

[3] In December 2007 IDEA received complaints from two service users that Ms Fleet had acted inappropriately and had used inappropriate language toward them and other service users. After a disciplinary process which spanned the Christmas/New Year break, Ms Fleet was dismissed for serious misconduct. Ms Fleet claims the dismissal was unjustified and seeks remedies.

[4] IDEA denies the claims and says it conducted a full and fair investigation, after which it concluded serious misconduct had occurred and the dismissal is justified.

[5] I am required to examine IDEA's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act which states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[6] The section requires me to scrutinise IDEA's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

Incident reports

[7] On 11 December 2007 Ms Lucy Wilson completed two incident reports on behalf of two service users ("A") and ("B"). In particular that Ms Fleet yelled at a non-verbal service user ("Z") for wetting his bed. Both incident reports alleged that Ms Fleet had yelled at the service users, and asked for Ms Fleet to be removed from the House.

[8] Mr David Huxtable, Community Services Manager, received the incident reports and interviewed the two service users on 12 December 2007. Mr Huxtable wished to gain a better understanding of what was happening at the house at which Ms Fleet was working.

[9] Two new allegations arose from the discussions Mr Huxtable had with A and B. The first was that Ms Fleet had hit Z with a cattle prod and secondly, that Ms Fleet had failed to administer panadol when requested.

[10] At the investigation meeting Mr Huxtable conceded that while he had interviewed both A and B together, it was not the best idea to do so, however, until he went into the interview he had no idea that allegations that Ms Fleet had hit Z with a cattle prod would come to the fore. Following this interview, and given the gravity of the claims made by the service users, Mr Huxtable advised Ms Yasmin Mohammad, the Residential Services Manager of the allegations.

[11] The allegations were that Ms Fleet had hit Z, had refused to provide pain relief to a service user and had yelled inappropriately at service users.

Actions taken to investigate the allegations

[12] On 13 December Ms Mohammed wrote to Ms Fleet and advised her of the allegations that she had physically assaulted and verbally abused service users. Ms Fleet was advised that until the matter was resolved she would be moved to another house where she would work the same rostered hours. Ms Fleet was requested not to make contact with any of the service users at the location where the allegations had arisen.

[13] On 14 December Ms Mohammed sent copies of the complaints to the Service and Food Workers Union (SFWU) as Ms Fleet's representative. She also wrote to Ms Fleet advising her that of two options discussed with her union representative, a temporary placement at another worksite or suspension, Ms Iriaka Rauhihi from SFWU and IDEA had agreed that Ms Fleet would be suspended on full pay until a meeting set down for 18 December had taken place.

[14] It was common ground that at the time this process was being worked through Ms Fleet's husband was very ill. The combination of the complaints and the medical issues surrounding Ms Fleet's husband led to her feeling stressed. Ms Rauhihi says for this reason she requested that Ms Fleet be put on stress leave rather than suspension.

[15] It was also common ground that Ms Mohammad and Ms Rauhihi had a number of conversations over the two days of 13-14 December. It appears that Ms Rauhihi and Ms Mohammad put to one side the option of putting Ms Fleet to work in an alternative house. Rather there was an agreement that Ms Fleet not be required to work and would remain on full pay.

[16] At the time the allegations arose Ms Ruahihi already had a large number of personal grievances on her plate and so she provided Ms Fleet with various representation options to ensure she was represented throughout the disciplinary process. Ms Fleet decided to seek independent legal advice and was thereafter represented by Ms Swarbrick.

[17] On 17 December Ms Swarbrick wrote to IDEA and advised that the union was no longer acting for Ms Fleet. Ms Swarbrick requested copies of Ms Fleet's file and the allegations. IDEA was advised that Ms Fleet would not be attending the meeting scheduled to take place on 18 December. From then until 21 December Ms Mohammed tried, without success, to arrange an alternative meeting date and time. The Christmas and New Year period then intervened.

[18] The first disciplinary meeting occurred on 17 January 2008. At this meeting the allegations were put to Ms Fleet and discussed in some detail. Ms Fleet denied the allegations and spoke to the information she had received. After taking into account Ms Fleet's explanations, Ms Mohammed advised that further enquiries would be necessary.

[19] On 22 January IDEA undertook further interviews of staff and service users. While the staff members interviewed reported that they had not witnessed Ms Fleet hitting Z, information from another service user was consistent with previous accounts, that is, that Ms Fleet would hit Z on the hand with the cattle prod each time he wet the bed.

[20] Z is non-verbal and was unable to be interviewed by Mr Huxtable. IDEA arranged for Mr Richard Edghill, a registered Clinical Psychologist to interview Z to assess his capacity to express his version of what might have occurred between him

and Ms Fleet. Mr Edghill concluded that Z did not appear to understand the concept of someone hurting him and his memory of past events was likely to be limited.

[21] On 30 January 2008 a second meeting with Ms Fleet was held to seek her further explanations with regard to the interviews conducted on 22 January. Ms Fleet continued to deny the allegations.

[22] Following this meeting, Ms Mohammed was concerned about the veracity of the information received from the initial interviews with A and B. To address her concerns she undertook further interviews with them. The information gathered from these interviews was made available to Ms Fleet and another meeting was arranged for 15 February 2008. The two service users, this time interviewed separately, maintained Ms Fleet had hit Z and treated him badly.

[23] Ms Fleet was given an opportunity to provide any further explanations. The meeting was then adjourned and the decision to dismiss Ms Fleet for serious misconduct was made.

Determination

[24] The law relating to serious misconduct is well settled. The definition of the kind of conduct that would justify summary dismissal is not possible, for it is always a matter of degree. What is usually needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship (see *Northern Distribution Union v BP Oil NZ Ltd* [1990] 3 ERNZ 483). Common sense dictates that hitting a client could be categorised by an employer such as IDEA as serious misconduct justifying dismissal (see *Randell v IHC NZ Inc*, unreported, 30 April 2003, WA64/03).

[25] This view is also supported in *NZ Crippled Children's Society v Vandermolen*, unreported, Palmer J, 21 August 1992 (CEC 36/92) where the court stated:

Any deliberate violence, whether of a reactive kind or not, by a social worker/houseparent/employee ... towards a disabled client of the Society comprises, I consider, serious misconduct in an employment setting.

[26] Further, in *Shutt v IHC*, unreported, 5 March 2004, AA 76/04, Member Anderson held:

There is no doubt that the relationship between IHC, via its staff, and its clients is one of a special nature in that a high degree of trust and confidence in the ability of caregivers is required in order to ensure that the clients receive the necessary care and attention relative to the respective degree of mental illness. An important aspect of that care and attention is a commitment to a non-aversive approach in regard to the welfare of clients.

[27] As with IHC, IDEA has comparable responsibilities to its service users and relies heavily on its staff to care for the service users in a non-aversive way. IDEA was not able to take any risks about the welfare of its service users. The fact that Ms Fleet's position was a sole charge position is an important consideration.

[28] In the face of Ms Fleet's denials, IDEA was faced with making a decision as to whether it believed Ms Fleet, or the service users and employees. It chose, after a full and fair investigation, not to accept Ms Fleet's denials and determined that in the circumstances of this case, it was more likely than not that Ms Fleet had acted inappropriately towards service users, had hit Z with a cattle prod, and had refused pain relief to a service user. IDEA concluded that Ms Fleet's actions had seriously eroded the trust and confidence expected of her, a conclusion an employer acting fairly and reasonably would, in all the circumstances of this case, have arrived at.

[29] The dismissal is therefore justified and I can be of no further assistance to Ms Fleet.

Costs

[30] Costs are reserved. The parties are encouraged to resolve that question between them, however if they fail to reach agreement on the matter Mr Whinn may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority