Employment Court of New Zealand

Cowan v Idea Services Limited [2019] NZEmpC 172 (25 November 2019)

Last Updated: 29 November 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[2019] NZEmpC 172
EMPC 9/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JEAN LOIS COWAN Plaintiff
AND	IDEA SERVICES LIMITED Defendant

Hearing:	16 and 17 September 2019 (Heard at Palmerston North)
Appearances:	S Meikle, counsel for plaintiff G Ballara, counsel for defendant
Judgment:	25 November 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Jean Cowan was dismissed for serious misconduct. Her employer, IDEA Services Limited (IDEA) considered she had hit a service user (SU), that she had a short fuse and yelled at SUs, and that she had called a SU a baby.

[2] Ms Cowan raised a personal grievance, asserting she had been unjustifiably dismissed. Her claim was dismissed by the Employment Relations Authority (the Authority).1

1 *Cowan v IDEA Services Ltd* [2018] NZERA Wellington 114.

[3] She then brought a de novo challenge to the determination, which this judgment resolves.

[4] There was an unopposed application by IDEA for permanent non-publication orders because the proceeding relates to two intellectually disabled SUs. I was satisfied that the making of such an order was entirely appropriate. On 16 September 2019, I made a permanent non-publication order as to the names and identifying details of the SUs referred to in the proceeding, as well as the location where the employment relationship problem took place.

Background

[5] IDEA is wholly owned by IHC New Zealand (IHC). Both entities are registered charities. IDEA is the operational arm of IHC and provides support services for people with intellectual disabilities.

[6] Ms Cowan was employed by IDEA as a level 3 support worker. By 2017 she had some 17 years' experience in this role. She was accordingly regarded as a senior and experienced member of staff who was or could reasonably have been expected to be conversant and would comply with IDEA's non-aversive approach. That meant that any physical contact such as hitting or slapping a SU would be regarded as completely inappropriate.

[7] Ms Cowan's job description included an obligation to work in line with the values, standards and principles of IHC, and to follow IHC policies and principles. One such was the "Protection of Vulnerable Children and Adults Policy". This policy stated that the safety and best interests of children and vulnerable adults are paramount. It went on to emphasise the importance of immediate action and proper process being undertaken where a SU discloses abuse or neglect, or staff have grounds to believe that such has occurred.

[8] The policy as to misconduct and serious misconduct stated that assaulting a person with an intellectual disability is an example of serious misconduct.

[9] Ms Cowan, and other support workers, reported to a Service Manager, Lauren Marie. She, and another Service Manager who became involved in a disciplinary investigation, Linda Hudson, reported to Adrienne Transom, Area Manager.

[10] In unchallenged evidence, Ms Transom told the Court that the role of support worker is a critical one for IDEA. Such persons may be responsible for sole charge care and support of SUs, who are inherently very vulnerable. IDEA must therefore have absolute trust in its support workers to perform their job safely, properly and in line with its non-aversive approach.

[11] Ms Cowan said that her role required her to live with SUs in their residential housing when working. This meant she would look after their personal care, including toileting and bathing, and taking such persons on external visits. Daily tasks included cleaning, cooking and completing the personal diary and communication book of that SU. It also meant ensuring that meals were eaten, and medications taken. At the time of the events under review, she was looking after SUs at a particular home which had six bedrooms, two bathrooms, a kitchen and dining area, a living room, and a sleepover room for staff.

[12] This case concerns two particular SUs. The first was Mr C, who was aged in his mid-60s with relatively high needs. He had received support from IDEA for many years. Ms Cowan said that she always got on well with Mr C. She recalled that his father had a role in an educational institution which she used to attend, and that Mr C was aware of this. She felt this gave them more of a connection than some support workers were able to enjoy with him. Mr C always required help to be showered and dressed and could not make his bed. He did not undertake work at the time, as he was terminally ill. At times it could be difficult to understand what he was saying. From time to time, he hit others.

[13] The second was Mr M; he was also a long-standing SU. He had a pamphlet delivery job and used public transport. He assisted with tasks around the home, such as washing dishes, vacuuming, making his bed and so on. There was evidence that Mr M had a propensity for telling lies, evidence which will need to be reviewed in detail later.

Key events

26 – 28 March 2017

[14] On Sunday, 26 March 2017, Ms Cowan was completing a sleep-over shift that had started 1.00 pm, Saturday and finished at 12.00 pm, Sunday. Subsequently, it was alleged that Ms Cowan slapped Mr C on his thigh at some time during Sunday morning.

[15] At 11.00 pm Sunday evening, Mr M told support worker, Rochelle Long, about an incident which he said he heard during the morning. While walking to his own bedroom, which was approximately opposite that of Mr C, he believed Ms Cowan had been in Mr C's bedroom, and he thought he heard Ms Cowan slap Mr C.

[16] In a subsequent incident report, Ms Long said Mr M stated he heard a "slap- like noise". In that account, she also said that "[Mr M] seemed very upset about it and keep asking if [Mr C] was okay as [Mr C] was very unsettled overnight".

[17] Ms Long also stated that when changing Mr C the next morning, 27 March 2017, she had not noticed any marks or bruising on him.

[18] On 28 March 2017, at 5.40 pm, Debbie Robinson, Service Manager, conversed with Mr C. Ms Robinson emailed Ms Marie, and others, the next morning, 29 March 2017, saying that when she spoke to Mr C, as she always did when she dropped a vehicle off, she asked him how he was. His reply was "Jean Cowan – bruise". He then rubbed his right thigh. She could not see any evidence of bruising to the thigh. She then sought confirmation that he meant Jean Cowan because it had been hard to understand the name because he appeared to be "worked up". A support worker, Daryll Parker, was also present. Ms Parker confirmed Mr C was referring to Ms Cowan. Ms Robinson said, "What – Jean Cowan". Mr C responded to her question by saying "Jean – hit me".

An investigation is commenced; first meeting

[19] Ms Marie then wrote to Ms Cowan on 30 March 2017 referring to the accounts which had been given by Mr C and Mr M. She stated IDEA needed to meet and hear

Ms Cowan's explanation regarding the matter and to consider whether any further steps were appropriate. She was advised she had the right to bring a representative to the meeting, and that because what had been alleged was potentially serious, dismissal was a possibility. The letter advised the possibility of suspension was also to be considered at the meeting.

[20] On 6 April 2017, an initial "please explain" meeting occurred. Ms Cowan attended with two Union representatives, an organiser, Linda Deans, and a delegate, Karen Kinane. Ms Hudson, Senior Service Manager, and Ms Marie also attended, taking notes. A copy of Ms Long's incident report and of Ms Robinson's email were provided to Ms Cowan and to those supporting her to read prior to the meeting.

[21] At the meeting, Ms Cowan said in summary that she had not hit Mr C; she said she had "no idea, wouldn't know" why Mr M would allege he heard her hit Mr C. Ms Deans stated that the allegation was hearsay only. Ms Cowan confirmed she had been in Mr C's room to make his bed and tidy the room.

[22] She also said that Mr C poked her when she was driving, and that she had told an SU that "if Mr C hits you, you can hit him back". She went on to say that it was known that Mr M would take things from cupboards and then deny it, although he would be found out. Ms Deans said that she thought the allegation was overkill, particularly when it was based on a hearsay assertion.

[23] After a break at the end of the meeting, Ms Cowan was advised there would need to be an investigation. Then her views as to suspension pending the outcome of the investigation were sought. A second break was taken, following which Ms Hudson advised that Ms Cowan was to be suspended. This outcome was confirmed in a letter sent to Ms Cowan on 6 April 2017.

IDEA interviews

[24] The first person to be interviewed was Ms Parker. Asked when she became aware of the incident, she said that after she started her shift on the afternoon of Monday, 27 March 2017, Mr M had asked her if he could talk to her privately about something that had happened in the weekend. Mr M then confirmed he had previously

told Ms Long that he had heard a slap from Mr C's room when Ms Cowan was there. He said he had heard Ms Cowan tell Mr C to "piss off". He said he was surprised that Ms Cowan gave everyone a biscuit, soon after, for morning tea. Mr M also said he heard Ms Cowan say to Mr C "do you want another one [Mr C]".

[25] Ms Parker was asked whether she discussed the matter with Mr C. She said that she did not talk about it to Mr C because he had been agitated and was "not himself". She then recorded what had been said when Ms Robinson came in the following afternoon, as already summarised.2

[26] Ms Parker stated that on Wednesday, 29 March 2017, Mr C was "really agitated". He kept saying "Who's coming? Who's coming?" Then he said, "Not Jean Cowan, Jean Cowan hurts [Mr C]". He also wanted her to take him to the doctor "to get his leg fixed".

[27] Ms Parker said she asked Mr C where it was sore. He indicated his right leg. She said there was nothing to see. She went on to say he had talked about it all week, and that he was distressed. She applied some skin moisturiser, telling Mr C that the doctor had told her to put it on his leg. She had not heard anything more about the matter after doing this.

[28] She also said that she had never heard Mr C accuse anyone of hitting him before. She expressed an opinion that she believed the incident had occurred, because Ms Cowan had a "short fuse".

[29] She also said that Mr M self-catheterises; sometimes when he wet his bed Ms Cowan called him a baby. Ms Parker said that he liked to get staff into trouble. Although staff were open about Mr M being a liar, she had never known Mr C to lie.

[30] On the same day, Ms Hudson interviewed support worker, Ngaire Theobald. She said she learned about the incident during a shift which commenced at 9.00 am on Tuesday, 28 March 2017, when she was informed by Ms Parker as to what Mr M

2 Above at [18].

had said. She had not spoken to Mr C, because she did not want to escalate the matter with him.

[31] She said it had been well documented Ms Cowan had no patience, or tolerance, and that Ms Hudson should talk to Ms Marie about this.

[32] She said Ms Cowan had a good rapport with Mr C. However, she was often “short fused”, and “too mouthy about things that don’t matter”. She had completed several incident reports regarding Mr C hitting her in the van. Mr C was prone to saying things about people teasing him, and that he could be very annoying at times. He was not well, so he could wind up a person who had a short fuse.

[33] She also said Ms Cowan did not have a good relationship with Mr M, and vice versa.

[34] On the same day, Ms Kinane spoke to Ms Parker. Her summary of the conversation contained a number of general statements concerning the two SUs involved, including Ms Parker’s view that Mr M would often tell staff things that may be untrue; and that Mr C would parrot and repeat things he had heard from others that may or may not be true, which could be for attention.

[35] Ms Hudson conducted several further interviews on 10 April 2017.

[36] She, and Ms Robinson, spoke to Mr M. They explained that they wished to follow up on the incident report Ms Long had written after he had spoken to her about something he heard in Mr C’s room. Asked when he heard the noise, he stated it was at morning tea time; and that Ms Cowan gave biscuits and tea afterwards. He said he had heard a noise “like a smack”. He also heard her say “would do it again”. He said he was in his room just near the door. Demonstrating where this was, he positioned himself inside the door of his bedroom. The sound he heard was coming from Mr C’s room. He repeated he heard Ms Cowan say she “would do it again”. He stated that Mr C’s bedroom door was open. Then he said that afterwards Mr C was upset and was not acting normally; he was reacting.

[37] Ms Hudson and Ms Robinson then carried out a re-enactment. Mr M was asked to confirm which one of three sounds was the one he had heard. He stood inside his bedroom about one metre from the door. Ms Robinson went into Mr C’s bedroom where she could not be seen. There she slapped her own thigh with her hand, hit the surface of the bedroom wall, and hit the top of a dresser with her hand. Mr M identified the slap.

[38] Mr M also referred to another occasion when travelling in the van. Ms Cowan had spoken about Mr C hitting her in the van. He said Ms Cowan was swearing, and he had said “[Mr C] can’t help it”.

[39] Then Ms Hudson spoke to Ms Long concerning what Mr M had told her on Sunday, 26 March 2017. She confirmed that she came on to her shift at lunchtime that day and had observed that Mr C’s behaviour had been unusually unsettled. Between

1.00 pm and 6.00 pm, he had kept grabbing her and trying to get her to sit with him. He slept from 8.00 pm to 12.30 am, after which he was “getting up and down all night”. She confirmed that she checked Mr C for bruising when changing him and saw no marks. A week later, on 3 April 2017, she saw what looked like a bruise on his leg, but after asking other staff, they had not noticed anything. She also confirmed that after she had completed the incident report, Mr M had told her there was “something I didn’t tell you, I thought I heard [Ms Cowan] say to [Mr C] ‘Do you want it again?’”.

[40] Ms Hudson also interviewed support worker, Rose Te Rangi. She recalled that at 9.00 am on 27 March 2017, Mr M said he had something to tell her. Ms Te Rangi told him he needed to inform Ms Marie. He said he had already told Ms Long. Ms Te Rangi then told Ms Long she needed to inform Ms Marie. Asked why Mr C would say this had happened, she said she did not think it likely Mr C would make up the allegations, and that she had never heard him accuse another staff member of hitting. She said also that Ms Cowan was nice enough, but that she yelled and got a bit flustered.

[41] Ms Robinson was then interviewed. She was asked whether she had spoken to Mr C about the incident. She said that because Mr C was worked up, she had not done this but advised Ms Marie as to what he had said. She also confirmed she had not

reported what she had been told in the late afternoon of 28 March 2017 by Mr C until the next day because Ms Cowan was not working a shift; she thought the matter could wait until the following morning.

[42] Ms Hudson and Ms Robinson also met and spoke with Mr C. In the course of the conversation, Ms Hudson told him that she wished to talk to him about something that he had told Ms Robinson had occurred with Ms Cowan; she was said she was sorry this had happened. He said, “Hit me/hit leg”. Asked where he was when this happened, he said, “In this room”. Asked when this was, he said “Saturday”.

[43] On 27 April 2017, Ms Hudson wrote to Ms Cowan summarising the information she had obtained. She said she had not yet made a decision as to what should occur. She would not do that until she had spoken to Ms Cowan again at a scheduled meeting when she could provide a response.

[44] She went on to record Ms Cowan's initial response, and her interviews with the SUs and staff. She said that having considered the matters, there were several behaviours which seriously undermined her, and IDEA's, trust and confidence in Ms Cowan. She said there were also two further issues that had come to her attention, and which would require consideration. It was alleged that Ms Cowan had a short fuse and yelled at SUs; and that when Mr M's bed became wet she would call him a baby. She went on to propose details for a further meeting.

Second meeting

[45] Ms Hudson and Ms Transom met with Ms Cowan, Ms Deans and Ms Kinane to receive Ms Cowan's response on 28 April 2017. At the meeting, the information which had been obtained from the SUs and staff to that point was discussed. The accuracy of the notes of the meeting are not contested by Ms Cowan.

[46] In her evidence to the Court, Ms Hudson referred to those aspects of the meeting which were of significance to her. She said Ms Deans had questioned whether the information in the letter of 27 April 2017 was based on fact, stating that vulnerable people were involved, and that what had been reported was mostly opinion.

[47] She then moved through the feedback provided by individual staff members, and the two SUs, seeking Ms Cowan's responses. These were recorded. One of the responses was that Mr C had been "good as gold"; she said she had dressed him in a bathroom, and not in his bedroom.

[48] There was then a general discussion. Reference was made as to the previous assertion that Ms Cowan lacked patience and tolerance. Ms Cowan said Ms Marie had spoken to her about that issue when working at a different house. She also considered she had been bullied by Ms Marie. She had accordingly raised a complaint as to the way she was managed. She had no such problems until Ms Marie took over as her manager. Ms Hudson said the issue was that Ms Marie had spoken to her regarding the same sort of behaviour as was now being investigated.

[49] Ms Kinane then said that she had interviewed Ms Parker; she was of the view that what she had been told provided a different connotation of Ms Hudson's interview with Ms Parker.

[50] In the course of the meeting, Ms Cowan had said that she did not yell, but might raise her voice. She said that all staff did this.

[51] Ms Deans and Ms Cowan accepted that Mr C said he had been hit by Ms Cowan, but said he was terminally ill and on medication. Ms Cowan said he was always threatening to hit others.

[52] Ms Cowan also said she had told Mr C not to hit, and that she had told other SUs to say they could hit Mr C back, if he hit them. She denied having called Mr M a baby; rather she had told him that he was "not a baby".

[53] After the meeting on 3 May 2017, Ms Hudson spoke to Donna Brown, a supported employment coordinator. This was to obtain an opinion from another person who knew Mr M well.

[54] Ms Brown confirmed that Mr M had told her he heard a slapping noise, but he had not mentioned names. He had not said that what he heard was someone hitting

someone. She was unsure when the conversation occurred; it was a while ago. Ms Brown also said she did not think Mr M would "blatantly lie". She noted that there was tension in the residence between staff, and that Mr M may overhear them talking, and misinterpret what he was hearing.

Final feedback report

[55] Then, also on 3 May 2017, Ms Hudson wrote to Ms Cowan by way of follow-up to the interviews and meetings. She said she had completed her investigation.

[56] On this occasion, she described what each SU or staff member had said, and then set out Ms Cowan's responses with regard to each interview. She said there were three allegations. The first related to what Mr C had told Ms Robinson to the effect he had been hit, and what Mr M had told Ms Long about what he had heard. The second allegation was that Ms Cowan has a short fuse and yells at SUs; and the third was that when Mr M's bed got wet she called him a baby.

[57] After summarising the information she had obtained, Ms Hudson said that her preliminary view was that on the balance of probabilities, Ms Cowan had hit a vulnerable person with disabilities, and that her actions, conduct and

behaviour had impacted on that person. She also considered that there was a pattern regarding Ms Cowan's communication, behaviour and conduct towards such people.

[58] She said that although these matters had previously been raised with her and documented, there had not been an improvement. Attached to the letter was a copy of a diary entry made by Ms Marie in September 2016, when a SU had complained about Ms Cowan's manner, saying she was bossy and grumpy when on a shift. Ms Marie recorded that she had discussed this issue with Ms Cowan, one that had been discussed with her many times in the past, and that this type of interaction may still be occurring. I interpolate that the evidence establishes Ms Cowan had initialled the note of this discussion.

[59] Ms Hudson said that she needed to consider whether Ms Cowan's actions towards vulnerable people with disabilities impacted on the trust and confidence that

IDEA needed to have in her, to allow the employment relationship to continue. When these matters were considered individually and cumulatively, IDEA had reached the tentative conclusion she had fallen well short of the expectations it held in terms of the leadership duties and responsibilities of the role of a level 3 support worker. She went on to say that given these findings, termination of her employment was being considered. But before a final decision was made, Ms Cowan would have the opportunity of responding to this preliminary view.

Final decision

[60] On 11 May 2017, Ms Cowan, Ms Deans and Ms Kinane were to meet with Ms Transom; by this time Ms Hudson was on leave.

[61] Prior to the meeting, Ms Deans provided a written response on behalf of Ms Cowan, which was considered by Ms Transom. In it, Ms Deans said there had been a terrible misunderstanding. She said there was no proof of Ms Cowan yelling at SUs, either when Ms Marie had spoken to her, or since. Ms Cowan had subsequently complained about her manager, who she said, bullied her. The complaint had never been adequately addressed by IDEA.

[62] Ms Deans also stated that the evidence of Mr C having been slapped was "extremely weak". She said that he was inarticulate and had not provided a detailed account of what had allegedly occurred and may be affected by medications so as to genuinely believe, although mistakenly, that the incident had occurred. There was, she said, a huge risk of an unfair outcome, so that it was not open for IDEA to dismiss Ms Cowan.

[63] A full note of the meeting which then occurred was produced; the content is not in issue.

[64] In her evidence, Ms Transom referred to salient parts of the meeting. She said she had asked Ms Deans what she meant when she referred to a "terrible misunderstanding". Ms Deans said that Ms Cowan knew she had not hit Mr C, and that no one had witnessed the event.

[65] She also asked Ms Deans why staff were saying Ms Cowan was short tempered and yelled at SUs. She said Ms Cowan had problems ever since becoming a member of Ms Marie's team some four years previously, and that prior to that time there had been none. Ms Transom considered that did not deal with the issue she was considering, as what had been alleged was more recent.

[66] Ms Transom also asked Ms Cowan about the statements concerning her being short tempered and yelling at SUs. Ms Cowan said she had not yelled at SUs, but that she did raise her voice. She also confirmed she would tell SUs that if Mr C hit them, they were allowed to hit him back. Ms Transom understood that there had been hitting by Mr C in the work vehicle.

[67] Ms Deans also said, in connection with an allegation about calling Mr M a baby, that Ms Cowan had in fact said to him that he was not a baby. Ms Cowan confirmed this is what she had told him.

[68] There was also a discussion about the fact that both SUs stated Ms Cowan hit Mr C. Mr C was not known to lie. Mr M had previously lied only to get himself out of trouble; he was not known to lie about others.

[69] There was a brief discussion as to whether Mr C's genuine belief in what had occurred was because he was on higher doses of medication. Ms Kinane also said that Mr C was susceptible to suggestions about hitting, and that it was accordingly likely he had confused hitting events.

[70] Following a break, Ms Transom advised Ms Cowan that the way she had interacted with the SUs was not to the standard expected of a level 3 support worker. On the balance of probability, she considered Ms Cowan had hit or slapped Mr C, and that she was therefore considering termination. She asked Ms Cowan if there was anything else she wished to add about that preliminary view or otherwise, before a final decision was made.

[71] Ms Deans said there was not, and that an injunction would be sought. Ms Cowan said she had nothing further to add,

but that she was very disappointed.

[72] Ms Transom accordingly decided to terminate Ms Cowan's employment with two weeks' pay in lieu of notice, and so advised her.

[73] On 15 May 2017, these conclusions were recorded in a letter sent by Ms Transom to Ms Cowan.

The parties' cases

Plaintiff's submissions

[74] For Ms Cowan, Mr Meikle, submitted in summary:

a. Reliance was placed on the dicta of the Court in *Ritchies Transport Holdings Ltd v Merennage*, where the Court held in respect of a situation such as the present, an employer must satisfy the Court on the balance of probabilities that as a result of a complete and fairly conducted inquiry it was justified in believing serious misconduct had occurred.3 That decision must be made not only on the evidence available to the employer at the time, but that which would have been available after proper inquiry by it. An employer had to base its decision on a reasonably found belief, honestly held, that serious misconduct had occurred.

b. Reference was made to *New Zealand (with exceptions) Shipwrights etc Union v Honda NZ Ltd*, where it was emphasised that convincing proof is required when the allegation is grave, because the "more serious the misconduct alleged, the more inherently unlikely it is to have occurred and the more likely the presence of an explanation at least equally consistent with the absence of misconduct".4

c. Here, there was not a complete and fair inquiry, because IDEA did not:

- obtain medical evidence of the "injury";

3 *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198, [2015] ERNZ 361 at [78].

4. *New Zealand (with exceptions) Shipwrights etc Union v Honda NZ Ltd* [1989] 3 NZILR 82 (LC); *Honda NZ Ltd v New Zealand Boilermakers Union* [1991] 1 NZLR 392, (1990) ERNZ Sel Cas 855 (CA).

- make enquiries as to the likelihood of a bruise being evident about seven days after the alleged slapping, when there was not one on 28 March 2017, two days after the alleged incident;
  - make an assessment as to the extent of Mr C's disability and the extent to which this and any medication made him unreliable; and
  - make an assessment as to the extent of Mr M's disability and the extent to which this and any medication made him unreliable.

d. What IDEA did do was:
   - carry out a re-enactment of the slapping that involved leading questions and predetermined scenarios which caused Mr M to maintain his false statements;
   - allowed itself to be swayed by unsubstantiated allegations that Ms Cowan had a short fuse and was bad tempered and that accordingly she was predisposed to slap the SU; and
   - relied on hearsay and conjecture from its co-workers.

e. IDEA also failed to consider the 17 years of service in the absence of any "similar offending".

f. Other points were raised in cross-examination of IDEA witnesses which, although not specifically addressed in submissions, require consideration.

Defendant's submissions

[75] For IDEA, Mr Ballara submitted in summary:

a. The Court should have regard to relevant authorities which confirm that the s 103A analysis is about substantive fairness and reasonableness, rather than minute or pedantic scrutiny to identify any failing.5

b. Previous cases emphasised that an employer such as IDEA has particular responsibilities to its vulnerable persons and relies heavily on its staff to assist in discharging those responsibilities.

c. Having regard to that context, it was open to Ms Transom to find that Ms Cowan had hit or slapped Mr C, and that she had acted as alleged. At the end of her investigation process and having heard from Ms Cowan directly, Ms Transom had, or reasonably believed that she had, sufficient information to conclude there had been serious misconduct warranting dismissal.

[76] I will refer to counsel's submissions in more detail later, where necessary.

[77] Before analysing the issues raised, it is necessary to summarise the applicable legal principles.

Legal principles

[78] Section 103A of the Employment Relations Act 2000 (the Act) provides that the question of whether a dismissal or an action was justified must be determined on an objective basis by applying the test in subs 2, which provides:

103A Test of justification

...

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

...

5 *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295, [2016] ERNZ 501 at [46].

[79] The section goes on to stipulate four factors which the Authority or Court must consider namely:6

...

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[80] The Court may consider any other factors it thinks relevant.7 It cannot determine that a dismissal or an action is unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.8

[81] It is not for the Court to substitute its decision for what a fair and reasonable employer could have done in the circumstances and how such an employer could have done it. In *Angus v Ports of Auckland Ltd*, it was emphasised there may be a range of responses open to a fair and reasonable employer, and that the Court's task is to examine objectively the employer's decision-making process and determine whether what the employer did, and how it was done, were what a fair and reasonable employer could have done.9 Subsequently, the Court of Appeal in *A Ltd v H*, discussed s 103A and observed:10

[46] It is apparent that the effect of the statute is that there may be a variety of ways of achieving a fair and reasonable result in a particular case. As the Court in *Angus* observed, the requirement is for an assessment of substantive fairness and reasonableness rather than "minute and pedantic scrutiny" to identify any failings.

6 Employment Relations Act 2000, s 103A(3).

7 Section 103A(4).

8 Section 103A(5).

9 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [36] – [44].

10 *A Ltd v H,* above n 5, at [45] (footnotes omitted).

[82] Reference should also be made to the dicta of the Court of Appeal in *Whanganui College Board of Trustees v Lewis*, in which that court dealt with standard of proof issues in this way:11

> [19] The test for justifiable dismissal is whether the decision to dismiss was a reasonable and fair one: was dismissal a course reasonably open to the employer in the circumstances? When applying to that the civil standard of proof it is necessary to keep in mind the distinction between the inquiry the employer makes and the inquiry the Tribunal or Court subsequently may be called upon to make. To fail to do this may result in the view of the employer, reasonably informed, being overridden by views of the Court, formed perhaps with the benefit of hindsight (*Northern Distribution Union v BP Oil NZ Ltd* [1992] NZCA 228; [1992] 3 ERNZ 483; (1992) 4 NZELC 95, 601 (CA) at p 488; p 95, 604).
> [20] The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to a Court or Tribunal that the dismissal was justified. The first does not involve any standard of proof, the second does. In ascertaining the facts the employer may be presented with conflicting accounts. He or she, acting reasonably, will be entitled to accept some in preference to others. That does not call for the application of any legal standard of proof. Nor is it usual to impose the application of a legal standard of proof on decisions of a litigant. That is not needed; there is already the standard of reasonableness. But when required to prove

that dismissal was justified the employer will need to show that both the course taken to ascertain the facts and the determination that they warranted dismissal were reasonable. That must be shown on the standard of proof of the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances.

[83] Finally, I refer to the numerous previous decisions where circumstances of an employer such as IDEA have been recognised. For example, in *IHC New Zealand Inc v Fitzgerald*, Judge Shaw emphasised that such an employer has responsibilities to its SUs and relies heavily on staff not only to care for these vulnerable persons, but to do so in a particular non-aversive way.12

[84] I proceed on the basis of these principles.

11 *Whanganui College Board of Trustees v Lewis* [2000] NZCA 136; [2000] 1 ERNZ 397.

12. *IHC New Zealand Inc v Fitzgerald* [2006] ERNZ 932 at [80]. Another example is *NZ Crippled Children's Society v Van der Molen* EmpC Christchurch CEC36/92, 21 August 1992 at p 17-18.

Analysis

[85] Before considering the points raised for Ms Cowan, it is necessary to summarise the approach that was adopted by both Ms Hudson and Ms Transom in concluding that the allegations raised were established.

[86] Information was obtained from each of the two SUs involved. Mr C was recorded as having expressed concerns about Ms Cowan on several occasions in the days following the alleged incident. Likewise, Mr M's concerns were also expressed to support workers on a number of occasions in the same period. In addition, Ms Hudson, the investigator, spoke to each of them in the presence of a service manager who was well known to them, Ms Robinson.

[87] Ms Hudson and Ms Transom, when evaluating the information they had obtained, considered the key question of the reliability of their accounts.

[88] The issue of whether Mr C was truthful was considered, with Ms Hudson and Ms Transom concluding that he had never previously been known to lie on a matter of this sort, although he was also recorded as parroting and repeating things he had heard from others which may or may not be true, possibly seeking attention.

[89] They were also satisfied that Mr M, although known to lie about himself, was not lying on this particular occasion, a conclusion which was reinforced by the repetition of his account, and by his reference to Mr C being unsettled after the alleged slap, a circumstance which had also been observed by staff.

[90] The information obtained showed some differences in the two accounts, but as I shall elaborate shortly, these were not regarded as significant.

[91] The cognitive abilities of each SU were considered in light of the lengthy experience which staff who had observed both SUs had, particularly Ms Robinson. As will be amplified shortly, medication issues with regard to Mr C were also considered.

[92] The question of whether the slapping incident may have occurred because Ms Cowan was alleged to have a short fuse and yelled at SUs was accepted because

there was a relevant history which confirmed the issue had been raised by Ms Marie, and because other staff said this was the case.

[93] There was no evidence that the two SUs had colluded. Ms Transom considered that the two SUs did not have the ability to do so; she also noted that both had stuck to their story over time. In the absence of such a possibility, it was concluded that the accounts from each SU were independent and consistent.

[94] In summary, Ms Hudson when investigating, and Ms Transom in making her final decision, considered that the totality of the information which was obtained from the SUs themselves, and from experienced staff some of whom had worked with them for many years, established the slapping allegation. As Ms Transom put it, whichever way she considered the matter, the same answer was reached. She also accepted the information provided by staff about the second and third allegations was reliable.

[95] For Ms Cowan, it is asserted that those conclusions could not have been reached by a fair and reasonable employer in all the circumstances, having regard to a number of factors, most of which were raised at the time.

Allegation one: no injury/bruising

[96] The first issue related to the fact there was no medical evidence of bruising, and no evidential basis for concluding that there was an injury from the alleged slapping. In his submissions, Mr Meikle in effect submitted that the absence of such information meant it was unlikely Mr C had in fact been slapped.

[97] The genesis of this issue arises from the statement made to Ms Robinson on 28 March 2017, wherein Mr C was understood to be attributing a bruise on his right thigh to Ms Cowan; he said Ms Cowan had hit him. Ms Robinson stated that she could see no evidence of bruising to the right thigh. She said Mr C was very agitated when making this statement.

[98] On the same day, Ms Parker also spoke to Mr C after he referred to the fact that Ms Cowan hurt him, and that he wanted her to take him to a doctor to get his leg fixed. She asked him where it was sore; he referred to his right leg which he showed her. She also considered there was nothing to see. In addition, she reported that he talked about it all week and was distressed. She applied skin moisturiser, telling him the doctor had told her to apply it. She heard nothing further from Mr C thereafter.

[99] Ms Long also referred to this issue. After Mr M had reported the incident to her, she said she saw no marks. She also said that about a week later, on 3 April 2017, she saw what looked like a bruise on Mr C's leg; she asked other staff about this, but they had not noticed anything. On the basis of these observations, it was not considered necessary to refer Mr C to his general practitioner.

[100] Ms Transom, commenting on the evidence that no marks had been found at the time, but that a week later there did appear to be a bruise, stated that in her experience a bruise could take time to appear. But she was not convinced it was the alleged slap which had caused the bruising observed at that stage.

[101] In light of these circumstances, Mr Meikle asked Ms Transom whether consideration had been given to the obtaining of expert evidence, possibly from a psychologist. She explained that the likelihood of Mr C being seen by a psychologist quickly was remote. She said that in any event, Mr C and Mr M had been in IDEA's care for many years, assisted by staff who knew the SUs well and were able to reliably assess their behaviour.

[102] Ms Robinson, an experienced enrolled nurse who had worked at IDEA for some time, said Mr C had never previously in the many years she had known him ever said he had been hit; what alarmed her was that when he said he had a bruise and had been slapped, and was agitated, this was not a story which he had made up. Nor did she consider he was impressionable. Ms Transom said she relied on this information.

[103] Ultimately, Ms Transom did not regard the issue of bruising as being determinative; she said that what she took into account was two SUs giving her the same information about Mr C being slapped. As already noted, she ruled out collaboration between the two.

[104] In all these circumstances, I conclude that the approach taken to the issue of injury/bruising was, in all the circumstances, one that was open to a fair and reasonable employer.

Assessment of disability and impact of medication on SUs: is their information unreliable, false and unbelievable?

[105] Mr Meikle submitted that IDEA should have made an assessment as to the extent of both SUs disabilities, and whether this and any medications they took made their information unreliable.

