

**Attention is drawn to the
order prohibiting publication
of certain information in this
determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 114
3026692

BETWEEN	JEAN COWAN Applicant
AND	IDEA SERVICES LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Meikle for Applicant
Guido Ballara for Respondent

Investigation Meeting: 12 December 2018

Oral Determination: 12 December 2018

Record of Oral
Determination: 17 December 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. Ms Cowan's dismissal was justified.**
- B. Costs are reserved.**

Non-publication Orders

[1] Idea Services Limited (ISL) made an application for non-publication orders relating to the service users identified in this matter and the actual location where the employment relationship took place. The application was not opposed by Ms Cowan and the application was granted.

[2] Pursuant to clause 10(1) of Schedule 2 to the Employment Relations Act 2000 (the Act) evidence or material which does or may identify any of the service users referred to in connection with this matter is prohibited from publication. This includes the actual location where the employment relationship took place.

Employment relationship problem

[3] ISL provides community care services. Ms Jean Cowan was employed as a support worker. Following allegations of misconduct Ms Cowan was dismissed on notice. Ms Cowan challenges her dismissal which she says was unjustified.

Issues

[4] In order to resolve Ms Cowan's employment relationship problem I must determine whether Ms Cowan was unjustifiably dismissed and if so, what if any remedies should be awarded.

[5] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Events leading to dismissal

[6] On 26 March 2017 a service user, SU Y, was unusually unsettled and kept grabbing at a support worker trying to get her to sit down. Later than evening another service user (SU X) reported to the support worker, that the service user thought Ms Cowan had slapped another service user (SU Y) and asked multiple times if SU Y was okay. On inspection the support worker could find no evidence of bruising or any marks on SU Y.

[7] Similar reports were made by SU X the following day to a second support worker.

[8] On 28 March SU Y reported to the second support worker that he had been hit by Ms Cowan. On 29 March SU Y became agitated and kept asking who was coming onto shift expressing concern that it not be Ms Cowan because Ms Cowans hurts SU Y.

[9] On 29 March the Service Manager for the location reported by email that the previous evening SU Y appeared worked up and claimed while indicating to the right thigh that Ms Cowan had hit the service user. On inspection the Service Manager could find no bruising or other marks.

Disciplinary process

[10] Ms Cowan was invited to attend a meeting to provide her with an opportunity to discuss the issues. The letter of invitation set out briefly the two accounts received about the alleged incident and invited Ms Cowan to bring a representative. Ms Cowan was advised that ISL was considering suspension, and that dismissal was a possibility if serious misconduct was established.

[11] At the meeting held on 6 April Ms Cowan was supported by an organiser from Etu and a union delegate. Ms Cowan was provided with information relating to the complaint and was given an opportunity to address the information. After a break Ms Cowan was informed that her employment would be suspended to allow an investigation to be undertaken. The suspension was confirmed in writing later that day.

[12] The disciplinary investigation took place between 7 and 10 April. During the investigation a Service Manager spoke with the service users and other employees working or closely associated with the workplace.

[13] The Service Manager completed a written report on 27 April in which she set out the interviews that she had undertaken and raised two new issues with respect to Ms Cowan's behaviour. Ms Cowan was reminded that if serious misconduct was established dismissal was a possibility.

[14] A meeting was held on 28 April. At this meeting the Area Manager was present as the decision maker as was the Service Manager who undertook the investigation.

[15] On 3 May the Service Manager completed an investigation report which was given to Ms Cowan. The report set out a comprehensive summary of the issues and Ms Cowan's responses to date. The report included a summary of findings which were set out in the following terms (verbatim):

I am of the preliminary view, that on the balance of probabilities you did hit a vulnerable person with disabilities and that your actions, conduct and behaviour have impacted on a vulnerable person with disabilities.

I also consider, from all the information reviewed there is a pattern of behaviour regarding your communication, behaviour and conduct towards vulnerable people with disabilities. That although these matters have been raised with you and documented, we have not seen an expected improvement. That in doing this you choose not to change or consider how your communication and conduct affects staff or people with disabilities.

Equally I must consider whether your actions towards a vulnerable people with a disability have impacted on the trust and confidence that IDEA Services needs to be able to have in you to allow the employment relationship to continue.

When these matters are considered individually and cumulatively, IDEA Services have reached the tentative conclusion that you have fallen well short of the expectations that we have in terms of undertaking the leadership, duties and responsibilities of the role of a Level 3 Support Worker.

[16] The parties met again on 11 May where the preliminary findings were discussed including the preliminary view that Ms Cowan's employment be terminated. After a short adjournment the Area Manager advised Ms Cowan that her preliminary view had not changed and she had determined that Ms Cowan would be dismissed with two week's pay being paid in lieu of notice.

