

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 373
5463439

BETWEEN RACHEL BLYLEVENS
Applicant

A N D KIDICORP LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Warwick Reid, Advocate for the Applicant
Chris Eggleston, Counsel for the Respondent

Investigation Meeting: 30 June and 31 June 2014 at Tauranga

Submissions: 07 July 2014 from Applicant
25 July 2014 from Respondent
01 August 2014 from Applicant

Date of Determination: 09 September 2014

DETERMINATION OF THE AUTHORITY

A Kidicorp Limited's (Kidicorp's) dismissal of Ms Rachel Blylevens for serious misconduct was justified so her personal grievance claim does not succeed.

Employment relationship problem

[1] Ms Blylevens was employed by Kidicorp under an individual employment agreement as the Centre Manager of the Topkids Waihi Road Centre in Tauranga (the Centre). She started work on 25 October 2011 and was dismissed for serious misconduct on 19 May 2014. The serious misconduct related to Ms Blylevens' Facebook actions.

[2] In early April 2014 Ms Lynda Ewing, the Business Manager (who works closely alongside the eleven Centre Managers in the Bay of Plenty Region) received

complaints about Ms Blylevens from some parents and several staff. On 08 April Ms Ewing arranged to meet with Ms Blylevens the following day to give her feedback on Kidicorp's investigation into these complaints.

[3] Ms Blylevens was told that the purpose of the meeting on 09 April was to keep her informed, that it was not disciplinary and that she was not required to provide any responses or feedback. Although Ms Blylevens initially agreed to meet with managers she withdrew her agreement a few hours later saying she would not meet without her advocate, Ms Rachel Rolston. She went on sick leave and did not return to work until 05 May 2014.

[4] Ms Celeste Marsh, the Regional Manager, and Mary Gaylard, Human Resources Adviser – Central North Island, visited the Centre together on 09 April to speak (offsite) to staff who had raised complaints with Ms Ewing. Subsequent to these meetings eight of the eleven staff Ms Blylevens managed filed separate written complaints about her.

[5] Although Kidicorp did not start a disciplinary process about the complaints staff had made about Ms Blylevens, it did advise her that it wanted to meet with her to discuss the staff complaints before deciding how to proceed. A meeting for that to occur was scheduled for 09 May but did not occur.

[6] Any issues arising from staff complaints were superseded by an entirely separate disciplinary investigation into Ms Blylevens' Facebook activities, which resulted in her dismissal for serious misconduct. The Facebook disciplinary process superseded Kidicorp's (non disciplinary) investigation into the staff complaints about Ms Blylevens.

[7] I raise the staff complaints as background only to the Facebook issues. I recognise the staff complaints (which are disputed by Ms Blylevens) do not form any part of the disciplinary process which resulted in Ms Blylevens' dismissal. They do however provide the context of Ms Rolston's Facebook posts and to Ms Blylevens' Facebook activities in connection with Ms Rolston's posts.

[8] When Ms Rolston posted the two Facebook posts that Ms Blylevens 'liked' Kidicorp was facing a very delicate situation at the Centre Ms Blylevens was managing. It is to be expected that Kidicorp would want to meet Ms Blylevens in person to discuss the situation with her.

[9] Kidicorp had obligations to all staff not just to Ms Blylevens. Regardless of who was right and who was wrong there were obviously matters that needed to be addressed at the Centre given;

- a. the number of complaints that had been made about Ms Blylevens
- b. Ms Blylevens' view that staff were conspiring against her;
- c. Ms Blylevens' view that the human resources people and managers who were investigating the staff complaints were also part of a conspiracy against her.

[10] This situation needed to be carefully and sensitively managed by all involved, particularly in light of the fact that;

- a. eight out of the eleven staff Ms Blylevens managed had made written complaints about her;
- b. Ms Blylevens had been on sick leave from 09 April to 05 May;
- c. Staff who had filed written complaints about Ms Blylevens were anxious about doing so given she was the only site manager;
- d. Ms Blylevens was returning to work as the sole manager in a Centre where almost all of the staff had filed written complaints against her;
- e. Kidicorp wanted to talk to Ms Blylevens about the complaints before deciding what if anything to do about the issues staff had raised;
- f. Ms Blylevens had been expressing her strongly held view that the Centre staff, human resources and the managers investigating the staff complaints were all conspiring against her;
- g. Kidicorp had not been able to speak to Ms Blylevens in person to get her views but a meeting for that to occur was scheduled for 09 May.

[11] It was against this background that Ms Rolston decided on Friday 02 May to post on her business Facebook page derogatory comments about Kidicorp and information which she believed related to Ms Blylevens' employment situation.

[12] Ms Rolston told the Authority she was not acting as Ms Blylevens' advocate when she did the Facebook posts. Ms Rolston also told the Authority she was "*just having a rant.*"

[13] When questioned by the Authority Ms Rolston agreed this '*rant*' did not serve her client. Ms Rolston also acknowledged to the Authority that her "*rant*" had attracted a huge amount of new traffic to her business Facebook page. As an aside this increase in activity on Ms Rolston's business Facebook page was also something she had referred to during the disciplinary meeting.

[14] During the Authority's investigation Mr Reid observed that had the matter been handled differently there may have been a different outcome for Ms Blylevens. I told those attending the investigation meeting that I agreed with that observation.

[15] Ms Rolston's first Facebook posting on 02 May does not name Ms Blylevens but it does refer to Ms Rolston dealing with a bullying complaint against a Kidicorp Centre Manager. No other Kidicorp Centre Managers were facing bullying complaints. The post also contains wrong information about the resignation of another Centre Manager (that person is not named in the post but her name was given to the Authority).

[16] Ms Rolston had no personal knowledge of that other Centre Manager's situation. She based the post on unsubstantiated hearsay information that Ms Blylevens had passed on to her. Ms Rolston says she did not ask Ms Blylevens' permission to write Facebook posts about her situation or about the other Centre Manager referred to in Ms Rolston's first post. Likewise no prior permission was sought by Ms Rolston to refer to the situation of a former Kidicorp employee whose situation is referred to (but who is not named) in the second post.

[17] Ms Rolston's first post was headed "*Kidicorp Strikes Again.*" It claims Kidicorp was "*removing unwanted staff*", "*lots of them*" by "*allegations of bullying*" involving "*trumped up charges, tampered with or totally fake documents, refusal to allow a target to have a support person.*" Ms Rolston described Kidicorp's human resources as the "*vindictive Kidicorp HR Krew.*" Ms Rolston implied that Kidicorp provides an unsafe environment for staff and children and recommends parents "*may want to seriously rethink the level of care [their children] can receive.*"

[18] On 02 May (the same day the article was posted) Ms Blylevens hit the 'like' button under Ms Rolston's post and added her own comment "*Interesting article pep! As a parent looking at childcare it's good to be informed x.*"

[19] Ms Blylevens claims she intended this comment to simply be a communication to her daughter (who she calls "*pep*") and who was apparently looking for childcare at the time.

[20] Ms Blylevens says she did not 'like' the article to endorse it or approve of it. However, she could not explain to the Authority how the post would "*inform*" parents who were seeking childcare other than put them off using Kidicorp Centres. Nor could she identify what was "*interesting*" about Ms Rolston's post.

[21] Ms Blylevens emailed Ms Rolston on 03 May making adverse comments about Kidicorp managers which seems to provide an insight into Ms Blylevens' feelings about Kidicorp at that time. She says "*my daughter's brought my attention to issues with Kidicorp on Facebook!!! Wow,,, made for interesting reading corrupt, damaging people.*"

[22] On 04 May Ms Rolston made a second post on her business Facebook page. This was in response to a comment received about the first article that said "*If there is employment/legal issues going on then that's a place for the courtroom*". Ms Rolston's second posting refers to Kidicorp creating a "*toxic*" environment and questions the care children receive by saying "*there must be an adverse effect*" on them. She also accuses Kidicorp of "*corporate bullying*".

[23] Ms Blylevens also liked Ms Rolston's second post. By 'liking' Ms Rolston's posts Ms Blylevens ensured that the posts and the comment she had made about the first post were all published to all of her 'Facebook friends.' Ms Blylevens' 'Facebook friends' included other Kidicorp staff and parents with children at Kidicorp Centres. Ms Blylevens did this the day before she returned to work to resume managing eight staff who had filed complaints about her.

[24] When Ms Rolston's two posts and Ms Blylevens' two 'likes' occurred on 02 and 04 May Kidicorp was still working its way through a delicate preliminary investigation. It had received verbal complaints from parents and staff, it had spoken to the staff who had complained, it had required any complaints staff wanted investigated to be put in writing, it had disclosed the complaints to Ms Blylevens and

it had attempted to meet with her to get her views before deciding what to do about the situation.

[25] That is an appropriate way for Kidicorp to have proceeded and it should not be criticised for that. Kidicorp obviously wanted and needed to speak to Ms Blylevens about the issues occurring in the centre she managed.

[26] In terms of the Facebook issues, Ms Blylevens does not dispute engaging in the actions she was dismissed for. However she claims her dismissal was substantively unjustified because what she did could not fairly or reasonably be viewed as amounting to serious misconduct. Alternatively Ms Blylevens says that even if she had engaged in serious misconduct (which she denies) dismissal was not a response a fair and reasonable employer could have taken in all of the circumstances.

[27] Ms Blylevens admits that the process Kidicorp used was fair and reasonable and she accepts that Kidicorp complied with its good faith obligations to her. In Mr Reid's closing submissions he withdrew Ms Blylevens' disparity of treatment argument because the people she was comparing herself with had not engaged in the same or similar conduct as Ms Blylevens.

[28] Kidicorp held a disciplinary meeting on 16 May and Ms Blylevens provided written feedback (via Ms Rolston) on 15 and 18 May. Ms Blylevens' position through the disciplinary process (and at the Authority's investigation) was to deny any wrongdoing and suggest she was being punished for Ms Rolston's actions which had nothing to do with her. Her view was that Ms Rolston was merely exercising her right to free speech so could say and do whatever she liked.

[29] I want to make it clear that Kidicorp did not discipline or dismiss Ms Blylevens for Ms Rolston's actions. Kidicorp dismissed Ms Blylevens for her own actions, namely:

- a. Clicking 'like' below two separate Facebook posts Ms Rolston had posted on 02 and 04 May on her business Facebook page which included comments that were highly critical and derogatory of Kidicorp; and

- b. Adding a comment under Ms Rolston's first post saying "*Interesting article pep! As a parent looking at childcare it's good to be informed x.*"

[30] The comment Ms Blylevens made on the first post is attributed to "*Rachel Blylevens*" and both her 'likes' identify her as a current Kidicorp employee.

[31] Kidicorp says Ms Blylevens' actions breached its Media Relations and Social Networking Policy (the Policy), as set out in its Employee Handbook and her express and implied obligations of fidelity and good faith she owed Kidicorp as her employer.

[32] Kidicorp concluded Ms Blylevens' actions called into question her ability to undertake her Centre Manager duties in a manner commensurate with its seniority and importance. Kidicorp says dismissal was justified because it did not have trust and confidence in Ms Blylevens to act appropriately in future.

Issues

[33] At the Authority's investigation meeting, Mr Reid confirmed that Kidicorp had complied with its s.4(1A) good faith obligations set out in the Employment Relations Act 2000 (the Act) and with each of the four procedural fairness tests in s.103A(3) of the Act. Therefore the issues to be determined are:

- a. Could a fair and reasonable employer conclude that Ms Blylevens had engaged in serious misconduct?
- b. If so, was dismissal a response which was open to a fair and reasonable employer in all of the circumstances?
- c. If not, what if any remedies should be awarded?
- d. What if any costs should be awarded?

Could a fair and reasonable employer conclude Ms Blylevens' had engaged in serious misconduct?

[34] The leading case on what constitutes serious misconduct is the Court of Appeal decision in *Northern Distribution Union v BP Oil New Zealand Limited*¹ which says:

Defintion is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential element of the employment relationship.

[35] Although Ms Blylevens and Ms Rolston were reluctant to accept that the two posts in issue were derogatory of Kidicorp I find that they were. Kidicorp's human resources team was described as "vindictive" and having "fabricated" complaints. The standard of care children received was questioned and it was suggested Kidicorp had intentionally created a "toxic" environment.

[36] Whilst the article did not name Ms Blylevens or the Centre she worked at, it did refer to a Kidicorp Centre Manager facing bullying complaints within a Bay of Plenty Kidicorp Centre. The staff who had recently complained to Kidicorp about Ms Blylevens would likely have concluded that the posting referred to their complaints.

[37] Anyone who visited Ms Rolston's business Facebook site who scrolled across the 'like' tab under the first post would see Ms Blylevens' name beside these posts and if they hovered the cursor over her name they would see she was a current Kidicorp employee. This information was available to an observer without any requirement for them to have accessed Ms Blylevens' Facebook page.

[38] Ms Blylevens admitted she was aware of Kidicorp's Media Relations and Social Networking Policy (the Policy). As a Centre Manager she inducted and trained staff on the Policy.

[39] The Policy prohibits employees from making unauthorised statements or publishing material commenting on any aspect of the Kidicorp's operations. Employees are also prevented from disclosing sensitive or confidential information relating to Kidicorp, or from posting any information that could bring Kidicorp into

¹ [1992] 3 ERNZ 483 (CA), at 487.

disrepute or which could damage, impair or undermine the reputation of Kidicorp or its employees.

[40] Kidicorp's decision maker, Ms Marsh considered that Ms Rolston's first Facebook post divulged that Kidicorp was investigating a Centre Manager following bullying allegations. This information was regarded as sensitive and confidential due to the negative implications it could have for the business and staff relationships.

[41] Ms Marsh concluded that Ms Bylevens had breached the Policy because she had published Ms Rolston's two posts to a wider audience by 'liking' them and by adding a public comment under the first post. This meant that Ms Rolston's discussion of Kidicorp's confidential investigation into sensitive bullying allegations and Ms Rolston's derogatory comments regarding Kidicorp and its allegedly poor standards of care, were disseminated by Ms Bylevens' via her own Facebook page to a new and wider audience.

[42] Ms Bylevens confirmed that the 'Facebook friends' she exposed to her comment and the two posts by Ms Rolston included ten Kidicorp staff and three parents who had children at the Centre Ms Bylevens managed. This added exposure likely played a factor in Ms Rolston's business receiving over 1,500 hits that week rather than its usual 20 to 30.

[43] Given the nature of Facebook, Ms Bylevens had no control over which of her friends might chose to share the articles with their friends and in turn, their friends, hence exposing the original posts to a potentially unlimited audience. For example, Ms Bylevens' daughter gave evidence of intentionally posting Ms Rolston's articles to various name and shame websites specifically to ensure maximum exposure.

[44] This limitless audience was recognised by the Employment Court in *Hook v. Stream (NZ) Pty Ltd*². Judicial notice has also been taken of the potential far reaching of Facebook in *Senior v. Police* in which the High Court observed (in connection with an alleged breach of a protection order):

“That the Court takes judicial notice that persons who use Facebook are very aware that the contents of facebook often communicated to persons beyond the “friends” who use facebook. Information is put on a Facebook page, to which hundreds of people have access, the persons putting the information on the page know that the

² [2013] NZEmpC 188.

information will likely extend way beyond the defined class of “friends”. [...] The reality is that comments made on virtual social networks can readily permeate into real life networks. Facebook posts have a permanence and potential audience that casual conversations around the watercooler at work or at an afterhours social gathering do not.”

[45] I consider it was open to a fair and reasonable employer to have concluded that Ms Blylevens’ own actions had breached the Policy.

[46] I also consider that a fair and reasonable employer could have concluded that the effect of Ms Blylevens ‘liking’ Ms Rolston’s posts would have been reasonably likely to have communicated to users of social media that she agreed with, endorsed or supported Ms Rolston’s posts.

[47] I consider it was open to Kidicorp to conclude that the effect of Ms Blylevens’ actions in ‘liking’ two of Ms Rolston’s posts and by adding a comment to the first post was to convey to members of the public that as a current Kidicorp employee she ‘liked’ her advocate’s comments, thought they were “*interesting*” and that it was “*good to be informed*” about the matters Ms Rolston had written about.

[48] I also consider it was open to Kidicorp to conclude that Ms Blylevens was not concerned that her name and status as a current Kidicorp employee appeared together with a ‘like’ alongside Ms Rolston’s derogatory posts because she took no action to change that until after the disciplinary meeting.

[49] Ms Blylevens’ actions in this case were analogous to her standing outside the Centre she managed handing out copies of Ms Rolston’s derogatory articles about Kidicorp while telling people “*here is an interesting article – it is good to be informed.*” I find that it was open to a fair and reasonable employer to have concluded that publishing derogatory comments about it to a potentially unlimited audience is a fundamental breach of an employee’s duty of fidelity.

[50] I also consider that a fair and reasonable employer could have concluded, as Kidicorp did, that Ms Blylevens had breached clause 1(b) of her employment agreement which required her to:

- a. Regard her employment with respect and discretion and not discuss the affairs of the company in a demeaning, undermining or derogatory manner;

- b. Conduct your duties in the best interests of the Company and the employment relationship;
- c. Deal with the Company in good faith in all aspects of the employment relationship;
- d. Comply with all policies and procedures (including Codes of Conduct) implemented by the Company.

[51] Ms Blylevens says she did nothing wrong. She claims she was not aware of the posts before they happened and had not authorised them. Ms Rolston and Ms Blylevens say the timing of the posts right before her return to work was a mere coincidence and was not intended to intimidate her subordinate staff who had made complaints against her.

[52] Ms Blylevens also claims she had not 'liked' the posts as an endorsement of them but only 'liked' them to ensure she would receive updates directly to her newsfeed for any subsequent activities on the posting. She also says she had only intended to comment to her daughter.

[53] I consider that it was open to a fair and reasonable employer to have concluded that Ms Blylevens' explanations for her actions were unsatisfactory. She did not need to 'like' the posts to follow them, all she needed to do was visit the site to view recent activity. That would have avoided public visibility of her actions and any public or ongoing association by her with Ms Rolston's posts.

[54] In her witness statement to the Authority Ms Blylevens says "*I was aware that a lot of people were commenting but I didn't pay too much attention to it*". This calls into question her explanation that she 'liked' the post merely because she was interested in receiving and viewing comments on it. It gives support to Kidicorp's conclusion that Ms Blylevens had more likely than not intended to endorse Ms Rolston's comments.

[55] Ms Blylevens' actions and inaction in the face of Kidicorp's expressed concerns about Ms Rolston's posts is also curious if she had not intended to endorse the content of Ms Rolston's posts. The failure to take action to remove her comment or 'likes' tends to suggest that Ms Blylevens was happy to be publicly associated with the derogatory comments about her employer at least until after the disciplinary

meeting, which she finally took steps (at Kidicorp's request) to hide her 'likes' and comment.

[56] I also consider it was fair and reasonable for Kidicorp to have concluded that the comment Ms Blylevens made under Ms Rolston's first post could not reasonably be viewed by Ms Blylevens as a communication just to her daughter.

[57] There were many other ways in which she could have privately communicated with her daughter, she did not have to comment publicly on Ms Rolston's post. She could have text messaged, she could have telephoned, she could have met her daughter in person, she could also have used Facebook Messenger for an instant and private exchange with her daughter. It was open to Kidicorp to fairly and reasonably conclude that Ms Blylevens' comment was intended to be a public endorsement of Ms Rolston's views.

[58] Kidicorp concluded that Ms Blylevens' conduct had breached her obligations of good faith and fidelity as stated in clause 1(b) of her employment agreement. Although Kidicorp accepts that Ms Blylevens did not write the posts it concluded that her actions ensured that Ms Rolston's derogatory comments about Kidicorp were disseminated to a wider audience, which included other staff members and current clients of the Centre she was managing.

[59] I consider it was open to Kidicorp to conclude by doing so, Ms Blylevens failed to regard her employment with respect and discretion and was a party to discussing the affairs of her employer in a demeaning, undermining and derogatory manner in breach of her employment obligations.

[60] Kidicorp accepts that the 'likes' and comment happened outside of Ms Blylevens' work and outside of normal working hours. However, it concluded that Ms Blylevens chose to identify herself by name, as well as identifying herself as a current employee of Kidicorp. The posts at the time Ms Blylevens liked (or added a comment) to them also referred to Kidicorp by name.

[61] Kidicorp says that as an employer it expected any activity she undertook or publicly identified with as a Kidicorp employee would be in the best interests of her employer and employment relationship. It concluded that spreading destructive criticism of Kidicorp to existing staff and clients, as well as to an interminable pool of

prospective employees and clients, fell short of the standards expected of a Centre Manager. I find a fair and reasonable employer could have reached that conclusion.

[62] The Policy specifically states that any inappropriate use of communications on social networking sites, via any means, may result in appropriate disciplinary action. Clause 18.2 of Ms Blylevens' employment agreement refers to and highlights that breaches of duty of loyalty or trust and confidence or breach of the employment agreement may result in dismissal and it cross refers to Kidicorp's Employee Handbook for details.

[63] I consider Kidicorp did properly consider Ms Blylevens' explanations. However it was open to Kidicorp to conclude these explanations for her conduct were unsatisfactory.

[64] Although Ms Blylevens' conduct occurred outside of work hours I find that there was a sufficient causal connection between her conduct and her employment for Kidicorp to conclude serious misconduct had occurred. There was also a close nexus between the content of the posts which Ms Blylevens 'liked' (and commented on) and her employment.

[65] I find that Ms Blylevens' admitted actions had the potential to adversely impact Kidicorp, its staff and clients. I also consider that Ms Blylevens' admitted actions can fairly and reasonably be viewed as injurious to Kidicorp's interests because they could reasonably be viewed as condoning or endorsing the content of Ms Rolston's two posts.

[66] I consider Ms Blylevens' deliberate actions impacted or potentially impacted Kidicorp because her liking of derogatory and critical posts about it and her publication of a comment implying that people could be "*informed*" about childcare options by the "*interesting*" (derogatory) comments Ms Rolston had made about Kidicorp were incompatible with the proper discharge of her duties as a Centre Manager.

[67] Kidicorp had reasonable grounds to conclude that serious misconduct had occurred. I find that Kidicorp also did actually believe that serious misconduct had taken place. It had sufficient evidence available to it to form that conclusion to the required standard of the balance of probabilities.

Was dismissal a response that was available to a fair and reasonable employer in all the circumstances?

[68] Kidicorp says it lost trust and confidence in Ms Blylevens to act appropriately and responsibly in her role as a Centre Manager in future. As a Centre Manager she was very much the ‘face’ of the Centre she managed and as such is accountable for all aspects of the Centre’s performance including leadership, staff management and family/parent/whanau relationships.

[69] Kidicorp concluded that Ms Blylevens’ own actions by publicly associating herself with Ms Rolston’s two derogatory posts had fundamentally undermined her ability to operate effectively or credibly as a leader and to achieve positive relationships with management, staff or parents. Kidicorp also considered that by publicly associating herself with Ms Rolston’s derogatory comments about Kidicorp Ms Blylevens fundamentally undermined her ability to fulfil the essential core functions of her role.

[70] I consider these were conclusions that were open to a fair and reasonable employer in all the circumstances.

[71] It is critical for Kidicorp to have a high degree of trust and confidence in its Centre Managers to carry out the functions of that role in a professional manner. The Centre Manager is the most senior person on site and is the point of contact for staff and parents. Obviously the need to exercise good judgment and to work effectively with parents, staff and senior (off site) management is a critical part of the role.

[72] I find it was fair and reasonable for Kidicorp to conclude that Ms Blylevens’ wide (potentially unlimited) dissemination of and public association with Ms Rolston’s derogatory, inflammatory and factually incorrect comments about Kidicorp seriously compromised the trust and confidence required of someone in her role.

[73] Kidicorp was also rightly concerned that Ms Blylevens accepted no responsibility for her actions and maintained her position that she had done nothing wrong. There was no acknowledgement or understanding of how her actions by publishing Ms Rolston’s posts may have adversely impacted on Kidicorp, its staff and parents who had children at the Centre she managed. There was no remorse expressed or apology given for her own actions.

[74] Kidicorp expressly explored the extent to which Ms Bylevens appreciated that her actions may have been in conflict with her Centre Manager role during the disciplinary process. Ms Bylevens maintained her position that she had not done anything wrong and that her advocate was just exercising her right of free speech by posting adverse criticism about Kidicorp.

[75] I also consider it was open to Kidicorp to conclude that Ms Bylevens was unconcerned about being publicly associated with Ms Rolston's derogatory posts about Kidicorp. Ms Bylevens told the disciplinary meeting that she did not have any obligation as a Centre Manager to remove her 'likes' or to disassociate herself from the public comment she had posted or from the views publicly expressed by Ms Rolston in her two posts.

[76] Ms Bylevens was aware, because she had been copied in to correspondence between Ms Rolston and Mr Elliot QC, that Kidicorp wanted the posts removed. However she did not take any steps to assist Kidicorp with that. Ms Bylevens could have instructed her advocate to hide or remove the posts or her 'likes' or comment but choose not to.

[77] Ms Bylevens also appears to have adopted an arrogant attitude during the disciplinary meeting when asked by Kidicorp to remove her Facebook likes and comment. Ms Bylevens sat there in agreement while Ms Rolston told Kidicorp it had to "*ask her nicely*" by saying "*please*" to get the posts removed. That was surprising given the ongoing communications about that via Mr Elliott QC which had already occurred around the removing of the posts in issue.

[78] I consider Kidicorp was entitled to consider the fact that Ms Bylevens did not voluntarily offer an apology or any undertaking or other reassurances to Kidicorp about how she would or would not act in future into account when assessing the appropriate action.

[79] During the disciplinary meeting Kidicorp gave Ms Bylevens an opportunity to express remorse and/or demonstrate some understanding around why it was concerned about her actions. The fact she failed to do so was a relevant consideration when deciding on the appropriate sanction.

[80] Kidicorp had no comfort that Ms Bylevens had understood its concerns or accepted any sort of accountability for her actions which meant it was not reassured

she would act appropriately in future. Ms Blylevens' refusal to acknowledge any fault or accept any responsibility for her own actions contributed to Kidicorp's conclusion that it no longer had trust and confidence in her to remain in her Centre Manager role.

[81] I consider that was a conclusion that was open to a fair and reasonable employer to reach in all of the circumstances. I am satisfied that dismissal was within the range of appropriate responses available to a fair and reasonable employer at the time Ms Blylevens was dismissed.

Outcome

[82] Applying the justification test in s.103A(2) of the Act, I find that Kidicorp's actions, and how Kidicorp acted, were what a fair and reasonable employer could have done in all the circumstances at the time Ms Blylevens was dismissed.

[83] I am therefore satisfied that Kidicorp has discharged the onus of establishing on the balance of probabilities that its decision to dismiss Ms Blylevens for serious misconduct was justified. Accordingly, Ms Blylevens' unjustified dismissal claim does not succeed.

Costs

[84] Kidicorp as the successful party is entitled to a contribution towards its legal costs. The parties are encouraged to resolve costs by agreement.

[85] If that is not possible then Kidicorp has 14 days within which to file its costs memorandum, Ms Blylevens has seven days within which to respond with Kidicorp having a further three working days to file its reply. This timetable will be strictly enforced and departure from it requires the prior leave of the Authority.

[86] The Authority is likely to adopt its usual notional daily tariff based approach to costs so the parties are invited to identify in their submissions any factors which they consider should result in the notional daily tariff (currently \$3,500) being adjusted.

Rachel Larmer
Member of the Employment Relations Authority