

**Attention is drawn to the order
at [1] prohibiting the
publication of certain
information in this
determination.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 337
5366667

BETWEEN

SHERYL RITCHIE
Applicant

A N D

IDEA SERVICES LIMITED
(IN STATUTORY
MANAGEMENT)
Respondent

Member of Authority: Rachel Larmer

Representatives: Tim Oldfield, Counsel for Applicant
Paul McBride, Counsel for Respondent

Investigation Meeting: 02 August 2012 at Auckland

Submissions Received: 10 August 2012 from Applicant
21 August 2012 from Respondent
24 August 2012 from Applicant

Date of Determination: 27 September 2012

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Sheryl Ritchie by Idea Services Limited (In Statutory Management) was justified.**
- B. Ms Ritchie was disadvantaged by Idea's unjustifiable action in failing to fulfil its contractual obligations to appropriately address the potential hazard presented by A's behaviour.**
- C. Idea is ordered to pay Ms Ritchie \$1,000 distress compensation for her unjustified disadvantage grievance.**

Non-publication order

[1] I confirm the order made at the investigation meeting under clause 10 Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting the publication of the names or any information which may identify Idea's service users or their residential home. The relevant service users are referred to in this determination by A; B; C; D and the letter E has been used in place of the name of their residential home.

Employment relationship problem

[2] Ms Ritchie was employed by Idea as a Level 3 Community Service Worker (CSW). She is a member of the Service & Food Workers' Union Nga Ringa Tota Incorporated (SFWU) so is covered by the Collective Agreement (CA) between IHC New Zealand Incorporated and its subsidiary companies, Idea Services Limited and Timati Hou Limited, and the SFWU.

[3] Ms Ritchie's role involved supporting and assisting intellectually disabled clients (service users), with their day to day activities. The service users reside in a flatting type residential home. At the time of her dismissal Ms Ritchie provided services to the service users who reside at E. The Community Service Manager (CSM) responsible for E was Lynette Wright and the Area Manager was Dion Twiss.

[4] A, B, C, and D (the four service users) have a variety of intellectual and other disabilities. Prior to commencing work at E in June 2011, Ms Ritchie had worked with B; C; and D so she was aware of their care plans and familiar with their behaviour. Ms Ritchie had not worked with A prior to moving to E. Ms Ritchie says she did not receive an orientation when she started at E so was not given sufficient information or specific warnings about A's behaviour.

[5] On 19 August 2011 Ms Ritchie and the four service users attended an after-school disco. Whilst Ms Ritchie was driving them home from the disco A started hitting D and verbally abusing B. A also hit Ms Ritchie when she attempted to intervene. Ms Ritchie drove to a nearby police station which was closed so she returned to E.

[6] When they got back to E, A got out of the car and kicked the driver's door. Ms Ritchie put D to bed and B and C went inside. C went to bed and Ms Ritchie and

B returned to her car to call the police. B helped Ms Ritchie dial 111 because A had broken Ms Ritchie's glasses during the incident that evening so she could not see the numbers on the phone.

[7] Ms Ritchie says that while she and B were in the locked car calling the police A screamed abuse at them and hit the car with her fists while trying to rip off a side mirror. Ms Ritchie spoke to the police but was unhappy they failed to attend the incident.

[8] Ms Ritchie was rostered to stay the night at E and says she went to bed at around 2am. Ms Ritchie called the on-call manager at 8.05am on Saturday 20 August 2011 about the incident. The on-call manager's note of the call says:

Reporting on incident last night on way home from social. A hitting D and staff. Police called to lay charges. They may come to see A today.

[9] The on-call manager notes Ms Ritchie was asked to file an incident report. Ms Ritchie worked on Saturday and Sunday 20 and 21 August. She says she filled out an incident report on 20 August but did not fax it to Ms Wright until 21 August. After speaking to Ms Wright about the incident on 23 August, Ms Ritchie faxed a fuller account of the incident to Ms Wright on Thursday 24 August.

[10] Ms Ritchie was not rostered to work on Monday 22 August. She was scheduled to work the evening of Tuesday 23 August but did not do so because she went on sick leave. Ms Ritchie did not return to work prior to her dismissal on 28 October 2011.

[11] On Friday 25 August (whilst on sick leave) Ms Ritchie contacted the media and arranged for a reporter to meet her at E that afternoon. Ms Ritchie was aware that Mr Twiss would be visiting the service users at E that same afternoon but did not tell him about the meeting with the reporter, who left just 15 minutes before he arrived at E.

[12] The reporter who attended E spoke to Ms Ritchie, B and C. C was also photographed and her photo accompanied the article which was published. The photo of C meant she could be recognised by people who knew her. The article included personal information about the four service users, the 19 August incident, the alleged

reactions of the service users to the incident together with adverse comments Ms Ritchie made about A.

[13] Ms Ritchie acknowledges she knew Idea has a media policy and that her actions were contrary to that policy. She claims her actions did not amount to misconduct or serious misconduct because she only contacted the media because she believed management were not going to do anything about her incident report.

[14] Ms Ritchie says B and C were capable of giving, and did give, their informed consent to the media involvement and subsequent publicity which occurred. She says B agreed to her suggestion to involve the media; B and C invited the reporter into E; B and C agreed to be interviewed; and C consented to being photographed so her photo could accompany the article.

[15] Idea commenced disciplinary action on 29 August 2011 alleging Ms Ritchie had breached its media policy by:

- *Divulging private and confidential information to the media concerning people in our services.*
- *Inviting the media into the home of service users and allowing them to question and photograph the service users without the appropriate authorisation.*

[16] Disciplinary meetings were held on 21 and 30 September. On 10 October Idea wrote to Ms Ritchie setting out its preliminary views regarding the alleged breach of media policy and informing her it believed her actions constituted serious misconduct, with dismissal being a possible outcome. A meeting was scheduled for 18 October to enable Ms Ritchie to respond to Idea's preliminary findings and its proposed outcome.

[17] The final outcome meeting was held on 28 October. Ms Ritchie was dismissed for serious misconduct because she had involved service users with the media and had invited the media to E without following the necessary or proper procedures. Idea did not accept Ms Ritchie's explanation that B and C had given informed consent. It also concluded Ms Ritchie had failed to obtain appropriate consent from Idea before the media entered E, interviewed B and C, and photographed C.

[18] Ms Ritchie claims her dismissal was unjustified. She says her conduct in contacting the media was not serious misconduct and even if it was, dismissal was not an appropriate response.

[19] Ms Ritchie also claims she was unjustifiably disadvantaged in her employment because of Idea's alleged failure to:

- (a) Follow its Incident Reporting and Response System Policy in respect of the 21 August incident report; and
- (b) Provide a safe workplace because it did not do enough to deal with the potential hazard presented by A's behaviour.

Issues

[20] In relation to Ms Ritchie's disadvantage grievances, the following issues require determination:

- (a) Did Idea follow its Incident Reporting and Response System Policy?
 - (i) If not, was that failure an unjustified action?
 - (ii) If so, did that disadvantage Ms Ritchie?
- (b) Did Idea fail to provide a safe workplace by not doing enough to deal with the potential hazard presented by A's behaviour?
 - (i) If so, was that failure an unjustified action?
 - (ii) If so, did that disadvantage Ms Ritchie?

[21] In relation to Ms Ritchie's dismissal grievance, the following issues require determination:

- (c) Was her dismissal for serious misconduct justified in light of the s.103A justification test in the Act? In particular:
 - (i) Did Idea conduct a full and proper investigation into its concerns?

- (ii) Did its investigation disclose conduct which a fair and reasonable employer could view as serious misconduct?
- (iii) If so, was summary dismissal a response which was available to a fair and reasonable employer in all of the circumstances?
- (d) If Ms Ritchie's dismissal was unjustified, what if any remedies should be awarded?

Alleged disadvantage grievances

Did Idea follow its Incident Reporting and Response System Policy?

[22] Ms Ritchie alleges Idea did not follow its Incident Reporting and Response System Policy (the policy) because:

- (a) It provided her with insufficient support after the 19 August incident¹;
- (b) It failed to adequately follow up the incident because she was not informed of the outcome of the incident until 4 October²;
- (c) Ms Wright should not have asked her what could have been done differently³;
- (d) It failed to offer her EAP services⁴;
- (e) She was not given a debriefing after the incident;
- (f) Idea did not interview C.

(a) *Post incident support*

[23] I do not consider Idea failed to provide Ms Ritchie with sufficient support. It offered to move her from E so she would not have to work with A. Ms Ritchie declined that offer, instead insisting A should be moved out of E, her residential home.

¹ Alleged breach of clause 6.2.

² Alleged breach of clause 6.3.

³ Alleged breach of clause 6.2.

⁴ Alleged breach of clause 6.3.

(b) Incident follow up

[24] Ms Wright became aware of the 19 August incident on 23 August when Mr Twiss told her about it and she contacted Ms Ritchie by phone that day. She also phoned Ms Ritchie on 24, twice on 25, and 26 August.

[25] I accept Ms Wright's evidence that Ms Ritchie told her on 23 August she was okay but that C was upset. Ms Wright gave Ms Ritchie an opportunity to discuss the incident and to vent about A in accordance with the suggestions in the policy.

[26] In addition to investigating Ms Ritchie's incident report, Idea was concurrently investigating the incident report filed by another staff member which involved concern Ms Ritchie had insisted on A leaving the disco before A was ready to do so, and A's complaint against Ms Ritchie regarding the events of 19 August.

[27] In light of this context I do not consider it a breach of policy that Idea did not respond to Ms Ritchie regarding the outcome of her incident report until 4 October.

(c) Ms Wright's question

[28] I find Ms Wright's question about what could have been done differently was not an attempt to blame Ms Ritchie for the incident (as she perceives it was), but was merely part of Idea's usual reflective practice, to enable the organisation to learn from the incident. This question did not breach the policy.

(d) EAP services

[29] The second call Ms Wright made to Ms Ritchie on 25 August was to remind her of EAP services. However, Ms Ritchie cut Ms Wright off before EAP could be discussed by saying the union said Ms Wright was not to contact her (Ms Ritchie) any longer. Ms Ritchie then hung up on Ms Wright.

(e) Debriefing

[30] Idea's failure to hold a debriefing meeting with Ms Ritchie must be seen within context. Ms Ritchie was on sick leave from 23 August and did not return to work. From 25 August she refused to have direct contact with Idea. She was also subject to a disciplinary process which commenced on 29 August.

(f) *No interview of C*

[31] I accept Ms Wright's evidence that it was inappropriate to interview C because of the extent of her intellectual disability.

Conclusion

[32] I consider Idea did sufficiently support Ms Ritchie after the incident and did adequately follow up the incident. I find Ms Ritchie cut off Ms Wright's attempt to discuss EAP when she hung up on her on 25 August. The debriefing of staff regarding an incident report usually occurs in weekly staff meetings but Ms Ritchie was not at work following the incident to enable that to occur.

[33] I do not consider Idea breached its policy and I find its actions in connection with the policy were justified. Accordingly, Ms Ritchie has been unable to establish that her employment was affected to her disadvantage by Idea's unjustified action in relation to this policy.

Did Idea fail to provide a safe workplace by not doing enough to deal with the potential hazard presented by A's behaviour?

[34] Idea has statutory obligations under the Health and Safety in Employment Act 1992⁵ to provide a safe workplace. The courts recognise these obligations as implied terms of an employment relationship. The parties also agreed to be bound by the express contractual terms regarding health and safety which are set out in clause 16.7 of the CA.

[35] Clause 16.7.2 states:

[...] the employer will ensure that no employee shall be required to undertake any work without proper instruction as to hazards likely to arise in connection with that work, and for the employee to have access to appropriate training and all known relevant information as to the precautions to be taken to avoid such hazards.

For the avoidance of doubt, within the employers' operations the hazards in the workplace may include challenging behaviour of service users.

[36] Clause 16.7.4 states:

All hazards identified by an employee in the workplace must be reported to the reporting officer as soon as practical so that remedial

⁵ And its amending legislation.

action may be taken as appropriate. Such hazards and remedial action shall be regularly monitored as part of the employer's hazard monitoring programme and affected staff advised of the outcome.

[37] A moved to reside at E in January 2011. Over the period 20 January to 19 August 2011 thirteen incident reports were filed which recorded physical behaviour by A towards property and/or staff and/or other service users. Nine incidents occurred prior to Ms Ritchie moving to E and three occurred after Ms Ritchie arrived at E but prior to the 19 August incident.

[38] Idea had sufficient information to identify A's physical behaviour as a potential hazard. Under the terms of the CA it was therefore required to *properly instruct* Ms Ritchie about this potential hazard and to *provide her with appropriate training and relevant precautions* she should take in order to avoid that potential hazard. Idea also had an obligation to take *remedial action* in respect of the thirteen physical incidents which occurred. I find that did not occur.

[39] Idea accepts that, contrary to its usual procedure, Ms Ritchie was not given a formal site orientation before moving to E. There was a conflict in the evidence between Ms Wright and Ms Ritchie about what information Ms Ritchie was given regarding A. Ms Wright says she discussed with Ms Ritchie A's behaviours; what Dual Disability⁶ had said about A; and scenarios to use with A.

[40] I find that even if these discussions did occur they were insufficient to fulfil Idea's contractual health and safety obligations under the CA. I accept Ms Ritchie's evidence that aspects of A's condition and behaviour were unknown to her until after the 19 August incident. That would not have been the case had she been properly briefed about A.

[41] A's background was complex and she demonstrated a range of challenging behaviours. A had been involved in numerous physical incidences after moving to E and, given Ms Ritchie's lack of previous knowledge of A, Idea should have properly communicated A's situation to Ms Ritchie. I am not satisfied that occurred.

[42] It is not justifiable that all relevant documentation was not properly discussed with Ms Ritchie. I consider it unlikely Ms Ritchie was given the information she should have been about the precautions she could take to address the potential hazard

⁶ An organisation specialising in the treatment of people with intellectual disability and possible mental health issues.

A's physical behaviour presented. The casual conversation Ms Wright had with Ms Ritchie, which I find did not involve consideration of any relevant documentation, was insufficient to comply with Idea's contractual health and safety obligations under the CA.

[43] I consider that Idea failed to take appropriate remedial action to address the potential hazard A's behaviour presented prior to the 19 August incident because no remedial action was taken. The only behavioural tool Idea appeared to be using to deal with A's behaviour was *Think-Feel-Act* which did not appear to be suitably effective in managing A's recurring physical outbursts.

[44] There were a number of reasonable and appropriate follow up and/or remedial actions available to Idea. The following options were specifically recorded on the incident form and should have been considered but did not appear to have been:

- (a) Amending A's Support/Service plan;
- (b) Changing the hazard register;
- (c) Involving Behaviour Support;
- (d) Having a debriefing session;
- (e) Staff training;
- (f) Involving a Health Adviser.

[45] Idea should also have forwarded copies of the incident reports relating to A's inappropriate physical behaviour to her Behaviour Support Specialist and Health Advisers to ensure they were fully informed about A's situation but that did not occur.

[46] I find on the balance of probabilities that Ms Ritchie did not get an adequate orientation or induction regarding A's behavioural issues and was not properly briefed about how to support A in a non-confrontational manner.

[47] The sole tool for managing A's behaviour (*Think-Feel-Act*) was not working. A fair and reasonable employer could not have failed to have taken alternative or additional remedial action in light of that. A fair and reasonable employer could be expected to have implemented new strategies and remedial action to keep staff and other service users safe from A's physical outbursts. That did not occur.

[48] It was not until after the 19 August incident that Idea referred A to Behaviour Support, had a debriefing, and sent A to a neurologist to review her medication. These actions should have been taken earlier. I therefore find Idea failed to provide Ms Ritchie with a safe workplace because it did not do enough to deal with the potential hazard presented by A's behaviour.

Was that failure an unjustified action?

[49] Idea's failure to comply with its contractual health and safety obligations was an unjustified action. A fair and reasonable employer could not have failed to comply with such obligations.

Did that disadvantage Ms Ritchie?

[50] Idea's unjustified action clearly disadvantaged Ms Ritchie. She was assaulted by A, suffered a work related injury, and took sick leave from work.

Conclusion

[51] Ms Ritchie's employment was affected to her disadvantage by Idea's unjustified action in failing to meet its contractual health and safety obligations.

Was Ms Ritchie's dismissal for serious misconduct justified in light of s.103A justification test in the Act?

Did Idea conduct a full and proper investigation into its concerns?

[52] Ms Ritchie says Idea's investigation was unfair because C was not interviewed. She says C should have been interviewed as part of Idea's disciplinary investigation because C gave informed consent to the media's involvement and to being photographed.

[53] I do not accept Ms Ritchie's evidence about that. Ms Wright has known and worked with C for many years. I accept her evidence that the nature and extent of C's disabilities meant it was inappropriate to have interviewed her because she could not have understood the matters that would have been discussed.

[54] Ms Ritchie alleges Idea did not sufficiently investigate whether B and C had given their informed consent to the media's involvement because it improperly focused on the alleged breach of the media policy and failure to use internal channels to address her concerns about Ideas response to her incident report.

[55] I do not accept that criticism. B and C were well known to the decision-makers who were well placed to assess Ms Ritchie's explanation they had given their informed consent. The parties were agreed on what would amount to informed consent, and it was clear that what occurred in relation to B and C's purported consent fell far below what was required. Idea's rejection of the informed consent explanation was open to it on the evidence available.

[56] Ms Ritchie says that Idea's failure to disclose A's incident reports during the disciplinary process breached s.4(1A) of the Act and therefore undermined the fairness of its investigation. Ms Ritchie claims the incident reports were relevant information that she should have been given access to because of her explanation that she involved the media because of safety concerns about A's behaviour. I do not accept that.

[57] I consider A's previous physical behaviour and Ms Ritchie's decision to involve the media were two separate and distinct matters. Ms Ritchie had access to the reports whilst employed so she was able to explain her reasons for involving the media without needing to view the personal and confidential information about A which was contained in the incident reports.

[58] I find Idea was not required to disclose the incident reports to Ms Ritchie because I do not consider they were relevant to the disciplinary concerns, which focused on an alleged breach of the media policy. Even if I am wrong about that, and they were relevant to the disciplinary concerns, Idea was still entitled to treat the incident reports as confidential information. It was therefore not required to disclose the incident reports because there was a good reason to maintain the confidentiality of the information, namely in order to protect A's privacy⁷.

[59] I am also satisfied Idea complied with its s.4(1A) good faith obligations in the Act to provide Ms Ritchie with access to information relevant to her ongoing employment⁸ and an opportunity to comment on the information⁹ before it decided to dismiss her.

⁷ S.4(1B) and 4(1C) ERA.

⁸ S.4(1A)(c)(i) ERA.

⁹ S.4(1A)(c)(ii) ERA.

[60] I find Idea conducted a full and fair investigation into its disciplinary concerns. It met all four tests in s.103A(3) of the Act. It sufficiently investigated its concerns¹⁰; it raised its specific concerns with Ms Ritchie before she was dismissed¹¹; it gave her a reasonable opportunity to respond to its concerns before she was dismissed¹²; and the evidence satisfied me that Idea genuinely considered Ms Ritchie's explanation to its concerns before she was dismissed¹³.

Did Idea's investigation disclose conduct which a fair and reasonable employer could have viewed as serious misconduct?

[61] Ms Ritchie knew her actions breached Idea's media policy.

[62] I accept Idea's evidence that the nature of C's disability meant she was unable to have given informed consent to: the media entering E; to being interviewed; or to being photographed for a newspaper article because she was unable to understand the implications of these decisions.

[63] I also find that Idea was entitled to conclude B had not given his informed consent because Ms Ritchie improperly led him to agree to involve the media, to meeting with the reporter, and to inviting the reporter into his residential home.

[64] I accept Idea's evidence that Ms Ritchie should have involved Mr Twiss, as the Area Manager, to ensure that B's decision making process complied with the basic requirements of informed consent. Her failure to do so was a serious matter.

[65] I consider Ms Ritchie had her own strong reasons for wanting to involve the media and appeared to have lead her to have inappropriately and improperly influenced B by presenting media involvement as the only viable option available to him.

[66] Ms Ritchie actively mislead B about realistic and appropriate alternatives¹⁴ that would have ensured his privacy and the privacy of the other service users would be maintained. She also deliberately omitted to inform anyone in authority about the proposed media involvement.

¹⁰ S.103A(3)(a) ERA.

¹¹ S.103A(3)(b) ERA.

¹² S.103A(3)(c) ERA.

¹³ S.103A(3)(d) ERA.

¹⁴ Such as raising his concerns with Ms Wright or Mr Twiss. If unhappy with the outcome of their response he could then raise concerns with the GM, and then CEO, and also the Disability Commissioner.

[67] Idea's conclusion that by contacting the media Ms Ritchie divulged private and confidential information concerning its business, its service users, and the service users' residential home was one that was open to a fair and reasonable employer.

[68] Idea's finding that Ms Ritchie's actions in inviting the media into the home of service users in her care and allowing C to be photographed without first obtaining informed consent (or appropriate authorisation from Idea for that to occur) undermined the privacy of the four service users who reside at E was one that a fair and reasonable employer could have made.

[69] Breach of privacy of service users and failure to obtain their informed consent to media publicity about them are serious matters that go to the heart of the trust and confidence. I consider it was open to a fair and reasonable employer to have concluded that Ms Ritchie's actions fundamentally undermined trust and confidence and therefore amount to serious misconduct.

[70] I find that it was open to Idea to fairly and reasonably conclude that Ms Ritchie had engaged in serious misconduct.

Was summary dismissal a response which was available to a fair and reasonable employer in all of the circumstances?

[71] During the disciplinary process Ms Ritchie indicated she had lost trust and confidence in her employer. She also failed to demonstrate any self awareness of why her actions in involving the media were of concern or about the impact the media involvement had on the service users she was responsible for.

[72] Ms Ritchie did not apologise for her actions and did not provide an undertaking that she would comply with Idea's policies in future. Ms Ritchie specifically told Idea she would do the same thing again.

[73] Ms Ritchie's actions were deliberate and adversely impacted on the service users in her care. She decided to breach the media policy and decided not to follow the internal procedures (which she had successfully used to address previous concerns) to address her concerns about A's actions. Ms Ritchie's view that her actions were justified because she was unhappy with the way Idea had responded to her incident report was unreasonable and inappropriate.

[74] I accept Idea's evidence that it had lost trust and confidence in Ms Ritchie to act appropriately in future. I consider that view was available to it on the information it had. I find summary dismissal was within the range of responses which was available to a fair and reasonable employer in all the circumstances.

Outcome of personal grievance claims

[75] Idea's actions and how it acted in relation to dealing with the potential hazard presented by A's behaviour were not what a fair and reasonable employer could have done in all the circumstances. Ms Ritchie was disadvantaged as a result of Idea's unjustified action and is entitled to compensation for the distress that caused her.

[76] Idea's actions and how it acted in relation to Ms Ritchie's dismissal for serious misconduct were what a fair and reasonable employer could have done in all the circumstances at the time her dismissal occurred.

What remedies should be awarded?

What distress compensation should be awarded for the unjustified disadvantage?

[77] The level of compensation awarded must reflect Ms Ritchie's evidence about the affect Idea's failure to appropriately manage the potential hazard A's behaviour presented had on her.

[78] I accept Ms Ritchie's evidence she was stressed and distressed by the 19 August incident. However, I consider Ms Ritchie's evidence regarding her claim for distress compensation focused on the affects dismissal had on her. The award of distress compensation on the disadvantage claim should therefore be modest, commensurate with the evidence in support of it.

[79] Idea is ordered to pay Ms Ritchie \$1,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity, and injury to feelings she suffered as a result of her unjustified disadvantage grievance.

Should remedies be reduced for contribution?

[80] Section 124 in the Act requires me to consider whether Ms Ritchie contributed to the situation that gave rise to her disadvantage grievance, and if so reduce remedies

accordingly. I find Ms Ritchie did not contribute to the situation that gave rise to her disadvantage grievance.

Costs

[81] The parties are encouraged to resolve costs by agreement. If that is not possible then costs will be dealt with by an exchange of memoranda. Idea has 14 days within which to file its costs memorandum and Ms Ritchie has 14 days within which to respond.

[82] The Authority is likely to adopt its usual tariff based approach to costs. The notional daily tariff is currently \$3,500. The parties are invited to identify any factors they say should result in the notional daily tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority