

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 32
5314482

**Prohibition on publication
see paragraph [5]**

BETWEEN	LUKE OSKAM Applicant
AND	IDEA SERVICES LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	John Unsworth, for the Applicant Paul McBride, for the Respondent
Investigation Meeting:	14 December 2010 at Wanganui
Submissions Received:	17 December 2010 from the Applicant 17 December 2010 from the Respondent
Submissions in reply by Telephone conference	23 December 2010
Determination:	4 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Oskam was dismissed on 25 June 2010. He has challenged the dismissal. He is claiming reinstatement, compensation, lost wages and costs.

[2] The respondent (Idea Services) has denied Mr Oskam's claims and has opposed the remedies sought, and particularly opposed any reinstatement.

The issues

[3] The issue for determination is whether a fair and reasonable employer would have dismissed Mr Oskam in all the circumstances?

The facts

[4] Mr Oskam was provided with the reasons for his dismissal in writing. The letter dated 25 June 2010 reads as follows:

Dear Luke,

I am writing to advise that your employment with IHC is terminated on the grounds of serious misconduct while already on a current final warning. The termination is with two weeks' notice and is to take effect immediately and confirms the decision which was conveyed to you when we met on 25 June 2010.

Following an allegation that you physically moved a service user against his will, a thorough investigation was carried out by IHC. This occurred over a period of five days and involved two meetings with you. You were supported at these meetings by a union delegate.

During the investigation process you provided your explanation and this was taken into account before any decisions were made as to the outcome of the investigation.

The findings have led me to believe that your actions constituted serious misconduct and breached IHC Staff Policy 9.2 in that you assaulted a person with an intellectual disability by physically manhandling a service user against his will. Such behaviour also contravenes the abuse guidelines (Section 4). Your record of training shows that you have been fully instructed in treating people with respect and have completed autism training.

I believe your actions have irreparably eroded the duty of trust and confidence expected of an employee and for this reason the decision to terminate your employment was made.

In reaching this decision I considered fully the circumstances of this matter as well as your explanation. I have also considered whether there were any factors in your favour which might militate against dismissal but found that there was none.

I have arranged for your final pay to be calculated, including outstanding holiday pay and this will be paid into your account as soon as possible. I have also included a copy of the minutes taken when we met on 25 June 2010.

[5] The incident leading to the dismissal occurred on 17 June 2010. Mr Oskam was working at the Team 180 office in Glasgow Street, Whanganui. It is alleged that at approximately 2.30pm, Mr Oskam was fixing a towel dispenser to the wall in a toilet. He then tried to access the office and came across a service user (the service user) standing in the way of his access to a toolbox underneath a table. The name of the service user has been prohibited from publication for privacy reasons. Mr Oskam claims that he asked the service user to move and when the service user did not move,

he placed his hands on the service user's shoulders from behind and to the side to redirect that person. A written incident report was handed in by another employee, who I will refer to as T. This gave rise to the need for an enquiry on Mr Oskam's alleged breach of the non aversive requirements that all employees were aware of (and which had been fully discussed with the team on 2 June 2010).

[6] Idea Services alleged that Mr Oskam assaulted the service user who has an intellectual disability (autistic). This is how the community services manager referred to it in her dismissal letter: "...assaulted a person with an intellectual disability by physically manhandling a service user against his will...". The service user has very high needs for care. It is alleged that Mr Oskam physically manhandled that person against the person's will and Mr Oskam raised his voice and spoke to the person in an aggressive manner.

[7] The service user apparently flicked his hands up as if to remove Mr Oskam's grip and struck Mr Oskam on the side of the face. T took the service user out of the office and Mr Oskam went about his business. No one else heard anything. Apparently C arrived during the time the incident occurred, but says she did not see or hear anything. She claimed that she would have heard the incident if it occurred the way T has claimed. C was not interviewed. Another employee R was in the vicinity and claimed that she too would have heard it, if it happened and she says she heard nothing. T filled in an incident report 4 days later. T claimed that C arrived after the incident.

[8] On 21 June 2010, Mr Oskam was handed a copy of the incident report by Idea Service's Community Services Manager and they had a short discussion, but Mr Oskam could not recall the detail of the event.

[9] The report stated:

"Date of incident 17-6-10 Time of incident 2.30 pm

...Luke came storming around the corner from toilet wanting access to area [service user name withheld] was standing. He ordered [service user name withheld] to leave the office in a raised voice. [Service user name withheld] didn't move. Luke then pushed [service user name withheld], grabbed his arm and told [service user name withheld] to get out of office. ([Service user name withheld] hit Luke back. [Service user name withheld] threw his arms up and connected with Luke). [A community support worker(R)]R was behind Jamie..."

[10] Mr Oskam was requested to attend a meeting to be held on 22 June 2010. At that meeting Mr Oskam was supported by his union representative, and the community services manager attended with a support person who took the notes. Mr Oskam was given a letter that confirmed the disciplinary investigation and potential consequences. It also explained the purpose of the meeting and he was asked to read it. Mr Oskam suffers from dyslexia and he says he struggled to understand the letter and the significance of the meeting. The purpose of the meeting was to provide Mr Oskam with an opportunity to respond to the allegations.

[11] Mr Oskam said at first that he was surprised as he could not recall the incident. He says at the first meeting he only had a vague memory of what happened and did not think it was a big deal.

[12] After the meeting, Mr Oskam continued working, and the community services manager conducted further interviews with people involved including T and R. T's account included that Mr Oskam said to the service user "*to get out*" in a loud voice and aggressive manner supported by the interview notes and her evidence. R confirmed that she did not see the incident because she was sitting a few steps away with her back to the door. T says another employee ((C) the daughter of Mr Oskam's union representative) was at the day base during a part of the afternoon, but arrived after the incident. C was not interviewed at the time. C now says she was present when the incident occurred. She says had been in the office where everyone was, but squeezed out and went to the kitchen. She remembered Mr Oskam passing her a number of times and did not see any incident. She was not interviewed by the community services manager. She says if there had been an incident she would have heard it and the service user's response to Mr Oskam would have been such that she would have known. She says the matter has been exaggerated. Mr Oskam says that his representative, also employed by Idea Services, was in the vicinity of the office, but that person did not see anything either.

[13] In the meantime, by 24 June 2010, Mr Oskam had more fully recalled the incident and he telephoned the community services manager to let her know that he had remembered and could explain.

[14] There was another meeting held on 25 June 2010. Mr Oskam and his representative demonstrated what they say happened.

[15] Mr Oskam was asked to comment on statements that had been obtained from other people. After an adjournment, the meeting resumed and the community services manager stated:

- (a) That Mr Oskam put his hands on a service user in an aggressive manner;
- (b) That Mr Oskam spoke to the service user with a raised voice;
- (c) That Mr Oskam admitted doing this before;
- (d) That she believed he would do the same thing again;
- (e) That she noted there was a zero tolerance to aversive practice;
- (f) That she considered it was not permissible for Mr Oskam to put his hands on a service user and move him in the way in which Mr Oskam and his union representative had demonstrated during the meeting;
- (g) That she informed Mr Oskam that she was considering dismissal for serious misconduct;
- (h) That she reaffirmed that Mr Oskam was on a final warning;
- (i) That she believed she could no longer continue to trust him.

[16] Also, she took into account some previous events involving Mr Oskam that were:

- a. Driving in a dangerous manner that caused a complaint from a mother of a service user. This was the “donut incident”. In March 2009 Mr Oskam was given a first written warning after an investigation and disciplinary process. That should have lasted six months and expired in September 2009.
- b. There was a complaint about him speeding in an Idea Service’s vehicle. After an investigation and disciplinary meeting he was given what was called final warning dated 9 December 2009. However this was erroneous because the first warning had expired. He was barred from driving the respondent’s vehicles for three months.

- c. An earlier incident of Mr Oskam speaking with a loud voice to another service user directing that person to get out of an office they were in. He was counselled at the time. The incident was confirmed by another employee (K).

[17] A team meeting was held on non aversive requirements and involved Mr Oskam.

[18] Mr Oskam's union representative spoke at the time in his defence about how Mr Oskam was passionate about his job, that he had been doing some great work and that he needed more training. When they could say no more, the community services manager informed them that it was an aversive practice constituting serious misconduct warranting termination of employment, which would occur immediately. Mr Oskam departed from the premises.

[19] Following Mr Oskam's dismissal, Mr Oskam's father became involved in the matter and telephoned the community services manager to discuss the dismissal. Mr Oskam's father considered that Mr Oskam had a personal grievance and it was decided that there would be a further meeting. Mr Oskam's father raised a number of concerns about the decision and the process getting to the decision. Idea Services considered that the matters he had raised and which were considered at a further meeting on 5 July 2010 were without merit.

[20] Issues then arose between both parties with regard to attending mediation, which was opposed by Mr Oskam's father. The matter of reinstatement became an issue between the parties but without any mediation occurring. Mediation occurred when the Authority intervened on the application.

Determination of the matter

[21] Given the credibility issues that existed at the time the incident report was lodged and there being only one witness my first consideration must be whether a fair and reasonable employer would have come to an honestly held belief from the information available at the time that Mr Oskam acted in an aggressive and aversive manner to the service user. This is not about me being required to make a finding on what actually happened in regard to the employer's justification of its decision, but to scrutinise the employer's decision from the information available at the time.

[22] Next, I have to consider whether a fair and reasonable employer would have dismissed Mr Oskam having regard to all the circumstances.

[23] Mr Oskam agreed and has accepted that aversive practice would not be appropriate in the work place.

[24] Mr Oskam was given immediate advice of the issue once the employer became aware of it. He was given the incident report. He was advised of the need for a meeting and that there was potentially an issue about serious misconduct and that dismissal was a potential out come if the allegation was proved.

[25] He was informed of his right to have a support person and he involved his union.

[26] The fact that he was handed a letter at the beginning of the meeting was not procedurally ideal but was not critical because he knew in advance about the incident report and its contents. This might have been a problem because of his dyslexia, but he never raised that, and nor did the union at the time.

[27] Mr Oskam admitted that he touched the service user. He had the opportunity to demonstrate what he remembered happening. However, at first he could not remember what had happened, and now trusts that his memory has served him well because he provided another demonstration for the Authority.

[28] In addition, the witness (T) to the incident recalled him speaking loudly and described it as an aggressive raised voice to the service user to “*get out*”. For the community services manager this compounded the seriousness of the situation.

[29] I am satisfied that there were a number of factors that would cause a fair and reasonable employer to come to an honestly held belief to accept what T said had occurred. However I hold that a fair and reasonable employer would not have come to an honestly held belief based on the information available at the time that Mr Oskam had engaged in aversive behaviour and aggressive language. This conclusion is supported by:

- a. The incident report being delayed 4 days after the incident.
- b. The fact was that the applicant had touched the service user, which he had admitted, but disputed the extent of what happened. He was

consistent about that, although his demonstration was held not to assist him by the community services manager.

- c. The eye witness reported what she saw happen and what she heard, but this evidence is affected by another witness (R) who said that she was close to the office and she did not see and did not hear anything. A fair and reasonable employer in this instance would have given some benefit of doubt to Mr Oskam.
- d. I have balanced that Mr Oskam had no witnesses he could rely on at the time, except for R who did not hear anything. Certainly C has come forward since then, but that person's involvement has to be treated with a lot of caution because she is related to the union delegate and never came forward until later. In addition she does not work for Idea Services and there is a very real question about why she was there "*busying herself in the kitchen*" when she was not an employee. If her evidence has any relevance it has more to do with making findings if necessary in regard to reinstatement.
- e. There is a conflict about the timing of C's arrival at the site according to T and C. Indeed the community services manager believed that it was the case that C arrived after the incident, as T had made that comment to her at the time. This was the reason why C was not interviewed, but I hold that it would have assisted if she had been interviewed at the time to at least be able to consider her evidence, and it would have been necessary for Idea Services to establish when C arrived at the workplace, and if she was at the workplace to assess what she would have seen or would not have seen and heard.

[30] I hold that there is no question that there is any procedural irregularity, except that a fair and reasonable employer would have given Mr Oskam some benefit of the doubt given the above factors I have referred to.

[31] Having come to a belief about what happened would a fair and reasonable employer acted to dismiss Mr Oskam for serious misconduct? In other words did the offence fit in the range of responses open to a fair and reasonable employer?

[32] My conclusion is that it was not open to the employer to consider dismissal in the range of options open to it because:

- a. A fair and reasonable employer would not have categorised Mr Oskam's behaviour at the serious end of the scale when there was a conflict between at least two witnesses and where what one of them had to say she saw was not supported by what another said she did not hear. Mr Oskam's touching the service user and speaking to the service worker in a loud voice, which was interpreted as being aggressive, would have been a reason for other options to have been considered for misconduct.
- b. Mr Oskam had been counselled previously on his driving that had been dealt with. That was a separate matter which had been dealt with.
- c. Mr Oskam had been previously warned about aversive practice involving the service users in his care, but the final warning had not been properly issued under the "Staff Policy" and could not have applied at the time of the 17 June 2010 incident. The consideration that he was on a final warning (letter dated 25 June 2010 and the service manager's attention to it at the meeting on 22 June with Mr Oskam) was unfair because this warning would have expired by the time of the 17 June 2010 incident.
- d. Was there any evidence of deliberate and wilful behaviour in the event as it occurred? That was a matter where there is a lack of clarity and reasoning from the employer having regard to what one witness says she saw and another who says she would have heard something if there had been a problem and confirmed she did not hear anything. I am not satisfied that Mr Oskam's behaviour was deliberate and or wilful and that there would be a linkage to establish a loss of trust and confidence.

[33] It follows that Mr Oskam does have a personal grievance for unjustified dismissal.

[34] For completeness I have considered the range of circumstances put in mitigation by Mr Oskam.

- a. The community service manager accepted that she was aware of Mr Oskam's dyslexia although it was denied in her affidavit filed before the investigation meeting. Mr Oskam was represented at the time. The employer was entitled to rely on his representation at the time. Mr Oskam had a requirement to be open and communicative to inform his employer at the earliest opportunity of any problem. This ideally should have involved him reminding the community services manager if he had any problem of proceeding. This did not happen until much later. Because Mr Oskam was represented, and whether or not the community services manager knew that there was a problem of him understanding what the issue was about, the employer was entitled to reasonably proceed on the basis of the union's involvement. Also, notwithstanding getting a letter Mr Oskam had been told in advance what the issue was and that he had an opportunity to explain his role. So he did have some time to think about it and advise his union representative.
- b. The community services manager's refusal to allow Mr Oskam to give a demonstration before the formal meeting that had been called was not fatal because Mr Oskam was not being prevented from giving a demonstration when they did meet. It was all about a matter of timing. The employer is entitled to keep to the process. There would not have been any material impact to Mr Oskam by the community services manager's decision to keep to the process.
- c. The community services manager only acknowledged the warnings were no longer current at the Authority's investigation. I accept she would have been influenced by the warning that she regarded at the time of the disciplinary meeting because her dismissal letter stated: "*...your employment with IHC is terminated on the grounds of serious misconduct while already on a current final warning...*". This was not the action of a fair and reasonable employer.
- d. The employer is not prevented from considering prior matters but they must stand on their own and the warning would not apply where it has expired. In any event the employer's decision related to a separate

incident and as it stands the employer judged it in the range for serious misconduct grounds, which it was entitled to do, albeit a fair and reasonable employer would have come to a different conclusion. That is it was a matter of misconduct given the benefit of the doubt a fair and reasonable employer would have given Mr Oskam. In such a situation a fair and reasonable employer would have considered options available under that ground, but had to give consideration to the steps under the disciplinary process (clause 9 of the staff policy).

- e. It was claimed that Mr Oskam was not given enough credit for past good behaviour and length of service. I am satisfied this was taken into account by the community services manager in reaching her decision and Mr Oskam's opportunity for further input at the last meeting. It was claimed that Mr Oskam should have been able to rely on his employer abiding by the principles set in the collective agreement to work together. This is a broad principle that does not detract from the employer's right to investigate any incident of misconduct and to follow the disciplinary process. There has not been a significant breach of that process to convince me that the broad principles under the collective agreement have somehow been breached also.

- f. Was Mr Oskam dismissed for an assault? He was not dismissed for an assault in the criminal sense, although the community services manager has referred to it as an aversive practice. I understand how he feels this reflects against him. In the employment setting the reasons for the dismissal are found under clause 9 of the collective agreement for using abusive and offensive language and assaulting a person with an intellectual disability. In this regard Mr Unsworth has argued that it must mean something more than putting hands on a service user's shoulders when there is a reliance on an assault, especially as Idea Services did not have a written aversive practices policy. I have to agree only because there was no written aversive policy, but that all employees knew and understood what was being referred to.

- g. It has been claimed by Mr Oskam that he only put his hands on the service user's shoulders to direct that person away. Mr Unsworth has argued that at that level the type of conduct would be associated with only misconduct and not serious misconduct. Mr Unsworth submitted that Idea Services could only rely on its staff policy and would have to satisfy that there was an assault on a person with a disability to take the matter to another level. I have previously dealt with this. I have noted that using abusive or offensive language constitutes misconduct and has a different range of options including a warning and or dismissal. Mr Unsworth concluded that a push, as Mr Oskam said happened and a raised voice would not amount to serious misconduct. That is consistent with my findings. The difficulty for Idea Services is that it would not have come to an honestly held belief because a fair and reasonable employer would have given Mr Oskam the benefit of the doubt about the extent to which he touched the service user and to direct the person out of the room based on what he says happened, that R did not hear anything to alert them to a problem and considering what T says she saw at the time.
- h. Mr Unsworth submitted that there was the possibility of a conflict in that Mr Oskam's support person, a delegate for the union was also employed in the same place as Mr Oskam and had a senior position in management. That person's evidence about his role in the workplace was not an accurate reflection of his seniority for there to be any conflict, and in any event no one raised that at the time. As I have said earlier Mr Oskam had a responsibility to be open and communicative too and since there was a union delegate supporting Mr Oskam, I hold there has been no disadvantage. There was no obligation as a matter of law for the employer to raise any conflict on this when Idea Services could reasonably conclude that the delegate was representing Mr Oskam, which is the role expected of a delegate unless Mr Oskam wanted someone else. That was never an issue at the time.

Conclusion

[35] Mr Oskam has a personal grievance for unjustified dismissal.

Remedies

[36] I now must consider remedies. First Mr Oskam is seeking reinstatement. This is a separate consideration from the employer's justification of the dismissal and can take into account information that has come to the attention of the employer since the dismissal and in this case the employer has opposed the claim on the basis that it is impracticable to reinstate Mr Oskam. It does not follow that Mr Oskam should be reinstated because of my earlier finding. This is because there was evidence produced from Idea Services that supported reinstatement being impracticable despite his length of service and support from some employees. T referred to Mr Oskam in a positive way, but that he let himself down because of his lack of maturity. These were carefully and sympathetically explained observations about Mr Oskam that I can not ignore or treat lightly given the standards required by Idea Services in the workplace. I have given these observations more weight than the evidence produced supporting Mr Oskam and his written character references. Moreover, Mr Oskam's lack of maturity and indeed lack of judgement were unfortunately displayed in an incident that he participated in with friends after his dismissal involving the egging of other peoples' property. In fact he changed his evidence of his involvement in this matter on two occasions. Also, his demonstration in the Authority as to what happened was challenged as being different to his demonstration at the employer's inquiry. I accept that he is remorseful about egging other people's property, but it happened and he has to take responsibility for the consequences. How he might react to other matters is a potential risk to his former employer if he were to be reinstated. Thus, I hold that there is more to Idea Services witness' claims of a loss of trust and confidence than just considering them as mere assertions particularly as there have been prior incidences involving him being warned, needing counselling and being banned from driving. In such circumstances reinstatement cannot be applied because his presence will create tension and disharmony in the workplace. I dismiss Mr Oskam's claim for reinstatement.

[37] Second I am required to make an assessment of Mr Oskam's contribution and any blameworthy behaviour to assess his quantum for monetary remedies. The fact is that he touched another person and that has left him open to criticism of acting inappropriately. T has given a very good account of herself as a mature and experienced person and whose credibility has not been found by me to be questionable and or doubtful in what she says she saw and heard. In this regard she

did not resile from her evidence and was able to explain her evidence clearly and I am satisfied that Mr Oskam should not have touched the service user. Unfortunately Mr Oskam did not have the maturity to deal with the situation differently. I also hold that although R and K say they did not hear anything inappropriate from where they were, I prefer T's evidence of what she says she saw and heard. Given that there was a physical reaction from the service user it is more than likely Mr Oskam's approach to the situation was inappropriate, especially for the service user to react and hit Mr Oskam, for whatever reason. Also, I have not given any weight to C's evidence because I have decided her evidence must be treated with considerable caution given it was raised later and there is the conflict about when she arrived. Therefore, I hold that Mr Oskam did engage with a service user inappropriately and this means he has considerable contribution and blameworthy conduct. This is to the extent that he must forgo any remedies for lost wages and compensation. Indeed his wages would have been reduced because he failed to properly mitigate his losses. Indeed he did not do enough to mitigate his loss of wages, although he did do some voluntary work.

[38] Mr Oskam has a personal grievance, but because it is impracticable to reinstate him his claim for reinstatement is dismissed. Also, his contribution means that his claims for lost wages and compensation have been reduced and dismissed.

[39] Costs are reserved.