

**Attention is drawn to the order
in paragraph 3 of this
determination prohibiting the
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 53
3017711

BETWEEN ACHIM FRANK GARBE
Applicant

AND IDEA SERVICES LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Simon Meikle, Counsel for Applicant
Paul McBride, Counsel for Respondent

Investigation Meeting: 14 February 2018 at Palmerston North

Submissions Received: 14 February 2018 from applicant
14 February 2018 from respondent

Determination: 7 June 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Garbe was employed as a support worker for Idea Services Limited (ISL) from December 2010 until 11 January 2017. His employment was terminated, effective immediately, at the conclusion of an investigation conducted by his employer. He was paid two weeks wages in lieu of notice. Mr Garbe claims his dismissal was unjustifiable and he seeks compensation and reimbursement of costs.

[2] ISL says Mr Garbe was justifiably dismissed after a full and fair investigation. It rejects his claims for remedies.

The Authority's investigation

[3] In the course of a telephone conference with the parties on 17 October 2017, at the request of counsel for ISL and without objection from Mr Garbe, I ordered the prohibition on publication of the name of an ISL service user referred to in the parties' documentation. At the outset of the investigation meeting I confirmed that order, which is to remain in place permanently.

[4] I have not referred to all the witnesses who attended the investigation meeting. Nor have I set out all the evidence brought to the Authority but have set out the material facts and made findings on issues relevant to the determination of the applicant's claims in accordance with s. 174E of the Employment Relations Act 2000 (the Act).

[5] The determination has been issued outside the timeframe set out at s.174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s.174C(4) to do, are exceptional.

Relevant background

[6] The event which resulted in Mr Garbe's dismissal in January 2017 occurred almost 11 months earlier and involved the serious injury, and hospitalisation, of an ISL service user. An investigation had been carried out by an external consultant in February and March 2016 but was inconclusive as to the cause or timing of the service user's injury.

[7] Mr Garbe, along with other employees, had been interviewed as part of the external consultant's investigation. He continued his support worker duties throughout 2016, including providing care for the service user who had been hospitalised.

[8] On 30 December 2016 Adrienne Transom, the then Area Manager for Manawatu for ISL, informed Mr Garbe by telephone and letter that a pathologist had placed the timeframe for the service user's injury between the hours of 8 p.m. on

17 February 2016 and 1 a.m. the following day. During this time Mr Garbe had been responsible for the service user's care.

[9] Ms Transom informed Mr Garbe he was being placed on temporary leave, as provided for under the relevant collective agreement¹, until 4 January 2017 when he was asked to attend a meeting with her to discuss the matter.

[10] Mr Garbe attended the 4 January meeting with his union representative, Linda Deans. The meeting was conducted by Ms Transom. An ISL Human Resources consultant, Michelle Atkins-Gilbert, also attended and took notes of the meeting. Following discussion Ms Transom informed Mr Garbe she was considering suspending him for five working days while she followed up on information he had given. He reluctantly agreed to this.

[11] A further meeting between Ms Transom, Ms Atkins-Gilbert, Mr Garbe and Ms Deans occurred on 11 January 2017. At the end of that meeting Ms Transom verbally conveyed her decision to dismiss Mr Garbe with two weeks' pay in lieu of notice. She confirmed her decision in writing on 12 January 2017.

Issues

[12] The issue for determination is whether Mr Garbe's dismissal was justifiable in all the circumstances at the time. The test of justification, as set out in s. 103A of the Act, applies.

[13] If the dismissal was not justifiable, further issues of remedies will arise.

Discussion

[14] In her letter of dismissal to Mr Garbe Ms Transom said the findings of the investigation she had carried out were that "*A service user sustained a serious injury while you were on shift on the 18th February between 8pm and 1am*". She said the findings of the investigation had led her to believe Mr Garbe's actions "*have constituted serious misconduct in breach of IHC Policy*". She stated her belief that his actions had irreparably eroded the duty of trust and confidence expected of an employee and for that reason she had made the decision to terminate his employment.

¹ The Collective Employment Agreement between IHC NZ Inc, Idea Services Limited and Timata Hou (the Employer) and the Service and Food Workers Union Nga Ringa Tota Inc (the Union) effective from 21 October 2014 to 20 October 2016

[15] In her evidence to the Authority Ms Transom said she had not been employed at ISL at the time the injury to the service user occurred. Her involvement began in late December 2016 when she was tasked with undertaking an investigation on the basis of new information that had been received. Michelle Malcolm, who was at that time the General Manager Central Region for ISL, had assigned that task to her.

[16] This had been on the basis of communication on 23 December 2016 between Ms Malcolm and a detective in the New Zealand Police Force. It was Ms Malcolm's evidence the detective had informed her of a pathologist's conclusion that the timeframe for the injury to the service user was between the hours of 8 p.m. and 1 a.m. on the night of 17/18 February 2016. Ms Malcolm, who was about to start a period of leave, was not at work at the time. She said she made notes of the conversation which she later typed up into a file note.

[17] Amongst the matters recorded in the file note was that the detective had told her the police would not be laying charges at this stage. The reason she recorded was that:

“...if this went to court the pathologist would be questioned to the timeframe by the defence – which they would have to answer that it may have occurred earlier, although the pathologist believes that this was the time frame that the injury occurred.”

[18] Ms Malcolm also recorded in the file note that the detective had informed her the police had questioned Mr Garbe under caution regarding the service user's injury and Mr Garbe had made a request to the police for documentation, which had been declined. Ms Malcolm noted, in an addition she made to the file note, that on 28 December 2016 she had emailed the detective asking for written information from the pathologist.

[19] The detective had responded on 3 January 2017 declining her request and saying that the police “*would not want the intricacies of the information in the public domain.*” Ms Malcolm told the Authority she understood from the detective that the police case was still open.

[20] Ms Transom confirmed she had relied on the accuracy of the information given to her by Ms Malcolm. She said she had no concerns about relying on a police officer's verbal reporting to her manager of the contents of a pathologist's report that neither she nor the manager had sighted. Ms Transom said she believed Ms Malcolm

had built a relationship with the detective and the information from him was reliable. She also said she had asked for the pathologist's report and it was at her request that Ms Malcolm had asked the detective for a copy.

[21] Despite the failure to obtain that report, Ms Transom said she considered the timing information, which placed the injury between 8 p.m. on 17 February and 1 p.m. on 18 February, to be credible and reliable. She said she had no reason to doubt Ms Malcolm's reporting of what she had been told by the police detective and it was her understanding the information had come from a pathologist who had provided an expert opinion.

[22] Between the meetings of 4 and 11 January 2017 with Mr Garbe and his representative Ms Transom said she looked into the process followed by the external consultant who had carried out the initial investigation several months earlier. She also checked with her predecessor in the Area Manager role and with Ms Malcolm as to whether there had previously been any information about the service user's injury occurring between 8 p.m. and 1 a.m. They confirmed there had not been any such information previously.

[23] The notes of the 4 January meeting record that Ms Transom opened the meeting by informing Mr Garbe and his union representative the purpose of meeting was to talk to them about some of the information that had come from the police in December 2016 and to get Mr Garbe's view of the situation. When she informed Mr Garbe the information from the police was that the pathologist believed the service user had sustained his injury between 8 p.m. and 1 a.m., Mr Garbe is recorded as saying "*the day before*".

[24] In the meeting he referred to the illness and vomiting of the service user on 17 February while he was being looked after by a different support worker. He also referred to events the previous day when the service user had been visiting relatives off site and had subsequently not been well. Mr Garbe invited Ms Transom to read the diary in which support workers recorded matters relating to the service user to see what had been written for the day of 17 February.

[25] When asked by Ms Transom for his view of the pathologist's "*finding*" that the injury occurred on the night he was caring for the service user, Mr Garbe said he did not know and would love to read the report and to see its wording. He also

referred to his recent formal police interview in which he said the police had spoken to him about the 48 hours before the service user's admission to hospital.

[26] Between the first investigation meeting of 4 January and the second meeting of 11 January 2017 that ended in Ms Transom informing Mr Garbe of her decision to dismiss him, Ms Transom said she had looked into the process followed by the first external consultant's investigation. She had done that by briefly reading the investigation report (the King report).

[27] Ms Transom acknowledged the King report contained references to the service user being ill in the days leading up to his hospitalisation. She noted the investigation had been inconclusive and there had been no information about the timing of the service user's injury being between 8 p.m. and 1 p.m. Ms Transom considered this was likely to be because the police had not provided this information to anyone until the detective disclosed it to Ms Malcolm in December 2017, either because the police investigation was ongoing or the information was not available earlier.

[28] She said it had not been her intention to re-open the February/March 2016 investigation but to consider only new information that had come to light since then, specifically being the information regarding the pathologist's report. Ms Transom said Mr Garbe and Ms Deans did not provide any new information at the January 2017 meetings.

[29] She said she was unaware Mr Garbe had not seen the King report, and could not recall if he had asked for a copy of it at the 4 January meeting. She did not provide him a copy of the report, and nor did she provide medical records of the service user that she had checked between the 4 and 11 January meetings. When asked why not, Ms Transom replied that she did not think he needed them. She was aware Ms Deans had asked for information to be provided before the 11 January meeting, as recorded in the notes of the meeting of 4 January, but could not recall whether any specific documents, other than the pathologist's report, had been requested.

[30] The notes of the 11 January meeting record much discussion about the lack of the pathologist's report, with Mr Garbe referring to it as hearsay evidence. Ms Transom disagreed, saying "*that's what the police officer has told (Ms Malcolm)*". She is also recorded as having stated "*...we agree we still don't know what happened*

we can say with confidence we defined a timeframe of when happened that is what we saying".

[31] When Ms Deans asked "*so what happens if day before*", Ms Transom's response was that she couldn't comment on "*what ifs*".

[32] It is clear from Ms Transom's evidence that she made the decision to terminate Mr Garbe's employment based on the new information she had received via Ms Malcolm. She believed that information to be credible and reliable and dismissed Mr Garbe in reliance upon the timeframe a pathologist had purportedly placed around the injury sustained by the service user that resulted in his hospitalisation.

[33] I find her decision was not one a fair and reasonable employer could have reached in all the circumstances at the time. In applying the test of justification referred to above, the Authority is required to consider the following factors, as well as any others it thinks appropriate:²

- (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.

[34] I find the employer in this instance satisfied only factor (3)(b) of the test of justification. The investigation it carried out in December 2016/January 2017 was based on an acceptance of new information about the timeframe for the service user's injury. Mr Garbe's dismissal was effected in reliance upon that new information.

[35] However, the information was at least second hand and possibly third hand, and certainly not verified by the employer.³ ISL appears to have accepted the police

² Section 103A(3)

³ It is unclear whether the police officer had personally read the pathologist's report.

officer's refusal to provide a copy of the pathologist's report, apparently making no further attempt to obtain it. In a situation where an employee's livelihood is potentially at stake that is unacceptable and I find ISL's investigation to have been inadequate.

[36] Having put the new information to Mr Garbe by the letter of 30 December 2016, ISL satisfied factor (b) of the test above. However, it failed factors (c) and (d) by its acceptance of the unverified new information; its failure to provide the report or even a relevant extract from it to Mr Garbe; and its failure to consider matters he raised, such as the illness of the service user prior to the start of Mr Garbe's shift.

[37] Counsel for the respondent submits ISL could fairly and reasonably rely on the advice of the New Zealand Police about the content of the Pathologist's report in dismissing Mr Garbe. I disagree. I find ISL had insufficient information on which to rely in dismissing Mr Garbe. Its decision maker relied on second hand reporting of a pathologist's report that Police were unwilling to make available to ISL, and in which the Police had insufficient confidence to subject it to the scrutiny of defence lawyers.

Determination

[38] For the reasons given above I conclude Idea Services Limited unjustifiably dismissed Mr Garbe.

[39] There is insufficient evidence to conclude he contributed to the situation that led to his personal grievance.

Remedies

[40] Mr Garbe obtained alternative employment soon after his dismissal and is not claiming lost wages although he says he is receiving approximately the same pay for working double the hours he did while employed by ISL.

[41] He seeks compensation and gave evidence of the effect his dismissal had on him and his family. I accept his evidence and find he is entitled to be compensated for the hurt, humiliation, and injury to feelings he suffered.

[42] Idea Services Limited is ordered to pay Mr Garbe the sum of \$15,000 under s. 123(1)(c)(i) of the Act.

Costs

[43] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority