

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 125  
5525001

BETWEEN

LYNETTE CROZIER  
Applicant

AND

IDEA SERVICES LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Graeme Ogilvy for Applicant  
Paul McBride for Respondent

Investigation Meeting: 28 June and 25 August 2016

Submissions Received: 30 August and 19 September 2016 from Applicant  
16 September 2016 from Respondent

Determination: 7 October 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Ms Crozier has established she has a personal grievance on the basis of unlawful discrimination under section 103(1)(c) of the Employment Relations Act 2000.**
- B. Ms Crozier was unjustifiably dismissed.**
- C. Idea Services Limited is ordered to pay to Ms Crozier within 28 days of the date of this determination:**
- a) a sum equivalent to three months ordinary time remuneration from 8 October 2014 under section 123(1)(b) of the Act; and**

**b) the sum of \$13,500 under section 123(1)(c)(i) of the Act.**

**D. Costs are reserved.**

### **Non-Publication Orders**

[1] Prior to the investigation meeting Idea Services Limited (ISL) made an application for non-publication orders relating to clients of ISL who Ms Crozier was employed to support during her employment.

[2] The application was not opposed by Ms Crozier and in order to efficiently dispose of the application, Authority Member Loftus granted the application based on the papers in front of him. This determination confirms the orders of the Authority that pursuant to clause 10(1) of Schedule 2 to the Employment Relations Act 2000 (the Act) the parties are prohibited from publishing any evidence or material which does or may identify any of the service users referred to in connection with this matter.

### **Employment relationship problem**

[3] Ms Lynette Crozier claims she was discriminated against and unjustifiably dismissed from her employment with ISL in September 2014. ISL denies the claims.

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

### **Background**

[5] Ms Crozier was employed as a support worker by Timata Hou Limited. Timata Hou Limited was amalgamated with ISL on 30 March 2015. In accordance with section 225 of the Companies Act 1993 Ms Crozier's claim continues against ISL.

[6] Timata Hou Limited was a disability services provider which provided custodial services and rehabilitation support for intellectually disabled people who, in the main are the subject of a Court order requiring their detention by reason of

criminal activities, and who, but for being intellectually disabled, would be imprisoned.

[7] Historically most of the clients have been physically violent. A number have engaged in sexual offending, or are at real risk of doing so. The clients are potentially dangerous to the community.

[8] There are some clients who are admitted under a civil order and who may be undergoing assessment. These clients include people who are also at a very high risk of serious offending but are not detained as a result of criminal charges.

[9] The facilities provided by ISL and which relate to this matter, are similar to a secure psychiatric unit. Although clients see the facility as their home, it is a secure locked facility where there are a number of locked doors and gates, and very high fences.

[10] Care workers are required to manage clients with complex and challenging behaviours, accompanying them in the community as part of their rehabilitation, and responding to them to prevent them from absconding or escaping.

[11] Ms Crozier was employed as a care worker, a role she held for more than 23 years.

[12] In February 2010 Ms Crozier met with Mr Paul Moles, her then Team Leader. Ms Crozier was advised that it was Mr Moles' intention to move her from her current location due to the increasing risk of potential harm to her as a result of changes in the working environment and her physical status.

[13] On 7 December 2010 Ms Crozier requested a transfer to Vocational Services – Farm/Footprint. The reasons for the request were health related due to concerns about second hand smoke and an allergy to the house pet, a cat. No vacancies were available at that time.

[14] Ms Crozier had previously provided a medical certificate dated 22 November 2010 in which Ms Crozier's doctor advised ISL that it was vitally important that Ms Crozier have a smoke and animal free environment. The doctor advised that Ms Crozier had a very sensitive respiratory system, for which she required regular

medication. The doctor noted that exposure to smoke or cats cause a severe deterioration requiring strong medication which was not good for Ms Crozier on an ongoing basis. The doctor instructed ISL that to satisfy Ms Crozier's health requirements the cat needed to be permanently removed from the premises and that a staff member who was smoking needed to be addressed directly.

[15] In February 2011 Ms Crozier advised ISL that her doctor recommended she reduce her hours to three days per week. Ms Crozier met with Ms Collette Ellison-Hack, National Manager, on 14 February 2011 to discuss her doctor's recommendation. Ms Ellison-Hack advised Ms Crozier that ISL was unable to arrange rosters to accommodate a reduction in Ms Crozier's hours. Ms Crozier was invited to provide ISL with suggestions on a possible way forward. No suggestions were made at that time.

