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## Thomas v Idea Services Limited (Christchurch) [2017] NZERA 1042; [2017] NZERA Christchurch 42 (23 March 2017)

Last Updated: 14 April 2017

### IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 42  
5613533

BETWEEN HELEN THOMAS Applicant

A N D IDEA SERVICES LIMITED Respondent

Member of Authority: David Appleton

Representatives: Barbara Lautogo, Advocate for Applicant

Paul McBride, Counsel for Respondent

Investigation Meeting: 28 February 2017 at Christchurch

Submissions Received: 28 February 2017, from the Applicant

28 February 2017, from the Respondent

Date of Determination: 23 March 2017

### DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

**A. The applicant was not subjected to any unjustified disadvantage**

**in her employment.**

**B. Costs are reserved.**

### Prohibition from publication order

[1] The matter being determined by the Authority relates to how the respondent investigated a complaint against Ms Thomas which had been made by a service user of the respondent. That service user took no part in the Authority's investigation and her identity should be kept confidential.

[2] I therefore prohibit from publication any information that could lead to the service user's identity being disclosed, other than that set out in this determination. I shall refer to the service user as Ms X in this determination.

### Employment relationship problem

[3] Ms Thomas complains that she suffered an unjustified disadvantage in her employment due to the actions of the respondent in investigating Ms X's complaint and in relation to the respondent subsequently placing Ms Thomas on a performance improvement plan (PIP). Ms Thomas seeks that the allegations of serious misconduct stated in a letter to her be withdrawn, any reference to it being removed from her personnel records, the PIP being withdrawn and any reference to it being removed from her personnel records, the reinstatement of four days sick leave that she took as the result of workplace stress relating to

the allegations, an apology for the distress the matter has caused her and an award of \$5,000 for “hurt and humiliation”.

[4] The respondent denies that Ms Thomas suffered any disadvantage, but if she did, it was not through the actions of the respondent. If she did suffer disadvantage through the actions of the respondent, the actions were justified. In addition, the respondent says that Ms Thomas did not raise a valid personal grievance in respect of some of the actions complained of. Furthermore, the respondent asserts that the Authority does not have the jurisdiction to award some of the remedies sought and, in so far as it does, and in so far as a personal grievance may be found, the respondent says that Ms Thomas contributed to the situation giving rise to any such grievance.

#### **Brief account of events leading to personal grievance being raised**

[5] The respondent is a charity that provides support to vulnerable, intellectually disabled people. Ms Thomas was employed as a level 3 support worker in the South Canterbury area, supporting, amongst others, the service user Ms X.

[6] On 2 September 2015 Ms X made a complaint against Ms Thomas alleging that, the previous day, Ms Thomas had made a comment to Ms X which had upset her. Specifically, the complaint was worded as follows:

I painted a picture for my mum’s birthday. Helen said to me “that’s awful, Madison (her 5 year old granddaughter) could do better than that.

[7] In terms of the outcome that Ms X wanted, she stated:

I want her to go to another house. She always picks on me and

doesn’t make me feel very good.

[8] As a result of this complaint, the services manager, Julia Ford, telephoned Ms Thomas, and subsequently wrote to her on 16 September 2015 to advise Ms Thomas of the complaint made by Ms X. The letter advised Ms Thomas that the respondent needed to hear Ms Thomas’ explanation and to consider whether any further steps were appropriate. For that purpose, Ms Ford had scheduled a preliminary interview. The letter went on to say the following:

If your explanation satisfactorily explains events then that will be the end of this matter. However, if your explanation does not resolve this issue, then the next step would be to conduct a full and fair investigation.

This is a serious allegation and I need you to be aware that if serious misconduct on your part is determined, your dismissal is a possibility.

At the meeting, due to the seriousness of the allegation, 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.

[9] A meeting took place between Ms Thomas and Ms Ford on 2 October 2015, together with two note takers and a support person for Ms Thomas. The notes of the meeting put before the Authority record that Ms Thomas explained how she and Ms X had come to discuss Ms X’s painting, and that Ms Thomas denied making the comments contained in the complaint, saying that Ms X had been “triggered” or “heightened” when she was on the phone to her sister. Ms Thomas said that she believed that she and Ms X got on well and that she used to babysit Ms X in the past, so she had great empathy for her.

[10] Ms Thomas stated that Ms X had not given any particular response to Ms Thomas after the conversation about the painting and that she had “had her knees knocked out from underneath her” when she found out about the complaint.

[11] The notes record that Ms Ford said that, as there were two conflicting versions of the events, she would need to investigate the matter, and that, in the meantime, Ms Thomas was to work in a different facility.

[12] The Authority saw the notes of Ms Ford’s interview with Ms X. They record that Ms X reiterated that Ms Thomas had said that her 5 year old granddaughter could have done a better job with the painting and that she had been shocked by the comment. However, Ms X also stated that she wanted Ms Thomas to return, that she had known Ms Thomas for many years, and that she was “lovely, kind and generous”. She also said, however, that Ms Thomas sometimes “makes her mad”. The notes record that Ms X stated that she hoped that Ms Thomas would not be “fired” and that she would “just walk away if [Ms Thomas] does anything [to upset her]”.

[13] Ms Ford’s evidence is that she felt concerned that Ms X said that she felt she had to walk away if Ms Thomas said anything that upset her. However, she also concluded that Ms Thomas did not intend to cause upset with the things that she sometimes said.

[14] Ms Ford discussed the matter with the HR team and with her colleague, Kim Martin, a fellow service manager. Ms Martin then carried out interviews with five of Ms Thomas’ colleagues. Ms Martin says that the questions she asked the colleagues were given at the advice of human resources, and that the respondent did not want to ask questions that might indicate any kind of misdemeanour on Ms Thomas’ part. Ms Martin says that the aim of the interviews was to have a conversation about the support that Ms Thomas provided and, in relation to Ms X, whether her support of Ms X was any different to that of the other

people she supported in the community home.

[15] Ms Martin states in her evidence that most of the comments made about Ms Thomas by the five colleagues were positive, but that there were some negative ones which mostly reflected what Ms Thomas had already acknowledged about her relationship with Ms X being different, or less professional than her relationship with the other service users, due to their very long history. Ms Martin said that colleagues also commented on jokes that Ms Thomas would sometimes make which they felt sometimes devalued the service users.

[16] Ms Martin says that, having carried out the investigation interviews with the colleagues of Ms Thomas, she discussed the situation with HR and it was decided that no disciplinary action should be taken against Ms Thomas, but that they had concerns about Ms Thomas' approach, including the jokes that she made, and whether they were sometimes inappropriate. They concluded that it was clear that Ms Thomas was not necessarily aware of the perception that people had of her comments and that

some coaching on the way that Ms Thomas was perceived and on her communication would be a better outcome for everyone.

[17] Accordingly, Ms Martin met with Ms Thomas on 9 October 2015 to discuss with her the comments and that the investigation was to be closed. Ms Martin says that, at this meeting, Ms Thomas was given details about the feedback received from Ms X and the colleagues, including that Ms Thomas' manner could sometimes come across as being nasty or devaluing, but that this appeared to be unintentional. Ms Martin said in evidence that the service users had an intellectual disability and that they did not always understand the meaning of jokes.

[18] Ms Martin said that she was very clear with Ms Thomas that the investigation was finished, but that Ms Ford would work with her on a performance improvement plan (referred to as a PIP in the notes of the meeting) for about six to eight weeks<sup>1</sup>. Ms Martin said that she made it very clear that this was not a punishment, that they valued Ms Thomas, and that they understood how difficult the environment could be.

[19] Ms Martin said that the focus of the PIP was to help Ms Thomas with building skills in her communications and her professional relationships with service users so that a situation such as that which has occurred with Ms X did not happen again.

[20] Ms Martin says that her impression was that Ms Thomas was very receptive to this idea and that Ms Thomas thought it would be useful to work alongside Ms Ford so as to gain an insight into how she was perceived and how she could improve her communication. Ms Martin said that the PIP was not intended to be disciplinary in nature and that this was made clear to Ms Thomas at the time.

[21] Ms Ford's evidence is she used as a template for the PIP an action plan which Ms Helen Blake, an HR consultant working for the respondent, had developed some years before. She met with Ms Thomas on 3 November 2015, and they had worked together on the document recording the plan.

[22] The document that was presented to Ms Thomas contained some quotes from her colleagues that had been garnered during the interviews carried out by Ms Martin.

These included the following comments:

1 The interview notes record that Ms Martin referred to Ms Ford meeting with Ms Thomas for 8 to 10 weeks.

Helen can be perceived by others as disrespectful, gruff, overpowering when communicating with staff and Service Users at times.

Helen's intent when communicating on a humorous level is more

often interpreted by others as disrespectful and devaluing.

Helen's attitude at times can lead others to perceive that she has a negative outlook in relation to change and that this can impact on them.

[23] The document also contained Ms Thomas's feedback on her colleagues' comments. It stated that Ms Thomas understood that sometimes her communication, such as her jokes, was not appropriate, but that she did not entirely agree with the description of her current behaviour, particularly that staff perceived her as having a negative outlook in relation to change.

[24] The document set out the process that was to occur, including meeting with Ms Ford fortnightly or weekly, providing her with feedback and documentation to show the work was being carried out, to record progress and to carry out an evaluation of expected outcomes after a period of time. The PIP stated that the expected timeline was eight weeks minimum.

[25] Ms Ford said in her evidence that she was unfamiliar with PIPs and that she found out later, in discussions with HR, that she and Ms Martin should have called the PIP a "coaching plan" or an "action plan". Ms Ford said that it was not intended to be a formal performance improvement plan where Ms Thomas could have been dismissed or given a warning. It was intended to

be something more informal where she worked with Ms Thomas to help her understand some of the issues identified.

[26] During evidence given by Ms Blake to the Authority, she explained that the respondent had a formal Performance Improvement Plan in place which was part of its formal disciplinary processes. Ms Ford and Ms Martin did not know about that formal process at the time, and they had always been referring to an informal process when referring to a PIP. A comparison of the action plan template used by Ms Ford in meeting with Ms Thomas, and that used in the formal Performance Improvement Plan, shows they are different.

[27] Ms Ford's evidence is that a meeting scheduled for one week after the initial meeting about the PIP was cancelled because Ms Thomas was ill and that the second

meeting did not take place because, the day before, Ms Lautogo raised a personal grievance on behalf of Ms Thomas and stated that Ms Thomas would not attend any further meetings.

[28] Ms Ford says that she did not advise Ms Thomas that the action plan process had ended because it was Ms Lautogo who had initiated the end of that process. She said that Ms Thomas could not have been under any impression that the PIP was continuing as there were no further meetings to discuss it.

[29] Ms Thomas' evidence is that she had initially believed that the process she was undergoing was one implemented under the respondent's "EPIC" process, which sets out how staff and managers could work together to help improve performance and develop staff. Ms Thomas' understanding of the process she was undergoing when she met with Ms Ford on 3 November 2015 was the same as Ms Ford's; that is, that they would work together in an informal but structured way to improve Ms Thomas' communication style to avoid perceptions that Ms Thomas did not intend.

[30] However, at some point between 3 November and 23 November 2015, Ms Thomas had a conversation with her daughter, who did not work for the respondent, but who told her that a PIP was a formal disciplinary process. Ms Thomas's evidence is that she was confused as to how and why she had been placed on the PIP, as she had not seen or been advised of the outcome of the investigation. She did not know if the allegations against her had been proven or not, and she did not even know what a PIP was.

[31] Ms Thomas then sought advice from Ms Lautogo, and subsequently instructed Ms Lautogo to raise a personal grievance on her behalf. Ms Lautogo wrote a letter to the respondent on 23 November 2015 stating that she was going to raise a personal grievance, and seeking copies of certain documents. Ms Lautogo also sent an email to Ms Ford the same day stating that Ms Thomas was "not to attend any further meetings regarding her "PIP" until such time as we have met to discuss our issues".

[32] Ms Lautogo wrote a letter dated 26 January 2016 raising a personal grievance about the investigation into Ms X's complaint and the placing of Ms Thomas on a PIP.

### **The issues**

[33] The Authority must determine the following issues:

(a) Whether Ms Thomas was unjustifiably disadvantaged in her employment by the manner in which the investigation into Ms X's complaint was carried out; and

(b) Whether Ms Thomas was unjustifiably disadvantaged in her employment by placing Ms Thomas on a PIP.

[34] In investigating the actions of the respondent, it will be necessary to consider the following alleged disadvantageous actions:

(a) Transferring Ms Thomas to other facilities rather than suspending her;

(b) The respondent questioning Ms Thomas' colleagues without her full knowledge;

(c) The decision to place Ms Thomas on a "PIP" without discussing the possibility with her first; and

(d) Not advising Ms Thomas of the outcome of the allegation of serious misconduct.

### **Unjustified disadvantage**

[35] In considering whether Ms Thomas suffered an unjustified disadvantage in her employment, the Authority must be mindful of the tests of justification set out in s.103A of the Act. This provides as follows:

#### **103A Test of justification**

(3) In applying the test in subsection (2), the Authority or the court must consider-

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
- (5) The Authority or the court must not determine a dismissal or an action to be justifiable under this section solely because of defects in the process followed by the employer if the defects were-
- (a) minor; and

(b) did not result in the employee being treated unfairly.

## **The investigation**

### *Transferring Ms Thomas to other facilities rather than suspending her*

[36] Ms Lautogo stated at the start of the Authority's investigation meeting that one of the actions that Ms Thomas asserts was a disadvantage was the respondent placing Ms Thomas into other facilities rather than suspending her. Mr McBride objected to this as no personal grievance had been raised about placing Ms Thomas into other facilities, rather than suspending her.

[37] First, I am satisfied that there has never been any mention by Ms Thomas, or Ms Lautogo on her behalf, that Ms Thomas should have been suspended instead of being placed in different facilities. In addition, the personal grievance letter sent on her behalf on 26 January 2016 makes no mention of Ms Thomas being placed in different facilities during the investigation. The statement of problem also does not do so.

[38] However, Ms Thomas' brief of evidence dated 29 September 2016, prepared

for the Authority, does refer to her being placed in different facilities after 2 October

2015, and that she found it "very embarrassing to arrive at the facilities and have to explain why she was there" and that she felt very uncomfortable. I also note that Ms Ford and Ms Martin in their briefs of evidence do reply to the allegation of disadvantage raised by Ms Thomas in her brief of evidence, arising from her being placed in different facilities.

[39] Section 114(1) of the Act provides that every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with

his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period. Is there an argument that the respondent consented to the raising of a grievance about being transferred to other facilities by addressing the substance of this allegation in its briefs of evidence?

[40] In *Commissioner of Police v Hawkins 2*, the Court of Appeal held at [24]:

The real issue is not whether, in formal terms, the Commissioner "turned his mind" to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.

[41] In the Employment Court case of *Barbara Twentyman v The Warehouse Limited*<sup>3</sup>, His Honour Judge Smith also addressed a situation of implied consent when he held that the respondent in that case had given consent to a personal grievance being raised outside of the statutory time limit by making a deliberate decision to engage with the applicant's representatives, because it was dealing with an existing employee, and an on-going relationship<sup>4</sup>.

[42] Ms Thomas remains an employee of the respondent and, although Ms Thomas only complained about being transferred to other facilities under the aegis of her brief of evidence, I believe it is arguable that she raised a personal grievance in doing so. I also believe that, whilst she raised this grievance well outside of the 90 days statutory time limit for doing so, implied consent was given by the respondent to it being raised out of time when the respondent addressed substantively the allegation in its witnesses' briefs of evidence. It did not say that the issue was new, and that it did not give consent to it being raised out of time.

[43] I therefore accept that the Authority has the jurisdiction to consider a personal grievance that Ms Thomas was subjected to unjustified disadvantage in her employment when she was transferred to other facilities.

[44] Having accepted jurisdiction to investigate this allegation, I must now consider whether it is proven, on a balance of probabilities.

<sup>2</sup> [\[2009\] NZCA 209](#)

<sup>3</sup> [\[2016\] NZEmpC 172](#)

<sup>4</sup> At paragraph [65].

[45] Ms Martin's evidence is that, at the meeting of 2 October 2015, a discussion took place with Ms Thomas and her union representative about rostering Ms Thomas to different facilities during the investigation, which was not a punishment but to make sure that Ms Thomas was "safe in the workplace", in particular with her interactions with Ms X.

[46] Ms Martin said that EAP (Employee Assistance Programme) support was offered and that the respondent tried to ensure that Ms Thomas was placed in the same house as her Union representative, and to schedule her into the same shifts as her as far as possible. Ms Martin said that no concerns were raised by either Ms Thomas or the Union representative about moving Ms Thomas to a different facility. Ms Martin said that the other staff were not told that Ms Thomas was going to be rostered on to the shifts in the other facilities, and that the staff at the other facilities were also not told.

[47] Ms Martin said that it was common for staff to be "oriented" to other facilities, to cover staff shortages, for training and for other purposes.

[48] The notes of the meeting of 2 October 2015, which Ms Thomas said were accurate, record very briefly a reference about Ms Thomas being transferred to other facilities during the investigation. Ms Thomas did not contradict (or even address) Ms Martin's evidence about her transfer to the other facilities, and I accept that Ms Thomas agreed to the transfer.

[49] I would add that it is surprising that the respondent found it necessary to move Ms Thomas to other facilities "for the safety of Ms X and Ms Thomas" exactly one month after Ms X had complained and after Ms Thomas had been supporting Ms X for some weeks since that complaint. One might wonder why that transfer did not happen as soon as the complaint was made, if it were to protect the complainant and the subject of the complaint. However, that does not fall within the scope of this investigation.

[50] Ms Thomas's evidence is that she found it embarrassing having to go and work at the other facilities. I accept that she found it embarrassing, and uncomfortable. However, that embarrassment and discomfort was an integral part of transferring to other facilities, having to work amongst service users and staff she did not know, and was not as a result of any unjustified action imposed on Ms Thomas

without her consent. Ms Thomas agreed to the transfer, and I cannot see how the respondent can then be responsible for what would have been predictable and inevitable consequences of that transfer.

[51] I therefore decline to find that Ms Thomas has a personal grievance in regard to this allegation.

*The respondent questioning Ms Thomas' colleagues without her full knowledge*

[52] Ms Thomas states that the first time that she had seen in writing the feedback comments made about her by the other staff regarding her behaviour, and the impact on her, was when she met with Ms Ford to discuss the PIP on 3 November 2015. She says that "the impact of this on her had been devastating".

[53] Ms Thomas says that she felt it was unfair to place her on a PIP based on comments that colleagues had made about her (some of whom she did not even work with) during an investigation into an incident that they had not witnessed or been asked about.

[54] It is the respondent's case that questioning Ms Thomas' colleagues was part of its investigation into the allegations of Ms X that Ms Thomas "always picks on her" and "doesn't make me feel very good".

[55] It is common ground that the respondent did not advise Ms Thomas in advance that it was going to be questioning five of her colleagues, and that it did not tell her what questions were asked of the colleagues. For the notes of the meeting of 9

October 2015, which Ms Thomas again said were accurate, it is clear that the respondent had already concluded what action it intended taking as a result of the comments of both Ms X and Ms Thomas' colleagues. She therefore did not have an opportunity to comment on the colleagues' feedback prior to the respondent's decision to place Ms Thomas on what it called a PIP (in reality, an action or coaching plan).

[56] However, did this failing by the respondent create a disadvantage for Ms Thomas? First, I accept that Ms Thomas would

have felt very uncomfortable knowing what her colleagues thought of her communication style, especially as some of their opinions were negative. It is arguable that Ms Thomas was caused a disadvantage by the questioning, which made her colleagues' view known.

[57] However, I am satisfied that it was reasonable for the respondent to have canvassed the views of Ms Thomas' colleagues, because the respondent had reasonably concluded from Ms X's comments that Ms Thomas' communications could sometimes inadvertently cause offence or upset. The respondent was entitled to investigate this aspect of their concerns, and I accept that speaking to colleagues was the only means of doing so, as those colleagues interacted with Ms Thomas and the service users.

[58] I therefore find that the disadvantage caused to Ms Thomas by the questioning of her colleagues was justified, as a fair and reasonable employer could have carried out the same action in all the circumstances.

[59] Second, I am not convinced that the failing of the respondent to give Ms Thomas a chance to comment on her colleagues' feedback prior to it deciding to place Ms Thomas on an action or coaching plan caused her any disadvantage. This is because I am satisfied that Ms Thomas accepted that the coaching was a reasonable way forward to avoid her communications causing further complaints from service users.

[60] I make this finding because the notes of the 9 October 2015 meeting record that Ms Thomas' representative stated "Helen realises she needs to make change" in relation to her relationship with Ms X. There is also no recorded objection from Ms Thomas or her union representative about a performance improvement plan being used to work on Ms Thomas' communication style.

[61] Had the action taken by the respondent towards Ms Thomas been disciplinary in nature, I would have been bound to have found that its failure to allow Ms Thomas to comment on the feedback from her colleagues first would have been an unjustified disadvantage. However, the action or coaching plan which resulted from that feedback was not disciplinary in nature, but was to help Ms Thomas to improve her communication style. Furthermore, and crucially, Ms Thomas did not object to the approach taken, but rather, I find, welcomed it. It could not have been a disadvantage to her therefore, and so not letting her comment on the colleagues' feedback prior to imposing the coaching plan also cannot have been a disadvantage.

[62] In addition, Ms Thomas was given an opportunity to comment on the feedback at the meeting with Ms Ford on 3 November 2015, as is recorded in the action plan document.

[63] I am therefore bound to find that Ms Thomas did not suffer an unjustified disadvantage in her employment in relation to this allegation.

*The decision to place Ms Thomas on a "PIP" without discussing the possibility with her first*

[64] It is true that the respondent decided to place Ms Thomas on the "PIP" (the action or coaching plan) without having discussed the possibility with her first. However, I accept the evidence of the respondent that Ms Thomas not only did not object to the action plan approach, but actually welcomed it. This is supported by the evidence of Ms Thomas herself, which she gave during the Authority's investigation meeting.

[65] Ms Thomas said that she had believed that she would be meeting with Ms Ford in accordance with the "EPIC" process to work on her communication skills. She was, in fact, correct. She says she was willing to meet with Ms Ford at that point and that they worked on the action plan document together.

[66] This evidence does not demonstrate any disadvantage to Ms Thomas arising from the decision to place Ms Thomas on an action plan without discussing it with her first. I must therefore decline to find that Ms Thomas was subjected to an unjustified disadvantage in relation to this allegation.

*Not advising Ms Thomas the outcome of the allegation of serious misconduct.*

[67] Ms Lautogo asserts that the respondent having failed to state expressly in writing that the allegation of serious misconduct was found not to be proven constitutes an unjustified disadvantage in Ms Thomas' employment.

[68] Whilst it is good practice, I do not accept that an employer is obliged in law to convey in writing to an employee how an investigation into alleged serious misconduct by that employee has been concluded. However, an employee who is not told that outcome in any form is likely to suffer an unjustified disadvantage.

[69] It is clear that Ms Thomas was told that there would be no disciplinary outcome to the allegation of serious misconduct at the 9 October 2015 meeting. This was confirmed by Ms Thomas in her oral evidence to the Authority, who stated "I was told there would be no disciplinary outcome".

[70] I must therefore decline to find that Ms Thomas was subjected to an unjustified disadvantage in relation to this allegation.

**Was Ms Thomas subjected to an unjustified disadvantage by being placed on a**

## **PIP?**

[71] Ms Lautogo submitted that Ms Thomas was not told that she could have been dismissed while she was on a PIP. However, I do not accept this was the case, as she could not have been dismissed as a result of having been put on the PIP, which was really an action or coaching plan.

[72] It is clear that, up to 3 November 2015 at the earliest, both Ms Thomas and the respondent were of the same understanding as to what was meant by the PIP; namely, a non-disciplinary means of assisting Ms Thomas to improve her communication style with the service users. It was only when Ms Thomas spoke to her daughter later that she believed that she was being subjected to a disciplinary process.

[73] However, Ms Thomas' daughter was mistaken. Her daughter was presumably assuming that a reference to a PIP always meant a formal disciplinary process. This was not the case however. I accept Mr McBride's submissions that Ms Thomas' fears of being placed on a formal disciplinary process did not stem from any action of the respondent, let alone an unjustified action, but stemmed from her daughter's misunderstanding as to what had been intended.

[74] It is a great shame that this misunderstanding had not been corrected by the simple means of Ms Thomas and Ms Ford briefly speaking to one another about Ms Thomas's fears, as they could have been very simply assuaged. However, it appears that a belief was formed that they could not speak together about this matter once a personal grievance had been advised.

[75] In any event, I do not find that Ms Thomas was placed on a formal PIP of a disciplinary nature, and so I cannot find that she suffered a disadvantage in such an

action. I must therefore decline to find that Ms Thomas was subjected to an unjustified disadvantage in relation to this allegation.

## **Conclusion**

[76] It is my conclusion that Ms Thomas has not suffered an unjustified disadvantage in her employment as a result of any of the actions referred to by her. She is therefore not entitled to any remedies.

## **Costs**

[77] I reserve costs. The parties are to seek to agree how the costs of representation are to be dealt with between them. If they are unable to do so within 21 days of the date of this determination, the respondent may then, within a further 14 days, serve and lodge a memorandum which sets out the contribution towards their costs sought, and the basis of that, and Ms Thomas or her representative shall then have a further 14 days within which to serve and lodge a written response.

David Appleton

Member of the Employment Relations Authority