

ATTENTION IS DRAWN TO THE
ORDER AT PARAGRAPH 1
PROHIBITING PUBLICATION
OF CERTAIN INFORMATION REFERRED
TO IN THIS DETERMINATION

Determination Number: AA 383/05
File Number: AEA 474/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Trevor Scott (Applicant)
AND IHC New Zealand Inc (Respondent)
REPRESENTATIVES Timothy Oldfield for Applicant
Paul McBride for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 13 September 2005
SUBMISSIONS RECEIVED 22 September 2005 from Applicant
23 September 2005 from Respondent
DATE OF DETERMINATION 28 September 2005

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following orders:-

- A. IHC New Zealand Inc is ordered to pay to Mr Scott \$9,331.20 reimbursement for lost wages pursuant to section 123(b) of the Employment Relations Act 2000.**
 - B. IHC New Zealand Inc is ordered to pay to Mr Scott \$8,000 compensation pursuant to section 123(c)(i) of the Employment Relations Act 2000.**
 - C. The parties are to attempt to reach agreement on the matter of costs, failing which leave is reserved for the matter to be put to the Authority.**
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Preliminary matters

[1] At the commencement of the investigation meeting the parties agreed that the Authority should prohibit the publication of any details leading to the identity of any IHC's service-users. I accept that request and accordingly apply Clause 10 (2) of Schedule 2 of the Act.

Employment Relationship Problem

[2] Mr Tevor Scott was employed by IHC New Zealand Incorporated ("IHC") as a community support worker to support, care, and educate individuals and groups of people with an intellectual disability.

[3] On 15 July 2004 an incident report alleged Mr Scott had physically assaulted and verbally abused a service user 'A' on 14 July 2004.

[4] After a series of investigatory and disciplinary meetings Mr Scott was suspended and then dismissed for serious misconduct. In his statement of problem Mr Scott claims the suspension gives rise to an unjustifiable disadvantage and the dismissal was unjustified. IHC denies the suspension disadvantaged Mr Scott and says it was undertaken in accordance with the collective employment agreement. Further, IHC says the dismissal is justified in all the circumstances.

[5] The issues for determination are whether:

- the suspension constitutes a disadvantage?
- the process followed by IHC was fair and reasonable; and
- the decision to dismiss was within the range of responses available.

Was the process fair and reasonable?

The incident

[6] Mr Scott's colleague, Ms Saskia Waistra completed an incident report regarding incidents occurring on 14 July 2004. Ms Waistra stated in the incident report that A had come home upset on 15 July and when questioned, relayed incidents which had occurred the previous day which were still upsetting him. The incidents were:

- at the Waiwera Hot pools, Mr Scott allegedly pushed A's head under the water; and
- at the Day Centre Mr Scott pushed A in the hallway; and
- Mr Scott grabbed A in the groin; and

- Mr Scott pushed A saying that he would “kick his backside”.

Suspension

[7] The applicable collective employment agreement provides for suspension of employees, on pay, where serious misconduct has been alleged. The collective agreement requires the employer to meet with the employee prior to any decision regarding suspension being made. The purpose of the meeting is to discuss the reasons for the suspension.

[8] On receipt of the incident report, Ms Marguerite Vanderkolk, IHC Area Manager sought advice from IHC’s HR department. Following that advice, Ms Vanderkolk contacted Mr Scott at his place of work and advised him that serious allegations had been received. Ms Vanderkolk advised Mr Scott that a meeting had been arranged for the following day, 16 July 2004 at 2.00pm.

[9] What happened next is disputed. Ms Vanderkolk says Mr Scott agreed to leave work for the rest of the day after he arranged for a ride home. Mr Scott denies he agreed to leave work. Rather, he says Ms Vanderkolk told him he had to leave work immediately.

[10] I am satisfied that it is more likely than not that when Ms Vanderkolk suggested to Mr Scott that he leave for the rest of the day Mr Scott asked to stay and complete his final task at 3.00pm. I am also satisfied that it is more likely than not that Ms Vanderkolk denied Mr Scott the opportunity to continue working and to complete his tasks. Ms Vanderkolk was concerned about the nature of the allegations and did not want Mr Scott to have any more contact with the clients under his care. I have concluded that Ms Vanderkolk instructed Mr Scott to leave his place of work immediately, and then arranged for transportation to take him home.

[11] Ms Vanderkolk told the Authority “Trevor did not attend the meeting arranged for 16 July, nor did he contact me regarding that meeting”. I do not accept Mr Scott had not contacted Ms Vanderkolk about the meeting.

[12] At 12.11pm on 16 July Ms Sarah Stone, Mr Scott’s union organiser, sent an email to Ms Vanderkolk. This email refers to a telephone conversation Ms Stone had had with Ms Vanderkolk in the morning of 16 July, and also raises an issue regarding the suspension of Mr Scott the previous day. Ms Stone advised Ms Vanderkolk that she was unable to attend a meeting until 22 July and suggested that the timeframe would allow full opportunity to peruse all the paperwork and details of the allegations. Ms Stone ended her email by advising Ms Vanderkolk that she would

be out of the office for the rest of the day, but would be available on Monday if she wished to discuss the matter further.

[13] Ms Vanderkolk's response to Ms Stone's email is also recorded. Ignoring Ms Stone's advice as to her availability, Ms Vanderkolk advised Ms Stone that she would be hand delivering a letter to Mr Scott that day requesting a meeting for the following Monday. Ms Vanderkolk advised Ms Stone "My decision to suspend [Trevor] was for his own protection as well as the protection of the complainant, particularly if the allegation is proven".

[14] Ms Vanderkolk hand delivered a letter to Mr Scott that day, and advised him of a new meeting time for 19 July 2004. The letter advised Mr Scott that an incident report had been received which alleged physical and verbal abuse of a service user and that the matter was at an investigatory stage. The letter advised Mr Scott that the meeting on 19th was to provide Mr Scott with the opportunity to respond to the allegation and discuss his suspension. No further information was provided. The letter confirmed that Mr Scott was suspended for three days from 16 July 2004.

[15] The meeting proceeded on 22 July 2004. Notes taken at that meeting were provided to the Authority. It was confirmed that the notes were a reasonable summary of the discussion at the meeting. At the Authority's investigation meeting Ms Vanderkolk conceded that there was no discussion about suspension at the meeting on 22 July.

[16] The collective agreement provided Mr Scott with a clear entitlement to meet with his employer before a decision was made about his suspension.

I find that the decision to suspend Mr Scott was made before any discussion with Mr Scott took place. Mr Scott has suffered a disadvantage in respect of the suspension and this gives rise to a personal grievance.

Was the disciplinary process fair and reasonable

IHC's policy requirements

[17] IHC have published a written policy outlining the steps to be taken if emotional abuse, physical abuse or neglect is witnessed, disclosed or suspected. The policy requires managers to contact the family or significant other to inform them of the situation. Ms Vanderkolk did not contact A's mother immediately. It wasn't until after Ms Stone had been in contact with A's mother that Ms Vanderkolk made any contact. Ms Jean Wheldale is a vocational co-ordinator with IHC. It was Ms Wheldale who took the notes of all the meetings during the disciplinary process.

Ms Wheldale told me that she thought a client service manager was equivalent to a “*significant other*” and therefore the requirement to notify a significant other had been met because Ms Ashton (CSM) was advised as a result of receiving the incident report.

[18] The policy also requires that when service users are being interviewed in relation to allegations managers are to ...ensure... the service users have a support person present with them at the meeting. In answer to questions at the investigation meeting Ms Wheldale told me that all service users interviewed, including A, were happy not to have a support person and that she was a key staff member and they were happy for her to be there with them.

[19] I am not satisfied that the guidelines outlined in the policy document have been met by Ms Vanderkolk in undertaking her investigation into the allegations about Mr Scott. I would have expected that *significant other* would have been interpreted to mean a partner or spouse of a client, not an employee of IHC. At the very least Ms Vanderkolk should, according to the policy, have contacted A’s mother on receipt of the incident report. Ms Vanderkolk also ought to have made sure adequate support was made available for the service users. I do not accept that Ms Wheldale could fill that role. Ms Wheldale was there on behalf of IHC, taking notes of the discussion. She was not there as a support person for the service users.

Disciplinary procedure

[20] On 16 July, After Mr Scott had been served with the letter advising him of the meeting to be held on Monday 19 July, Ms Stone, on behalf of Mr Scott, emailed Ms Vanderkolk raising again the unlawful suspension of Mr Scott. Ms Stone advised that Mr Scott would not be in attendance at the meeting on 19th. Ms Stone also alluded to the fact that the full details of the allegations against Mr Scott had not yet been disclosed to Mr Scott and advised that if the details were not fully revealed prior to the meeting then Mr Scott may not be in a position to comment on the allegations and an adjournment may be sought.

[21] On 19 July Ms Vanderkolk interviewed three service users in relation to the incidents. Minutes of each of the meetings were recorded and made available to Ms Vanderkolk that same day.

[22] On 22 July Ms Vanderkolk met with Mr Scott and Ms Stone. The minutes of that meeting show that Ms Stone and Mr Scott had only that day received a copy of the incident report and that the report had the name of the writer of the incident report and the other service users

blanked out. On enquiring why that was so Ms Vanderkolk advised Ms Stone that the writer had concerns about her safety.

[23] During the meeting Ms Stone enquired as to whether any statements had been taken from the service users concerned. Ms Vanderkolk is recorded as advising that they were not at that stage in the process. This response is inconsistent the the documents provided to the Authority which included the notes made of the interviews held on 19 July with the service users. At the investigation meeting in answer to my questions, Ms Vanderkolk could not explain why she had told Ms Stone on 22 July that no investigations had been undertaken.

[24] The meeting on 22 July took about 10 minutes.

[25] On 23 July 2004 Ms Vanderkolk met with the same service users she had previously met with on 19 July, and interviewed them once again about the alleged incidents. Those interviewed confirmed that Mr Scott had touched A in the groin area, had pushed A and had threatened A that he would kick him in the backside.

[26] On 23 July 2004 Ms Vanderkolk wrote to Mr Scott explaining that she needed to undertake further enquiries and that Mr Scott would receive full information before a further meeting, during which, Mr Scott would be provided with an opportunity to respond. Ms Vanderkolk confirmed that Mr Scott would continue to be suspended.

[27] On 26 July 2004 Ms Vanderkolk interviewed A. The minutes of that meeting show that A's recollection of events was consistent with the events relayed by the other service users who witnessed the events.

[28] On 4 August Ms Vanderkolk spoke with A's mother. Ms Vanderkolk told the Authority that A's mother had told her that the situation "...may not be as it seemed." A's mother told Ms Vanderkolk that A had been known to exaggerate. Ms Vanderkolk told the authority that A's mother seemed defensive of Mr Scott. Ms Vanderkolk says she took out of her conversation with A's mother that she should carefully assess whether she believed A, including whether there was any exaggeration of the events in question.

[29] Ms Vanderkolk seems to have completely disregarded that information as she determined that A's mother had been "...primed..." by Mr Scott. In answer to questions at the investigation meeting about why she came to that conclusion Ms Vanderkolk told me that she found it unusual that A's mother was advocating more for Mr Scott than A. Ms Vanderkolk told me that

the impression A's mother was giving her was different to the impression she had gained by looking through Mr Scott's file. Looking through his file Ms Vanderkolk had gained the impression that Mr Scott's skills and attributes were not suitable for working with people with disabilities.

[30] Ms Vanderkolk met with Mr Scott and Ms Stone later on 4 August. During that meeting Mr Scott advised that he had been in contact with A's mother who was able to provide more information about A and issues A had had in the past. Ms Vanderkolk told Mr Scott that what A's mother had to say was irrelevant as she was not a witness to the incidents.

[31] The meeting took less than 30 minutes. Ms Vanderkolk told the Authority that Mr Scott "...just denied everything all the time." This is inconsistent with the recorded minutes of the meeting which show that Mr Scott provided detailed responses to each of the incidents complained of.

[32] At no stage during the 4 August meeting did Ms Vanderkolk put to Mr Scott for his response, the impressions she had gained during her review of his personal file.

[33] I am satisfied that the procedure adopted by Ms Vanderkolk was seriously flawed. Ms Vanderkolk failed to follow IHC's policies regarding allegations of abuse of service users. Mr Scott did not receive any information about the allegations made against him until the morning of 22 July 2004. At the meeting on 22 July Ms Vanderkolk made misleading statements about the stage the investigation was at and failed to provide Mr Scott with copies of notes taken from meetings held with service users on 19 July. Ms Vanderkolk completely disregarded important information from A's mother about his ability to exaggerate and information about A. Ms Vanderkolk gained impressions about Mr Scott from his personal file which she failed to put to Mr Scott for his response.

Was the decision to dismiss within the range of responses available to IHC

[34] Both the Employment Court and the Court of Appeal have held that where a serious charge is the basis of the justification for the dismissal then the evidence of it must be as convincing in its nature as the charge is grave, i.e. the test was a balance of probability to a high degree of proof (*Whanganui College Board of Trustees v Lewis* [1999] 2 ERNZ 1006 and [2000] 1 ERNZ 397.

[35] Mr Scott was accused of physical and verbal abuse of a service user. These are very serious allegations. The procedure adopted by IHC did not result in a fair and proper investigation. It follows that without showing to a high degree of proof that the allegations were well founded, IHC could not respond by dismissing Mr Scott from his employment.

Remedies

[36] I have found that Mr Scott was unjustifiably disadvantaged as a result of his suspension and then unjustifiably dismissed from his employment with IHC. He is therefore entitled to remedies.

Lost Wages

[37] Mr Scott is seeking lost wages for the period 6 August 2004 to 7 November 2004. Mr Scott gave evidence of the efforts he took to find alternative employment including undertaking a training course, but that did not result in securing employment. He is currently employed as a dump truck driver.

[38] I am satisfied that this is a case in which the discretion of the Authority to award more than the statutory 3 months is warranted. Mr Scott made genuine attempts to mitigate his loss and eventually changed the industry in which he had been working in order to secure employment.

IHC New Zealand Inc is ordered to pay to Mr Scott \$9,331.20 reimbursement for lost wages pursuant to section 123(b) of the Employment Relations Act 2000.

Compensation

[39] Mr Scott is entitled to a global award rather than separate awards for each grievance and that appears to be what he is claiming in his statement of problem. I am satisfied that Mr Scott found the manner and process of his dismissal very distressing. I have considered the issue of contribution and find that the investigation disclosed no basis for linking any conduct on Mr Scott's part to his unjustified suspension or unjustified dismissal.

IHC New Zealand Inc is ordered to pay to Mr Scott \$8,000 compensation pursuant to section 123(c)(i) of the Employment Relations Act 2000.

Costs

[40] The parties are to attempt to reach agreement on the matter of costs, failing which leave is reserved for the matter to be put to the Authority.

Vicki Campbell
Member of Employment Relations Authority