnecessary to reiterate what was in Mr Clark's email to Mr Gwynn. Suffice it to say that Mr Clark concluded with these words: "This email from you has left me feeling deflated, that process is more important than results, that a new person making an error will be dealt to …". In retrospect, this was an ominous outcome to a work performance issue involving a new managerial employee not used to a culture of centralised and tight operational controls.

[13] After further and briefer correspondence from Mr Gwynn, Mr Clark appeared to accept his admonishment and advised Mr Gwynn that they would work together including in the drafting of an advertisement.

[14] In April 2008 Wendy Stirling was appointed as an Administration Manager in Mr Clark's Southland/Gore region. There were administrative difficulties with Ms Stirling's remuneration payments.

[15] Within a matter of only months of Mr Clark taking up his semi-autonomous position as the Southland/Gore Area Manager of ISL, Ms Ramsay had sufficient concerns about his work performance that she raised these with him and counselled

him at the company's regional offices in Christchurch. Ms Ramsay told Mr Clark at the end of their four hour meeting on Friday 4 July 2008 that if he was to remain with ISL he would need to change his behaviour. Mr Clark was sufficiently shaken by Ms Ramsay's assessment of some aspects of his work performance and by her advice to him that he feared the loss of his position. Ms Ramsay promised to write to him the following week but did not do so until 21 July 2008, but which letter I am satisfied Mr Clark did not ever receive.

[16] The defendant's letter of 21 July 2008 did not simply affirm Ms Ramsay's advice to Mr Clark on 4 July 2008. If it had done so, I am satisfied it would have been sent to him within a much shorter period than the 17 days between the meeting and the date on the letter. What occurred during that period of almost three weeks is not the subject of evidence and should not be speculated on. In any event, even if this letter had been received by Mr Clark, I do not consider that it amounted to more than informal advice that if similar matters recurred, Ms Ramsay would explore such issues.

[17] I accept Mr Clark's evidence that, instead of sending him the promised confirmatory letter within a few days of their meeting on 4 July 2008, Ms Ramsay telephoned the plaintiff and told him, having reflected on their conversation a few days previously, of her acceptance of his assurance that his performance would improve, and that her concerns would not be taken further in these circumstances. Whether Ms Ramsay had second thoughts about that advice, before preparing her letter on 21 July 2008, would be speculative but in any event I am satisfied on the balance of probabilities that this letter was not received by Mr Clark and no step was taken by Ms Ramsay to satisfy herself of its receipt.

[18] In the first year of Mr Clark's employment, an issue arose about his salary. During that period ISL reviewed the salaries of area managers as an occupational group. These were in a salary band in which Mr Clark was located initially at a little over two-thirds towards the top of the band. As time progressed, however, Mr Clark came to believe that his salary band (and that of his relevant colleagues) should move upwards as had happened to Community Services Managers (CSMs). ISL's

offer of a salary increase disappointed him. He had expected that he would be located similarly but within an increased band range.

[19] On 9 September 2008 Mr Clark was sent an email about a proposed salary increase for him as a result of a review by ISL of its area manager salary structure. The email contained, erroneously, details of the salaries and proposed salaries for most of Mr Clark's colleagues, ISL's other area managers. It revealed that (along with one other) he had received the lowest salary offer. When this became obvious to Mr Clark, he elected both to retain the information about his colleagues' salaries and, rather than advising the defendant of its error, to use the information to his own advantage in salary negotiations with the defendant. As it transpired later, but only after his dismissal, Mr Clark disclosed the fact that he had this salary information and what he believed to be its implications in an attempt to persuade CSMs, who reported to him, that the Southland/Gore area was being treated disadvantageously by ISL.

[20] Mr Clark did not disclose immediately to ISL his receipt of the salary information about his colleagues. Rather, he asked Ms Ramsay for information about how the offers had been formulated. She advised that these had followed a national "scoping exercise" which took into account a number of factors including the size of the area managed, the number of clients, staff numbers, demographics in each area, and some external relativities. Ms Ramsay assured Mr Clark that the National Human Resources Manager and the defendant's Chief Executive had known of and approved the offers. Mr Clark then asked the National Human Resources Manager for information about the numbers of staff and clients in each area. This prompted Ms Ramsay to telephone Mr Clark to inquire why he wanted that information. He responded that he wanted to undertake some comparison before agreeing to ISL's salary offer.

[21] At a meeting with Ms Ramsay shortly afterwards in Christchurch at which his salary issue was discussed, Mr Clark then disclosed that he had inadvertently received the information about the offers made to his colleagues. Ms Ramsay thereupon agreed to give him a mid-year increase at a higher level than had been originally offered, to be followed by the usual end of year across-the-board review.

[22] In March 2009 ISL received several complaints about its Southland operations overseen by Mr Clark. These were not, or at least not exclusively, complaints about Mr Clark personally but to the extent they were not, how he responded to them formed a part of the justification for his subsequent dismissal. They must, therefore, be considered. I will refer to the names of the complainants by alphabetical letters to preserve their anonymity and, more importantly, the anonymity of the service users affected by the complaints.

[23] The first complaint was received from S (a parent of a service user) on 13 March 2009. This concerned what S considered was an inadequate response from a CSM about an issue of S's daughter's bank account. S then made reference to a previous complaint that S had made about the service of a CSW which had been investigated several months previously by a CSM and was overseen by Mr Clark. Mr Clark had sent S a detailed email in February 2009 about the way in which S's initial complaint had been dealt and the outcome, that no action would be taken against the CSW. S was dissatisfied with that outcome.

[24] Before completing its inquiries of Mr Clark about the complaint, however, ISL wrote to S on 23 March 2009 advising S of the outcome of S's complaint, including the training that was to be provided for staff, and apologising to S. In retrospect, it appears that ISL concluded that it was dissatisfied with Mr Clark's involvement in the S complaint before it concluded its inquiries of him about it.

[25] On 17 March 2009 P complained to ISL about a relocation from one home to another of P's service user daughter. The potential for this had arisen because one of ISL's Invercargill homes was a rented property on which the lease was about to expire and would not be renewed. Although P's daughter was not an occupant of that home, one of the possible outcomes of the loss of this property was the movement of residents from it to other properties including that occupied by P's daughter.

[26] Mr Clark acknowledged, in respect of what he had advised P's family, that he had not complied with ISL's policies in that his approach should have been more consultative and conciliatory rather than prescriptive and predetermined as he

accepted it might have appeared. Mr Clark said he was under undue work pressure at the time of these communications and explained the mitigating factors which he said contributed to his lapse of judgment in not following the relevant policies.

[27] On 19 March 2009 the L family complained to the Ministry of Health about a potential move of their son (a service user) from his existing accommodation. Ms Ramsay brought the L complaint to Mr Clark's attention on 25 March 2009. He responded that a consultation process was under way with the L family and that a potential property for their son's accommodation had been viewed. Mr Clark explained that consultation had taken place to that point and ISL emailed the Ministry of Health explaining that there had been longstanding issues with the L family about their service delivery expectations. ISL confirmed to the Ministry of Health that it was exploring options with the family that had already been raised and that there was no intention to move the service user without the L family's consent. ISL also confirmed that there would be discussions which would meet its requirements, both in its policies and in its contract with the Ministry of Health, to consult about such issues.

[28] Of particular concern to ISL about Mr Clark's role in the events that led to the L complaint were two factors. First, it said that he had previously advised the L family that their son would not be moving in the near future and then, two weeks later, advised them that he might need to do so. Second, ISL was concerned that Mr Clark's consultation with the family, as required by its policy, had taken place initially in writing (by email) rather than face to face.

[29] Mr Clark explained that the change of advice to the family came about because of an unexpectedly developing situation with the needs of other service users. He also explained that because in his view there were difficulties in dealing with the L family, he had decided to engage in written consultation rather than at face to face meetings. He also wished to preserve thereby a record of consultations.

[30] This flurry of complaints and ISL's treatment of them and Mr Clark resulted in his advice to Ms Ramsay that he proposed to raise a personal grievance against her. In the end, however, he did not do so. Indeed, any grievance that he may have

raised could only have been against ISL. His indication that his grievance was with Ms Ramsay, however, identified the personality conflict that was developing.

