

**NOTE: This determination
contains an order at paragraph
[5] prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 634
3152161

BETWEEN PATRINA MEREDITH
Applicant

AND IDEA SERVICES LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Nathan Santesso, advocate for the Applicant
 Guido Ballara, counsel for the Respondent

Investigation Meeting: 25 and 26 August 2022

Further information: By memoranda from representatives on 31 August 2022

Determination: 30 November 2022

DETERMINATION OF THE AUTHORITY

- A. Idea Services Limited (ISL) unjustifiably dismissed Patrina Meredith.**
- B. In settlement of her personal grievance, ISL must pay Ms Meredith the following sums within 28 days of the date of this determination:**
- (i) \$12,040 as reimbursement of lost remuneration; and**
 - (ii) \$18,000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- C. Ms Meredith's claim for penalties for breaches of her terms of employment is declined.**

D. Costs are reserved with a timetable for memoranda set if an Authority determination of costs is needed.

Employment Relationship Problem

[1] Idea Services Limited (ISL) dismissed Patrina Meredith from her role as a community support worker on 22 June 2021.

[2] Following a disciplinary investigation ISL's area manager Polo Aguirre had concluded Ms Meredith breached an ISL policy by fighting with or assaulting a co-worker during a "confrontation" on 20 May 2021. The co-worker had admitted punching Ms Meredith in the head as Ms Meredith walked away from an argument and was leaving the workplace at the end of her shift. ISL dismissed both Ms Meredith and her co-worker on the grounds of serious misconduct.

[3] In the personal grievance Ms Meredith raised about her dismissal she said ISL had failed to address earlier concerns she had about the co-worker, had unfairly suspended her after the 20 May incident and had reached a decision to dismiss her that was not what a fair and reasonable employer could have done in the circumstances. In her application to the Authority about those grievances Ms Meredith sought remedies of lost wages and distress compensation. She also asked for penalties to be imposed on ISL for breaching terms of her employment agreement about suspension and providing a safe workplace.

[4] In reply ISL said a full and fair investigation of the 20 May incident led it "to actually and reasonably believe" Ms Meredith was "involved in an argument and physical fight at the workplace with a co-worker". On that basis ISL said its decision to dismiss her met the statutory standard of being what a fair and reasonable employer could have done in all the circumstances at the time. It said claims Ms Meredith made that she was unlawfully suspended and ISL had failed to provide a safe workplace were similarly unfounded.

Order prohibiting publication of certain evidence, including some names

[5] Publication is prohibited of the following information in the pleadings and evidence given in this matter: the name of the co-worker; the names of any residents of ISL facilities; and the street address and suburb of the ISL residence where the 20 May incident occurred. There are two reasons for this order, made under clause 10(1) of

Schedule 2 of the Employment Relations Act 2000 (the Act). Firstly, the co-worker did not have the opportunity to answer evidence given about her conduct and her dismissal so it is not appropriate that her name is a matter of public record. Secondly, the privacy of residents in their ISL-supported homes should not be compromised by an employment dispute involving staff who support them in living there.

[6] In the remainder of this determination the co-worker is referred to as Ms Z. One resident mentioned in the evidence about interactions with Ms Z and Ms Meredith is referred to as Ms A. The initial letters used are not from their actual names.

The Authority's investigation

[7] Five witnesses provided written statements and attended the investigation meeting: Ms Meredith, her husband Paul Schuster, Mr Aguirre, ISL human resources adviser Dion Twiss and former ISL service manager Karishma Beach. Ms Beach, by arrangement, attended by audio-visual link. The others attended in person.

[8] All witnesses, under oath or affirmation, answered questions from me and the parties' representatives. At the end of the meeting the representatives, speaking to written synopses, gave oral closing submissions about the facts and legal principles relevant to the issues for resolution.

[9] As s 174E of the Act permits, this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It has not recorded all evidence and submissions received.

Issues for determination

[10] The issues for determination were:

- (a) Was ISL's suspension of Ms Meredith an unjustified action?
- (b) Was ISL's decision to dismiss Ms Meredith and how that decision was reached justified?
- (c) If ISL is found to have acted unjustifiably (by disadvantaging and/or dismissing Ms Meredith), what remedies should be awarded to her, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate her loss for the period of loss claimed); and
 - Compensation under s123(1)(c)(i) of the Act?

- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Ms Meredith that contributed to the situation giving rise to her grievance?
- (e) Did ISL breach terms of Ms Meredith's employment agreement by suspending her and by not providing a safe working environment?
- (f) If there was such a breach, is Ms Meredith within time to claim a penalty for that breach and, if so, is ISL liable to a penalty?
- (g) Should either party contribute to the other party's costs of representation?

Context of the 20 May argument

[11] Ms Meredith started working for ISL in May 2017. Her role initially involved working at several community houses supporting residents. Some of her shifts were worked at a house where Ms Z also worked. In 2018 Ms Meredith was appointed to a role at an ISL vocational workshop. In that role she enjoying applying her interests in art and design in her work with the users of the workshop, receiving staff awards and other positive feedback from colleagues for that work.

[12] The workshop closed in March 2020 due to the Covid-19 epidemic emergency restrictions. Ms Meredith was then redeployed to work at the ISL residential house where she had previously sometimes worked with Ms Z.

[13] Over the following months tensions arose between Ms Meredith and Ms Z about various workplace matters. Ms Meredith raised some of her concerns about that situation with her managers, including Ms Beach. One instance concerned Ms Z asking residents, including Ms A, to say which staff they liked and did not like. Ms A responded by saying she did not like Ms Meredith and some of the other staff. Another instance occurred when Ms A talked about throwing rocks at Ms Meredith's car and said Ms Z did not like Ms Meredith working at the house.

[14] These concerns, and some raised by other staff, led to Ms Beach convening a meeting of the house's staff in early October 2020 to talk about "team strategies and conflict resolution". She summarised the strategies discussed in an email she sent to them on 23 October 2020. She copied the email to Mr Aguirre and Mr Twiss.

[15] The following passage from Ms Beach's email was relevant to later events:

Staff are to speak to each other kindly and supportively. If anyone has any major issue with another staff member's actions I would like them to discuss their concerns with me first rather than 'confronting' their colleague. If there are minor workplace disagreements these should be discussed calmly, without personal insults being used, and away from the service users so they cannot overhear the conversation. If anyone starts to feel uncomfortable with the discussion, please leave the situation and advise the other party that you would like to discuss it later with myself present. (underlined emphasis added)

[16] The email also discussed the need to have clear boundaries with Ms A in particular and for discussions during staff shift handovers to be conducted outside her hearing.

[17] As part of addressing those concerns Ms Beach arranged for Ms Meredith and Ms Z to be rostered to work on different shifts. Their contact with one another was then generally limited to a 10-15 minute shift handover period although Ms Meredith sometimes provided a written handover and left before Ms Z arrived. Ms Meredith continued to express concern about instances where Ms Z made critical comments about her in front of residents. She reported that those comments affected how some of the residents then behaved when she was working with them.

[18] The next relevant event occurred on 19 May 2020, contributing to tension between Ms Z and Ms Meredith the following day. Due to a miscommunication Ms Z had arrived at a site where Ms Meredith and another staff member had taken some residents to get flu vaccinations. There was then a disagreement whether Ms Z should be there or not. Ms Meredith later reported that an on-call manager was contacted and had asked Ms Z to leave. Ms Z did not leave. She stayed and took one of the residents through the vaccination process.

The 20 May incident

[19] Ms Meredith was responsible for organising the residents of the house to enter an ISL art competition. It was a continuation of work she had done in her former role in the vocational workshop. On 18 May Ms Beach had sent a text message to Ms Meredith checking the residents were entered for the competition, which had a deadline of the end of the month. Ms Meredith replied that she would be entering the residents for the competition on 19 May.

[20] On 20 May Ms Meredith spent her shift at the house working with residents, including Ms A, on their art pieces for entry in the competition. When Ms Z arrived at 3pm to start her shift, some of the residents showed her the art pieces they were working on. Ms Meredith then heard Ms Z telling Ms A that she had already entered her art piece in the competition. Ms Meredith asked Ms Z about that comment as she knew the art pieces worked on by the residents that day were not finished. Ms Z replied that the piece was one she had worked on separately with Ms A. Ms Meredith was concerned by that reply as the competition rules allowed each resident to enter only one piece and it had to be their own work.

[21] The sub-text to her query was that work on the art project was, as Ms Meredith understood arrangements with Ms Beach, something for which she was responsible, not Ms Z. It was also, from Ms Meredith's perspective, a continuation of Ms Z undermining her working relationship with Ms A as a resident.

[22] Ms Meredith then told Ms Z that Ms A had worked hard during the day on her piece at the house. She asked to see the art piece Ms Z was talking about. Ms Z replied that it was at her own home and she had proof of it on her phone. Ms Z began looking at images on her phone.

[23] According to her written witness statement Ms Meredith, whose work shift had ended, replied that she was not interested in seeing proof and that she would speak to "management" about the issue. She then walked out the door of the house, carrying a roll of art paper and a large bag containing art supplies.

[24] Ms Meredith said she then began walking down the driveway of the property, through a narrow gap between a parked work van and bushes on one side. Ms Z followed her and, reaching her arm over Ms Meredith's shoulder, held her mobile phone about 10 centimetres in front of Ms Meredith's face. Ms Z wanted her to look at a photo on the phone's screen. Ms Meredith pushed Ms Z's arm aside and continued walking saying she did not want to see the photo. Ms Z then reached over Ms Meredith's shoulder a second time, again holding the phone in front of her face. Ms Meredith again pushed Ms Z's arm away.

[25] Ms Meredith then felt a blow to the back of her head. She dropped her bag and went to turn around. As she did so, Ms Meredith said she received a second blow, this

time to the left side of her face. She said that, as she turned, she saw Ms Z was standing “in a fighting stance with both fists clenched”.

[26] In an interview with Mr Aguirre and Mr Twiss during the later disciplinary process Ms Z said she felt Ms Meredith “hit her deliberately” when pushing Ms Z’s arms away. She said this happened once. According to the notes Mr Twiss wrote of that interview Ms Z said “I then punched her and pulled her hair. She hit me and I hit her back”. Ms Z said that Ms Meredith had also “punched me back again”.

[27] The incident had ended with Ms Meredith saying she would call the Police about what had happened and Ms Z saying she too would call the Police.

[28] Ms Z returned to the house and called the Police. She also tried to contact Ms Beach by telephone. Ms Meredith walked out on the street, where her husband was due to arrive to pick her up from work, and made telephone calls to the Police and to Ms Beach.

[29] Ms Beach arrived several minutes later, before the two Police officers who attended in response to the calls made by Ms Z and Ms Meredith. After talking with Ms Beach, the officers’ report recorded they decided not to speak to the residents as they were “disabled and deemed unsuitable to obtain a witness statement”. After speaking with Ms Z and Ms Meredith, the officers decided to take no further action. The Police report noted they “were unable to identify who assaulted who first due to conflicting stories and no evidence or witnesses”.

[30] Ms Meredith’s husband took her to a medical centre later that afternoon. The centre’s medical notes showed the doctor who examined her saw a bruise to her left cheek but no swelling. The notes said Ms Meredith reported having a headache and some blurred vision, which she thought was due to the stress of the incident. Ms Meredith was issued with a medical certificate for 20 and 21 May, stating she would be fit to return to work on 22 May.

ISL’s investigation

[31] On 21 May Ms Beach visited Ms Meredith at home to deliver a letter from Mr Aguirre. She did so at his request and had phoned ahead to get Ms Meredith’s agreement to her visit. The letter referred to “potentially serious concerns” Mr Aguirre wanted to discuss with Ms Meredith and continued:

Specifically it is alleged that:

1. Whilst at work on 20 May 2021 at [address of the ISL residence] you had an argument with your colleague, [Ms Z]. After a verbal altercation, you allegedly pushed [Ms Z]'s arm and hit her.

[32] The letter said a preliminary interview was scheduled for 26 May to hear Ms Meredith's explanation. It continued that, if her explanation was satisfactory, that could end the matter but if the issue was not resolved, "the next step would be to begin a disciplinary process and conduct a full and fair investigation". It said disciplinary action up to and including dismissal might result if serious misconduct on her part was determined. It noted her right to bring a representative with her to the interview, if she wished.

[33] Mr Aguirre's 21 May letter also contained the following two paragraphs about what would happen in the meantime:

As discussed with you today, I am invoking the temporary leave provision as outlined in your conditions of employment.

...

At the [26 May] meeting, due to the seriousness of the allegations, consideration may be given to whether it is appropriate for you to continue working while the matter is being investigated. Such discussion may include the possibility of suspension.

[34] Ms Meredith remained on full pay from 21 May to the date of her dismissal on 22 June. The arrangement was described in a letter sent to her on 27 May, after she had attended the 26 May interview with Mr Aguirre, as being suspension. Letters formally extending her suspension during the disciplinary process were sent to her on 31 May, 9 June and 15 June.

Ms Meredith not treated unfairly by suspension on pay

[35] Ms Meredith claimed she was unjustifiably disadvantaged by being suspended during ISL's disciplinary process, beginning with the 21 May letter that told her ISL had invoked "the temporary leave provision as outlined in your conditions of employment" and continuing with being told in the 26 May meeting there was a "need for suspension" as ISL carried out its investigation.

[36] The 21 May letter, signed by Mr Aguirre, had two clear errors. Firstly, it referred to the subject of "temporary leave" having been discussed with her that day. It

had not. Ms Meredith did not learn of that decision until Ms Beach delivered the letter. Secondly, it described such leave as being outlined in her conditions of employment. Ms Meredith's individual employment agreement did not refer to any such form of leave or include any provisions for suspension from employment during a disciplinary investigation. The best explanation ISL could give for the reference was a paragraph in its Misconduct and Serious Misconduct Policy which said a staff member "may be suspended on pay while an investigation is taking place". The policy was said to be incorporated as a term because her individual agreement referred to strictly observing ISL's "standard policies" and her letter of appointment had referred to "staff policies" that were instructions to her and formed part of the employment relationship.

[37] Mr Twiss' evidence revealed that the 21 May letter was prepared from a standard form template used by ISL's human resources advisors. It was referring to a term in ISL's collective agreement for union members about temporary leave. The collective agreement also had a term which permitted ISL to suspend a worker on pay while an allegation of serious misconduct was investigated, provided the worker was invited to a meeting to discuss the reasons for suspension before it was imposed.

[38] Neither term applied directly to Ms Meredith as she was not a union member and her individual agreement did not refer to those or other terms from the collective agreement as forming the basis of her agreement.

[39] However the topic of suspension was discussed with her in the 26 May meeting before Mr Aguirre advised her that she would be suspended on pay during the investigation.

[40] For the following two reasons, Ms Meredith had not established she was unjustifiably disadvantaged by the particular circumstances of being placed on "temporary leave" and then formally suspended on pay in the period from 21 May to 22 June 2020.

[41] Firstly, suspension on pay may be warranted in the particular circumstances of the employment even if there is no express contractual power to do so.¹ This particular situation was not one where, from 26 May at least, the decision to suspend Ms Meredith was made without inquiry of her. Notes of the 26 May meeting show Ms Meredith's

¹ *Sefo v Sealord Shellfish* [2008] ERNZ 178 at [33].

view on the prospect were sought before Mr Aguirre formally made the decision to suspend her while ISL investigated the allegations about her and the co-worker.

[42] Secondly, even if ISL could have done more to fairly and reasonably consider and then impose the suspension, any defect in its process in this case was minor and did not result in Ms Meredith being treated unfairly by the decision and its consequences.² Ms Meredith, both at the time and in the Authority investigation, had not suggested she should have been put back in the workplace or perhaps be deployed to work at another house while ISL conducted its inquiry. She accepted remaining off work on full pay, which removed her from what may have been a stressful work situation while that process was carried out, and she suffered no negative financial consequences as a result.

ISL's decision to dismiss Ms Meredith was unreasonable

The statutory test of justification

[43] Under s 103A of the Act the Authority must determine, on an objective basis, whether ISL acted as a fair and reasonable employer could have done in all the circumstances at the time of investigating its concerns about Ms Meredith's conduct on 20 May 2021 and deciding to dismiss her for it.

[44] When called upon during the Authority's investigation to justify its decision to dismiss Ms Meredith, and how that decision was reached, s 103A(3) of the Act required ISL to show it had sufficiently investigated allegations made about her, raised its concerns with her, given her a reasonable opportunity to respond and, then, had genuinely considered any explanation she gave before reaching any conclusions about what to do. However her dismissal could not be found to be unjustified solely for any minor defect in the process if that had not resulted in her being treated unfairly.³

[45] The following principles, from a summary described by the Court of Appeal as uncontroversial, guide the application of statutory test of justification to ISL's actions in this case:⁴

- (a) The Authority's task is to objectively examine 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.

² Employment Relations Act 2000, s 103A(5).

³ Employment Relations Act 2000, s 103A(5).

⁴ *Cowan v Idea Services Limited* [2020] NZCA 239 at [40] and [18].

- (b) A range of responses may be open to a fair and reasonable employer and the Authority is not to substitute its decision for what a fair and reasonable employer could have done in the circumstances.
- (c) The requirement is for an assessment of substantive fairness and reasonableness, not a minute and pedantic scrutiny to identify failings.
- (d) In considering the standard of proof, a distinction is drawn between what is required for the Authority's investigation and the employer's earlier disciplinary inquiry. 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 the Authority that the dismissal was justified. The employer's inquiry does not involve a legal standard of proof. The Authority's investigation does.
- (e) In ascertaining the facts, the employer may be presented with conflicting accounts. Acting reasonably, the employer will be entitled to accept some accounts in preference to others. That does not call for the application of any standard of proof.
- (f) When required to prove that dismissal was justified, the employer's evidence to the Authority investigation will need to show that both the course taken to ascertain the facts and the employer's conclusion that those facts warranted dismissal were reasonable.

[46] In considering whether ISL met that standard of reasonableness, the Authority is empowered to make a factual inquiry about whether ISL had a sufficient and reliable evidential basis for concluding Ms Meredith had committed serious misconduct.⁵

No significant failure of process

[47] In this case there were no substantial or significant failures in the process ISL followed to raise and consider its concerns about Ms Meredith's conduct on 20 May 2020. Mr Aguirre was an experienced manager who, with the assistance of Mr Twiss, followed the formal steps of arranging interviews, providing documents and giving opportunities to both workers involved to comment on the information provided.

[48] The process followed was not flawless. For instance, it was not clear that all the information Mr Aguirre gathered from Ms Beach and two other staff members was

⁵ *Cowan*, above n 4, at [41] and *Air Nelson Ltd v C* [2011] NZCA 488 at [19].

provided to Ms Meredith for comment. At the time Ms Beach was due to finish her employment with ISL, in order to take up a role elsewhere, and was not as directly involved in the investigation as she might otherwise have been. Ms Meredith was given a summary of what Ms Beach said she was told on 20 May by Ms Meredith and Ms Z and about talking to the Police officers. This included reporting that a police officer said “she had spoken to both ladies and wouldn’t be charging either of the women involved”. However, as apparent from her later evidence to the Authority, Ms Beach had expressed firm views to Mr Aguirre about what she described as a lack of professionalism by Ms Z and, based on her experience of dealing with issues in the house from 2019 onwards, whether what Ms Z said could be relied on as truthful. This information about Ms Beach’s view, relevant to what weight should be given to what Ms Meredith and Ms Z had each said, was not disclosed to Ms Meredith.

[49] However, ultimately, it was not a shortfall in providing some information to Ms Meredith which resulted in her being treated unfairly. Neither was it a failure by Mr Aguirre to genuinely consider her explanations of what had happened. There was nothing to suggest that he was not sincere and honest in gathering and assessing information about the conduct of both workers in the 20 May incident. Rather, as explained below, the outcome of dismissal was not justified due to shortcomings that were more fundamental than defects of process.

ISL’s decision not made to the standard of reasonableness

[50] Mr Aguirre gave clear and unequivocal evidence about his approach to assessing information gathered in the disciplinary inquiry. He said he “did not prefer anyone’s account”. Rather, Mr Aguirre considered he was entirely and appropriately even-handed in considering the conduct of both women. He found each of them had “hit” the other person and this fell within one of the categories of serious misconduct in ISL’s disciplinary policy regarding “fighting with or assault upon” another person. He then applied what he described as a “zero tolerance” response to violence in ISL workplaces that required the severest sanction of dismissal be imposed on both woman. For the following reasons, the analysis or rationale he applied to the evidence he gathered failed to meet the standard of reasonableness required of ISL in conducting its inquiry and reaching conclusions from it.

[51] Firstly, Mr Aguirre applied a false equivalence to the physical contact between both women. In a point he repeated throughout his oral evidence, he said “a hit is a

hit”. It was a description oversimplifying similarities and ignoring differences. He drew no distinction in his analysis between what Ms Meredith said was pushing away the arms of Ms Z from her face and what Ms Z admitted she did by punching Ms Meredith’s head.

[52] In her evidence to the Authority Ms Meredith demonstrated how she said she had used an open palm to push away Ms Z’s arm that was reaching over her shoulder. Ms Meredith recalled demonstrating the same physical actions to Mr Aguirre and Mr Twiss when they interviewed her. The notes of that interview recorded Ms Meredith saying she pushed Ms Z’s arms away twice and denying Ms Z’s allegation that Ms Meredith had tried to punch Ms Z as she turned to face her after being hit in the back of the head.

[53] The notes made of their interviews with Ms Z recorded that she admitted punching Ms Meredith. She described what Ms Meredith had done in pushing her arms aside as deliberately hitting her.

[54] Mr Aguirre’s evidence confirmed he had given no weight to the difference in magnitude of the two actions, between pushing arms away with an open palm and (as Ms Z admitted she did) punching someone in the head. While the contact of Ms Meredith’s hand in pushing away Ms Z’s arm might technically be an assault, it was beyond a reasonable interpretation to say the facts of that action came within the reference in ISL’s misconduct policy to “fighting with or assault upon any person on [its] premises”.⁶

[55] Secondly, Mr Aguirre’s evidence did not establish he had reasonably considered the extent to which Ms Meredith’s actions on 20 May were legitimate self-defence, in a reflex action to being harassed and then punched by Ms Z. He had closed his mind to that prospect saying, in his oral evidence, “if you defend yourself with physical force on our premises, it is not acceptable”. Such a blanket approach was not open to a fair employer acting reasonably, for the reasons explained in the following extract from an Employment Court decision:⁷

There is a line of cases decided by this Court dealing with the difficult area of physical conflict between employees, especially in safety sensitive workplaces. Although an employer may properly regard assault, other physical

⁶ *Pilkington (New Zealand) Ltd v Sangha* [1999] 2 ERNZ 263, 269.

⁷ *Housham v Juken NZ Limited* [2007] ERNZ 183, at [23]-[25].

aggression and fighting as serious misconduct upon appropriate proof of which employees involved might be dismissed, that cannot reasonably extend to every participant in such a confrontation under any circumstances.

An employee attacked by another or reasonably fearing imminent physical attack by another is not required to offer no resistance at all, run away (especially if operating dangerous machinery), or meekly submit to the assault. Such an employee is entitled to take reasonable steps in all the circumstances to avoid actual or imminent assault. Such steps may include what would amount to a technical assault upon the aggressor, pushing the aggressor away, tackling the aggressor to prevent further blows, or the like. No hard and fast rules can or should be provided. Every case is different and what amounts to a reasonable response to actual or impending violence will depend on those unique circumstances as fairly and reasonably ascertained by the employer.

While a “zero tolerance” policy towards workplace violence is admirable in principle, the devil is, as always, in the detail of what is meant by a policy that has been sloganised. It cannot be a reasonable policy if it purports to be applied to any involvement in any physical altercation whatsoever. Nor can it be a reasonable policy or practice for an employer to dismiss summarily all the employees in any way involved in any physical altercation. While an employer is entitled to have a “zero tolerance” policy in the sense that employees engaged culpably in violence in a safety sensitive workplace should be liable to dismissal, that does not absolve that employer from the critical assessment of all of the relevant circumstances in which that employee may have been involved in the altercation. Such an analysis is especially important where there is a so-called “zero tolerance” approach that will see offenders dismissed.

[56] Thirdly, Mr Aguirre gave misplaced weight to a report that the Police officers who attended the house on 20 May had decided not to make further inquiries or to charge anyone. At the time he had not seen the Police reports as they only became available to him only after Ms Meredith had been dismissed and raised her grievance. In June 2020 he relied on Ms Beach’s verbal account of having talked to the Police. He said what he was told about that conversation “supported for me that the incident was a fight”. His conclusion that both women were equally culpable was not an inference reasonably reached simply on the basis that the Police were charging neither.

[57] Fourthly, Mr Aguirre’s evidence showed that, in effect, the conclusions drawn in ISL’s disciplinary inquiry blamed Ms Meredith for provoking Ms Z to punch her. In the letter advising Ms Meredith of her dismissal she was told that the “situation was avoidable as the confrontation with [Ms Z] regarding the Art Awards was unnecessary”. However, based on the interview notes provided by ISL, there was no significant difference in the accounts of the two women over how the topic had unexpectedly arisen and resulted in a brief conversation which Ms Meredith ended by saying she would raise the issue with “management” and leaving the premises.

[58] Ms Meredith's actions were consistent with what she had been told to do in such situations in the October 2020 email referred to earlier. She had started to feel uncomfortable with the discussion, about an unexpected topic, and left the situation telling that other party that she would discuss it later with a manager.

[59] While a range of responses is open to a fair and reasonable employer in making decisions about the complexity of such circumstances, the evidence in this case showed ISL had failed to reasonably consider differences in the nature and degree of the two workers' actions, instead applying a false equivalence and resolving to punish both by dismissal. Accordingly, for the reasons given, ISL's inquiry resulted in conclusions that did not meet the necessary standard of reasonableness. As a result Ms Meredith established a personal grievance of unjustified dismissal and an assessment of remedies was required.

Remedies

Reimbursement of lost wages

[60] In her statement of problem Ms Meredith sought an order for \$12,040 as reimbursement of wages lost up to the date of lodging that statement in September 2021. The basis of the calculation was not explained. In closing submissions Ms Meredith sought reimbursement "for much longer than the standard three months".

[61] Ms Meredith, in her oral evidence, said she had no employment since her dismissal in June 2021, which was 14 months earlier. She said she had not sought any other work as she was traumatised by what happened and had lost confidence.

[62] Ms Meredith had also suffered some severe health problems following her dismissal which, inevitably, also affected her ability to seek new paid employment. On the available evidence it was not possible to identify the degree to which those health issues or the residual effects of her dismissal were responsible for the extended period in which she had felt unable to seek new employment.

[63] On the basis of that information, the order for reimbursement of lost remuneration is limited to the amount claimed in Ms Meredith's statement of problem.⁸ It must be paid to her within 28 days of the date of this determination.

⁸ Employment Relations Act 2000, s 123(1)(b) and s 128.

Compensation for humiliation, loss of dignity and injury to feelings

[64] Ms Meredith gave evidence that she experienced a wave of humiliation as a result of her dismissal after a working life of 35 years, particularly because it was on the grounds of serious misconduct. She reported experiencing panic attacks (which she said she had not suffered previously), ongoing headaches and unusual rashes which she attributed to the stress caused by her dismissal. She needed ongoing assistance through counselling and medication prescribed to address anxiety and depression. She had withdrawn from family and social interactions. She experienced weight fluctuations. She had also undergone two medical surgeries in 2022 which had impacted on her ability to recover from the effects of her dismissal on her.

[65] While some documentation was available about Ms Meredith's ongoing health challenges, it was not possible without direct evidence from a suitable health professional to establish the degree to which her ongoing health issues were caused or made worse by her dismissal or would have arisen independently anyway. For that reason it was not appropriate to accept Ms Meredith's own self-assessment linking the extent of her health problems to the effects of her dismissal.

[66] Accordingly the assessment of compensation under s 123(1)(c)(i) of the Act is made only on Ms Meredith's evidence of the immediate effects of her dismissal on her and her ongoing need for assistance through medication and counselling to address anxiety, depression and stress-related skin disorders. Considering the particular circumstances of her case and the range of awards in similar cases, \$18,000 was an appropriate award of compensation for the humiliation, loss of dignity and injury to her feelings caused by her unjustified dismissal. This sum must be paid to her within 28 days of the date of this determination.

No reduction of remedies for contributory conduct

[67] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to blameworthy conduct by the worker that contributed to the situation giving rise to their grievance.

[68] In this case Ms Meredith did not contribute in any sufficiently blameworthy way to ISL's failure to meet the standard of reasonableness in the decisions made in its disciplinary inquiry. As already noted, her conduct on 20 May 2021 in ending the conversation that was becoming an argument was consistent with guidance provided to

her in October 2020 for dealing with such situations. No reduction of remedies was warranted.

No penalties awarded

[69] The limitation period for a penalty relating to a breach of an employment agreement is 12 months from the date when the cause of action first became known to the person bringing the action.⁹

[70] Ms Meredith's action in the Authority began by lodging a statement of problem on 28 September 2021. This meant penalties could be sought in relation to events as far back as 29 September 2020.

[71] Her suspension, through the latter part of May 2021 and into June 2021, fell within that period. However, for reasons already given, no sufficient grounds were established to impose a penalty on ISL for breaching Ms Meredith's terms of employment by suspending her during its investigation of allegations about her conduct. While there was no express term allowing for the suspension, neither did she suffer any loss as she was paid throughout. In the circumstances, what ISL did was not of sufficient seriousness to warrant punishment by imposing a penalty.

[72] The allegation of breaching the obligation to provide a safe workplace concerned whether ISL had done enough to manage the "hazard" said to have been caused for Ms Meredith, and other staff, in their workplace by Ms Z's conduct. This included what were said to be the effects of Ms Z's conduct on the behaviour of residents, such as Ms A throwing rocks at Ms Meredith's car and using abusive language about her. Some of those instances occurred earlier than 29 September 2020 so were excluded by the limitation period. The 20 May 2021 incident, including punches by Ms Z, was certainly within the relevant timeframe but the law does not require an employer to guarantee such instances of unacceptable physical violence will never occur.¹⁰

[73] Ms Beach's evidence showed measures were taken in 2020 to encourage reporting of instances of concern and those reports were investigated and acted upon. The staff meeting held on 5 October 2020 discussed strategies, as recorded in Ms

⁹ Employment Relations Act 2000, s 135(5).

¹⁰ *Attorney-General v Gilbert* [2002] 2 NZLR 342 at [83].

Beach's 23 October email to the workers, to set standards of behaviour and manage conflict. Ms Beach had also got the rosters of Ms Meredith and Ms Z changed to minimise contact and reduce the risk of conflict. In that light there were no sufficient grounds, even allowing for events outside the limitation period, to say ISL had breached its duty to take reasonable and proportionate steps to provide a safe workplace in relation to concerns raised about Ms Z's conduct. No penalty was warranted.

Costs

[74] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[75] If they are not able to do so and an Authority determination on costs is needed Ms Meredith may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum ISL would then have 14 days to lodge any memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[76] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate (that is \$8,000 for this two-day investigation meeting) unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹¹

Robin Arthur
Member of the Employment Relations Authority

¹¹ See www.era.govt.nz/determinations/awarding-costs-remedies.