[17] Ms Cowan is critical of the process used by ISL in conducting its disciplinary investigation including:

- a) There was no medical evidence of an injury;
- b) No assessment was made as to the extent SU X's and SU Y's disability and medication made their reports unreliable;
- c) A reenactment of the reported event involved leading questions and predetermined scenarios which made the statements unreliable;
- d) Being swayed by unsubstantiated allegations that Ms Cowan lacked tolerance and yelled at service users;
- e) Relied on conjecture and hearsay from Ms Cowan's co-workers.

[18] It was common ground that SU Y did not suffer from any injury that was immediately apparent on 27 or 28 March. There were reports of a bruise appearing about a week later in the area indicated by the service user as being the place the service user was hit.

[19] Ms Cowan raised concerns during the disciplinary investigation regarding SU Y's medication and its affect on the perception the service user had about the incident. ISL investigated this concern and was satisfied no changes had been observed in the behaviour of the service user since being put on the medication.

[20] SU X did have a propensity to lie about matters where the service user personally was involved. For example SU X would take property not belonging to him and would lie about taking it. It was not known for SU X to lie about matters pertaining to others.

[21] During the disciplinary investigation the two Service Managers involved undertook a reinactment of the incident to test the report made by SU X. SU X was asked to show the Service Managers where he was when the incident occurred. SU X indicated a spot about 1m inside the bedroom used by SU X. Without any prior notice to SU X one of the Service Managers entered SU Y's bedroom and slapped herself and two other items in the bedroom. SU X identified the noise resulting from the self slap as being the same as the noise SU X had previously reported.

[22] The issues of lack of tolerance and yelling at service users was used by the Area Manager to provide context when making the preliminary and final decisions on outcome. Also taken into account was that Ms Cowan had 17 years experience and was graded Level 3 – Level 4 being the highest. This means Ms Cowan should have had a thorough understanding of the use of non-aversive techniques and appropriate ways of dealing with difficult service users.

[23] The investigation was undertaken by a Service Manager who took comprehensive notes of all interviews. These notes were provided to the Area Manager and Ms Cowan as part of the disciplinary process. The criticisms of the Area Manager not undertaking, or being present, during the interviews is not valid. The Area Manager had appointed another experienced Manager who was familiar with the

residence and service users to undertake the investigation. That Manager was present during the disciplinary meetings.

Conclusion

[24] Ms Cowan was dismissed as a result of a finding that on the balance of probabilities she had hit a vulnerable person with disabilities and that the way Ms Cowan interacted with service users was not to the standard expected of an experienced Level 3 Support Worker.

[25] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether ISL's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[26] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, ISL sufficiently investigated the allegations, raised the concerns with Ms Cowan, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal.

[27] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Ms Cowan being treated unfairly.¹ A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.

[28] I am required to assess whether ISL had, on the balance of probabilities, convincing evidence to show it had a reasonable basis at the time of the dismissal for believing serious misconduct had occurred.²

[29] It has long been accepted that ISL has comparable responsibilities to its service users and employees and has a strong commitment to a non-aversive approach

¹ Employment Relations Act 2000 (the Act), s 103A(5).

² *Honda New Zealand Ltd v NZ Boilermakers Union* [1991] 1 NZLR 392 (CA) at 394.

in regard to the welfare of clients.³ This means using positive reinforcement and not punishment for unacceptable behaviour.

[30] ISL is not required to prove that the particular alleged behaviour actually occurred. It is enough to show that at the time of dismissal it was justified in believing that serious misconduct had occurred.⁴

[31] ISL conducted a full and fair investigation into the allegation that Ms Cowan had slapped a service user and had reasonable grounds to honestly believe her conduct amounted to serious misconduct. I am satisfied the investigation process was compliant with s 103A of the Act. ISL raised its concerns with Ms Cowan and gave her a reasonable opportunity to respond and considered her explanations.

[32] I accept the allegation made about Ms Cowan was serious and required convincing evidence. At the time of the dismissal that evidence had been obtained.

[33] I am satisfied ISL has established on the balance of probabilities that dismissing Ms Cowan was an action an employer acting fairly and reasonably could take. In all the circumstances dismissal was within the range of reasonable responses available to ISL. Ms Cowan's dismissal was justified.

Costs

[34] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so ISL shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Cowan shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

³ *Fleet v IDEA Services Limited*, AA73/09; *Shutt v IHC* AA76/04; *Hansen v IDEA Services* [2015] NZERA Wellington 57.

⁴ *IHC NZ Inc. v Fitzgerald* [2006] 1 ERNZ 932 at [81].

[35] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority