

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 87
5518845

BETWEEN TUAHINE HANSEN
 Applicant

AND IDEA SERVICES LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Alaska Dobbs, for Applicant
 Paul McBride, for Respondent

Investigation Meeting: 2 July 2015 at Whanganui

Submissions Received: Orally and in writing on 2 July 2015, from the Applicant
 Orally and in writing on 2 July 2015, from the
 Respondent

Determination: 4 September 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tuahine Hansen was employed as a Community Support Worker by Idea Services Limited for nine years. Before that she was employed by IHC NZ Incorporated for 19 years. Idea Services Limited is a fully owned subsidiary service company of IHC NZ Limited.

[2] Mrs Hansen was dismissed on 24 June 2014 and claims her dismissal was unjustifiable. She seeks compensation for lost wages and for the hurt and humiliation she suffered. She also seeks costs. Mrs Hansen withdrew her claim for reinstatement in the course of the investigation meeting.

[3] Idea Services Limited rejects Mrs Hansen's claims. It says it was justified in dismissing her, and that her dismissal followed a fair and reasonable process.

Non-publication order

[4] Idea Services sought an order prohibiting the publication of any evidence or material which identified, or could identify, any of the service users referred to in this matter. I have granted that order and accordingly will refer to the service users by the initials "A", "B" and "C".

Relevant background

[5] Mrs Hansen spent the last fifteen years of her employment providing support to two clients in the Whanganui home of one of them. At all times relevant to this matter, Mrs Hansen provided support to both the home owner and the other occupant. Both were clients, or service users, of IHC initially and then Idea Services. I shall refer to the homeowner as Mr A and the other male occupant as Mr B.

[6] On 9 May 2014 Dallas Barns, the local Area Manager for Idea Services, wrote to Mrs Hansen notifying her formally of complaints made against her by Mr A. Ms Barns asked her to attend a meeting on 12 May 2014 to answer the allegations and told her not to make any contact with Mr A or anyone at his home before the meeting. She was to be on paid leave until that time. Ms Barns' letter informed Mrs Hansen that when her explanation had been heard, consideration would be given to whether further steps were necessary. If the matter did go further, a full and fair investigation would be conducted.

[7] Ms Barns informed Mrs Hansen the matter was serious and that, if serious misconduct on her part were to be determined, dismissal was a possibility. Mrs Hansen was advised the issue of suspension could also be considered during any investigation of the complaints. She was informed of her right to bring a representative to the meeting which was to be conducted by the Area Manager, Dallas Barns. Another person, Vicki Moase, a Community Services Manager, would also be present.

[8] Mrs Hansen attended the meeting on 12 May with a Union delegate and two Union organisers, Lynn Williams and Linda Deans of the Service and Food Workers Union (SFWU). Mrs Hansen was given the opportunity to read relevant

documentation, with the meeting being adjourned for that purpose. Notes of the meeting were taken by Ms Moase and copies were provided to the Authority.

[9] The allegations made by Mr A, who was described by the respondent as frail and elderly, were that he felt unsafe, neglected and scared at times due to his treatment from Mrs Hansen. Specific allegations he had made were that Mrs Hansen sat on the couch and called him out of his room to make her cups of tea; that she made him do the housework which he found very difficult; and that he was scared to ask her to hang his sheets out. If he did she had a “go” at him.

[10] In responding to the allegations, Mrs Hansen accused another support worker, who also did shifts at that house, of coercing both Mr A and Mr B to make her look bad. She said she had told Mr A to come to her if he had any problems, but he did not ever do so. She acknowledged that Mr A and Mr B would make her cups of tea but denied asking for that. With regard to complaints that Mr A had made to a medical practitioner, Mrs Hansen said the other support worker would have told him what to say.

[11] She denied making Mr A do housework, although she agreed that she had given him the job of vacuuming his room. She said she may have asked, but did not expect, Mr A to vacuum the house and that it was only if he wanted something to do. Mrs Hansen also accused the other support worker of doing a lot for both Mr A and Mr B in order to make her look bad.

[12] At the conclusion of the meeting there was an adjournment following which Ms Barns informed Mrs Hansen there were no shifts available in another house and, due to the seriousness of the allegations, it had been decided in the interests of Mrs Hansen and Mr A and Mr B to suspend her on full pay while an investigation was undertaken. This was confirmed in writing by letter dated 12 May 2014.

