

**Note: This determination
includes an order prohibiting
publication of some
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 340
3085473

BETWEEN

VIRGINIA HENRY
Applicant

AND

SOUTH WAIKATO
ACHIEVEMENT TRUST
Respondent

Member of Authority: Robin Arthur

Representatives: Erin Burke, counsel for the Applicant
Jessie Laphorne and Tariqa Satherley, counsel for the
Respondent

Investigation Meeting: 11 and 12 March and 4 May 2021

Determination: 2 August 2021

DETERMINATION OF THE AUTHORITY

- A. South Waikato Achievement Trust acted justifiably in deciding to dismiss Virginia Henry and how it made that decision.**
- B. Costs are reserved with a timetable set for memoranda from the parties if the Authority needs to resolve that issue.**

Employment Relationship Problem

[1] South Waikato Achievement Trust (SWAT) dismissed Virginia Henry on 2 August 2018 for serious misconduct. Ms Henry raised two personal grievances about SWAT's actions. The first, for disadvantage, was raised early in the disciplinary process that led to her dismissal and said the process and her suspension during it was

unjustified. The second, raised soon after her dismissal, alleged how her employer reached that decision was unfair and the disciplinary outcome imposed on her was disproportionate to her conduct.

[2] SWAT provides residential, vocational and other services to people with various intellectual and physical disabilities in Tokoroa. Ms Henry had worked for SWAT for 18 years and since April 2017 had held what was called the “2IC” role.

[3] SWAT dismissed her after an investigation in which its decision-maker concluded Ms Henry, as a senior manager, had not acted promptly and properly in dealing with a verbal report alleging an employee had physically mistreated a disabled resident in SWAT accommodation. At the heart of SWAT’s decision was its conclusion that Ms Henry had only followed up this report some six months later because she was disappointed with the outcome of a recent complaint she had made about that particular employee. It said she had belatedly pursued the earlier report for the “inappropriate purpose” of seeking some further disciplinary action against the employee with whom her working relationship had become dysfunctional.

The Authority’s investigation

[4] The following witnesses provided written statements in advance of the Authority investigation meeting and attended to answer questions, under oath or affirmation, from me and the parties’ representatives:

- Ms Henry;
- Vilma Meuli, Ms Henry’s sister and a support worker in SWAT’s residential homes with 22 years’ service;
- Wanda Lunam, a SWAT support worker since 1995;
- Melissa Henry, Ms Henry’s daughter;
- Russell Ensor, SWAT’s chief executive officer;
- Peter Treanor, a former SWAT Trust Board member who was appointed as the decision-maker for an investigation of some issues that arose during the disciplinary inquiry into Ms Henry’s conduct;
- Neil Sinclair, a SWAT Trust Board member who was appointed as the subsequent decision-maker for the disciplinary inquiry into Ms Henry’s conduct; and

- Tarrin Terry, an Employers and Manufacturers Association (EMA) employment relations advisor who provided services to SWAT through the disciplinary process.

[5] Melissa Henry was not required to answer any questions about her witness statement. It described her observations of how upset her mother was and continued to be as a result of being dismissed.

[6] One further witness, Violeta Militar, attended the Authority's investigation meeting in response to a witness summons. She provided a written statement and, under affirmation, gave further oral evidence in answer to questions. Ms Militar is also a SWAT support worker. She was working at the residence on the night that the alleged physical mistreatment of a resident had occurred.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. The wide ranging written and oral evidence given in the investigation meeting, spanning three days, and the closing submissions given at its conclusion have been carefully considered in preparing this determination but not all the evidence and submissions given are recorded in it.

Order prohibiting publication of certain names

[8] The names of three people referred to throughout the evidence and pleadings are prohibited from publication, in writing or by verbal repetition, in relation to this matter. This order is made under clause 10 of Schedule 2 of the Act. The order, as now recorded in this determination, confirms and makes ongoing the order made verbally at the Authority's investigation prohibiting publication of the names of three people in relation to this matter. Those three people are referred to in this determination as Ms A, Ms B and Ms C.

[9] Ms A was the resident said to have been mistreated. She is now deceased but Authority determinations usually prohibit the publication of evidence identifying patients and residents in health or care settings.