[106] The issue that was raised at the time for Ms Cowan related to the effect of medication on Mr C only. Ms Deans had said Mr C was inarticulate, had provided no detailed account of the events which allegedly occurred, and may have been affected by medications so as to genuinely believe those events had occurred, yet be mistaken. The issue was put in this way, because Ms Cowan accepted Mr C said he had been slapped by her.

[107] After this issue was raised, Ms Hudson recorded that Mr C's methadone medication had increased in December 2016. There was also evidence that at a subsequent stage, sevredol was prescribed for Mr C's terminal condition.

[108] Ms Hudson and Ms Transom noted the increased medication, but also observed that no change had been noticed as to Mr C's behaviour by anyone because of that, or because of his illness; rather, the change that staff reported at the time was different behaviour following the incident of 26 March 2017.

[109] Ms Hudson also stated that staff were required to be aware of any changes or side effects they noticed from the taking of medication, particularly a newly prescribed one, and were to file an incident report with any such observation, as well as informing the relevant manager. There was no indication of such reports being lodged.

[110] Ms Transom also proceeded on the basis that no changes of behaviour had been noted as a result of ill health or the taking of medication.

[111] No issue was raised regarding Mr M's medication at the time of the investigation, nor was it produced to the Court. I am not satisfied that this was an issue that a fair and reasonable employer could be expected to consider in the

circumstances.

[112] A related issue raised by Mr Meikle was the extent of the SUs disabilities. I have already alluded to the consideration given to the cognitive abilities of both persons. Ms Hudson and Ms Transom had reasonably reliable information on this topic, based on years of interactions between them and staff.

[113] That knowledge led to a consideration of two particular issues which it is now convenient to consider in more detail. The first related to any propensity to lie, and the second related to apparent inconsistencies. I deal with each.

[114] A range of information was received and considered as to the question of whether either SU would lie. A consistent theme from Ms Parker, Ms Theobald and Ms Brown was that Mr M was known to do so. But this was qualified. Ms Theobald said that this was to cover up what he had done wrong. Ms Brown confirmed this by saying he would not "blatantly lie". At the meeting held on 6 April 2017, Ms Cowan herself stated it was known Mr M would take things from cupboards and then deny it, but that he then "gets found out".

[115] Ms Hudson and Ms Transom also considered two related factors. First, Mr M had repeated his concerns on several occasions. Second, he observed, as had staff, that Mr C became unsettled after the incident which tended to suggest he was upset by what had occurred. They concluded, therefore, that this particular incident related to an event which was wholly different from other circumstances where Mr M had lied about his own conduct.

[116] The question of whether Mr C himself had lied and/or parroted something he had been told was also considered. Staff, including Ms Te Rangi, Ms Parker and Ms Robinson said that in all the years they had known him, Mr C had never previously said he had been hit. They said he talked about hitting others. Ms Te Rangi said Mr C would not make up something which had not happened.

[117] Ms Parker had also stated that he could parrot what others had said. There was no information, however, that Mr M had suggested a slapping story to Mr C. Ms Hudson thought this was unlikely because Mr M had stated immediately after the incident that Ms Cowan then provided morning tea and a biscuit, and his focus would have been on that rather than talking to Mr C.

[118] For her part, Ms Transom noted the information that the two SUs did not get along particularly well, and that Mr M would sometimes threaten Mr C, which did not support a conclusion he was lying about what he had heard. She also observed that Ms Cowan was not saying that Mr C was lying, rather, the focus had been on the medication issue already discussed.

[119] Next, I consider the concerns raised about inconsistencies of the account between the two SUs. It was submitted Mr M had been inconsistent with regard to where he was when he said he heard the alleged slapping. In his original description of events, he said he was walking to his bedroom. In the re-enactment that was undertaken, he positioned himself within his room. Ms Hudson considered that there was no real inconsistency because his statement that he was "walking to his room" could have been descriptive of the fact that this is exactly what happened: he walked to his room and then heard what occurred.

[120] It was suggested that his report of a statement made by Ms Cowan "do you want another one", was not made when initially speaking to Ms Long, so that he had given inconsistent accounts. However, she also reported that after filing the incident report on the morning of 26 March 2017, he had said there was something he had not told her, referring for the first time to the additional words. This was regarded as credible.

[121] It was also suggested there was significance in the fact that when Ms Hudson spoke to Ms Brown some weeks later, on 3 May 2017, she said she had been told by Mr M about a slapping noise, not that someone was being hit; and that he mentioned no names. She also said, however, that she was not sure when the incident occurred and that it was "a while ago". This information was not regarded as giving rise to

inconsistencies. Rather, it was considered that Ms Brown's information was somewhat vague due to the lapse of time.

[122] With regard to Mr C, it was suggested there was an inconsistency, because when he was spoken to on 10 April 2017, and asked when the incident occurred, he said "Saturday", which was inconsistent with other information provided to that point. This apparent minor error was not regarded as significant. Given the totality of all other information obtained as to the date of the event, the view was taken that this did not materially diminish the accuracy of his concerns about being hit. All the information suggested that what he said was reliable.

[123] Mr Meikle invited witnesses to confirm that a range of points about which information had been obtained from staff, should have been put to the relevant SUs. So, for example, it was suggested that Ms Cowan's denial of the event was not put to Mr C; nor was it pointed out to him no bruising could be seen; nor was he asked why he delayed in making his first complaint.

[124] Both Ms Hudson and Ms Transom were adamant that they were required to deal with vulnerable persons suffering intellectual disabilities, so that it would be wholly inappropriate to ask such questions.

[125] As the Court of Appeal has emphasised, the statutory injunction is that the question of what is fair and reasonable must be assessed "in all the circumstances", and that circumstances may affect the extent of inquiry of individual persons being questioned.13 I regard that dicta as being appropriate here.