[13] In the following days Ms Barns and Ms Moase met both Mr A and Mr B separately and also met Heather McDonnell. Ms McDonnell was the other support worker at the house where Mr A and Mr B lived. It was she whom Mrs Hansen had accused of coaching Mr B in the complaints he made about her. Ms Moase took notes of those meetings, copies of which were provided to the Authority.

[14] The notes of the meeting with Ms McDonnell record she informed Ms Barns she had had a suspicion two years earlier that things were not quite right in the house

and that Mr A was unhappy. When she had tried to encourage him to talk about the issues he said he was concerned Mrs Hansen would have a “go” at him if he did. Ms McDonnell also spoke of Mr A being too frail to undertake the vacuum cleaning and hang up the washing. She said she had mentioned this at facility meetings for some time and that it had been minuted. She noted that when she told Mrs Hansen that Mr A could no longer manage the vacuuming, Mrs Hansen’s response was that she was getting up to around the same age as Mr A and she was capable of doing it, so he could also do it.

[15] Ms Barns wrote to Mrs Hansen on 22 May 2014 informing her of the progress of the investigation she had been undertaking. She stated her findings and said she had not yet made a decision as to the outcome. She would not do that until she had spoken to Mrs Hansen again in a meeting which she set for 27 May.

[16] In addition to the findings regarding the matters that had previously been put to Mrs Hansen, Ms Barnes raised a further eight matters of concern. These had come to her attention in the course of conducting her investigation. Five of the matters of concern had come directly from Mr A and Mr B in their separate interviews, while three had arisen from the interview with Ms McDonnell. Those matters were specified and Mrs Hansen was given the opportunity at the 27 May meeting to give her response in relation to them.

[17] The meeting for 27 May had to be postponed due to the unavailability of Mrs Hansen’s Union representatives. The meeting was rescheduled for 5 June 2014. In the meantime Mrs Hansen remained on paid suspension.

[18] In the meeting of 5 June 2014 Mrs Hansen was accompanied by Ms Williams from the SRWU and Ms Barns was accompanied by Michelle Atkins-Gilbert, a Human Resources (HR) Consultant employed by IHC. Ms Atkins-Gilbert provides HR services to Idea Services.

[19] Mrs Hansen rejected most of the further allegations that were made against her. She reiterated her view that the other support worker at the care house was behind the allegations and had coerced Mr A into complaining. She provided an explanation for one of the allegations, which was that she had another service user, Mr C, with her when she did the shopping for Mr A and Mr B and that Mr C carried the groceries in to their house. Mrs Hansen said she did not see anything wrong with

that arrangement . On her behalf Ms Williams suggested she was saving Idea Services Ltd time and money by performing work for Mr A and Mr B during hours she was being paid to support Mr C.

[20] Mrs Hansen said she was aware from Ms McDonnell that Mr A was afraid of her and that he would raise his concerns with Ms McDonnell rather than directly with her. She said she would then raise this with Mr A during dinner at the house and tell him he should ask her for help if he needed it. She also stated that she was 65 and Mr A was 70 and she could not see why he was frail when she didn't feel the least bit frail. In her view Mr A was capable of doing everything and she was prompting him to do things in order that he kept his independence.

[21] It was agreed during the meeting that Mrs Hansen would remain on paid suspension until the next meeting which was scheduled for 16 June 2014. In the intervening period, Ms Barns and Ms Atkins-Gilbert met with Mr A again and with Mr C. Ms Barns wrote to Mrs Hansen on 17 June 2014 setting out her view of the allegations and Mrs Hansen's explanations in respect of them.

[22] Ms Barns informed Mrs Hansen that the allegations had raised serious concerns about her capability to support service users, not only in their own homes, but also in the community. Ms Barns had formed the view that Mrs Hansen had manipulated situations whereby the service users supported her needs and/or completed her duties. She looked at the options open to her, noting that Mr A and Mr B did not want Mrs Hansen back supporting them in their home. Ms Barns had reviewed Mrs Hansen's personal file which, in the last 6 years, contained evidence of warnings, invitations to disciplinary meetings for performance issues, and performance management for three months on two separate occasions.

[23] Ms Barns further noted that Mrs Hansen had taken no responsibility or accountability for her actions or for any of the allegations that had been put to her. She needed to consider Mrs Hansen's support for people with disabilities, and her lack of insight into the effects of aging on a person and performance, and whether that was capable of change. She had reached the tentative conclusion that Mrs Hansen had fallen well short of the expectations and trust and confidence that Ms Barns could expect to have of her in her role of Community Support Worker.

[24] No final decision would be made until Mrs Hansen had had the opportunity to respond to this tentative conclusion and to the possibility of dismissal. That opportunity was given in a meeting that took place on 23 June 2014 in which Mrs Hansen was supported by one SFWU official and one delegate. After hearing from Mrs Hansen and her supporters, the meeting adjourned. When it reconvened Ms Barns informed Mrs Hansen she had listened to what had been said but her trust and confidence in Mrs Hansen had gone. She explained the reasons for this and informed Mrs Hansen that she would be dismissed with two weeks' pay in lieu of notice.

Issues

[25] The issues for me to determine are:

- a. whether Mrs Hansen's dismissal was unjustified; and, if so
- b. what remedies are appropriate.

The legal test

[26] Whether or not a dismissal is justifiable is to be determined on an objective basis by applying the test in s.103A of the Employment Relations Act 2000 (the Act). The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[27] A number of factors must be considered in applying the test. These entail an assessment of the investigation the employer carried out, and the opportunities for the employee to be informed of the employer's concerns, respond to them, and have those responses genuinely considered before the dismissal occurred.

Evidence

[28] Evidence was given in the Authority's investigation by Mrs Hansen on her own behalf and by Ms Dallas, Ms Atkins-Gilbert and Ms Carroll (formerly Ms Moase) for the respondent. Although I have considered all the evidence it is not necessary for me to set out a record of it all, and I will not do so¹.

¹ In accordance with s.174E(b)(i) of the Act.

[29] Mrs Hansen's evidence reiterated her responses to the allegations that had arisen from the complaints raised by Mr A and to the further concerns that had been put to her in the course of Ms Barns' investigation. She denied all the allegations and described many of them as "*petty and untrue*". Mrs Hansen said she cared deeply for the service users and had their best interests in mind at all times.

[30] She had worked at the house owned by Mr A for 15 years. He had been there all that time while other occupants had come and gone. For the last several years Mr B had been the other occupant and she was the key worker for him. She worked on a rostered shift basis for 62 hours a fortnight.

[31] In her written and oral evidence Mrs Hansen again laid the blame for the "*negative attitudes*" towards her on Ms McDonnell's arrival at the house some years earlier. In her view, Ms McDonnell had influenced Mr A and Mr B to turn against her. Under questioning she accepted she had no evidence of this but said she had no problems before Ms McDonnell started working at the house. Mrs Hansen said she was sad and embarrassed to have ended her career of working with the intellectually vulnerable in such a manner.

[32] Mrs Hansen acknowledged that, if she had acted in the manner she was alleged to have done, such behaviour would have been unacceptable and would have warranted dismissal. However, she also said in her oral evidence she did not believe the matters alleged against her were serious enough to warrant dismissal. Moreover, although she acknowledged the process, she did not believe her employer had properly listened to her.

[33] She agreed it was appropriate for her employer to take her out of Mr A's house when the complaint was made against her and that his wishes should be respected. If he did not want her to return, she agreed she should not do so. She believed that her employer had taken the easy option by dismissing her so that it would not have to find her another position within the organisation.

[34] Ms Barns provided useful background information about Idea Services in her written evidence. She had worked for IHC and then Idea Services for 27 years in total and had been in managerial positions for many years. She described the philosophy of the organisation, the key role of which was to advocate for the rights, inclusion and welfare of all people with intellectual disability (the service users) and support them

to live satisfying lives in the community. The aim was to support service users to ensure that they could live as ordinary a life as possible. The support could be provided in different ways. In this instance, service users were supported in their own home.

[35] Ms Barns stressed that the focus of Idea Services, which was, or should be, understood by all staff, was not to "*care for*", control, or exclude individuals from decisions being made about their lives. She explained another part of the organisation's philosophy which was known as a "*non-aversive*" approach. This was instilled into all staff and meant that any form of abuse or inappropriate interaction, which could be verbal abuse, bullying, manipulation or coercion was unacceptable.

[36] Mrs Hansen's role as a Community Support Worker was to provide "*hands on*" support for the service users. She was normally the only person on duty at the service user's house and her role was to support the service users and ensure their safety and that their day to day needs were met.

[37] Ms Barns also gave evidence about the investigation she had undertaken into the complaints made against Mrs Hansen and the further concerns that came to light during that process. I have already referred to much of the process and will not repeat it.

[38] Ms Carroll, who was Mrs Hansen's manager from December 2013, said she had previously been Community Support Worker for 30 years. It was her evidence that she had some concerns about Mrs Hansen's practices which she was on the point of formally raising with her when the complaint was laid by Mr A. She had instigated the initial meeting with Mrs Hansen and had attended, and taken notes at, the meetings that took place in May 2014 with Mrs Hansen and the service users. She had not been involved in the decision to terminate Mrs Hansen's employment but supported Ms Barns' decision.

[39] Ms Atkins-Gilbert gave evidence concerning her role in providing HR advice to Ms Barns in the later stages of her investigation into the allegations made against Mrs Hansen. In her view the investigation had complied with the IHC policy for the conducting of such procedures, a copy of which was made available to me.

Submissions and discussion

[40] Ms Dobbs questioned the adequacy of the investigation conducted by Idea Services. She referred to the service users being vulnerable people who were easily influenced and submitted there were dangers inherent in the employer relying on statements they made. Ms Dobbs suggested this could lead to service users learning they could have Community Support Workers removed at their discretion.

[41] She also suggested Ms Barns had concluded that Mrs Hansen would not be returning to her employment as early as 12 May 2014. She linked this with notes of the meeting that took place that day with Mrs Hansen and her representatives in which Ms Barns said that there were no shifts available in other houses. This was in the context of considering whether further investigation was required following the meeting and, if so, whether Mrs Hansen should be suspended while that took place.

[42] From this, and two other statements made by Ms Barns during the investigation process, Ms Dobbs submitted the investigation was insufficient and Ms Barns had predetermined the outcome. One of the other two statements was recorded in notes of a meeting held with Mr B on 14 May 2014 in which Ms Barns assured him that if he did not want Mrs Hansen to return to the house he and Mr A occupied, she would not. The other statement was made in Ms Dallas' letter of 17 June 2014 to Mrs Hansen in which Ms Barns stated her belief that Mrs Hansen had "*manipulated situations whereby the service users support your needs and/or complete your duties.*"

[43] I reject Ms Dobbs' submissions for the following reasons. The first comment with which she took issue was made when Ms Barns was, properly in my view, looking at whether there was an alternative to suspension which would remove Mrs Hansen from Mr A's house. At the time there was not. It would not have been appropriate to leave Mrs Hansen in the house in which complaints had been made about her by a vulnerable service user. This was at an early stage in the process and I find the comment could not be construed as an indication of a predetermined decision.

[44] Nor do I view the assurance given to Mr B as indicating predetermination of the allegations against Mrs Hansen or of the outcome of the investigation. That assurance was not inappropriate in light of the views being expressed by Mr B and his reluctance for Mrs Hansen to return to the house. In the face of opposition from service users whom a Community Support Worker has been tasked with supporting, it

is difficult to see how Idea Services could override the wishes of the service users and impose that person on them in their own home.

[45] Such an action would be irreconcilable with the organisation's philosophy as outlined in Ms Barns' evidence. It is noteworthy that Mrs Hansen agreed during the Authority's investigation that it was appropriate for her to have been removed from the house while the complaints were investigated. I also note that Ms Barns' assurance to Mr B did not preclude the possibility that Mrs Hansen could be assigned elsewhere in the event the allegations against her were not sustained.

[46] The third statement was made in the letter to Mrs Hansen in which Ms Barns stated her findings from the investigation she had undertaken and her preliminary views as to the outcome. Her statement was appropriate in that context if it honestly reflected a finding she had made following her investigation into the original complaint and the further allegations against Mrs Hansen that had arisen. I do not doubt that it was an honest statement of Ms Barns' findings.

[47] Mr McBride submitted that the employer carried out a fair and reasonable investigation and was justified in forming the view that the allegations against Mrs Hansen were established. I accept his submissions.

[48] I am satisfied from the evidence before me that Ms Barns carried out a comprehensive and fair investigation into the complaints made against Mrs Hansen and the concerns that arose in the course of her investigation. The process was conducted in a measured and methodical fashion. At all times Mrs Hansen had support staff available to assist her. Where necessary, timeframes for meetings were extended to allow for unforeseen events.

[49] I am also satisfied that the matters Mrs Hansen raised during the process were genuinely considered. I do not believe Ms Barns reached her decision to dismiss Mrs Hansen lightly and I accept that she acted as a fair and reasonable employer is required to do.

Determination

[50] Mrs Hansen's claim to have been unjustifiably dismissed fails and her application is dismissed.

Costs

[51] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority