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20 March 1995

CONFIDENTIAL

FROM: CITY MANAGER

TO: MAYOR AND COUNCILLORS

PUBLIC EXCLUDED **Section 7(2)(g)**

EMPLOYMENT COURT JUDGMENT CIVIC CHILD CARE CRECHE

Further to my memorandum of 20 March, attached please find Buddle Findlay's (Tom Weston's) report on the Interim Judgment together with the Interim Judgment.

Mike

Mike Richardson
CITY MANAGER

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CCC717480

21 March 1995

CONFIDENTIAL

The City Manager
Christchurch City Council
PO Box 237
CHRISTCHURCH

Attention: Mr Mike Richardson

Dear Sir

Civic Childcare Centre - Employment Court

1. You have asked for a short report for distribution to Councillors in confidence. As I understand it, it is intended that this report be circulated together with the decision of the Employment Court dated 16 March 1995.

2. The decision is described as an interim judgment. This terminology is very curious. It is not an interim judgment strictly speaking because it finally determines the remedies that were sought by the Applicants. In that sense, it is a substantive judgment. Pursuant to Section 135 of the Employment Contracts Act the Council has a right of appeal on a point of law. Such appeal is made by giving notice of appeal within 28 days after the date of issue of the decision and in this case, that must be from 16 March 1995.

3. Nevertheless, the Judge has taken the unusual step of giving what he calls "skeletal reasons" for his decision and has said that he will issue a much fuller judgment in due course. While it is known for Judges to issue judgment and then deliver their reasons for judgment later, it is extremely unusual for a Judge to give judgment together with interim reasons, and then provide a more detailed account of those reasons at a later date. In fact, there have to be real doubts that the Court has jurisdiction to do this but I have not had an opportunity of giving it any consideration. For all that, and if the matter is appealed, I imagine that the Court of Appeal would find that this was a curious method of delivering judgment.

4. At the very least, this method of delivering judgment means that the Council is forced to decide on the issue of appealing (or not) in something of a vacuum. Normally, of course, the 28 day period would run from the date of delivery of judgment together with the reasons for

that judgment and the party concerned can carefully look at that judgment and make an informed decision. Here, we may not have that luxury and it may be necessary to file a Notice of Motion on Appeal simply to preserve the position while we wait for the reasons to be given. Obviously, and if the Council does decide to appeal, this will have to be kept under review over the next few weeks.

5. Because the judgment is expressed to be interim it is difficult to provide you with any definitive advice in relation to its contents. While my following remarks must be provisional, I comment as follows:

   (a) The interim judgment effectively makes no reference to the suspension of the licence by the Ministry of Education. As a result of that suspension the creche was going to close in any event and there is no way, in all the circumstances, that it was likely ever to reopen again.

   (b) The Court of Appeal has stated that in redundancy situations the Employment Court's only role is to examine whether or not redundancy is genuine. For reasons that are not particularly clear, the Court has concluded that this was not a redundancy but in doing so it appears to have breached the test set out in the Court of Appeal decision in Hale. However, until we receive the final reasons for judgment I cannot be certain that this is the approach taken by the Judge.

   (c) For all that, the Judge seems to have assumed that the suspension of the licence amounted to the making of "allegations" and that the Council dismissed the employees on the basis of those allegations. That is completely contrary to the evidence but at this stage the Judge has not dealt with it in his interim decision.

   (d) The amount of compensation awarded to the First and Second Applicants is extraordinary and well in excess of any previous authority. In the Devlin case the Court of Appeal reduced the amount of compensation that the Employment Court had awarded in that case. There, the Employment Court had awarded a much lesser amount than has occurred here and the Court of Appeal said that in so doing it had erred in law. Once again, we do not have a full set of reasons but it would appear that such an argument is open here.

   (e) The Court has dismissed our argument about the indemnity provision, describing it as "ingenious". What the interim judgment does not mention was that this argument was based on an English House of Lords decision which has been adopted in New Zealand by the High Court. On that basis, it is difficult to see how it can be characterised as "ingenious".