[126] In summary, having regard to the various issues I have just discussed – medication matters, propensity for lying, and inconsistencies – I am satisfied that the steps taken, and conclusions reached by IDEA were those which a fair and reasonable employer could be expected to take.

13 *A v H Ltd*, above n 5, at [37] and [39].

The re-enactment

[127] Mr Meikle submitted that the carrying out of the re-enactment of the slapping involved leading questions, and a pre-determined scenario, which caused Mr M to maintain his false statements.

[128] The record which was made of this event confirms that a series of open, not leading, questions were asked regarding the nature of the noise, where Mr M was positioned, the words he heard, the fact that his door was open, and that later Mr C had been upset and was not acting normally. After these questions were asked, the re-enactment occurred with Mr M being unable to see Ms Robinson. It was at that point Ms Robinson made the three sounds in Mr C's room as described earlier. Mr M did not know in what order they would be made, nor the nature of them. He correctly identified the slapping noise made when she hit her own thigh with her hand.

[129] This was not, of course, the only information held by Ms Hudson and Ms Transom. A fair and reasonable employer could have concluded that this was a fair process, and that it produced information which was consistent with the extensive other information which had already been obtained.

Hearsay and conjecture

[130] Mr Meikle submitted that IDEA should not have relied on hearsay and conjecture from Ms Cowan's co-workers.

[131] It is apparent that Ms Hudson and Ms Transom carefully considered all the information provided by co-workers; this included checking assertions raised by Ms Cowan and her representatives in the course of interviews.

[132] I accept Mr Ballara's submission that in fact the observations of staff about Ms Cowan were not hearsay, but directly witnessed observations of support workers who knew the SUs very well. It was open to Ms Hudson and Ms Transom to place weight on their professional opinions, as they did by obtaining and seeking opinions of the experienced co-workers who knew the SUs and the circumstances of the home.

[133] IDEA in its relevant policies made it clear that any complaint of this kind had to be investigated, and that investigation had to be one that was fair and reasonable in the particular circumstances which would involve vulnerable persons.

[134] As the previous authorities reviewed earlier make clear, in circumstances such as the present, it may not be appropriate to rely only on statements made by vulnerable persons suffering intellectual disabilities, but to evaluate such other information as may be available. Ms Hudson and Ms Transom say that is what they did.

[135] In my view, the investigation that was undertaken in the present case, and the detailed consideration of the information so obtained, led to conclusions that a fair and reasonable employer could be expected to reach in the particular circumstances.

Allegation two: short fuse/yelling

[136] In the course of the hearing, an issue arose as to precisely which staff members had worked with Ms Cowan, and whether they were in a position to provide reliable information as to Ms Cowan having a "short fuse". The three persons who referred to this issue during the IDEA investigation were Ms Parker, Ms Theobald, and Ms Te Rangi.

[137] It transpired that Ms Parker had not in fact worked with Ms Cowan on concurrent shifts with her. This issue was raised at the time. Ms Hudson said that a senior staff worker checked the relevant schedules, and she also discussed the matter with Ms Transom. She said, however, that staff workers who did not work immediately with Ms Cowan would have interacted with her during handovers and were thereby in a position to know about her interactions with SUs.

[138] It was suggested in cross-examination of Ms Hudson that Ms Te Rangi had also not worked with Ms Cowan. Ms Te Rangi had made it clear when interviewed that she had "heard" that Ms Cowan yelled at SUs, and "gets a bit flustered". She did not say she personally observed Ms Cowan's interactions with SUs.

[139] Ms Hudson also said there had been tensions in the home. She concluded staff would have discussed the manner in which individual support workers interacted with

SUs, whether at meetings or otherwise. She considered that those interviewed were senior staff who had worked in the facility for quite some time, were very clear in their opinions, and she trusted what they had to say.

[140] There was other information on this topic. Ms Cowan herself acknowledged she raised her voice, although she said she would not yell.

[141] In addition, there was information concerning a prior discussion between Ms Marie and Ms Cowan about her manner, including that she was bossy and grumpy when working on a shift. Ms Cowan had complained about Ms Marie after the discussion when this topic was referred to. She said she felt bullied by Ms Marie. She did not say the concerns as to being bossy and grumpy were groundless.

[142] Having regard to the exchange with Ms Marie, Ms Hudson and Ms Transom were justified in concluding that prior issues had arisen, notwithstanding her 17 years of service. Moreover, they proceeded on the basis that a support worker of longstanding should have known that the conduct in question was inappropriate because she should have known better.

[143] All this information was consistent with what the individual staff members said. The conclusions reached by Ms Hudson and Ms Transom were open to them on the information provided.

Allegation three: that when Mr M's bed gets wet she calls him a baby

[144] The information provided with regard to this allegation arose from Ms Cowan herself, at the meetings of 28 April and 11 May 2017. She had told him that he did not need to wet his bed at night, and that he should go to the toilet. She had said she told him he was not a baby.

[145] In light of this information, it was open for Ms Hudson and Ms Transom to conclude that the allegation was made out.

Conclusion

[146] I conclude that none of the concerns raised for Ms Cowan are made out. I am satisfied that IDEA's decisions as to serious misconduct, and the fact that this warranted dismissal, could have been reached by a fair and reasonable employer in the particular circumstances.

[147] Accordingly, the challenge is dismissed.

[148] IDEA is entitled to costs. This topic should in the first instance be discussed between counsel. My provisional view is that these should be considered on a Category 2, Band B basis under the Court's Guideline Scale as to Costs. If agreement is unable to be reached, IDEA may file and serve an appropriate application within 21 days, and Ms Cowan may respond within the same period thereafter.

B A Corkill Judge

Judgment signed at 2.50 pm on 25 November 2019