[16] Following an enquiry from ISL, on 15 February 2011 Ms Crozier's doctor wrote to ISL regarding her ongoing medical issues. In that letter the doctor provided ISL with a list of medical issues suffered by Ms Crozier and in particular advised ISL that her chest and breathing were always an issue which worsened when she was exposed to colds and viruses. The doctor advised ISL that Ms Crozier managed well but did require time off for sickness if she got run down or caught a cold.

[17] This letter was followed by a medical certificate dated 28 February 2011 addressing Ms Crozier's fitness to work in her position as support worker. The doctor advised ISL that Ms Crozier was fit to continue to work in her role provided it was completely smoke free and she was not involved in heavy physical work/lifting.

[18] In the medical certificate the doctor recommended a reduction in Ms Crozier's regular hours from full time. The doctor advised that Ms Crozier may be able to continue working a 40 hour week, but did not think Ms Crozier could sustain this regularly throughout the year.

[19] The doctor further advised ISL that Ms Crozier was fit to regularly work 3 days a week (approximately 24 hours a week) and that when she was well she would be able to increase this to full time hours, which may be quite a lot of the time.

[20] On 27 May 2011 Ms Ellison-Hack wrote to Ms Crozier outlining discussions they had which included her notification to Ms Crozier on 18 March 2011 that she

was not able to accommodate Ms Crozier's request to reduce her hours to 3 days each week depending on her health. In this letter Ms Ellison-Hack referred to a letter dated 27 March 2011 from Ms Crozier advising Ms Ellison-Hack that she had been working full time hours for the previous four weeks and was able to work full time from then on.

[21] In her 27 May letter Ms Ellison-Hack refers to a further letter dated 9 May 2011 in which she outlined two options. The first option was to obtain a clearance from Ms Crozier's doctor confirming that she was able to safely work full time. The second option was an alternative option to agree to alter Ms Crozier's working relationship from full time to working on a casual basis.

[22] Ms Ellison-Hack confirmed her understanding of Ms Crozier's view that as she had been working full time for ten weeks ISL's interpretation of the 28 February 2011 medical certificate was wrong and Ms Crozier agreed to meet with her doctor if ISL met the cost of her appointment.

[23] In her 27 May 2011 letter Ms Ellison-Hack raised continued concerns about Ms Crozier's health and the impact it had on ISL including that she had observed Ms Crozier at times struggling while undertaking her work and was clearly having difficulty breathing while climbing steps.

[24] Ms Ellison-Hack agreed to meet the cost of Ms Crozier seeing her doctor in order to obtain a medical clearance. Ms Crozier was asked to provide from her doctor a medical report indicating a precise diagnosis of her medical situation, a prognosis and any views on whether Ms Crozier was able to maintain full time work for the immediate future.

[25] Ms Ellison-Hack expressed her concerns that Ms Crozier was working outside the medical certificate arrangements signed off by her doctor in February 2011 and in that case working full time was risky for both herself and ISL.

[26] As requested, on 14 June 2011 Ms Crozier's doctor wrote to ISL advising ISL that Ms Crozier had a good spell with her health for the previous three months but, being on the cusp of the winter season, it was too difficult to predict Ms Crozier's fitness to continue working full time. The doctor stated that it was inappropriate to

class Ms Crozier as medically unfit, given that she had just managed three full time months without major issue.

[27] Ms Crozier's doctor reiterated the need for Ms Crozier to be able to work in a completely smoke-free environment and also recommended that her night shifts be kept to a minimum due to her needing to transport and wear a CPAP machine when sleeping.

[28] Ms Ellison-Hack considered the contents of the doctor's letter but remained concerned about a number of matters regarding Ms Crozier's ongoing health and her ongoing safety in the work place. Ms Ellison-Hack proposed that ISL arrange for the matter to be considered by IHC's Occupational Specialist, Dr Hartshorn. This would require Dr Hartshorn to have an overview of Ms Crozier's medical condition specifically in respect of her work situation. Ms Ellison-Hack requested Ms Crozier's agreement to this proposal and asked that she sign an authorisation allowing Dr Hartshorn to contact her doctor in respect of her fitness to work and meet with Dr Hartshorn if necessary.