6. The result is extremely disappointing and is, I believe, quite against the weight of the evidence. That, of itself, can amount to an error of law in some circumstances. For all that, the Judge will be aware that he is susceptible to challenge on matters of law only and he will be endeavouring to make findings of fact that will bind the Council on appeal. For that reason, if no other, and if the Council does decide to appeal, it is important that there are no public comments upon the interim judgment that may allow the Judge to "patch up" any gaps that he has left.

7. As a matter of law, I believe that the interim judgment reveals sufficient flaws in its reasoning as to amount to errors of law. Consequently, and as things stand at the moment, I believe that the Council has proper grounds upon which to appeal should it decide to do so. I

recommend that if it decides to appeal then we hold off filing the appeal as late as possible within the 28 day period so that we can give consideration to the more detailed reasons that I hope will be forthcoming within that time frame.

Yours faithfully
BUDDLE FINDLAY

T C WESTON
Partner

CEC7/95
W48/94

IN THE EMPLOYMENT COURT
WELLINGTON REGISTRY

IN THE MATTER of personal grievances

BETWEEN Gaye Jocelyn Davidson, Janice Virginia Buckingham, Deborah Janet Gillespie, and Marie Keys

First Applicants

AND A
B
C
D
E

Second Applicants

AND F

Third Applicant

AND [illegible], and [illegible]

Fourth Applicants

AND the Christchurch City Council

Respondent

AND BETWEEN G

Applicant

AND Christchurch City Council

Respondent

Court: Goddard CJ

Hearing: Christchurch
27 and 28 February, and 1,2, and3 March, and 6, 7, and 8 March 1995

Appearances: Mr G K Panckhurst QC and Mr H D P van Schreven, Counsel for First, Second, Third and Fourth Applicants
Mr P D Lawson, Advocate for Applicant
Mr T C Weston and Ms J Appleyard, Counsel for Respondent

Judgment: 16 March 1995

INTERIM JUDGMENT OF THE CHIEF JUDGE

At the conclusion of the eighth day of the hearing of the case, I adjourned it for a further eight days until today saying that I would deliver judgment orally in Court unless I had sooner issued it in writing. I sounded a *caveat*, mentioning that this forecast was subject to my sitting commitments in Wellington in the intervening week remaining as light as I then understood them to be. As it has turned out, I have been called upon to sit on other cases almost every day since By the end of the eight days of the hearing I had formed a very clear view of the merits of this case. From my further consideration of it since, I have come across nothing that has caused me to waver from that view. I do not think it right to postpone announcing the conclusions I have reached just because I am not yet able to state full reasons for those conclusions. The events with which this case is concerned are already more than two and a half years old. No-one is to blame for the time that has necessarily elapsed before the case could be made ready for trial. That is all the more reason why its decision should not be avoidably delayed I have therefore decided upon a compromise between the two alternative possible courses of action that I mentioned a week ago. In this interim judgment I propose to declare the result, giving only skeletal reasons, and in due course will issue a much fuller judgment stating comprehensively my reasons for each conclusion reached, including an account of the evidence given and the arguments advanced. The exercise of preparing such a judgment is already well advanced.

The case before the Court consists of the personal grievances of 13 applicants who, at the beginning of the last quarter of 1992, were employed by the Christchurch City Council in the council's child care centre known as the Civic Creche. Eleven were child care workers and two were cleaners. Their grievances arose at half past five on the evening of 3 September 1992 when Mr J H Smith, the City Manager of the Christchurch City Council, addressed a hastily summoned meeting of the staff of the creche. Also in attendance was Mr P D Lawson, the

Secretary of the Southern Local Government Officers Union, the representative at tne time of the chilo care workers.

Mr Gray told those assembled that the Ministry of Education had withdrawn the council's licence to operate the creche because the creche no longer complied with the Early Childhood Regulations. As will appear, this statement does not tell the whole truth. Mr Gray went on to explain that the creche would not re-open, that all the staff were dismissed for redundancy with four weeks' pay in lieu of notice but otherwise with immediate effect, that there could be no question of redeployment elsewhere in the council's organisation, and that such of them as were full time employees would be entitled to redundancy compensation in accordance with the formula in the collective employment contract. Mr Gray handed out a written notice containing the same information to most of those present (he did not have enough copies to go around), and then left. While he was still addressing the staff, or soon afterwards, a locksmith began to change the locks on the doors. He told the staff they could return the next day to collect their belongings When they did so, police who were conducting a search of the creche sent them away.

The truth of the matter was as follows. Between 1986 and 1991 the civic creche employed on its staff a number of women. but also a man called P H M Ellis. A complaint about his behaviour towards a child was made by a parent in late 1991 It was made in the first instance informally to the supervisor of the creche, the applicant Davidson, who immediately sought advice from appropriate council officers as to how to handle the situation and, as a result, they had a meeting with the complainant parents, at the conclusion of which it was left to the parents to make a formal complaint in writing to the council so that it could act upon it, and also to complain to the police if they saw fit The parents did complain in writing and shortly afterwards a structured meeting was conducted by the council, resulting in the employee being suspended The police announced after some weeks that they had no evidence of any offence committed by P H M Ellis, and volunteered the opinion that he was plainly unsuited to returning to work with children, some of whom, the police said, appeared to be scared of him. However, the letter of complaint to the council from the parents was dealt with as a formal complaint pursuant to the appropriate provisions of the collective employment contract. This was confirmed by Mr Gray and also by Mr Lawson when he gave evidence. He argued that this showed that the council knew what it was obliged to do when it received a complaint. Early in 1992, Mr Gray terminated the employment of P H M Ellis. I am not concerned with whether that was a justified action at the time, but note only that it took place It is, of course, quite possible for a dismissal for serious misconduct to

be justifiable even if the employee's action does not lead to a criminal prosecution, or does so but ends in an unsuccessful one: *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd* [1986] ACJ 462. It has been held that it is *"not necessarily wrong"* to dismiss an employee before guilt is established in a competent Court: *NZ Bank Officers IUOW v ANZ Banking Group Ltd* [1981] ACJ 225.

Police inquiries, including evidentiary interviews of children, continued throughout 1992. As a result, P H M Ellis was first arrested on 30 March 1992 on a variety of charges that he had committed sexual offences against children who had been at the creche in 1991 and earlier years. Additional charges were laid throughout the 1992 calendar year but, as the applicants stress, none of these related to a child currently at the creche As is now a matter of public record Ellis was, upon the hearing of depositions against him, committed for trial to the High Court where, in 1993, a jury convicted him on a substantial number of counts of sexually abusing children at the creche before 1992. He was sent to prison for 10 years.

The suspension of P H M Ellis from employment caused a sensation; and this, together with the information given to parents by the police and the Department of Social Welfare soon afterwards, no doubt shook the confidence of a significant number of the parent body in the ability of the civic creche to continue to care for their children. His later arrest probably added to this negative image, but at the same time must have been reassuring to those parents who assumed that there was only one culprit and that he had been safely removed from the scene. In any event, in the months following the arrest, confidence in the civic creche was restored and new parents were again attracted to use its services, notwithstanding the very high profile in the news media given to the reportage of recent events.

It is against a background of things settling down to a degree of normality that on 1 September Mr Gray was asked to receive at short notice a deputation from the Ministry of Education, the Department of Social Welfare, and the police. This meeting took place early on 2 September.

A police inspector revealed to Mr Gray that there were ongoing police investigations concerning the creche. He did not, and when pressed would not, say what these investigations were about. However, from the nature of the meeting and the persons present Mr Gray assumed that the investigations involved child abuse by staff other than P H M Ellis, and currently in progress. The inspector said that because there were ongoing police investigations, the discussion that was to occur

at the meeting was to be kept in the strictness confidence, and even the Mayor could not be informed. Before going on, the police required Mr Gray to agree to their requirement that the information remained confidential. They also demanded similar undertakings from the other council officers present. Mr Gray agreed, and the others naturally followed suit. The police then went on to tell him that, as a result of the ongoing investigations, they were satisfied that the children at the creche were considered to be in serious danger and as a result all those present at the meeting wanted the creche closed that very day, not later than 1pm. However, the police said that for reasons of their own they could not share any details of the investigation with Mr Gray or the council.

The next step taken by those present was to remind Mr Gray that the centre was able to operate only by virtue of a licence issued by the Ministry of Education. At this point the Ministry of Education representatives disclosed that they knew something more of the nature of the investigation but were not able or prepared to tell Mr Gray what they knew. However, it was obvious to Mr Gray that their concern was with staff members in addition to P H M Ellis for, in no other way, could children have been in immediate serious danger. He did not know which staff member or members were under suspicion, nor how many. Very properly, he explained to the police and the Ministry that it was difficult for him to act if he was not to be told anything of the details. Nevertheless, they refused to disclose anything.

Then the police said that their preferred course of action was for the Ministry of Education to withdraw the creche licence, and to do so that day. The police also said that an alternative course, if their preferred course was not available, would be to lay an information against the Christchurch City Council in the Children's Court.

I have no difficulty in believing Mr Gray's evidence that he now finds it difficult to recreate the feeling of concern that he was experiencing by this stage.

Mr Gray, despite his qualms, surrendered after securing a day's grace. An arrangement was made to formalise the matter the following morning by means of an exchange of letters. At a short meeting that may have lasted only five minutes, Mr Bede Cooper, Deputy Manager (South Island Operations) of the Ministry of Education handed Mr Gray a letter of suspension; Mr Gray in turn handed him a letter saying that the council had no representations to make concerning cancellation; whereupon Mr Cooper gave Mr Gray a further letter cancelling the licence. In the afternoon of 3 September Mr Gray notified the respective unions and

the creche supervisor that an urgent staff meeting would be held at 5.30 that evening.

Mr Lawson protested at that staff meeting that the way Mr Gray was proceeding was contrary to the collective employment contract binding on the council. Mr Gray conceded in evidence (but not at the time) that he was mistaken in not giving preliminary notice of a redundancy situation to the union but he believed that he was prevented from doing so, and from answering any of the questions put to him at the meeting or from giving any more accurate information than he did, because he had earlier been sworn to secrecy by the police.

Later that evening Mr Gray telephoned Mr Lawson and said that he had given further thought to the latter's argument that Mr Gray had not complied with the redundancy provisions in the collective employment contract. Mr Gray said that upon reflection he agreed that Mr Lawson's was the better view, and undertook to issue an amended notice first thing the following day. He promised that it would specifically say that redeployment and/or relocation was being considered. This he duly did. The dismissals were replaced by a suspension on pay for two weeks. At the same time Mr Gray also wrote to the two unions concerned formally giving notice of an impending redundancy situation. This specified that all the staff employed at the Civic Childcare Centre were surplus, and that the surplus needed to be discharged within two weeks from 4 September 1992 As a result of further discussions, Mr Gray issued yet another amended notice on 7 September 1992. This extended the suspension on leave with pay until 22 October 1992.

The employment of the staff did come to an end on 22 October 1992 when the employees were dismissed for the stated reason of redundancy. Redundancy payments were made under the collective employment contract but in the certain knowledge that the dismissals would be challenged, Mr Gray agreed that the payment made to them need not be accepted as full and final settlement but only on account. During the intervening period two members of the staff were redeployed to positions in other departments of the council - these positions carry approximately equal pay but are not concerned with the child care function.

It is common ground that the attempt to dismiss the employees on 3 September 1992 for redundancy by means of paying them four weeks' wages in lieu of notice was a breach of the collective employment contract. As the full Court of this Court made clear in *Unkovich v Air NZ Ltd* [1993] 1 ERNZ 526 to proceed in this way, that is by truncating the employment abruptly by a resort to a payment

purportedly in lieu of notice where there exists a contractual scheme for dealing quite differently with redundancies, is both a breach of contract and a breach of the wider duty of trust, confidence, and fairness lying upon an employer in such circumstances. The corrective action taken by Mr Gray is available in mitigation but could not undo the damage done by his revelations to the staff, to parents and to the world at large (by means of media release) on 3 September. Except to a limited and artificial extent, those revelations ruled out the possibility of any real attempt to place the employees elsewhere in the council's workforce.

At the heart of this case is the whether Mr Gray handed in the licence because of a business decision no longer to operate the creche, or whether he did so as a means to the end of dismissing employees who were suspected of a grave dereliction of duty of which, however, he had no evidence. The respondent faces the problem that confronted the employer in the famous case of *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378 where, although the employer had a number of complaints against their employee, it decided to take what was perceived to be the safer course of dismissing him by the period of notice specified in his contract. The Court of Appeal held that the employer could not shelter behind the contractual provision when its real reason was dissatisfaction with the employee as to his discharge of his duties into which it had not properly inquired. Similarly in the present case, the council made no inquiry at all, and it has maintained stoutly throughout that it did not receive any allegation or complaint about any employee. It is true that the allegation was directed at the employees of the creche generally, and that the complaint was unspecific as to date, place, and circumstances. However, the number of employees was small - 11 excluding the cleaners, 13 including them - and the nature of the allegations was reasonably specific, and it was plainly their commission currently that was alleged. I do not see how the respondent can say that it had received no complaint within the meaning of the contract. It had plainly received a very serious and a very pointed complaint.

Mr Gray pointed not only to the risk to the children but to the criticism that the council might sustain if he refused to heed the police warnings and they turned out to be prophetic. However, Mr Gray had absolutely nothing to go on except the word of two police officers and Ministry and departmental officials that they were satisfied. As a body of jurisprudence shows, it was for him to be satisfied of the facts before taking a step that could and did destroy the lives and the careers of council employees. He was not entitled to substitute the opinion of a police officer for the council's own enquiries and assessment: *Wellington Clerical Workers IUOW v Anderson & Son* [1979] ACJ 333 is an early specimen of a line of cases to this

effect. In the two years and six months since, nothing has emerged to show that any of the applicants was guilty of any untoward activity towards any child, let alone that such activity was occurring in 1992.

On those facts, I hold the dismissal on 3 September 1992 of the 13 applicants to have been unjustifiable for two reasons, either of which is sufficient to lead to this conclusion on its own. The first reason is that the council has not discharged the burden of proving that redundancy, and not untested suspicion of serious misconduct, was the true reason for the dismissal. The second is that even if redundancy had been the dominant reason, the council was not entitled to move at once to dismissal in disregard of its contractual obligations in the event of redundancies arising: *Unkovich.*

A month after the closure of the creche, the police arrested the four first applicants. They were acquittted without having to stand trial but only after a most harrowing experience. They were charged with repulsive crimes against small children and, to make matters worse, if possible, they were charged jointly with Ellis and with each other. The preliminary hearing lasted some 12 weeks and cost the applicants their life's savings. As was well said in *Wellington Clerical Workers IUOW v Anderson & Son* the Court is *"unable to hold that the activities of the police, whether they are justifiably criticised or not, can be inflicted upon the respondent"* - at any rate where, as here, the respondent has not provided the inspiration for the prosecution. However, there is something in the applicants' complaint that the police may have been more circumspect if the council had not abandoned its employees. The other members of the staff of the creche, those who were not prosecuted, had experiences almost as bad, but again not all that they experienced can be laid at the council's door. The council is, however, answerable for the loss of remuneration, loss of employment and career, and for the distress occasioned by its actions. It is also responsible for the branding of the applicants as child molesters by the council's poor handling of the situation. Each grievant must be considered separately, but one or two general observations need to be made.

First, there is no sum of money that can compensate the applicants for all the horrendous consequences of their dismissals. Next, there is no suggestion by the council that any of the applicants ever did anything culpable such as to require the remedies to be reduced on account of the applicants' conduct. Thirdly, the council is entitled to credit for the payments made on account and for its offer, whether taken up or not, to pay for counselling, and for its expressions of regret, however belated. In two cases, there has been redeployment and no income loss (but this conclusion

is without prejudice to other current discussions about the correct calculation or status of these applicants' current wages). The parties seemed to have difficulty in arriving at precise figures of earnings and final payments. I do not propose to be drawn into making arithmetical calculations except in the last resort, if the parties cannot agree. I will just state the principle applicable to each calculation. Whatever the applicants were paid by way of pay in lieu of notice and compensation for redundancy must be ascertained and deducted from the figures below. Fourthly, Mr Gray said that he listened to their evidence with accumulating sadness. That is an astute and a sensitive observation. All that the Court can do at the end of the day, by tempering compensation with moderation, is to hit upon figures that will go some way towards recognising without belittling the justice of the applicants' grievances. A feature of this case for several applicants is the loss, as a result of their personal grievances, of the investments they had made in careers for which they had trained and which they had practised for several years. The Court can value that loss in only the most general way. In making my assessment of lost income, I have taken into account in a broad way earnings from other sources since dismissal, so no further deduction on that account needs to be made.

In awarding remedies, I find it logical to approach gradually and to start with the two part-time cleaners because they will be at the lower end of the scale or in the lowest of several broad bands of hurt sustained. The general perception correctly was that as after hours cleaners they had no contact with the children. No mud should stick to them. That is why I did not prohibit publication of their names. Miss D. Kemp is a university student. She worked 1½ hours daily, receiving $72 per week. It made the difference between being comfortable and being in debt. She was at the meeting and was upset by the abrupt loss of her job which she had held for over five years and has been unable to replace. I award her loss of income for two years and compensation for distress $6,000. For .... the cleaning job was secondary employment. He earned $60 per week. The money meant a lot to him, especially as his main employment was seasonal. He hoped to keep his job until retirement age - then another nine years away, but he had unspecified injury problems. He was not at the meeting, so the blow was delivered more softly to him. I award him loss of income for two years, compensation for distress $2,500.

Next I come to the two employees who, after being initially dismissed, were redeployed by the council. They have suffered no major loss of income so far but each has lost a career for which she trained. The applicant named as third applicant in the proceedings run by counsel had devoted nine years to child care training and work. It was her preferred source of employment. She was employed full time at the

creche in the nursery end. She was at the meeting and after Mr Gray's announcement went into deep shock. Later she felt a physical pain of withdrawal from the children. Although a mother, she now avoids contact with other people's children. Others had similar or worse experiences and I will not in this interim judgment go through all this material. I award her for loss of career $10,000, for distress $15,000. The total is $25,000. Mr Lawson's client is highly enough qualified to be a supervisor of a childcare centre, yet she is unemployable in the profession of her choice. She has never been interviewed by or spoken to by anyone from the council about participation or knowledge of child abuse at the creche, yet it is no exaggeration to say that she has been persecuted as if personally guilty. The council is not responsible for all the cowardly acts committed against her, but only for lending itself to an act that gave credence to suspicions for which there is no foundation. She is entitled to $10,000 for loss of career and $20,000 for humiliation and distress, making in all $30,000. There will now be, in the interests of justice, an order prohibiting the publication in any report of this case or of this judgment, of the names of the two applicants dealt with in this paragraph, or of any details likely to lead to their identification. Fuller reasons for this order will be given in the final judgment.

I come now to the five second applicants. I also make orders prohibiting publication of their names and identifying circumstances. I will deal with their position by referring to the order in which they appear in the statement of claim.

The first named of the second applicants shared a job with the last named of them. She had been professionally in child care since 1977. She had been at the civic creche for 10½ years when the end came. She had every reason to expect to continue there indefinitely. As the council operated other creches, I think it reasonable to award her four years' loss of income (see *Horsburgh v NZ Meat Processors IUOW* [1988] 1 NZLR 698, at 700). She should also receive compensation of $5,000 for the loss of career, and $25,000 for distress and humiliation, the evidence of which is strong. The woman with whom she shared her job qualified as a Karitane nurse all of 30 years ago. After a career as a full time mother she returned to the work force in 1981. She had been employed by the council for 12 years when dismissed. She was present at the 3 September meeting. Later her house was searched by the police and she was taken away to the police station for questioning. She was not charged with anything. The whole episode has had a profound effect on her personality. I award her four years loss of remuneration, plus a further $30,000 like her co-worker.

The second named of the second applicants is in a special category. She is energetic and young enough to make things happen for herself. Her loss of income was the equivalent of a year's earnings on her part-time basis and this I award, but she still feels keenly the loss of her chosen career and of an outlet for teaching Maori language or protocol - she was in charge of the taha Maori programme at the creche - and she has been the butt of bizarre allegations and victimisation, including exclusion from activities at her child's school at the request of some other parents. She walked in fear of arrest and loss of her own children. She is entitled at her age to a more substantial award than other part timers for loss of career, and a suitable recognition of her suffering. I award $8,000 and $25,000 under these heads.

The two remaining second applicants were also part time employees. One had only returned from overseas in 1992. She felt lumped in with people with whom she had had nothing to do in prior years and felt that she was suspected by association. She is entitled to three years' loss of income, $5,000 for loss of career (she is likely to end up in a similar line of work or the amount would have been greater), and $15,000 for distress. The other was well qualified and a part-time worker earning $11,000 or so. She has found the experience devastating; she feels that she has been condemned unheard of being an unfit caregiver and, by implication, an unfit mother. She considers that the council obliterated her chosen profession with a stroke of the pen. She has found herself to be unemployable. She was an established employee of the creche. I award her three years' income loss, $5,000 for loss of career, and $20,000 for her considerable humiliation and distress.

This brings me to the first applicants. They were the most senior employees. They were all charged by the police. I look at their position as it was after dismissal but before arrest, and look prospectively from that point, but take into account subsequent evidence of losses where the wait-and-see approach is justified. Since the second applicants who were not prosecuted have fared no better, it is not possible to infer that the prosecution caused the difficulties in obtaining employment but it added to the anguish. However, the damage of the dismissal had been done before the arrests. The applicant Davidson was the supervisor of the creche. She had the most contact with council managers and the greatest expectations of being treated with trust and confidence. The council owed it her loyalty. Instead, it treated her as if she were a criminal. The effect on her has been almost indescribable, extending to death threats (the council is not responsible for these). I award her loss of income for four years, compensation for the loss of her career at $20,000 and distress at $30,000. Marie Keys was the Assistant Supervisor, having worked in the creche since 1985. Again, she can be taken to have lost four years' pay and to be

entitled to recover this and compensation for loss of career $10,000, and for distress of $25,000. I have taken into account the effect on her position in her community.

The applicant Buckingham sustained four years' loss of income and appalling social consequences, for which she should be compensated in the sum of $20,000. The applicant Gillespie was the senior childcare worker, although part time. She was the number three. She has been subjected to uncivilised confrontations in public, and has suffered a breakdown in her health. She should get four years' wage reimbursement, plus $10,000 for loss of career, and $20,000 for distress..

The four first applicants claim to be reimbursed the costs of their defence in the criminal proceedings over and above legal aid. These costs were established as follows:

	G Davidson	$24,428.58
	J.Buckingham	27,928.58
	D.Gillespie	14,693.22
	M.Keyes	22,428.58
TOTAL		$89478.96

The claim to reimbursement is made in two alternative ways, either as a loss of benefit attributable to the personal grievances, or as a contractual entitlement under an indemnity clause in the contract. The clause is clumsily drawn but its intent is clear or, if I am wrong and the applicants cannot come home under the contract, they must succeed under loss of benefit as it is inconceivable that a "good employer" would not stand behind loyal employees in their hour of need when their conduct in the course of their work in the council's behalf is called into question before a Court. I have given full weight to Ms Appleyard's ingenious argument that the indemnity is only for lawful acts that the employer has authorised, and the employee has done at the employer's behest out of duty. There could be no duty to commit criminal acts but, more relevantly on Ms Appleyard's analysis, no obligation to indemnify when the employee has not committed the act charged. That is too narrow a view. The acts done in the course of duty, and with the council's authority in relation to the child the subject of the charge, was to be a caregiver to that child. It is the alleged manner in which that duty was discharged that was the subject of an unproved complaint. The council should make good the cost of the defence. It would have been otherwise if the criminal prosecution had succeeded. I reserve for further argument the question of the form that this aspect of the judgment should take - a declaration or a money judgment. I know that costs are sought. The applicants are entitled to costs. As

usual I will receive a memorandum from counsel for the twelve applicants, and the advocate for the remaining applicant, to be followed 21 days later by a memorandum from counsel for the respondent. Counsel may wish to embark on this process while my fuller judgment is awaited and to endeavour to agree calculations. I reserve also any question that may be unresolved under paragraph (d) of the prayer for relief.

I am conscious that the total amount that the council is required by the terms of this judgment to pay is formidable. However, this judgment settles no fewer than 13 personal grievances and the amounts that have been awarded to individuals is commensurate with the serious injustice done them for which the council alone is responsible. I have applied the same principles as in *Trotter v Telecom Corporation* [1993] 2 ERNZ 935 to the assessment of compensation except that, because of the greater lapse of time since the dismissals, I am able to assess more accurately the losses sustained and likely to be so.