

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 610  
3023138

BETWEEN            LEANNE DAVIS  
                                 Applicant

AND                    IDEA SERVICES LIMITED  
                                 Respondent

Member of Authority:     Michael Loftus

Representatives:         Simon Meikle, counsel for Applicant  
                                 Guido Ballara, counsel for Respondent

Investigation Meeting:    21 June 2018 at Palmerston North

Date of Determination:    23 October 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Leanne Davis, claims her employment has been affected to her disadvantage by the actions of her employer, Idea Services Limited, as a result of Idea having failed to provide a safe workplace. By way of remedies she seeks a declaration the disadvantages have been unjustifiably suffered and while no compensation is sought Ms Davis seeks the imposition of a penalty and asks it be payable to her. It was conceded during a telephone conference this was in lieu of compensation pursuant to s123 of the Employment Relations Act 2000.

[2]     Idea's prime defence is that the claim, as pleaded, was raised beyond the 90 days required by s 114(1) of the Employment Relations Act 2000 (the Act) and there is no application to remedy that pursuant to s 114(3). It does not agree to late submission.

[3] In the alternate it is argued the claim has no merit and the remedies sought are so inappropriate they effectively render the application nugatory.

[4] Finally it is noted some of the events which give rise to these claims involve various actions by a client of Idea Services. The parties asked there be an order suppressing the publication of anything that might identify him and the place of employment. The request has merit and a prohibition on such publication is ordered.<sup>1</sup>

### **Background**

[5] Ms Davis was employed by Idea as a support worker and commenced in 2013. From early 2016 she was primarily tasked with caring for a residential client of Idea's who has an intellectual disability which necessitated 24 hour one on one care and could, at times, render him both unpredictable and violent. During working hours Ms Davis was therefore required to remain in close proximity to the client and this meant staying in the home he occupied when working nights.

[6] Ms Davis' terms and conditions of employment are covered by a collective agreement which, pertinent to this claim, has a clause which requires the parties act in accordance with Health and Safety legislation.

[7] Ms Davis says the clients' behaviour was deteriorating and this led to some staff trying to avoid working with him. She says she also witnessed displays of aggression toward others though not her till an incident which occurred in November 2016 when the client became violent and this included his throwing and/or smashing various household fittings. Ms Davis says she sought to avoid trouble by locking herself in the residences' office as protocol required but was unable to do so due to a broken lock. She says she therefore chose to leave the premises and a manager was called. Here I add answers she provided when questioned during the investigation would actually suggest the lock was damaged as opposed to broken as initially asserted.

[8] Ms Davis says she worked at another establishment for the next couple of weeks. She also complains she was not made aware of any changes in respect to the client's management regime despite asking. That said it is clear processes are in place

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<sup>1</sup> Clause 10 of schedule 2 of the Employment Relations Act 2000

to ensure this happened but answers given by Ms Davis suggest she may have been a bit tardy in her use of this information.

[9] On 4 December Ms Davis started her shift mid-afternoon. She says the client started showing signs of agitation around 10.00pm. She considers her initial response calmed him for a while but he again started exhibiting anger not long after midnight. Ms Davis responded with medication which appeared to address the issue, at least temporarily. At about 1.30am the client awoke from a brief sleep and started throwing chattels out of the house. At this point Ms Davis opted to depart forthwith and sought refuge at a neighbouring residence. After taking time to calm herself she contacted her on-call support service just after 3.00am. That resulted in a colleague being sent to assist and the two of them went to the residence Ms Davis was rostered to work in. Ms Davis says the client's initial greeting was truculent but they calmed him. After about 30 minutes the colleague asked if it was ok if she left to which Ms Davis answered affirmatively.

[10] Ms Davis and the colleague exchanged an update about 4.30am at which time all was in order.

[11] At about 5.00am the client again became angry. He was again ejecting chattels from the house and threw a jandal at Ms Davis. Again Ms Davis chose to leave but this time the client chased her. She says she was unable to access the neighbouring home and the client chased her around it before tackling and then repeatedly hitting her.

[12] A colleague from the house she had been trying to enter for refuge then came to her assistance and helped her inside. She says the client continued to bang on the door and threaten her which disturbed other clients. Ms Davis was then taken to hospital by an ambulance that had been called and, as a result of the injuries she sustained, is yet to return to work full time.

[13] The final incident about which Ms Davis complains occurred on 14 February 2017. Ms Davis was visiting an op shop which was frequently visited by the client who had assaulted her as part of his planned activities. Unfortunately Ms Davis's visit coincided with one of his and, according to her, the worker responsible for him that day was unable to restrain him and he again acted aggressively toward her, both physically and verbally. This last incident was not initially relied upon as constituting

a failure causing disadvantage but an incident that caused further harm to Ms Davis that might affect remedies. That approach changed in recent times with the incident now being referred to as one that clearly occurred within 90 days of the grievance being lodged.

[14] Ms Davis raised her claims by letter dated 7 March 2017. It expressly advises they are in the nature of *a personal grievance of unjustified actions ... causing disadvantage*. The employer responded on 17 March addressing the specifics though denying culpability on the grounds Idea had taken all reasonable steps to minimise risk prior to the incident of 4 December. It went on to record the events of that day constituted an unexpected escalation in the clients behaviour and denied any possible disadvantage in relation to the incident on 14 February.

[15] The letter ended with advice Idea was willing to attend mediation. The letter was prepared by a manager of Idea's and makes no mention of the claims being out of time. That issue arose once legal assistance was sought with clear advice then being given that attendance at mediation would be without prejudice to Idea's right to argue the 90 days issue invalidated the bulk of the claims.

## **Discussion**

[16] The determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[17] As already said Ms Davis' claims she has been unjustifiably disadvantaged. By way of summary she says Idea has failed to provide a safe workplace in breach of specific provision in her employment agreement. The term in question is clause 16.7.1 which requires both parties *act in accordance with the Health and Safety in Employment Acts*.<sup>2</sup> Ms Davis goes onto say this implies Idea is required to provide a safe workplace and then alleges it did not do so as it:

- a. Failed to have the clients disability, treatment and care, revaluated as she requested prior to the November 2016 incident;

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<sup>2</sup> Statement of problem at [24].

- b. Failed to have the client's situation reevaluated after the November 2016 incident;
- c. Failed to fix the lock to the office in the clients residence;
- d. Failed to provide *a safe place of work so that the assault of 5 December 2016 was unable to occur*;
- e. Failed to provide a safe place to which Ms Davis could retreat thus enabling the assault to occur;
- f. Continued to provide services to the client for which, it is claimed, Idea was ill-equipped;
- g. Failed to advise Worksafe of the 5 December incident.

[18] Before addressing this I turn first to the 14 February incident. As already said this was not raised as grounds for a grievance in the statement of problem but instead relied upon in support of an argument about the hurt Ms Davis suffered. It only appears to have become a ground of grievance as a result of the 90 day defence. Indeed Mr Meikle's opening comment was that he could rely on this incident as exhibiting Idea's failures as it clearly occurred within 90 days of the 7 March letter.

[19] I do not agree it can assist Ms Davis with her claim in this way. Aside from the fact the incident was never pleaded as constituting a ground of grievance in the statement of problem it is difficult to see how it can be considered a disadvantage, at least as envisaged by the Act.

[20] Section 103 requires the employee suffer a disadvantage in the employment or in respect to one or more condition there-of. It is difficult to see how this incident complies with that requirement. It occurred in a publically accessible place while Ms Davis was going about her private business. It was not *on the job* which would appear to preclude any possibility it could constitute a disadvantage grievance.<sup>3</sup>

[21] Ms Davis also acknowledged there was no reason why the client not be allowed out in public and accepted the fact both he and she were in the shop simultaneously was simply bad luck. With one possible exception that concession

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<sup>3</sup> *Henderson v Nelson Marlborough District Health Board* [2016] NZEmpC 123at [75] and [76].

makes it difficult to conclude this is a situation in which Idea can be considered to have acted unjustifiably.

[22] The exception is a possible argument based on the fact the client remained under the supervision of one, and not two, carers. The evidence, reinforced with knowledge subsequently gained when dealing with a facilitation about renegotiation of the collective which covered Ms Davis, leaves me satisfied that is a function of the funding model for which government (through the Ministry of Health) is essentially responsible and not a result of inappropriate action on Idea's behalf. Here I make final note that the process to address funding in respect to this client was actually underway. In other words Idea was seeking to address the issues Ms Davis had raised so cannot be considered to have acted unjustifiably by ignoring potential concerns and in any event the evidence shows double staffing of this client was not ultimately shown to be an appropriate response .

[23] Turning then to the claim as pleaded and the argument it has been raised out of time. I disagree.

[24] The raising of a grievance requires the employee bring to the employer's notice a wish to challenge as unjustified one or more of the events defined in the statute as a grievance to a sufficient degree that the employer can comprehend that there is a grievance, the nature of it, and how the employee wishes that to be dealt with. These are what might be called the *Creedy* tests.<sup>4</sup>

[25] There can be no doubt the letter of 7 March complies with those requirements.

[26] There is then Idea's response and here I note the Court's comments in *Davis v Commissioner of Police*.<sup>5</sup> There the Court noted the defendant could be considered to have acquiesced to the late submission of a grievance by providing a substantive response without taking the point of timeliness. A consideration of Idea's response leads me to conclude it acquiesced. It provided a detailed response that came from a manager in an organisation well-endowed with in-house HR professionalism. The response also went so far as to not only agree, but actually raise in the first instance, the idea of mediation as a way of addressing Ms Davis' concerns.<sup>6</sup>

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<sup>4</sup> *Turner v Talley's Group Limited* [2013] NZEmpC 31 at [61]

<sup>5</sup> *Davis v Commissioner of Police* [2013] NZEmpC 226 at [50]

<sup>6</sup> Letter of 17 March at [10].

[27] The real issue however arises not from the possible substance of Ms Davis' claims but in the remedies. As already said Ms Davis does not seek any of the remedies specified in the Act as appropriate to a successful personal grievance. She seeks the imposition of a penalty payable to her. There are two problems with this.

[28] The first is, as was conceded in a telephone conference to arrange the investigation meeting on 23 February 2018, the claim for penalties payable to her and not the Crown, was only brought because she had not claimed any financial remedies by way of personal grievance. As Mr Ballara submitted that is improper as "*an action for penalty should not be seen as a recovery action in a different guise to obtain payment of a sum of money to the applicant*".<sup>7</sup>

[29] Recent considerations would suggest this is still good law though there are numerous examples of payment to an individual where there are no other avenues through which loss can be addressed.<sup>8</sup> Here it was a decision of the applicant (or her representative) that closed the door on more appropriate avenues of redress.

[30] Furthermore the evidence clearly confirms Ms Davis is seeking compensation for hurt inflicted during the assault. That would, as Mr Ballara submits, appear to be precluded by s 317 of the Accident Compensation Act 2001.

[31] In other words, and even if I found Ms Davis to have been disadvantaged, I fail to see how I could grant the remedies sought. That, in turn, appears to render the claim nugatory.

[32] Even if that were not the case the evidence would not have led me to conclude Ms Davis was disadvantaged as claimed. In this respect I do not seek to downplay what happened to Ms Davis. She was the victim of an unfortunate incident which had serious consequences for her and via which she suffered significant injuries. The question though is whether or not that was attributable to unjustifiable acts of the respondent. The evidence did not support a conclusion it was.

[33] In *Attorney-General v Gilbert* it was said:<sup>9</sup>

... The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against

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<sup>7</sup> *Gibson v Department of Justice* (unreported), WEC58/94, 28 October 1994 per Judge Castle

<sup>8</sup> See, for example, *Nicholson v Ford* [2018] NZEmpC 132 at [43]

<sup>9</sup> *Attorney-General v Gilbert* [2002] 1 ERNZ 31 (CA)

unacceptable employment practices which have to be assessed in context. That is made clear by the definition of “all practicable steps”. What is “reasonably practicable” requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s 19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee.

[34] While that was a 2002 decision it would appear to remain good law.<sup>10</sup>

[35] I have already made some comment about the way in which Ms Davis resiled from, or diminished the import of, accusations on which she relied. I also have to conclude the evidence shows there here there is some inherent risk but it also shows Idea put considerable effort into initial and ongoing training aimed at ensuring staff and client safety. It has comprehensive reporting protocols so as to ensure issues are addressed and the evidence shows that when issues were raised about this client, both by Ms Davis and others, they were addressed and, where appropriate, remedial action taken and amended care plans put in place. The evidence also shows, and Ms Davis admitted this to be the case, that she did not adhere to specified safety protocols on the night of 4/5 December and that undoubtedly contributed to the unfortunate events that unfolded.

## **Conclusion**

[36] For these reasons Ms Davis’ claim fails.

[37] Costs are reserved.

Michael Loftus  
Member of the Employment Relations Authority

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<sup>10</sup> *FGH v RST* [2018] NZEmpC 60 at [191] to [199]