[29] In response Ms Crozier wrote to Ms Liz Matthews, General Manager Specialist Services and advised that she did not agree with Ms Ellison-Hack's proposal and would not consent to Dr Hartshorn consulting with either herself or her doctor.

[30] Nearly 18 months later on 14 November 2012 Mr Moles, now Residential Service Manager, emailed Ms Michelle Atkins-Gilbert, HR Consultant, to seek advice on raising concerns about Ms Crozier's ability to perform her support worker role. Mr Moles acknowledged in his email that he had no evidence of Ms Crozier not being able to perform her role or of the concerns held about that. Mr Moles was operating on the basis of general conversations he had had with people who had conveyed to him that Ms Crozier was suffering from a shortness of breath when walking from one end of the house to another.

[31] No further steps were taken to address concerns for another 16 months. On 17 March 2014 Mr Moles wrote to Ms Crozier's doctor setting out concerns he had discussed with Ms Crozier about concerns raised by other staff about Ms Crozier's ability to complete some of the physical aspects of her role. Mr Moles set out in his

letter five requirements which Ms Crozier was required to meet when undertaking her role. Mr Moles asked the doctor to provide a written response. Mr Moles did not receive a written response to his letter. At the investigation meeting Ms Crozier's doctor told me in her oral evidence that she did not receive a copy of the 17 March 2014 letter and that was why Mr Moles did not receive a response.

[32] The five requirements set out in Mr Moses letter were:

- a) Walking with clients to/from activities i.e. to complete walks (up to five kilometres);
- b) Catching public transport;
- c) Following/supporting clients (who are required to remain in our service) at a steady pace;
- d) Working on her feet for long periods of time (i.e. 2-4 hours); and
- e) Using physical restraining with clients.

[33] On 26 March 2014 Mr Moles met with Ms Crozier to discuss concerns he had with her sick leave balance and her health in general. Mr Moles made Ms Crozier aware that she did not have any paid sick leave available and that he was concerned about this with winter approaching. Mr Moles also raised concerns about Ms Crozier's ability to conduct her role given feedback that he had received from her colleagues.

[34] Mr Moles advised Ms Crozier that he would need to set up a meeting with her and advised her to bring a support person should she wish to have support during the meeting. Mr Moles did not advise Ms Crozier that he had written to her doctor and he did not provide her with a copy of his 17 March 2014 letter.

[35] On 31 March 2014 Ms Crozier attended her doctor who confirmed in writing that Ms Crozier's health, in particular her respiratory disease, had remained stable and under reasonably good control over the past 6 – 12 months. The doctor explained that Ms Crozier had a well-established action plan which would kick in immediately should Ms Crozier feel herself becoming unwell. The action plan would enable a quick recovery. The doctor notes that for the period March 2013 – March 2014 for each acute episode suffered by Ms Crozier, she had only required a maximum of 3-4 days sick leave for recovery.

[36] The doctor confirmed that Ms Crozier was physically able to continue in her role as support worker for 40 hours per week. This advice was based on Ms Crozier's reporting of her duties and not the five requirements set out in Mr Mole's letter dated 17 March 2015. On receipt of the written notification Mr Moles did not follow up with Ms Crozier's doctor requesting a specific response to the five requirements he had listed in his letter.

[37] On 7 May 2014 Ms Elisabeth Ison, the On-call Manager and Residential Service Manager – RIDSAS, wrote to Ms Crozier requesting to meet to continue the discussions started by Mr Moles in March regarding her sick leave and her health in general.

[38] A meeting took place as scheduled on 21 May 2014. Ms Crozier was supported during this meeting. The content of the meeting was confirmed in a letter to Ms Crozier dated 2 June 2014. During the meeting Ms Ison raised with Ms Crozier concerns about her ability to perform the tasks expected of her role due to her health issues. Ms Crozier agreed that she would communicate with ISL if there were any changes in her ability to perform expected tasks and Ms Ison agreed to catch up with Ms Crozier directly if any concerns were raised around her performance.

[39] Between 2 June and 24 June 2014 Ms Ison discovered Ms Crozier had a mobility parking permit in her car. On the day Ms Ison discovered this she raised it immediately with Ms Crozier who explained she had had the permit for a number of years.

[40] On 24 June 2014, Ms Ison wrote again to Ms Crozier this time confirming that during the 21 May 2014 meeting it was put to Ms Crozier that ISL expected Ms Crozier to be able to complete the following requirements as part of her role:

- a) Walking with clients to/from activities i.e. to complete walks (up to five kilometres);
- b) Catching public transport;
- c) Following/supporting clients (who are required to remain in our service) at a steady pace;
- d) Working on her feet for long periods of time (i.e. 2-4 hours); and
- e) Using physical restraining with clients.

[41] In her letter Ms Ison set out her understanding that at the meeting Ms Crozier had confirmed she was capable of meeting the five requirements. Ms Ison also raised in her letter her concern that after the meeting she had discovered Ms Crozier was in receipt of a mobility parking permit for her car. Ms Ison noted her concerns that the eligibility criteria for holding a mobility permit raised further concerns about Ms Crozier's ability to complete her role as a support worker.

[42] Ms Ison advised Ms Crozier of her view that based on the concerns and information held by ISL and the requirements and competencies required of a support worker Ms Crozier's medical condition would place ISL clients and Ms Crozier at risk. Ms Crozier was advised that because of these concerns ISL would be undertaking a review of her employment with a possible outcome being the termination of her employment.

[43] Ms Ison requested Ms Crozier to undertake an independent assessment by Dr Hartshorn who would assess Ms Crozier's ability to undertake the full range of duties required of her in her role. Ms Ison requested Ms Crozier sign an agreement to undertake the assessment in the knowledge that the report would be provided to ISL for the purpose of reviewing her employment. Ms Crozier was advised that if she did not agree to attend the assessment with Dr Hartshorn a decision on Ms Crozier's employment would be made based on the information currently available.

[44] Ms Crozier agreed to undergo the assessment which was completed on 19 August 2014. Dr Hartshorn reported back to ISL in a written report dated 21 August 2014. Dr Hartshorn noted the five requirements which he had been advised were required to be completed by Ms Crozier in her role. Dr Harshorn reported:

The history obtained suggested that Ms Crozier does have limitation with respect to her capacity for vigorous or physically demanding activity on the basis of her respiratory disorder. ... The level of impairment noted on lung function testing would be generally compatible with work activity, of a sustained nature, within the sedentary to light physical demand range. The level of respiratory impairment would not impact upon Ms Crozier's capacity to work on her feet for prolonged periods as long as this did not involve sustained periods of walking activity. It would not in itself prevent her from catching public transport. It is however, likely to prevent her from being able to follow clients at a steady pace for more than a very short distance. It is likely to impact upon her capacity to manage physical restraint with clients and is highly unlikely to be compatible with a capacity to walk at a steady pace for anything approaching a five kilometres distance.

[45] Concurrently with these events a new Residential Manager, Ms Joanne Baker, had been appointed to replace Mr Moles as Ms Crozier's team leader. Ms Baker

wrote to Ms Crozier on 3 September 2014 and advised her that based on the information ISL had received from Dr Hartshorn, ISL had formed the tentative view that she was not able to safely perform the role of support worker either then or in the immediate future.

[46] Ms Baker set out two options which were being considered by ISL. The options included a consideration as to whether any other roles were available which could be undertaken safely by Ms Crozier or, if not, whether Ms Crozier's employment should be terminated for medical reasons. Ms Crozier was invited to provide her input into these options in writing for consideration prior to a final decision being made.

[47] Ms Baker advised Ms Crozier that she did not consider it as safe for Ms Crozier to continue to work and proposed that Ms Crozier be placed "*on special leave*" effective immediately. Ms Crozier was invited to provide her views on this proposal.

[48] On 8 September 2014 Ms Crozier wrote to ISL reminding ISL that she had been undertaking her duties without incident since the first medical information about her health had been provided to ISL in February 2011. Ms Crozier advised ISL that she had discussed Dr Hartshorn's report with her own doctor who continued to hold the view that she was fit to work provided she was not involved in heavy physical work/lifting. Ms Crozier pointed out that the work demand for 95% of each shift was light to medium and therefore there were no grounds to terminate her employment due to her medical condition and inability to carry out heavy physical activity.

[49] In response ISL enforced the special leave arrangement advising Ms Crozier that she would not be able to return to work until a decision had been made. Ms Baker advised Ms Crozier that a meeting to discuss the situation would take place a week later. Ms Crozier was invited to have support with her if she wished.

[50] Ms Crozier attended a meeting on 24 September 2014. The focus of the meeting was the possible termination of Ms Crozier's employment. Ms Crozier raised concerns about the five requirements which she had become aware of only at the meeting on 21 May 2014. Ms Crozier's concerns were that the requirements against which Dr Hartshorn had been asked to assess her were new and were directly related

to Ms Crozier's medical condition and not the job requirements set out in her job description.

[51] Following discussion and a short adjournment ISL made the decision to dismiss Ms Crozier with two weeks' notice.

[52] On 25 September 2015 Ms Crozier raised a personal grievance claiming she had been discriminated against in her employment on the basis of her disability with respect to the five requirements and had been unjustifiably dismissed.

[53] By letter dated 29 September 2014 ISL confirmed that Ms Crozier's employment would be terminated for medical incapacity with a last day of work of 8 October 2014.

### **Issues**

[54] The issues for determination are:

- a) Whether Ms Crozier was discriminated against and if so what if any, remedies should be awarded; and
- b) Whether Ms Crozier was unjustifiably dismissed and if so what if any, remedies should be awarded.

### **Personal grievance for discrimination**

[55] Ms Crozier says she suffered a personal grievance pursuant to section 103(1)(c) of the Act, when she was discriminated against in her employment on the basis of her medical condition.

[56] This claim is limited to the narrow issue relating to the five requirements set by ISL in May 2014 and against which Ms Crozier was assessed by Dr Hartshorn. Ms Crozier claims she was discriminated against because these five requirements were not used as the basis for any assessments of any other employees. I have set out the five requirements earlier in this determination and will not repeat them here.

[57] Sections 105 and 106 of the Act set out the prohibited grounds of discrimination and the exceptions. Section 105(h) of the Act prohibits discrimination

on the ground of disability. Section 106(f) refers to section 29 of the Human Rights Act 1993 (HRA) which allows different treatment based on disability where:

- (a) The position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or
- (b) The environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

[58] ISL relies on section 29(1)(b) of the HRA to support its decision to treat Ms Crozier differently from other employees. It says that Ms Crozier was not able to safely perform the duties required of an employee in the role of support worker without the risk of harm to herself, colleagues who required her support in managing a client and the clients themselves.

[59] In *Air New Zealand Ltd v McAlister*<sup>1</sup> the Supreme Court held that in cases of alleged discrimination the question to be answered is whether a relevant ground of discrimination was “a *material factor*” in the decisions made. The question here is whether Ms Crozier would have been subject to an assessment against the five requirements if she had not been suffering from a respiratory disease.

[60] Ms Crozier’s incapacity arose from chronic obstructive pulmonary disease (COPD). The definition of disability set out at section 21(h) of the HRA includes a physical disability or impairment, physical illness or any other loss or abnormality of physiological or anatomical structure or function. Ms Crozier suffered a disability due to her COPD.

[61] Ms Crozier’s job description does not set out the five requirements relied on by ISL in seeking its medical opinion. The job description is a generic job description covering all employees employed in the support worker role. The only reference in the job description the physical attributes required by a support worker is a statement that support workers must:

...have a basic level of physical fitness to ensure the S/U’s personal care, personal development or desired lifestyle is not limited by the physical abilities of the support worker. [my emphasis]

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<sup>1</sup> [2009] NZSC 78; [2010] 1 NZLR 153.

[62] Ms Crozier has acknowledged that she was struggling to work with her medical condition. There is no dispute that of the five requirements Ms Crozier could meet two of them without difficulty.

[63] I accept that in the event that a client absconded, given the nature of the clients being supported, public safety would be a paramount concern. I also accept that Ms Crozier would have significant difficulties following an absconding client on foot for any distance and for any period of time. I also accept that Ms Crozier was unable to undertake restraints on large clients or for a lengthy period of time.

[64] ISL has not established it was justified in setting the five requirements beyond what was required in the job description. Being able to walk five kilometres goes beyond having a “*basic level of physical fitness*”.

[65] Further, I am not satisfied ISL has established there was a substantial risk that Ms Crozier’s medical condition would compromise her own safety and that of those working with her or that of the clients. In relation to absconding clients, Ms Ison related two incidents which had occurred in early 2014 and another at the end of 2013 but she was not sure whether these clients absconded during Ms Crozier’s shift or not.

[66] Ms Crozier had not been required to restrain clients during her 23 years of service and had been trained and tested in the restraint techniques. Ms Crozier gave evidence that she was able to walk with clients for up to 2 km and when she had been required to follow client’s she had done so using the ISL van.