[31] On 30 March 2009 ISL's Clinical Leader of Specialist Services, Gerald Ward, met with Mr Clark in Invercargill about training that Mr Ward's staff had been scheduled to deliver to ISL Invercargill staff but which Mr Clark sought to have postponed. Messrs Clark and Ward were not well known to each other although Mr Ward was, through one of his Invercargill based staff members, Cynthia (Cindy) Andrews, aware of local issues in that area. Mr Ward believed, as a result of what Ms Andrews had told him, that Mr Clark was seeking to isolate local Southland management against ISL.

[32] It is necessary to determine whether what transpired between Mr Clark and Mr Ward was agreed between them to have been confidential and so ought not to have been passed on by Mr Ward to Ms Ramsay and ISL. Although I accept that, in the course of a heated monologue directed by Mr Clark to Mr Ward, the plaintiff mentioned several times that his remarks were to remain within the room, I conclude that Mr Ward did not agree to maintain any expectation of confidentiality that Mr Clark may have had by those references. They were made in the course of, rather than at the beginning of, what was Mr Clark's intemperate monologue and I do not think that he (the plaintiff) can have had any reasonable expectation of confidentiality of what was said to Mr Ward in these circumstances. It was, therefore, not inappropriate that Mr Ward passed on his account of this meeting to ISL management.

[33] Mr Clark spoke in a critical and unrestrained fashion of his adverse views of ISL management, its organisation, structures and systems. Some of this was said in the presence of Mr Ward's staff members who then left the meeting in some embarrassment.

[34] Rather than respond to Mr Clark, Mr Ward subsequently passed on to Ms Ramsay not only the gravamen of what Mr Clark had said, but also Mr Ward's own concern about the negative effect of Mr Clark's attitude to the organisation. This was in an email dated two days after the events, 1 April 2009. Ms Ramsay

forwarded to Mr Clark Mr Ward's email to her, to inform the plaintiff of the subject matter of a meeting that she was to hold with him on the following day, 3 April 2009. Ms Ramsay asked Mr Clark not to discuss those matters with anyone else before the meeting (except his representative) including, especially, those who were named in Mr Ward's email and reported to Mr Clark. Ms Ramsay's email concluded:

> I now have serious concerns about your ability to manage the Southland Area while this matter is being considered. The information provided to me by Gerald Ward raises significant issues in respect of trust and confidence. To this end, it is possible that I may consider the issue of your suspension on pay at tomorrow's meeting.

[35] The outcome of this meeting in Invercargill between Ms Ramsay and Mr Clark, at which he was represented by his lawyer, was his suspension.

[36] On 2 April 2009 ISL had advised the plaintiff that an organisation called Wellnz, which managed the defendant's accident compensation claims, had raised concerns about the relationship between ISL and Wellnz's case manager. This related in particular to the circumstances of an ISL employee to whom I will refer as P2. Mr Clark emphasised the importance of P2's rehabilitation to ISL, denied suggestions that he (the plaintiff) had "removed" a physiotherapist and a psychologist who were working on the case, and explained that these actions had been undertaken by a previous case manager. Mr Clark responded that he had consulted fully with, and obtained the agreement of, P2's general medical practitioner, Wellnz and other specialists and CSMs before removing P2's rehabilitation placement. Finally, he questioned why these matters had not been brought up previously when the relevant Accident Compensation Corporation (ACC) manager assigned to the case had not raised any concerns about it over the previous 12 months.

[37] Wellnz's response was to confirm that the matters it had raised were not in the nature of a complaint against Mr Clark, and it must be noted that there were no references to it in the letter setting out the reasons for dismissal on 27 April 2009. Mr Clark provided a written response to ISL about the Wellnz matters.

[38] On 8 April 2009 ISL alleged Mr Clark had failed to follow its abuse policy by failing to notify more senior management or other authorities of an incident that had occurred at one of ISL's homes in Southland in which one service user had touched another inappropriately. The defendant categorised this as a complaint of sexual assault. Its preliminary view was that although it had been Mr Clark's responsibility to address this issue, he had done so in a way other than that required by the relevant ISL policy.

[39] A week later, on 15 April 2009, Mr Clark responded to these concerns and allegations.

[40] Two days later, on 17 April 2009, Ms Ramsay wrote two letters to Mr Clark (although erroneously dated a month later, 17 May 2009), suspending him from his employment and instigating what was described as a disciplinary investigation against him.

[41] There was a meeting in Invercargill on 21 April 2009 where the allegations of misconduct were discussed and the possibility of Mr Clark's dismissal was addressed. The plaintiff provided a written response to ISL on that day.

[42] On 27 April 2009, ISL (Ms Ramsay) wrote to Mr Clark in terms already set out at the start of this part of the judgment, advising him of its opinions and warning him of the possibility of his dismissal. Mr Clark's response was sought. As already noted, also, there was a meeting of the parties on the following date, 28 April 2009, at which Mr Clark was dismissed. A letter formally confirming his dismissal was sent on 1 May 2009. By 7 May 2009, Mr Clark had taken objection to Ms Ramsay's involvement in the making of the decision to dismiss him. He subsequently raised a grievance and lodged proceedings in the Employment Relations Authority which conducted its investigation meeting on 6 and 7 October 2009. Mr Clark was unrepresented in that forum.

The Authority's determination

[43] The Authority did not refer in its determination to either the provisions of Mr Clark's individual employment agreement or, more significantly because their provisions are incorporated expressly into the contract of employment, the company's relevant policies.

[44] The Authority focused, in its decision on the justification for Mr Clark's dismissal (in addition, at that stage also, to justification for his suspension), on whether the employer could be said to have lost irretrievably its trust and confidence in Mr Clark. It concluded:[3]

> It is clear from the evidence there was a serious obligation on Mr Clark to become familiar with, and strictly observe at all times, the standard policies and procedures. His failure to observe these and in particular his attempts at times to circumvent them, also weighed against him in the respondent's decision making process.

[45] The Authority set out for itself the correct legal test under s 103A of the Act as it then was. It concluded that Mr Clark's pre-dismissal suspension was both lawful and justified, having been allowed for expressly by cl 6.3.1 of ISL's standard conditions of employment and having been raised by Ms Ramsay as a possibility in her email to Mr Clark of 2 April 2009. The possibility of suspension was discussed at a meeting with Mr Clark and his solicitor on the following day in which they participated actively in the discussions. Finally, the Authority considered it significant that Mr Clark's solicitor accepted, on his behalf, that suspension on pay was appropriate in the circumstances.

[46] Turning to the justification for Mr Clark's dismissal, the Authority Member described the thoroughness of ISL's investigation as "commendable" including, in particular, its provision to Mr Clark of the details of each complaint and allowing him and his lawyer the opportunity to respond to these, taking time to consider those responses, providing a preliminary view and the reasons for it, and then a further opportunity for Mr Clark to make submissions on any sanctions to be imposed. Whilst acknowledging that Mr Clark conceded to it that he had made errors but,

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[3] At [37].

having learnt from them, would not repeat them, the Authority noted that the plaintiff had given similar undertakings to ISL in the past without much, if any, change having been effected by him.

[47] The Authority described subsequent complaints against both Mr Clark and the branch of ISL for which he was responsible as having had very serious consequences for the organisation, its service users, and their families. Although not doubting the genuineness of Mr Clark's assurances, the Authority was critical of the plaintiff's attempts to rally support for his cause from local staff and service users and, in particular, his unwise intimation to ISL that he would go so far as to summons a service user to support him in his case, presumably in the Authority. The Member wrote: "The inappropriateness of this proposal appeared to have eluded him".[4]

[48] The Authority acknowledged Mr Clark's strengths about which witnesses gave evidence. It identified, however, what was put forward as a positive element of Mr Clark's style ("At times when policy was in the way, he always found a way around it".). The Authority identified this as going to the heart of ISL's concerns. It did not accept his assertion that there were some important organisational policies of which he was not aware, in particular those affecting situations of potential sexual abuse risk between service users. The Authority found that ISL's policies and procedures were readily available to all affected staff on its intranet.

[49] It concluded that both ISL's loss of trust and confidence in Mr Clark and its summary dismissal of him were justified.

[50] In a supplementary determination given on 17 December 2010[5] the Authority awarded costs and disbursements of $7,800 in favour of ISL.

[4] At [30].
[5] ERA Christchurch CA112A/10, 17 December 2010.

Terms and conditions of employment

[51] These are taken from the parties' individual employment agreement. I deal first with termination of the employee's employment. Clause 6 (termination of employment) provided materially:

> 6.2 Where employment is terminated by either party without notice and good cause, eight weeks of the ordinary salary shall be paid or forfeited in lieu of notice.
>
> 6.3 Employment may be terminated without notice by IDEA Services in cases of serious misconduct.

[52] These are unusual and potentially contradictory provisions. Whereas cl 6.2 requires eight weeks' salary to be paid by the employer to the employee in the event that termination of the employment at the instigation of the employer (dismissal) is "without notice and good cause" (I assume the parties meant "without notice and without good cause" and so interpret the clause), cl 6.3 allowed ISL to dismiss Mr Clark without notice in the event of serious misconduct. What was to be the position where the employer had good cause to dismiss but where that fell short of serious misconduct?

[53] Making the best I can of these provisions, I conclude that the parties intended to allow for dismissal on eight weeks' notice (or payment or forfeiture of salary in lieu thereof) in cases of other than serious misconduct, in which latter case notice was not required to be given by the employer.

[54] It is regrettable that this issue was not addressed either by the Authority or by the parties in submissions at the hearing. Nevertheless, I conclude that their contract provided that, in circumstances other than of serious misconduct by Mr Clark, ISL was entitled to terminate his employment either by giving him eight weeks' notice of that or paying him eight weeks' salary if it decided that he should not work this out.

[55] I now deal with other relevant provisions of the agreement. It required him to become familiar with IHC's policies and procedures relevant to him and to "strictly observe them at all times" (cl 1.9). Clause 3.2 required Mr Clark to "follow and implement the philosophy and policy of IDEA Services". He was required to

support and comply with "Reasonable directions and requests of the reporting officer [his manager Ms Ramsay]" (cl 3.3). So compliance with ISL's policies and procedures, where relevant, became contractual as between the parties.

[56] The defendant has numerous detailed recorded policies (the number of more than 170 was referred to several times in evidence) with all of which policies staff, including senior managerial staff, could not reasonably be expected to have been familiar, at least in detail. What was known and expected, however, was the general nature of such policies and their whereabouts so that, when issues needed to be dealt with, staff were to be aware of the existence of a relevant policy and able to consult this for guidance. The compilation of policies resembled a dictionary in the sense that whilst few, if any, knew of the existence or meaning of each and every word in the dictionary, it could be consulted to provide a particular answer to a particular issue or problem.

[57] IHC's staff Human Resources Policy applied to both Mr Clark and ISL. It is an important feature of the case in relation to s 103A. Unusually, the same processes were specified by the defendant as being applicable to both "unsatisfactory performance" and "conduct" issues. So, for example, in the opening words of cl 9.1 ("Procedure for Unsatisfactory Performance and Conduct") the following appears:

> Formal procedures for unsatisfactory performance or conduct are used when an employee's performance and/or conduct gives concern and informal approaches have not corrected the problem.

[58] Other parts of the Human Resources Policy relevant to this case include:

> **5. Human Resources Policy**
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> IHC has a duty to act towards its employees in good faith. To enable this, a comprehensive and clear package of employment relationship policies and procedures (House Rules) has been [developed].
>
> IHC's Human Resources Manual contains a detailed description and application of the HR Policies that are to be consistently applied to all staff. They underpin the employment relationship between IHC and staff.
> …

5.1 Confidentiality and Privacy

In the course of employment with IHC … you will become aware of information about … other staff … and about the affairs of IHC that must be kept confidential.

We require all staff to maintain confidentiality as a condition of their employment with IHC. …

…

9. Disciplinary Procedures

IHC, like most other employers, has developed rules and procedures for dealing with performance and disciplinary issues which may arise. They are primarily aimed at improving staff performance and service quality. …

Most performance or disciplinary matters are dealt with through a progressive process aimed at correcting the problem and restoring good workplace relations. From time to time, matters will arise which are so serious that action, including dismissal, needs to be taken without formal warnings being given first.

…

9.1 Procedure for Unsatisfactory Performance and Conduct

…

Examples of behaviour likely to constitute Unsatisfactory Performance or Conduct are set out below. These are examples only and other matters of a similar nature may also be regarded as unsatisfactory service or conduct.

…

- Failing to carry out as far as possible IHC's Philosophy and Policy;
- Behaving in a manner not deemed suitable for the position held; …

…

Provided the employee has previously been informed of the areas of concern, given an opportunity to explain and correct the problem, IHC may institute the following steps which may lead to dismissal on notice:

Step One First Formal Warning

Step Two Final Warning

Step Three Dismissal

[59] The policy provides further details of steps 1 and 2 (first formal and final warnings). Step 3 provides:

> A further breach of any IHC standard while a final warning is in force shall render the employee liable to dismissal on notice.

[60] Clause 9.2 is entitled "**Procedure for Serious Misconduct (leading to summary dismissal)**" and provides materially:

> If a matter arises which is so serious that the continued employment of the employee is in jeopardy, the following disciplinary procedures will be invoked:
>
> 1. The alleged breach will be investigated.
>
> 2. The employee may be suspended on pay while an investigation is taking place.
>
> 3. If IHC is satisfied serious misconduct has occurred the employee will be dismissed with immediate effect and the reasons for the dismissal will be advised in writing.
>
> Actions likely to constitute serious misconduct include the following. IHC may also consider other actions of a similarly serious nature as serious misconduct:
>
> …
>
> - Deliberately refusing to follow or comply with IHC safety or hygiene rules or practices.
>
> …

[61] Clause 9.3 is a "**Commentary on Disciplinary Procedures**" and provides materially:

> IHC is committed to fair dealings with its employee and will endeavour to be procedurally fair on all occasions when formal or informal disciplinary processes are being used.
>
> The special nature of IHC and the services it provides may sometimes require IHC to take steps to ensure that the safety of service users and fellow employees are not put at risk. This may mean that actions are taken, including suspension on pay while an investigation is completed, that may not be necessary in other workplaces.

[62] It is pertinent to note that the policy's definitions of "serious misconduct" do not appear to include work performance or competency issues. Although accepting that ISL left open to itself the ability to categorise "other actions of a similarly serious nature as serious misconduct", none of the issues which formed the grounds for Mr Clark's dismissal amounted to the specified serious misconducts in cl 9.2. Nor do I think they can be said objectively and fairly to have been "other actions of a similarly serious nature" as those specified serious misconducts.

[63] The closest that any may have come to being such was Mr Clark's failure to report to police, and otherwise deal in accordance with another policy manual, the actions of one service user of "touching inappropriately" another service user in the home in which they both lived. I do not consider that this would have amounted to,

or could have been reasonably considered to be, a failure of a similarly serious nature to the prohibition on "deliberately refusing to follow or comply with IHC or hygiene rules or practices". Indeed, that allegation appears to be covered expressly by one of the definitions of "unsatisfactory performance or conduct" under cl 9.1, namely "Failing to carry out as far as possible IHC's Philosophy and Policy".

[64] So the scheme under the Human Resources Policy for dealing with circumstances such as arose in Mr Clark's case was as follows.

[65] The primary aim was to improve staff performance and service quality. Most performance or disciplinary matters were to be dealt with through a progressive process aimed at correcting the problem and restoring good workplace relations. An affected employee was entitled at all relevant times to have a support person and should have been advised of the reasons for any arranged disciplinary or performance issue meetings.

[66] The policy contemplated that "informal approaches" were the first step to correcting such problems before the cl 9 disciplinary procedures under the manual were invoked. This was emphasised by the requirement that the employer previously inform the employee of areas of concern and provide an opportunity to explain and correct the problem.

[67] In the event that this was not achieved, the policy provided for a first (formal) warning. This was to include discussion with, and advice to, the employee of corrective action required during the warning period and the provision of support and a reasonable opportunity to change the problematic behaviour. Such first warnings were to remain in place for a specified period which was not to exceed six months. A record of the meeting at which the warning was issued was required to be created and a copy of the warning letter was to be retained on the employee's file as a permanent record, stating the reasons for the warning, any terms and conditions of it, and the outcome if the misconduct was repeated or performance problems were not rectified within the warning period. The policy required that the employee be given a copy of the warning and encouraged to sign the file copy to confirm that the letter had been received and understood.

[68] Step two under this process could be invoked where the employee repeated the problematic behaviour or breached another standard within the period of the first warning, and was unable to give a satisfactory explanation for the breach. The policy required that the employee be advised that the outcome of this second step was to be a final warning and that any further breach "may result in dismissal". This final warning was to be recorded in a formal letter outlining details of the incident of breach, the employee's explanation, reference to the previous warning, any terms and conditions of the warning, and the outcome if any further breach of IHC's disciplinary code occurred during the remaining period. Final warnings were to remain in effect for specified periods of up to 12 months from the date of issue. As in the case of first warnings, a copy of the warning and record of the meeting at which it was issued were to be retained on the employee's personal file as a permanent record "although the ability to rely on it, after its expiry, will be limited".

[69] The policy provided that in relation to both sorts of warnings set out above, the employer was to advise the employee of his or her entitlement to have personal comments placed on the file in relation to the warning if the employee believed that the employer's record of the investigation process did not accurately reflect the situation.

[70] Finally, labelled "Step 3", the policy provided that "A further breach of any IHC standard while a final warning is in force shall render the employee liable to dismissal on notice".

[71] For "serious misconduct" as defined, the Human Resources Policy prescribed different standards. In addition to meeting the definition of serious misconduct, (being one of the misconducts specified or misconduct of a similar level of gravity), cl 9.2 required that the misconduct be so serious that the continued employment of the employee was in jeopardy. As already noted, the employee was liable to summary dismissal if serious misconduct was established. "Serious misconduct" was not, however, referred to by ISL in the process that led to his summary dismissal.

Grounds of challenge

[72] The plaintiff advances three broad grounds by which he says that the decision to dismiss him summarily should be found to have been unjustified. First, the plaintiff says that the defendant failed to follow its own policies and procedures in dealing with performance and misconduct issues against him. Next, Mr Clark claims that Ms Ramsay, as both the object of Mr Clark's relevant conduct and, in several respects, a complainant of his misconduct against her, was an inappropriate person within the defendant's organisation to have determined the complaints of misconduct against him and the sanction of summary dismissal for those. Finally, the plaintiff says that the defendant was obliged, but failed, to consider adequately alternatives to his dismissal.

The defendant's case in justification for dismissal

[73] Counsel for the defendant, Mr McBride, emphasised a number of factors which should affect the application of the test of justification under s 103A in this case. The first is that Mr Clark was a senior managerial employee in a position of responsibility so that ISL was entitled to expect a high level of trust and confidence in him. Next, counsel emphasised the geographical separation of the division of the organisation for which Mr Clark was responsible in Southland and his own managerial supervisors based in Christchurch. The level of local responsibility delegated to Mr Clark was said by Mr McBride to amplify and compound the need for a high level of trust and confidence in the plaintiff who was expected to work without immediate supervision or overview.

[74] Next, Mr McBride emphasised the unusual, if not unique, nature of the employer's enterprise which is to support service users and their families pursuant to contractual obligations, including with the Ministry of Health, which counsel submitted were breached as a result of Mr Clark's conduct. Counsel urged the Court to consider the effect of the plaintiff's conduct on ISL's relationships with third parties such as the Ministry, Wellnz and its own parent organisation IHC. It should not be insignificant, counsel submitted, that some of the complaints against Mr Clark had emanated from the company's clients.

[75] Next, counsel submitted that, as a charitable organisation, the defendant is entitled to expect high standards of conduct from its employees and adherence to policies and procedures put in place to ensure that such high standards are met. Counsel referred to what Judge Shaw in *Arthur D Riley & Co Ltd v Wood*[6] described as "… the values, culture and expectations of their specific work place …" that are brought by such parties to employment and that they "… must weigh the impact of the behaviour of an employee under investigation on other employees and the work environment generally."[7] Mr McBride emphasised two instances which he said exemplified Mr Clark's rejection of these fundamental values. The first was his threat to subpoena a service user to a hearing about a case which he proposed to bring, and the second was the dishonest use he made of salary information mistakenly given to him.

[76] Mr McBride submitted that Mr Clark's dismissal was brought about by the employer's justifiable loss of trust and confidence in him which, in turn, was the consequence of Mr Clark's cumulative actions as set out in the preliminary decision letter quoted at [7] of this judgment.

[77] Mr McBride emphasised that loss of trust and confidence in an employee is a long and well established justification for dismissal. The need for its continued existence was emphasised as long ago as in *BP Oil New Zealand Ltd v Northern Distribution Union.*[8] In *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd*[9] the Court of Appeal observed:[10]

> Good working relations depend on loyalty and confidence, both ways as between employer and employee. Once the employee destroys that relationship to the extent that the employer has reasonable grounds to believe there has been misconduct by the employee then, depending on the gravity of the situation, dismissal may be justifiable.

[78] Counsel for the defendant emphasised not merely the multiple instances of misconduct but Mr Clark's repetition of these about which he had been told and had agreed were inappropriate. This is said to have demonstrated a complete disregard

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[6] [2008] ERNZ 462.
[7] At [54].
[8] [1992] 3 ERNZ 483 (CA) at 487.
[9] [1990] 3 NZLR 549 (CA).
[10] At 15.

by the plaintiff for the obligations of his role so that, in all the circumstances, ISL could justifiably have lost confidence that such behaviour would not occur again.

[79] In response to Mr Clark's complaint that ISL failed to follow its own rules and procedures, Mr McBride argued that these were not straightjackets but "merely guides". Counsel submitted that the defendant was not obliged to follow its policies, at least to the letter, and that s 103A now makes it clear that the issue is not whether an employer has followed every requirement of the promulgated policy document but, rather, in all the circumstances at the time the dismissal occurred, the employer's actions were what a fair and reasonable employer would have done. Counsel emphasised, also, cl 9 of the IHC Staff Policy recording that it is a guide and that "from time to time, matters will arise which are so serious that action, including dismissal, needs to be taken without formal warnings being given first." Mr McBride also emphasised that the examples of serious misconduct provided in cl 9.2 of the IHC staff policy are non-exhaustive.

[80] Addressing the plaintiff's criticism of the decision to dismiss him and that alternatives to that ultimate sanction were not considered, counsel argued that simply because a grievant may suggest alternatives in the process leading to dismissal does not mean that an employer is obliged to follow these. Mr Clark acknowledged that the employer had to deal with a range of options including dismissal.

[81] Next, counsel submitted that at the final meeting to consider the outcome of the employer's findings of serious misconduct, no alternative was put forward but, rather, Mr Clark simply opposed dismissal. Next, Mr McBride submitted that the alternatives to dismissal which had been put forward by Mr Clark through his lawyer at previous meetings, were in any event carefully considered but eventually rejected by ISL.

[82] Dealing with the plaintiff's criticism of Ms Ramsay's continued and influential involvement in the dismissal decision making, Mr McBride submitted that this complaint first emerged some time after dismissal had taken place. Counsel submitted that if this point had had any validity, the Court should have expected it to have been raised much earlier and not reserved as it were for the worst case scenario

which later emerged. Mr McBride submitted that Mr Clark's approach to this question was not in compliance with the good faith obligations set out in s 4 of the Act and, in particular, the requirement to be communicative, active and constructive.

[83] Mr McBride submitted that a line manager's previous involvement with a staff member prior to the disciplinary process is completely unexceptional and in fact the evidence shows that Ms Ramsay lacked any personal antipathy towards Mr Clark, focusing on the issues rather than the personalities. For example, Mr McBride pointed to Ms Ramsay's letter which, when it addressed Mr Clark's personally derogatory comments about Ms Ramsay, referred to "speaking about me in a way that discredits the organisation …". Further, Mr McBride submitted that the evidence establishes that the significant decisions about Mr Clark's employment were made by Ms Ramsay in conjunction with the Chief Executive, Graeme Maden, who could not be said to have been prejudiced personally against Mr Clark in the same way claimed of Ms Ramsay.

[84] Moving to his submissions made in the event that the Court were to conclude that Mr Clark had been unjustifiably dismissed, Mr McBride emphasised not only Mr Clark's significant contributory conduct and the need to reflect that in reduced remedies under s 124 of the Act, but also the misconduct discovered by the defendant after it had dismissed Mr Clark. Mr McBride pointed out, correctly, that following the judgment of the Court of Appeal in *Salt v Fell*,[11] subsequently discovered email correspondence confirmed Mr Clark's disdain for those managing him and advocated a disruptive approach to employment relationships which were incompatible with trust and confidence.

[85] Next, counsel emphasised Mr Clark's failure to mitigate his losses, that is to take all reasonable steps to limit them. In particular, counsel submitted that instead of seeking alternative employment, Mr Clark elected to take an extended overseas holiday; relied on being reinstated by the Employment Relations Authority rather than seeking other work; and, for an extended time down to the Authority investigation meeting, was selective in terms of the work he sought, seeking only management roles. Subsequently, Mr McBride emphasised, Mr Clark elected to set

[11] [2008] 3 NZLR 193 (CA).

himself up in business. These actions, together, are said to establish a failure to take all reasonable steps to mitigate loss.

The plaintiff's case for unjustified dismissal

[86] Counsel, Mr Pine, addressed first the non-adherence by the defendant with its own policies and procedures and especially when reaching the conclusions it did that Mr Clark was to be dismissed for not adhering to rules and procedures. Counsel emphasised that in decisions such as *Magnum Corporation Ltd v Jenkins*,[12] this Court has emphasised that employer-established policies and procedures cannot in fairness be seen to be ignored or breached by an employer in dismissing an employee.

[87] Turning first to the IHC Staff Policy, Mr Pine emphasised its general cl 5 which provides:

> IHC has a duty to act towards its employees in good faith. To enable this, a comprehensive and clear package of employment relationship policies and procedures (House Rules) has been [developed].

[88] Next, cl 9.1 of the staff policy set out at [57] of this judgment requires a first formal warning and a final warning to be given to an employee before the employer may resort to dismissal if the employee has previously been informed of areas of the employer's concern, and has been given an opportunity to explain and correct the problem.

[89] Next, counsel submitted that the policies include, as examples of behaviour likely to constitute unsatisfactory performance and conduct, "failing to carry out as far as possible IHC's Philosophy and Policy".

[90] Emphasising cl 9.2 set out at [60] of this judgment, Mr Pine submitted that the included list of "actions likely to constitute serious misconduct" was followed by a note that "IHC may also consider other actions of a similarly serious nature as serious misconduct".

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[12] [1994] 2 ERNZ 443 at 459.

[91] Counsel submitted that the defendant did not use its first formal, or even final, warning procedure in relation to Mr Clark even although the breaches of policy about which it expressed concern were described in cl 9.1 as examples of behaviour likely to constitute unsatisfactory performance and conduct for which such sanctions were appropriate. Counsel submitted that the plaintiff could only have been dismissed for serious misconduct even although his actions were not ones "likely to constitute serious misconduct" as listed in cl 9.2. Nor were they "of a similarly serious nature" to those listed at cl 9.2.

[92] Counsel emphasised the defendant's Chief Executive's concession in cross-examination that it required its area managers to adhere to staff policies including compliance with procedures for unsatisfactory performance and conduct in cl 9.

[93] Next, Mr Pine submitted, following the *BP Oil* judgment, that the usually needed "conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship" was not present in this case.[13] So, following the Court of Appeal's guidance in *BP Oil*, counsel submitted that the defendant failed to establish "in the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances".

[94] Counsel emphasised that before Mr Clark's summary dismissal on 28 April 2009, he had not ever been subject to any formal disciplinary procedure by the employer as contemplated by its relevant rules. Mr Pine submitted that whether assessed individually or cumulatively, Mr Clark's acts and omissions did not constitute serious misconduct which might have justified dismissal.

[95] Referring to the S complaint received on 13 March 2009, counsel submitted that this concerned what S thought was an inadequate response from a CSM in resolving issues about a shared bank account after S's daughter had left the service. During her conversation with Ms Ramsay, S raised again a complaint that she had made several months previously about the care that had been provided for her daughter by a CSW. That initial complaint had been investigated by a CSM who

[13] At 487.

was, in turn, overseen by Mr Clark. The initial complaint was concluded before the second S complaint involving money in her daughter's bank account. Mr Clark had sent Ms Ramsay a two page email about the way in which the initial complaint had been handled. The outcome of that was that no action would be taken against the CSW, although S was unhappy with that outcome. Mr Pine emphasised that on 18 March 2009 Mr Clark provided the defendant with all information he had regarding the investigation he had overseen in relation to the S complaint.

[96] Before Mr Clark heard again about the S complaint on 25 March 2009, he sent S a letter on 23 March 2009 advising of the outcomes taken in respect of the earlier complaint. These included training being provided for staff and an apology made by Mr Clark to the complainant. In that letter of 23 March 2009, the plaintiff, writing on behalf of ISL, conceded to S that matters "could and should have been handled in [a] different way that would have resulted in a much better outcome for all concerned." Mr Pine submitted that there was uncertainty as to whether this concession was one by Mr Clark of his own conduct in overseeing the investigation but, in any event, the plaintiff says he was never advised of the appropriate alternative mechanism that could have been used to resolve the issues. In this regard, the plaintiff says it was never made clear to him what of his actions in relation to the situation constituted misconduct. Although the defendant did consider it inappropriate that the plaintiff referred to S's marital circumstances, his case was that this was simply in the course of recording discussions that he had with S about why her daughter may have been unhappy.

[97] To summarise the S complaint, the plaintiff says that the complaint did not disclose wrongdoing on his part in relation to those issues raised by the S complaint.

[98] Turning to the P complaint, this was received by the defendant on 17 March 2009. The complaint related to Mr Clark's handling of the potential relocation of P's daughter. When the matter was first raised with him, Mr Clark acknowledged that, with hindsight, there could have been better consultation and that he failed to follow the defendant's policy about such matters. He also advised his employer that his failure to follow the policy had occurred at a time when he was under immense pressure at work. This included the potential relocation of service users from one

property, a number of other moves of service users that needed to occur, and additional pressures brought about by the needs of a suicidal service user and of another whose father was terminally ill. Mr Clark said that these factors at least mitigated his lapse in following the policy. Mr Pine submitted that in these circumstances the plaintiff's breach did not amount to serious misconduct warranting, or contributing to, his summary dismissal. Finally in this regard, counsel referred to the defendant's Staff Policy stipulating a warning to be the appropriate disciplinary action to be taken when an employee breached such policies and procedures of which the defendant had more than 170 potentially applicable to Mr Clark's role.

[99] Turning to the L complaint which was received on 19 March 2009, this was originally lodged with the Ministry of Health about the potential move of the Ls' son from his existing accommodation. Ms Ramsay took this complaint up with Mr Clark on 25 March 2009. He explained that a consultation process was under way with the L family about the shift and that a potential property for the Ls' son's accommodation had been viewed. The defendant then sent an email to the Ministry of Health expressly acknowledging that there had been longstanding issues with the family and their expectations over service delivery. That email to the Ministry of Health confirmed that the defendant was exploring options with the family that had already been raised and that there was no intention to move their son without their consent. This email confirmed the plaintiff's understanding of what had occurred to that time.

[100] The defendant's concerns about the L situation were said to be two. The first was that Mr Clark had previously advised the L family that their son would not be moving in the near future when, two weeks later, he advised the family that their son might need to move. The second concern that the defendant had was that the consultation required under its policy had taken place initially in writing rather than face to face.

[101] Mr Clark explained that the possibility of a move was due to the complex needs of other service users so that any earlier indication that the Ls' son would not need to be moved was no longer accurate. Mr Pine submitted that the defendant

acknowledged that the L family was particularly difficult to deal with and it was for this reason that Mr Clark decided to engage in written consultation with them so that there would be a paper trail created. Mr Pine submitted that Mr Clark's actions with regard to the L family did not breach the defendant's policy but that even if it did, any breach was not serious enough to warrant, or to contribute to, summary dismissal.

[102] Turning to Mr Ward's complaint, counsel for Mr Clark accepted that he had "vented his spleen" on 30 March 2009 about Ms Ramsay's investigation of these various matters and the outcomes that were reached. Mr Pine emphasised that Mr Ward acknowledged his communication to Ms Ramsay that he was not clear about the detail of the conversations he had with Mr Clark. Counsel also emphasised Mr Clark's understanding that the discussion was confidential between two work colleagues and that he had emphasised this to Mr Ward on a number of occasions. It was submitted that such a discussion should not constitute serious misconduct warranting summary dismissal.

[103] Next are the Wellnz concerns. The defendant advised Mr Clark of these on 2 April 2009. They related to concerns that Wellnz had about the relationship between Mr Clark and its case managers.

[104] Mr Pine emphasised that Mr Clark provided the defendant with a very detailed five page response to Wellnz's concerns. He acknowledged the importance of the rehabilitation of the person concerned; denied specific allegations that he had removed the physiotherapist and psychologist, explaining that these actions had been taken by a previous case manager; advised that he had consulted fully with, and obtained the agreement of, the employee's general practitioner, Wellnz and another specialist together with vocational CSMs before moving the employee's rehabilitation placement; and questioned why matters that were then raised as concerns had not been raised before 2 April 2009 or otherwise over the previous 12 months. Counsel submitted that Wellnz confirmed that the matters that had been taken up were not in the nature of a complaint against Mr Clark but were an expression of its concerns about the management generally of the employee's ACC claim. Counsel submitted that there was no specific mention of the Wellnz concerns

in the letter to the plaintiff of 27 April 2009 which formed the basis of the decision to dismiss, although they were dealt with in some detail in ISL's case of justification for dismissal.

[105] Next, Mr Pine addressed the complaint around the alleged sexual misconduct by a service user. On 8 April 2009 the defendant asserted that Mr Clark had failed to follow its Abuse Policy by failing to notify Ms Ramsay or other authorities of an incident that had occurred during the time that he was the area manager involved. Mr Clark's response was that at the time the incident occurred, he did not consider it to be one of sexual abuse. The defendant's case was, however, that the relevant policy created rigid requirements about steps that had to be taken in all cases and that even in grey areas of sexual abuse, it was thought to be vital that it should be assessed by police and other authorities with expertise.

[106] Mr Pine emphasised, however, Ms Ramsay's concession in cross-examination that she had subsequently exercised her discretion not to report such matters to the police and confirmed that the policy did not appear to give her the discretion that she claimed to have exercised.

[107] As to the general allegation of the plaintiff's failure or refusal to follow instructions, this was first raised in the defendant's letter to the plaintiff of 17 April 2009. Mr Clark addressed this in his written response which was tabled at the investigation meeting on 21 April 2009, denying that he had ever disobeyed any instruction from the defendant and commenting that he was not clear about what it was referring to. Counsel submitted that this matter was not discussed during that investigation meeting and that Mr Clark was therefore deprived of the opportunity to respond to specific concerns underlying this allegation. In these circumstances it was submitted by counsel that it was not appropriate for such an alleged failure to follow lawful instructions to be taken into account by the defendant when deciding to dismiss the plaintiff summarily.

[108] Finally, on the question of the defendant's criticism of Mr Clark for threatening to subpoena service users, Mr Pine submitted that this was, and was said by Mr Clark to those at the meeting on 21 April 2009 to have been, as a result of the

frustration he felt about the manner in which the investigation process had been conducted by the defendant. Counsel submitted that it was, in reality, an empty and rhetorical threat because the Employment Relations Authority controls its procedures, determines from whom it wishes to hear and, on rare occasions, issues subpoenas itself. In these circumstances Mr Pine submitted that the plaintiff's threat to subpoena people should not have played much, if any, part in the defendant's decision to dismiss him.

[109] As to the contention that Ms Ramsay's continued and significant involvement as the defendant's decision maker was inappropriate, Mr Pine submitted that this would have led an objective observer of the defendant's process to conclude that she had closed her mind and was no longer able to give genuine consideration to Mr Clark's explanations, particularly those affecting the circumstances in which Ms Ramsay was personally involved.

[110] Mr Pine submitted that on a number of occasions Ms Ramsay accepted the validity of complaints and communicated this to the complainants before she had discussed them with Mr Clark whom she held responsible for the defendant's shortcomings. In relation to the S complaint, for example, Mr Pine submitted that Ms Ramsay chose not to interview the CSM who had investigated the S issues and reported to the plaintiff, chose not to interview an advocate who was neutral in the incident, and chose not to interview persons who supported S and were present during discussions about relevant matters affecting S's daughter. Counsel submitted that Ms Ramsay chose to interview only five of the 10 ISL employees who had knowledge about the complaints despite saying initially that she would do so in response to the plaintiff's advice that those persons could contribute constructively to the investigation. This was said to evidence, in a practical way, Ms Ramsay's proclivity to predetermination and to satisfy service user complainants even to the unjustified disadvantage of employees.

[111] Next, Mr Pine submitted that Ms Ramsay did not seek any input from the plaintiff into the 11 prepared questions asked of those employees during their interviews and has not subsequently provided original notes of those interviews conducted by her despite repeated requests from the plaintiff. In these

circumstances, Mr Pine submitted, an objective observer could not conclude that Ms Ramsay approached the investigation with an open mind or considered genuinely the issues put before her.

[112] In many instances, Ms Ramsay's own conduct was in issue in the complaints made to ISL. In the case of the Ward complaint, Ms Ramsay was the subject of Mr Clark's intemperate outburst to Mr Ward. Counsel submitted that despite the defendant's assertions, its Chief Executive, Mr Maden, and Human Resources Manager were not sufficiently involved in the investigation to remove the taint of lack of objectivity by Ms Ramsay.

[113] In particular, Mr Pine submitted that when Mr Clark purported to raise a personal grievance on 30 March 2009, and advised Ms Ramsay that it related to her allegedly unfair treatment of him and investigation into the L, P and S complaints, Ms Ramsay continued to investigate those allegations against Mr Clark and acted as a key decision maker in them. Counsel's submission was that a fair and reasonable employer would, in these circumstances, have ensured that Ms Ramsay stood aside from both the further investigative and decision making functions. Because the decision to dismiss Mr Clark summarily invoked these events and their outcomes, it was said that Ms Ramsay should not have continued to investigate and be the decision maker in them as well.

[114] As for Ms Ramsay's involvement in the Ward complaint, the submission is that at this stage at least, Ms Ramsay should have ceased her involvement as she was the subject matter of the complaint. Mr Pine submitted that Ms Ramsay acknowledged that this was the point at which she first contemplated dismissal of Mr Clark. Despite that, she continued to investigate issues including ones involving her relationship with the plaintiff. Three of the 11 questions asked of the defendant's employees during their significant interviews, about Mr Clark's working relationships, related directly to Ms Ramsay's employment relationship with Mr Clark.

[115] Turning to the defendant's decision making process, it is submitted for the plaintiff that Ms Ramsay was the primary decision maker. The letter of 27 April

2009 is written in the first person (by Ms Ramsay) as was the letter of 1 May 2009 confirming the defendant's decision to dismiss summarily. Mr Pine was critical of the limited extent of Mr Maden's involvement in the investigative and decision making processes which he said could not in reality have mitigated the apparently biased involvement of Ms Ramsay. Mr Pine criticised the Chief Executive's advice to Ms Ramsay that it was necessary for her to be involved in the decision making process affecting Mr Clark. This was said to be incorrect, and that Mr Maden endorsed Ms Ramsay's tentative decision to dismiss the plaintiff based on insufficient information and after an assessment which was made quickly.

[116] Counsel highlighted Ms Ramsay's concession in cross-examination that there were others within the defendant organisation who could have carried out the disciplinary investigation and had been given the authority to determine sanctions including dismissal.

[117] Turning to the strength of the case against Mr Clark warranting dismissal, Mr Pine made a number of critical submissions. He submitted that by allowing Ms Ramsay to investigate these allegations, even though her conduct was at issue in many of them, the defendant failed to carry out a sufficiently open-minded investigation. It was said to have been emphasised by Ms Ramsay's agreement with complainants and confirmation of outcomes before discussing these with the plaintiff where those affected him. Also in this regard was Ms Ramsay's election not to interview key people despite being asked to do so on the basis that they could contribute constructively to her investigation.

[118] Mr Pine submitted that Ms Ramsay claimed in cross-examination that certain people were not interviewed because her investigations were "incident specific". However, Mr Pine pointed out that she also confirmed that one of the pre-prepared questions was of a general nature, as were the 27 April 2009 letter's grounds for dismissal that the defendant had lost general basic trust and confidence in the plaintiff. The plaintiff's case is that it was unfair that at the point that the defendant's concerns changed from being incident specific ones to more general ones, it failed to broaden the scope of its investigation as a fair and reasonable employer would have done.

[119] Turning to the alleged failure by the defendant to consider alternatives to dismissal, the plaintiff relies on the judgment of the Court in *Secretary for Justice v Dodd*[14] as authority for the proposition that this should have been done by a fair and reasonable employer.

[120] More particularly, the plaintiff says that the defendant's own policy sets out the procedure for dealing with unsatisfactory performance and conduct which is to be followed when an employee is found to have breached its policies. This provides expressly that "Most performance or disciplinary matters are dealt with through a progressive process aimed at correcting the problem and restoring good workplace relations". Mr Clark emphasised that at all relevant times he expressed his wish to continue in the defendant's employment. He is said to have acknowledged that he needed to do things differently and advocated that the appropriate sanction in all the circumstances was a final warning, together with steps to ensure that there could be no repetition in the future. The plaintiff emphasises that he made a number of specific suggestions as to how this might be achieved including by external supervision, a more formal use of behavioural services personnel, more regular meetings focusing on him and his development, and reviews of his performance to be conducted by the defendant.

Decision of challenge

[121] The several distinct grounds which led to the defendant's overall conclusion of a loss of trust and confidence in Mr Clark were themselves a combination of performance and misconduct issues. In the case of the former, the defendant needed to establish that it complied with its own processes for competence and performance issues. It had to establish that it addressed those performance issues as such, that it assisted Mr Clark to improve his performance, and that it was only after a repetition of them or reasonably associated issues, that it was able to come to the conclusion that it had lost confidence in his ability to improve his performance and could justifiably dismiss him for that reason.

[14] [2010] NZEmpC 84 at 117.

[122] In respect of the misconduct issues, the same approach to that taken to performance or competence issues was appropriate. That is because the relevant policies make no distinction between the two broad grounds that may lead to a dismissal. First, the defendant should have complied with the rules and processes it set for itself and publicised amongst its staff that it would follow in circumstances of alleged misconduct. It could not have been justified in dismissing an employee, particularly on grounds of that employee's non-compliance with other rules and procedures, if it did so in breach of its own rules and procedures about how to deal with these sorts of issues. Next, because it specified and classified certain misconducts in its rules as either serious or otherwise, it was obliged to analyse objectively those allegations of misconduct against Mr Clark that it concluded had taken place. Its categories' definitions were non-exhaustive, but the examples in each give guidance as to how other misconduct should fairly and reasonably be categorised. The defendant specified a process for dealing with each sort of misconduct that it was bound in fairness to follow.

[123] The defendant was entitled to, and did, insist upon a highly prescriptive system of management of its operations. It was, therefore, justified in taking issue with what I have concluded were Mr Clark's non-observance of these policies and his substitution of ones of his own of a more commercial sector nature which ISL regarded as inappropriate. The defendant cannot, therefore, be criticised for insisting upon strict adherence to its policies.

[124] Such an approach, however, cuts both ways, both contractually and as a matter of fairness and reasonableness. ISL was bound to observe the detailed procedures it set for itself and other staff. It failed to do so in the way in which it dealt with Mr Clark's performance failings. A fair and reasonable employer would have treated many of the circumstances for which Mr Clark was dismissed as performance issues and would not have lumped them together with misconduct instances in reaching a decision that it had lost trust and confidence in him, so justifying his dismissal.

[125] Several of the justifiable issues that ISL had with Mr Clark were, although they arose in quick succession if not simultaneously, nevertheless work performance issues rather than misconduct issues, let alone serious misconduct ones.

[126] It was significant that Ms Ramsay conceded that at no relevant time in her investigation of the issues involving Mr Clark and her decision to dismiss him, did she ever refer to the company's Human Resources Policy which mandated not only the processes to be undertaken by the employer but also the outcomes. It is surprising that Ms Ramsay failed to do so, and more so because she was guided from time to time by the defendant's Human Resources Manager (Graeme Maden), although decision making was left with her. Had she given consideration to, and applied, the Human Resources Policy and its procedures, and viewed the issues with Mr Clark objectively in that context, a fair and reasonable employer in all the circumstances would not (indeed could not) have concluded that his summary dismissal was warranted at the time it occurred.

[127] Although the policy's separate lists of conduct by employees, as either misconduct or serious misconduct, are not exhaustive, they nevertheless do guide the categorisation of any particular conduct not referred to expressly in either list. Not only were the employer's concerns with Mr Clark's performance of his work not of a serious misconduct nature when set alongside the policy's specified misconducts, but indeed they fell directly into categories of the lesser misconduct examples identified.

[128] That was illustrated by the difficulties Ms Ramsay had in identifying her concerns about Mr Clark as specified serious misconduct when she was asked to do so in cross-examination.

[129] It is not sufficient for the defendant to plead that its dismissal of Mr Clark was nevertheless justified because it had lost trust and confidence in him. Such a claim must be assessed objectively and the existence of even several work performance issues, which the company had bound itself to address in a specified manner but failed to do, cannot justify objectively a loss of trust and confidence in the employee. Having bound itself to a prescriptive and graduated warning process for performance issues, the defendant, as a fair and reasonable employer in all the

circumstances, cannot avoid that obligation and say instead that it was justified in dismissing because of a general loss of trust and confidence.

[130] The statutory test in the form of s 103A of the Act that was in force at the time required the defendant not only to establish that summary dismissal was what a fair and reasonable employer would have done in all the circumstances at the time, but also to establish that how the defendant went about dismissing Mr Clark was also how a fair and reasonable employer would have done so in all the circumstances at the time. It is simply not possible to accept that a fair and reasonable employer in the circumstances of ISL at the time would have disregarded, substantially and in many respects completely, the contractual processes it imposed upon itself in these circumstances. That must have caused Mr Clark's dismissal to have been unjustified under s 103A.

[131] As I have interpreted cls 6.2 and 6.3 of Mr Clark's individual employment agreement, ISL was only entitled to dismiss Mr Clark summarily (that is terminate his employment without notice) in case of "serious misconduct". Mr Clark was dismissed summarily. The defendant's reasons for dismissal were that it had lost trust and confidence in him. There was no reference to serious misconduct on his part.

[132] In these circumstances, cl 6.2 of his individual agreement entitled Mr Clark to either eight weeks' notice of dismissal or to a payment in lieu of that, neither of which he received. It may have been open to ISL to categorise several instances of misconduct, which did not themselves constitute serious misconduct, as serious misconduct under cl 6.3. It may have been open to ISL to conclude that the number, nature and repetition of a combination of performance and misconduct issues caused it to lose trust and confidence in Mr Clark's continued performance of his work. But at most, the sanction for that contractually was dismissal on notice and not summary dismissal. For that reason, also, ISL's dismissal of Mr Clark was unjustified.

[133] Why ISL did not resort to its Human Resources Policy's provisions to deal with its dissatisfactions about Mr Clark's work performance and conduct was not explained in evidence. The fact is, however, that it should have done so but did not.

In particular, ISL having pointed out to Mr Clark, as it did, its "areas of concern" and having "given an opportunity to explain and correct the problem", it failed then to follow the prescriptive and progressive warning process that may have led justifiably to Mr Clark's dismissal.

[134] The formal written warning procedure was not a formality for its own sake. For example, written warnings were required to be time-limited so that, as part of an incentive to improve performance or conduct, an employee could be confident that a time-expired warning could not be taken into account by the employer in most cases if the policy was again resorted to. In this case, however, the defendant considered the totality or at least the generality of Mr Clark's employment history in reaching its decision to dismiss him. Because the defendant did not follow its structured warning process, it is not possible to say whether, if it had been followed, Mr Clark would not have benefited from it. The fact is, however, that it was not and it would not be fair and reasonable to allow the defendant to benefit by its own breach of its own policies in these circumstances.

[135] Ms Ramsay's role is the second broad ground of challenge to the justification for Mr Clark's dismissal.

[136] Ms Ramsay was Mr Clark's immediate manager and so was properly responsible for his work performance and conduct. There can be no criticism of the defendant over Ms Ramsay's early stage dealings with complaints made about these aspects of Mr Clark's employment. Indeed, she dealt with these thoroughly and professionally. However, difficulties arose for the defendant where Ms Ramsay became, in effect, a complainant and was herself the subject matter of Mr Clark's at times intemperate and trenchant criticism. This was in circumstances where it is said that she ought to have stepped back from the decision making role, which included Mr Clark's summary dismissal.

[137] For the defendant, it is said that Mr Clark, although represented by a solicitor during the process that led up to his dismissal, did not complain about Ms Ramsay's personal involvement until after that dismissal. That does not, however, affect the fairness and reasonableness of the defendant's investigation of allegations that were

determined to be sufficiently serious that they led to the plaintiff's summary dismissal. Put another way, would a fair and reasonable employer, in all the circumstances at the time, have continued to allow Ms Ramsay to have the principal responsibility for making the decisions that led to Mr Clark's summary dismissal?

[138] ISL and its parent body, IHC, is a very substantial organisation, albeit a social service, not-for-profit entity. It employs thousands of employees throughout New Zealand and has a sophisticated managerial structure including significant human resources and employment expertise. It has, and encourages, standardised procedures across the country and senior managers are expected to communicate with, and support, their colleagues in the organisation. No reason was advanced as to why it may have been difficult or even inconvenient for a manager of equivalent standing, or another senior manager with relevant expertise, to have taken over the process that resulted in Mr Clark's summary dismissal, when the extent of Ms Ramsay's own involvement in the complaints and allegations became apparent.

[139] Ms Ramsay conferred with, and otherwise involved, IHC's General Manager for Human Resources and, on occasions, its Chief Executive. However, it is clear from the evidence and the documents in particular that Ms Ramsay was the person within ISL who made the significant decisions leading to Mr Clark's dismissal and made the decision to dismiss him summarily.

[140] Despite what I accept was an absence of protest by Mr Clark before his dismissal, I conclude that a fair and reasonable employer would not have permitted Ms Ramsay to continue to occupy the conflicted roles of complainant and decision maker in relation to Mr Clark's ongoing employment. Although it is important for senior managers to take responsibility for significant decisions within their areas of responsibility, long before Mr Clark's summary dismissal this had become a situation in which it was appropriate for another representative of ISL, unlike Ms Ramsay who was involved personally in the complaints, to assume the onerous responsibilities which led to Mr Clark's dismissal, and to have been seen to have done so.

[141] Although, on its own, this error may not have caused Ms Clark's dismissal to be unjustified, when combined with the failure by the defendant to adhere to its own rules, it is an important element in deciding that summary dismissal, and more particularly how that was gone about, was not how a fair and reasonable employer would have dealt with what were clearly significant unsatisfactory issues with Mr Clark's employment.

[142] I turn finally to alternatives to dismissal. This third broad ground of challenge to dismissal justification relies on what the plaintiff says is the absence of consideration, or the absence of sufficient consideration, by the defendant of alternatives to summary dismissal.

[143] To the extent that I have already concluded this, I would agree that the defendant did not apparently give any, let alone sufficient, consideration to either dismissal on notice or even to allowing Mr Clark an opportunity to resign. That said, my own assessment of the evidence is that it would be very unlikely that he would have agreed to a face-saving resignation.

[144] Except, however, to that limited extent, I do not accept this ground of absence of justification. The evidence shows that other alternatives to summary dismissal (including those put forward by Mr Clark and his lawyer) were considered but rejected by the defendant. Assuming (for the purpose of this submission but which I do not accept ultimately) that Mr Clark was appropriately at risk of summary dismissal, the alternatives proffered by him were unrealistic. They would have involved significant managerial rearrangements within ISL. Mr Clark's role in the Southland branch was so senior and geographically removed from the defendant's more senior management structure, that its alternative options would have been very limited or probably non-existent, even without a consideration of the likelihood of their success given Mr Clark's track record. In that sense, the alternative of dismissal on notice (which was neither proposed nor apparently considered by the defendant) may have been the only realistic alternative if the decision to dismiss Mr Clark had otherwise been justified which, as I have found, it was not.

Remedies for unjustified dismissal

[145] Although Mr Clark sought reinstatement before the Employment Relations Authority, he abandoned this remedy and now seeks only monetary compensation for his losses.

[146] Regrettably, although not uncommonly these days, the evidence presented in support of claims to substantial remedies (lost remuneration from the date of dismissal to the date of hearing, $30,000 distress compensation, and loss of private use of a motor vehicle) was minimal or even non-existent. Indeed, Mr Clark's claim for remuneration lost as a result of the grievance was compromised by evidence that he was so confident of being reinstated in his position after dismissal that he re-mortgaged his own home and holidayed overseas for about two months. Despite claiming in evidence that this was necessary to alleviate the psychological effects of his dismissal, he provided only a brief doctor's letter stating that Mr Clark was "seriously distressed due to dismissal from his employment" and prescribing medication for anxiety/depression and lack of sleep. There was minimal evidence to support a claim for what is a substantial sum of distress compensation ($30,000). Mr Clark's domestic partner gave some evidence supporting the claim for this compensation, but a combination of the absence of detailed evidence and Mr Clark's culpable conduct that contributed significantly to the circumstances giving rise to his dismissal, mean that only a modest award can and should be made under s 123(1)(c)(i) of the Act.

Contributory conduct considerations

[147] Where the Court determines that an employee has a personal grievance and in deciding both the nature and extent of the remedies to be provided, s 124 of the Act requires it to consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance. If those actions so require, it must reduce the remedies that would otherwise have been awarded accordingly.

[148] Mr Clark's personal grievance was his unjustified dismissal. The situation that gave rise to that was his work performance and his conduct over the period of

about 13 months that he was employed. Not all of Mr Clark's performance or conduct was blameworthy, as the defendant accepts. There were a number of positive aspects to his managerial role within ISL. Even some of his performance or conduct which was criticised by the defendant cannot fairly be said to have been blameworthy and thus able to have been taken into account under s 124. For example, Mr Clark's early placement of advertisements for staff, which did not follow the employer's strict guidelines for these, were an enthusiastic attempt to bring a more commercial and less staid approach to the recruitment of staff. Mr Clark was reprimanded for doing so and accepted ISL's entitlement to insist upon a standardised form of advertising even if he did not agree with it. There are instances of other mistakes that Mr Clark made, both in the performance of his work and in his conduct towards others, that should not be regarded as blameworthy and thus able to be the subject of reduction under s 124.

[149] However, particularly as regards his conduct towards Ms Ramsay and others within the IHC organisation and especially in the latter part of his employment, the defendant is correct that there were both repeated and serious instances of unacceptable behaviour by Mr Clark which should be the subject of remedy reduction under s 124. These include, although not comprehensively or exhaustively, Mr Clark's policy corner cutting, his disparaging remarks about his managers, his continued management-focused rather than service user-focused strategies, and his generally divisive rather than constructive conduct as the professional leader of a range of staff undertaking difficult and sensitive work.

[150] The remedies to which Mr Clark might otherwise have been entitled for unjustified dismissal will be reduced accordingly.

[151] I have concluded that these can be justly reflected first in limiting Mr Clark's compensation for lost remuneration to the statutory minimum of three months' remuneration on the basis that I am satisfied that this sum would have been less than the loss of income resulting from that dismissal. No greater compensation for lost remuneration can be awarded because of Mr Clark's failure or refusal to mitigate his losses.

[152] Such was the level of contributory conduct that this three month remuneration compensation should be reduced by one third. Although there is some evidence that Mr Clark had some private use of a company motor vehicle, sufficient detail to be able to put a value on this is lacking in the evidence and to do so would be speculative and unreliable.

[153] Accordingly, I fix remuneration loss compensation by reference to Mr Clark's annual salary at the time of his dismissal which was $75,000. The plaintiff is entitled to compensation for lost remuneration of $12,500.[15]

[154] Likewise reflecting Mr Clark's significant contribution to the circumstances leading to his dismissal, I fix compensation under s 123(1)(c)(i) of the Act, which would otherwise have been more, at $3,000.

[155] Pursuant to s 183(2) of the Act, the Authority's determination (including its determination on costs) is set aside and in substitution I find that the plaintiff was dismissed unjustifiably and award the remedies set out above.

[156] The plaintiff may be entitled to costs in both the Authority and on his challenge. If this question cannot be agreed between counsel within the period of two months from the date of this judgment, application may be made by memorandum for these to be fixed with the respondent thereto having the period of one month within which to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 2 pm on Friday 16 August 2013

[15] Two thirds of three months' remuneration at the rate of $75,000 per annum.