[67] I find Ms Crozier’s disability was a material factor in the decision to set up the five requirements against which she was then medically assessed. Mr Hartshorn’s assessment against the five requirements was a significant factor leading to Ms Crozier’s dismissal. An employer acting fairly and reasonably could not have taken the action of setting the five requirements outside what was specified in the job description and then applying them only to Ms Crozier and not to other employees. This action was unjustified and amounted to discrimination.

[68] Ms Crozier has established a personal grievance on the basis of discrimination under section 103(1)(c) of the Act and she is entitled to a consideration of remedies for this personal grievance.

**The dismissal**

[69] Ms Crozier was dismissed due to medical incapacity and claims this was unjustified. ISL is required to establish that its decision to dismiss Ms Crozier was justified.

[70] The statutory test of justification is contained in section 103A of the Act. I am required to determine the question of whether an action was justifiable on an objective basis, having regard to 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 action occurred.

[71] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

(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.

[72] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because of defects in the process as long as those defects were minor and did not result in the employee being treated unfairly.<sup>2</sup>

[73] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[74] As a full Court observed in *Angus v Ports of Auckland Ltd*<sup>3</sup>

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<sup>2</sup> Employment Relations Act 2000 (the Act), section 103A(5).

<sup>3</sup> [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[75] One of Ms Crozier's complaints is that when Dr Hartshorn assessed her, he assessed her against criteria that did not form part of her job description. Of the five requirements Ms Crozier's evidence is that she had never been required to perform the first three points and had had no difficulty in performing the last two points.

[76] Ms Crozier acknowledges that as a support worker she had to be physically fit enough to do her job and says that apart from the times she was on sick leave she has always been able to perform all her duties.

[77] There is no dispute that Ms Crozier had difficulty breathing, that she may have taken a bit longer to do tasks and that her respiratory illness did affect her work.

#### **Assessment against the five requirements**

[78] Ms Crozier was dismissed on the basis of medical incapacity as a result of the conclusions of ISL that she was unable to undertake the requirements of her role. A significant factor in the decision to terminate Ms Crozier's employment was the medical assessment undertaken by Dr Hartshorn against the five requirements set by ISL.

#### ***Walking with clients to/from activities up to five kilometres***

[79] Ms Crozier says she has never been required to walk five kilometres for her work and neither is she aware of any other employees having to walk five kilometres. There is no dispute that Ms Crozier was unable to walk five kilometres due to her respiratory disease.

[80] In his report Dr Hartshorn states that Ms Crozier's medical condition "*...is highly unlikely to be compatible with a capacity to walk at a steady pace for anything approaching a five kilometres distance.*" [my emphasis]

[81] The test Dr Hartshorn was asked to assess Ms Crozier by was not whether she could walk at a “*steady pace*” for five kilometres, just whether she could complete walks of that distance. This discrepancy in Dr Hartshorn’s report was not clarified by Ms Baker prior to her making the decision to terminate Ms Crozier’s employment.

[82] Ms Crozier told me that she was quite capable of going on walks with clients and that during 2014 she took one client to the lagoon and walked around the lagoon with him, a distance of approximately two kilometres.

[83] Ms Crozier acknowledged that one particular client she had to walk with would sometimes run off and she would have to follow him. Other clients could be left unsupervised as long as she could watch them from the facility.

[84] Ms Crozier also told me that in 2014 she did not really do much of the walking because of the problem with her breathing. She told me that other staff would have done this task for her.

[85] Ms Crozier told me that she did not have to undertake much walking because she did not work on a day shift. Her shifts were afternoon shifts from 3.00pm to 11.00pm Monday to Friday and then Saturday from 7.00am to 3.00pm. On a Saturday the client she was assigned to would not be walking but would be undertaking other activities away from the facility.

#### ***Catching public transport***

[86] Ms Crozier and Mr Hartshorn agree that Ms Crozier’s medical condition did not prevent her from catching public transport.

#### ***Following/supporting clients at a steady pace***

[87] Ms Crozier says she has only had to follow clients for short distances. Dr Hartshorn confirms in his report that Ms Crozier was able to follow clients for short distances.

[88] The concern about the ability to follow or support clients at a steady pace related mainly to a concern about absconding clients. Ms Crozier’s evidence was that the procedure for pursuing absconding clients was for the support worker to follow the client by driving the vehicle and to wait until the client had calmed down and could be reasoned with. Ms Crozier denies ever having to follow a client on foot.

[89] Mr Moles told me that the support worker was expected to follow the client on foot and not use the van. Mr Moles was aware of one incident where Ms Crozier had followed a client in a van. No steps were taken by him to address this at the time if it was a concern that Ms Crozier had breached ISL's requirements to follow on foot.

***Working on her feet for long periods of time***

[90] Ms Crozier and Dr Hartshorn agree that the level of respiratory impairment experienced by Ms Crozier did not and would not impact upon her capacity to work on her feet for prolonged periods.

***Using physical restraint***

[91] Ms Crozier was required to undertake restraint training and testing on an annual basis. The training was carried out over the course of one day and included a performance test of the physical restraint process. Ms Crozier had passed this training every year and had undertaken training in 2014.

[92] Dr Hartshorn stated in his report that Ms Crozier's medical condition was likely to impact upon her capacity to manage physical restraint with clients. Ms Crozier's doctor told me that when undertaking restraints it would depend on the nature of the restraint but Ms Crozier would certainly not have been able to restrain a large person.

[93] The evidence from ISL is that the minimum amount of time a typical restraint might take was five minutes but could sometimes extend to 20 or 30 minutes at a time.

**Process leading up to dismissal**

[94] Ms Crozier had met weekly with Mr Moles during which times they discussed a number of issues including Mr Moles advising Ms Crozier that staff had complained about her not undertaking all the duties required of her. Mr Moles took no formal action to address these concerns in a way that would alert Ms Crozier that her job may be in jeopardy.

[95] Ms Ison had also been addressing matters informally until she discovered the mobility parking permit. This was the catalyst that led to Ms Ison's belief that Ms Crozier was incapacitated to the extent that she could no longer perform her duties. In

her written evidence Ms Ison provided specific examples of observations she had made about Ms Crozier's inability to perform her role to the required standard. These examples were never put to Ms Crozier at the time they were observed and neither were they put to Ms Crozier during the meetings leading up to the decision to terminate her employment.

[96] Ms Baker became Ms Crozier's immediate supervisor in August 2014. After receiving Dr Hartshorn's report Ms Baker says it became obvious that ISL could not keep Ms Crozier and others safe while they were at work and it was her decision to implement a formal process with the possibility of a termination due to medical incapacity.

[97] ISL has published a Medical Incapacity Quick Guide document. This document sets out the steps to be taken when a person is no longer able to fulfil their obligations under the employment agreement due to incapacity. A necessary element of terminating employment under the medical incapacity guide is that an employee has been absent from work for more than six weeks. Ms Crozier had not been absent and had been working in her full time role.

[98] The guide requires an assessment of the current medical information available prior to a decision being made. ISL had received Dr Hartshorn's report but no other medical information was requested. Both Mr Moles and Ms Ison had been advised previously by Ms Crozier that she was under a specialist. No enquiries were made of her to seek information from her specialist who may have been in a better position than Mr Hartshorn to assess Ms Crozier's capacity to undertake her role.

[99] Ms Baker's enquiries were limited to the information contained on Ms Crozier's personal file and the information contained in Dr Harshorn's report. In her evidence Ms Baker provided specific examples of her observations of Ms Crozier but these observations were not put to Ms Crozier during the process leading up to the decision to dismiss.

[100] At the investigation meeting, Ms Baker told me she took into account the reports other employees had made to her about Ms Crozier's inability to undertake her work, but conceded that she had not raised any specific concerns with Ms Crozier.

[101] Neither did Ms Baker clarify with Dr Hartshorn his assessment that Ms Crozier could not complete five kilometres at a steady pace which was not one of the five requirements.

[102] In her letter dated 3 September, Ms Baker proposed terminating Ms Crozier's employment based on medical grounds but at that stage, Ms Baker had not met with Ms Crozier and her assessment was simply based on the documented records on file.

[103] The difficulty in relying on the documents contained on the file is that Ms Baker had two inconsistent statements from two different medical professionals. When asked how Ms Baker had resolved the differences in opinion she told me that her assessment was based on Dr Hartshorn's report and it was his opinion that she followed. Ms Baker accepted at the investigation meeting that Dr Hartshorn did not comment on health and safety issues in his report or reach any conclusions about whether Ms Crozier's medical condition would put her and others at risk.

[104] I find the investigation undertaken by ISL fell short of meeting the standard of sufficiently investigating Ms Crozier's ability to perform her role. More could have been done such as including Ms Crozier's doctor and/or her specialist in the medical analysis of Ms Crozier's capacity.

[105] Further, during the meeting on 24 September 2014, immediately following an adjournment Ms Crozier noted that she wished to seek legal advice on a number of matters. An employer acting fairly and reasonably at this point would have called a halt to the meeting to allow Ms Crozier to seek the legal advice she required. Instead Ms Baker proceeded to advise Ms Crozier that her employment would terminate after two weeks' notice.

[106] The decision to dismiss Ms Crozier on 24 September 2014 was not a decision an employer acting fairly and reasonably could make. The flaws in ISL's investigation process were not minor and have led to Ms Crozier being treated unfairly. This unfairness was exacerbated when Ms Baker did not allow Ms Crozier the opportunity to seek legal advice when she advised Ms Baker that she wished to take that opportunity. The dismissal was unjustified and Ms Crozier is entitled to a consideration of remedies.

**Remedies**

[107] Ms Crozier seeks reimbursement of lost wages and compensation for each of her personal grievances.

***Lost wages***

[108] Ms Crozier is entitled to the payment of three months lost wages as a result of the unjustified dismissal. Ms Crozier seeks reimbursement of twelve months lost wages under section 128(3) of the Act.

[109] Before her dismissal Ms Crozier's specialist had begun the process of arranging for Ms Crozier to have an operation to assist her. The operation was undertaken four months after the dismissal.

[110] At the investigation meeting Ms Crozier told me that she was not fit to be working because even though she had had an operation to assist with her respiratory problems it had not improved her capacity for work.

[111] Section 128(1)(b) allows payment of lost remuneration where the loss has resulted from the personal grievance. I am satisfied that any loss suffered by Ms Crozier following her operation is not attributable to the unjustified dismissal, but has been caused by her incapacity to work.

[112] Idea Services Limited is ordered to calculate and pay to Ms Crozier a sum equivalent to three months ordinary time remuneration from 9 October 2014. Payment is to be made within 28 days of the date of this determination.

[113] If the parties are unable to agree on the quantum of lost wages I reserve leave for them to return to the Authority for the matter to be determined.

***Compensation***

[114] Ms Crozier seeks separate awards of compensation under section 123(1)(c)(i) for each of her personal grievances. I have instead preferred to take a global approach. The discriminatory conduct influenced the decision to dismiss meaning the actions are intertwined.

[115] Ms Crozier has given compelling evidence of the affect the dismissal has had on her. Ms Crozier had worked for ISL and its related entities for over 23 years and within the health sector for about 40 years. After losing her job Ms Crozier was unable to meet her normal living expenses and had to utilise her kiwisaver funds to assist in meeting bill payments. Ms Crozier reports having difficulty sleeping and suffering from anxiety issues.

[116] I am satisfied Ms Crozier has suffered considerable emotional distress as a result of her personal grievances. Taking all of the circumstances into account I consider an appropriate award, subject to my findings on contribution to be \$15,000.

### ***Contribution***

[117] Section 124 of the Act obliges me to consider the extent to which Ms Crozier's actions contributed towards the situation that gave rise to her personal grievances. If I consider her actions so require, I must reduce her remedies accordingly.

[118] When construing the word "*situation*" in section 124(a) of the Act, it is appropriate to treat it as referring to all relevant events that led to the personal grievances. ISL would not have dismissed Ms Crozier if she had been performing all of the duties and tasks required of a support worker.

[119] Ms Crozier's doctor gave evidence that Ms Crozier was not fit to walk any significant distance and was severely impaired due to her health.

[120] Ms Crozier also conceded that she was not undertaking all of the tasks required of her due to her medical issues and that other staff would cover for her. In her oral evidence Ms Crozier told me she did get breathless and struggled with some tasks including folding linen (which she sat down to do).

[121] I find that there should be a moderate reduction in the compensatory award and have assessed that as being 10%.

[122] Idea Services Limited is ordered to pay to Ms Crozier the sum of \$13,500 under section 123(1)(c)(i) within 28 days of the date of this determination.

### **Costs**

[123] Costs are reserved. Ms Crozier has advised the Authority that she is in receipt of legal aid. The parties are encouraged to resolve the matter of costs between them. If they are unable to do so Ms Crozier shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. ISL 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.

[124] 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