[10] Ms B is a SWAT employee. During the week Ms A lived in the home of Ms B under a care arrangement but spent her weekends staying in a SWAT hostel. Ms B did not work in that hostel on the weekend days that Ms A stayed there.

[11] Ms C is the SWAT employee who Ms A named when Ms A was asked how she got a bruise of her toe and a bruise on her arm. Ms B saw the bruises after Ms A returned home from a weekend stay at a SWAT residence where Ms C worked.

[12] The names of Ms B and Ms C are prohibited from publication because they did not give evidence during the Authority investigation. This meant they did not have the opportunity to respond to or refute anything critical or negative said about them by the witnesses or in the documents provided for the investigation. This determination has referred in some detail to that evidence and it would be unfair to permit publication of the names of Ms B and Ms C in those circumstances.

The issues

[13] After reviewing the evidence and submissions given during the Authority's investigation, the following issues required determination:

- (a) Was the decision to suspend Ms Henry, and how long that suspension lasted, justified?
- (b) Was the involvement of Ms Terry throughout the three stages of the investigation fair?
- (c) Was Ms Henry treated differently and unfairly in relation to reporting and responding to complaints, compared to Mr Ensor, Ms B or Ms Lunam?
- (d) Did SWAT fairly investigate concerns about the nature of the relationship between Ms C and Mr Ensor and whether any issues about her conduct had been properly looked into?
- (e) Were there defects in the process followed by SWAT which resulted in Ms Henry being treated unfairly?
- (f) Were the findings of serious misconduct by Ms Henry ones that a fair and reasonable employer could have made?
- (g) Was SWAT's conclusion that Ms Henry's conduct had irreparably damaged its trust and confidence in her reasonably open to an employer in the circumstances?
- (h) Was SWAT's decision to dismiss Ms Henry within the range of responses open to it?
- (i) Should either party contribute to the costs of representation of the other party?

Relevant law

[14] In investigating Ms Henry's personal grievances the Authority applies the statutory "test of justification" set by s 103A of the Act. The test asks whether SWAT's actions, and how SWAT acted, were what a fair and reasonable employer could have done in all the circumstances at the time of carrying out its inquiries and making its decision to dismiss Ms Henry. In addition to any other appropriate factors, the test requires the Authority to consider whether SWAT:¹

- (a) sufficiently investigated the allegations against Ms Henry before dismissing her; and
- (b) raised its concerns with Ms Henry before taking action against her; and
- (c) gave Ms Henry a reasonable opportunity to respond to SWAT's concerns before dismissing her; and
- (d) genuinely considered Ms Henry explanation in relation to the allegations against her before dismissing her.

[15] There will often be a range in responses open to an employer which is fairly and reasonably investigating and deciding on concerns about an employee's conduct and there may be a variety of ways to achieve a fair and reasonable result.² Within that range, and against the objective standard of what a fair and reasonable employer could have done, the Authority must assess the substantive fairness and reasonableness of what the particular employer actually did and decided rather than pedantically scrutinising the process followed to identify any failing, however minor.³ A dismissal may be determined to be unjustifiable only where any defects in that process were more than minor and resulted in the employee being treated unfairly.⁴

[16] In making its inquiries and reaching its decisions about whether serious misconduct occurred and, if so, whether dismissal was the appropriate disciplinary outcome, SWAT had to meet the standard of reasonableness, not a legal standard of proof. Its decision-makers did not have to approach that process with a completely blank mind or without forming tentative views during it. A decision-maker is entitled to resolve conflicting versions of events, and prefer one over the other, provided this is done on a reasonable basis and with a sufficiently open mind to enable genuine

¹ Employment Relations Act 2000, s 103A(3) and (4).

² *A Ltd v H* [2016] NZCA 419 at [43] and [46].

³ *Angus v Ports of Auckland Ltd* (No 2) [2011] NZEmpC 160 at [26].

⁴ Employment Relations Act 2000, s 103A(5).

consideration of the issues. It is only at the stage of the Authority proceedings that SWAT had to be able to show, on the balance of probabilities, that it acted reasonably and had a sufficient and reliable evidential basis for concluding what Ms Henry did, was serious misconduct.⁵

Context

[17] The justification for SWAT's actions is considered on the basis of "all the circumstances" at the time of those actions. To assist with that assessment the following findings are made from the extensive oral, written and documentary evidence available for the Authority investigation.

The concern about bruises on Ms A – early October 2017

[18] On the weekend of 30 September and 1 October 2017 an incident occurred between Ms C and Ms A while Ms A was staying at a SWAT residence. Ms A, who had an intellectual disability and autism, became disruptive around dinner time. Ms C removed Ms A to her room. Ms Militar was on duty at the residence with Ms C and heard some of the interaction between them.

[19] Ms Militar wrote an account of those events in a page of her personal diary dated 30 March 2018. In her oral evidence Ms Militar said this was the date that the incident occurred but the evidence of other witnesses made that highly unlikely. Her diary note was most likely Ms Militar's recall of what occurred on 1 October 2017.

[20] Her note, written partly in English and partly in Tagalog, said Ms A had seemed upset and begun to "play up" around dinner time and Ms C yelled at her to go to her room. Ms A had replied no and Ms C had "forced" her to go to her room where Ms C "caused [Ms A] to trip while restraining her arm and [Ms C] pushed [Ms A] [on] to the bed". Ms Militar wrote that she heard Ms A say "ahhw it's sore you bitch" and Ms C reply: "I'm stronger than you bitch".

[21] Ms Militar, in her oral evidence, insisted she did not actually see any of the interaction in the bedroom and her understanding of what happened came partly from what Ms C told her. She said Ms C told her Ms A was throwing plates in the dining room and, to protect other residents, Ms C took Ms A to another room to calm down.

⁵ *Ritchies Transport Holdings Limited v Merennage* [2015] NZEmpC 198 at [59], [102] and [108].

[22] When Ms B came to pick Ms A from the hotel later that day Ms C told her she had made Ms A go to her room because Ms A “was playing up”. Ms B asked if Ms C had written an incident report about that and Ms C said no.

[23] While showering Ms A that evening Ms B noticed a bruise on one of Ms A’s toes and a bruise on her arm. When Ms B asked Ms A about the bruises, Ms A told her Ms C “did it”. Ms B used a camera on her mobile phone to take photos of Ms A’s right foot and left arm. The electronic date stamp of those photos, checked with counsel at the investigation meeting, showed they were taken on 1 October 2017.

[24] Ms B told Ms Lunam about the bruises and showed her the photos. Ms Lunam asked if Ms B had notified Mr Ensor or Ms Henry. Ms Lunam pressed her to do so but Ms B said she did not want to because she thought Mr Ensor would say they were “on a witch-hunt” against Ms C.

[25] Despite Ms B’s reluctance to report her concerns Ms Lunam decided to tell Ms Henry. Over their years of working together Ms Lunam and Ms Henry had developed a friendship outside of work. Ms Lunam telephoned Ms Henry and told her what Ms B had said and that she had taken photos. Ms Henry then telephoned Ms B and asked her to provide a report to Mr Ensor. Ms B refused saying it would be a “waste of time” as Mr Ensor would not take any action against Ms C.

[26] Ms Henry spoke again with Ms B the following day at work and asked her to provide a written report to go to Mr Ensor. She said Ms B declined to show her the photos because Ms B thought Mr Ensor would not do anything about it.

[27] Ms Henry did not attempt to speak directly with Ms A at the time. She said this was because Ms A only stayed at the hostel in the weekends and Ms Henry usually worked only Monday to Friday.

[28] Neither, at that time or in the following weeks, did Ms Henry tell Mr Ensor anything about what Ms B had told her. She said this was because Mr Ensor had a policy of requiring any reports of concern about staff made by other staff to be in writing and she considered that report would have to come from Ms B.

[29] In November or December 2017 Ms B spoke again with Ms Henry and told her she was worried because Ms A no longer wanted to go to the hostel in the weekends.

She reported Ms A had said: “No [Ms C], no [Ms C]”. Ms Henry said she again asked Ms B to write a report and to forward her photos to Mr Ensor if she was really worried. Ms B again declined to do so because she said she had made a complaint about Ms C in relation to another client and Mr Ensor “did nothing”.

[30] Ms Henry spoke to Ms B by telephone most days she was at work and usually saw her in person there at least once a week but Ms Henry had no further discussions with Ms B about that topic until late March 2018.

Tensions in the workplace

[31] Ms Lunam’s oral evidence provided a useful insight to some of the tensions and divisions between SWAT staff working in its various residences. Those divisions proved to be both the cause and the subject of disciplinary investigations of both Ms C and Ms Henry begun in April 2018.

[32] Some staff, including Ms C, had a low opinion of Ms Henry. She had risen through the ranks to be unexpectedly appointed to the role of 2IC. In carrying out her management role Ms Henry made decisions, including about rostering and allocation of hours of work, which caused resentment from time to time. Ms Lunam described some comments made by other staff about Ms Henry as “pretty nasty”. These included referring to Ms Henry as her royal highness and a bitch.

[33] In turn, Ms Lunam and Ms Henry had a low opinion of Ms C. Ms Lunam described Ms C as “a very out there person” who was not afraid to say what she thought and do what she wanted. Ms Lunam said Ms C told her she would not acknowledge Ms Henry as 2IC. Ms C said she went directly to “the fat man”, her phrase for referring to Mr Ensor, about any work matters. Ms Lunam asked Ms C why she could go to Mr Ensor directly and other staff could not. She said Ms C had replied it was “because I have him by the balls” and “it’s all on here”, waving her mobile phone. Ms Lunam understood from other staff that Mr Ensor had not reprimanded Ms C for some unacceptable work conduct. She formed the view that Ms C and Mr Ensor were “having some kind of relationship” and that Ms C was “blackmailing” Mr Ensor with some information held on her mobile phone.

[34] A similar rumour circulated among some staff that Ms Henry and Mr Ensor had an intimate personal relationship. In their evidence both Ms Henry and Mr Ensor firmly

denied any substance to that suggestion. Other evidence also referred to Ms Henry and Mr Ensor addressing and having “cleared up” that rumour during a staff meeting in February 2018. Such rumours were however an indicator of a level of speculation, resentment and gossip in the workplace which contributed to how various members of staff behaved towards one another.

The 2 March and 26 March complaints by Ms Henry about Ms C

[35] At a staff meeting in early March some staff complained about Ms C’s work and conduct. She was not at the meeting. Those complaints included her swearing when talking to clients and when talking to family members on her mobile phone while at work. On 5 March 2018 Ms Henry gave Mr Ensor a complaint form about a text Ms C had sent which used what Ms Henry considered to be a derogatory phrase about either clients or staff. The form also set out some complaints from other staff about Ms C. Ms Henry believed nothing was done about those complaints but a note on the form, signed by Mr Ensor and dated 5 March, said the outcome was to be that Ms Henry and he would talk to Ms C about “name calling” of staff or clients being unacceptable.

[36] On 26 March Ms Henry completed another complaint form about Ms C. She had rung Ms C at home on her day off because staff were looking for the key to a work van and Ms Henry wanted to know if Ms C had the key. Ms Henry’s complaint said Ms C had replied “fuck off, hold on I’ll check my bag” and then asked in a raised voice “haven’t you got a spare key”. Ms Henry wrote that she had hung up because she did not deserve to be treated like that.

[37] Mr Ensor sent Ms C a letter calling her to a disciplinary meeting over the complaint. His letter included the following passage:

I note that I have previously spoken to you about the inappropriate way you speak and interact with your colleagues and also about your language in the workplace in general. My expectations of you in this regard have been clearly communicated.

[38] Ms C provided a written statement for the disciplinary meeting. It said she was woken on her day off by Ms Henry’s call. She said Ms Henry had yelled at her about the key saying, “you were the last person to have it, where is it”? Ms C said she looked in her handbag beside her bed and said “ohhh fuck” when she found the key there. She told Ms Henry she was unwell and asked if they had a spare key as she did not want to drive into work that day. She said Ms Henry replied “no” and told her the time that the

key was needed by and “slammed down the phone on me”. Ms C drove to work to drop off the key.

[39] In that statement Ms C also complained about how Ms Henry treated her. She said she did not deserve “the silent treatment” or being yelled at or being “spoken down to”. Her statement ended: “At a later date I do have some complaints regarding [Ms Henry’s] professionalism that I would like to address”.

[40] At the disciplinary meeting with Ms C on 29 March 2018 Mr Ensor told her he would not impose a disciplinary sanction. He accepted Ms C had sworn in frustration at herself on realising she had mistakenly taken the van keys home. He told Ms C he planned to hold “an internal mediation session” with her and Ms Henry. He said he would talk at that session about his expectations of Ms C and give her an opportunity to discuss her concerns about her working relationship with Ms Henry.

[41] He confirmed the outcome of that meeting in a letter sent to Ms C dated 3 April 2018 and headed “Formal Reprimand”. His letter referred to telling Ms C earlier of his expectation that she “behave professionally at all times towards your colleagues and Trust residents” and that “swearing and speaking inappropriately ... is not acceptable”. He wrote that he was “concerned that there appears to be a pattern of behaviour forming and that you appear to be involved in an increasing number of incidents/complaints”. He advised her that “any further instances of inappropriate behaviour ... would almost certainly result in a formal disciplinary process”.

[42] His letter concluded by saying the emphasis for the planned internal mediation session with Ms Henry was “on setting clear guidelines for the management of this working relationship”.

[43] The mediation session never happened because plans for it were overtaken by other events from 29 March onwards.

[44] On 29 March Mr Ensor told Ms Henry he would not take any disciplinary action over her complaint that Ms C swore at her on the phone.

The 2 April 2018 incident report

[45] On Ms Henry’s account of events Ms B had, on her own initiative and coincidentally, contacted Ms Henry on 30 March and “once again raised the issue of

[Ms C] assaulting [Ms A]”. Ms Henry said “this time” Ms B had decided she would file a written complaint and provide the photos of the injuries.

[46] On the balance of evidence available, it was more likely than not that it was Ms Henry who instigated that discussion on 30 March and persuaded Ms B to provide the photos and a statement about her concerns. This finding is consistent with a later statement Ms B signed, dated 10 April, in which she said Ms Henry had asked her a “couple of weeks ago” to write a report about Ms C. Ms B had again expressed doubt about the point of doing so but Ms Henry told her: “I’m here now. There will be something done about it”. Ms B said Ms Henry told her to “write the report” if she cared about Ms C.

[47] Soon after that discussion Ms B gave Ms Henry a one page written account dated 30 March 2018. She also forwarded two photos to Ms Henry’s mobile phone. One photo was a picture of a foot with a bruised second toe. It was accompanied by this text message: “[Ms A’s] toe which happened at the hostel while being forced by [Ms C] to go to her room. Unsure when it happened.”

[48] The second photo showed part of an arm with some bruises around the elbow area. It was accompanied by this text message: “Bruises also on [Ms A’s] arm, asked [Ms A] how did she get it her response [Ms C] This happened while back.”

[49] On 3 April 2018 Ms Henry gave Mr Ensor an incident report dated 2 April 2018 attaching the handwritten statement from Ms B (dated 30 March 2018) and a page from Ms A’s diary.

[50] Ms Henry’s report was dated 2 April and gave the date of the incident she was reporting as 30 March 2018, that is the most recent date Ms B had spoken with Ms Henry about her concerns about the bruises she had seen on Ms A on 1 October 2017, some six months earlier. The report set out the following account, including details of what Ms Henry had then done on 31 March, 1 April and 2 April after getting Ms B’s statement:

30-3-18

Details & description: Ms B] approached me and told me what’s bothering her and [Ms A] for the past few months. [Ms B] showed me and forwarded the picture of [A’s] toes and arm.

Action taken: I've asked [Ms B] why she didn't report it right away. [Ms B] responded what's the point nothing is going to get done and we've been told by Russell [Enzor] to leave [Ms C] alone and don't go on a witch hunt and watch everything she does.

Saturday 31-3-18

I went to see [Ms A] at [the hostel] and showed her the photo of her toes, with no hesitant she said my toe very sore [Ms C did it]. And I've showed her the photo of her arm, again [Ms A's response] [Ms C did it].
When I questioned [Ms A], Wanda [Lunam] was present.

Sunday 1-4-18

I went to [the hostel] to see if there's any incident report. No incident report found. I went to see [Ms A] again. I've asked [another staff member] to come with me, I've asked the same question to [Ms A] and showed her the photo and she answered with no hesitant [Ms C] did it.

Monday

2-4-18

Anya's diary checked see attached.

Outcome/follow up/referral: I have forwarded the photo of [Ms A's] toes and arm and messages to Russell [Enzor]. I rearrange staffs at [the hostel]. I tried to ring Russell [Enzor] on the weekend to discuss the above – no response – I inform [Ms B] to give a chance to speak to Russell first.

[51] The page from Ms A's diary for 1 October 27 had a note written by Ms C which said:

[Ms A] became upset when staff had said to go into the other lounge as that tv was going. She began to swear and kick glass doors. Redirected her into her bedroom until she calms down. Once she calmed down she came out.

[52] On the same page in Ms A's diary Ms Henry had written the following note dated 2 April 2018:

I've asked [Ms A] if she kicked and slam doors. Maybe that's how she hurt her toes, her response no Virginia in my room [Ms C] did it, and she took me in her room.

[53] Although Ms Henry's incident report said she had forwarded the photos to Mr Ensor, he did not receive them. Instead she forwarded the photos and Ms B's text messages to Ms Terry's phone on 3 April. In an accompanying text message Ms Henry explained to Ms Terry that Mr Ensor had asked for the photos to be sent to Ms Terry because "his phone is not working at the moment".

The 3 April discussion

[54] Ms Henry and Mr Ensor gave starkly different accounts of the discussion they had on 3 April when she give him the incident report dated 2 April 2018. Ms Henry

said Mr Ensor angrily denied telling Ms B not to go on a witch-hunt against Ms C and told her that he could “turn this around against you and [Ms B]”, including by having Ms A “taken off” Ms B. Mr Ensor denied being angry or making threats or referring to a witch-hunt but said he did express concerns about Ms Henry’s ongoing complaints against Ms C.

Investigating Ms C’s conduct

[55] On 3 April Mr Ensor contacted Ms C about the allegations in the 2 April incident report. Ms C provided a written report later that day setting out her account of the events of 1 October 2017 and also of the weekend of 31 March and 1 April 2018 when Ms Henry visited the hostel to speak to Ms A. Ms C complained that Ms Henry was harassing her by pressuring other staff members to write reports about her. She offered to meet with Mr Ensor and Ms B to resolve the matter and to assist with any investigation by SWAT or the Police.

[56] Mr Ensor wrote formally to Ms C on 5 April calling her to a meeting as part of his investigation of the reported 1 October 2017 incident. His letter said the concern being investigated was whether Ms C had been physically abusive towards Ms A in order to get her to go to her room, including by applying unreasonable force to her arms, and resulting in visible bruising to Ms A’s arm and toes. Ms C was suspended on full pay for the duration of the investigation.

[57] Mr Ensor interviewed Ms Lunam and Ms B, asking each to provide written statements. Ms Lunam alleged Mr Ensor told her during that discussion that Ms B could lose care of Ms A and that Ms A was known to self-harm. Mr Ensor denied making either comment.

[58] Mr Ensor said Ms B told him she had not come to him in October 2017 because she was not sure anything untoward had happened and because Ms A could say things she did not mean or were not true. She also referred to Ms A often kicking tables as a possible cause of her bruised toe. Ms B’s written statement, dated 10 April, recounted her discussions with Ms Lunam in October 2017 but said she had not heard anything from Ms Henry about it until a “couple of weeks ago”.

[59] Mr Ensor ended his investigation of Ms C’s conduct over this incident by sending her a letter dated 9 April 2018. He said there was insufficient evidence to

support the allegation against her but he had established “that there is a history of potential false claims made by this resident”. He also referred to talking to Ms C about “an interpersonal issue between yourself and your manager, Virginia Henry”. His letter noted that Ms C had asked to be moved from residential work to another part of SWAT and he agreed to arrange that move.

Mr Ensor starts an investigation of Ms Henry

[60] Through those inquiries in early April 2018 Mr Ensor became concerned Ms Henry had known about an instance of suspected abuse of a resident in October 2017 but did not report it at the time. Rather she had only done so soon after being told her most recent complaint against Ms C would not result in disciplinary action. He was also concerned that she had then undertaken an investigation on her own initiative by speaking to Ms A, who he described as “highly autistic”, on 31 March and 1 April.

[61] He sought advice from Ms Terry and then began an investigation of Ms Henry’s conduct.

[62] In a letter from Mr Ensor, drafted by Ms Terry and dated 11 April 2018, Ms Henry was advised that Mr Ensor was now investigating concerns about the delay in Ms Henry reporting the 1 October 2017 incident, the link to the outcome of her most recent complaint about Ms C and whether her speaking to Ms A was appropriate. The letter also advised her of another concern arising from a written complaint from two staff, made on 9 April. They complained about Ms Henry slamming the door of a work van in a way that startled SWAT clients and making comments to staff they thought were derogatory and intimidating.

[63] Mr Ensor’s 11 April letter advised that a disciplinary process could follow, depending on the outcome of the investigation. It also advised that Mr Ensor believed it was not appropriate for Ms Henry to be at work during the investigation. He proposed suspending her, asking for any response to that proposal by the following morning.

[64] Ms Henry sent two letters of response on the same day – one about the complaint about slamming a door, the other about her reporting of the 1 October 2017 incident involving Ms C. Neither letter commented on the prospect of suspension. Both denied the allegations. Ms Henry wrote that she wished she had mentioned to Mr Ensor at the time what Ms Lunam and Ms B had told her in October 2017. She also apologised for

the investigation process she had undertaken after getting Ms B's 30 March statement but said she had not been able to contact Mr Ensor and Ms A was able to communicate.

[65] Mr Ensor said he could not remember if Ms Henry had provided any other verbal or written response regarding suspension. She was suspended from 12 April and remained so until she was dismissed on 2 August 2018, some 16 weeks later.

Investigation meeting with Ms Henry

[66] Mr Ensor met with Ms Henry on 16 April. She was accompanied by a union representative. He was accompanied by Ms Terry.

[67] Questions, asked mostly by Ms Terry, explored why Ms Henry had not done more in October 2017 and how Ms B came to provide her account and photos in late March 2018, particularly whether that was at Ms B's initiative or in response to a request from Ms Henry. Ms Terry and Mr Ensor also asked why this had occurred one day after Ms Henry found her complaint against Ms C "went nowhere".

Ms Henry called to a disciplinary meeting

[68] By letter of 19 April 2018, drafted by Ms Terry, Mr Ensor called Ms Henry to a disciplinary meeting to respond to four allegations of serious misconduct. In summary the allegations were:

- (a) failing to report to Mr Ensor in October 2017 about the allegation of Ms C abusing Ms A with the result that the allegation "was not investigated in a timely manner";
- (b) approaching Ms B on 30 March 2018 about that allegation for the purpose of having further disciplinary action taken against Ms C;
- (c) conducting an interview of Ms A that was inappropriate because of the significant time delay and because she was on the autistic spectrum; and
- (d) inappropriate conduct by slamming a van door in front of SWAT clients and colleagues.

[69] The letter advised Ms Henry that the alleged conduct potentially breached SWAT's code of conduct. It referred to provisions in that code about knowingly failing to disclose information that prejudiced the proper carrying out of SWAT business and failing to follow work procedures which then potentially resulted in a serious safety risk to residents.

[70] Soon afterwards Ms Henry engaged her legal representative, Erin Burke, who wrote to Mr Ensor questioning the independence of the disciplinary investigation. Ms Burke's letter referred to Mr Ensor as having "a very close relationship with Ms [C]" and "hav[ing] made it clear that you will not entertain any complaints made against her". Ms Burke asked for an independent investigator to be appointed which she said could not be any EMA representative who had previously advised SWAT in the past.

[71] Ms Terry replied by letter to Ms Burke on 1 May saying she was acting for SWAT. Her letter described the reference to a very close relationship between Mr Ensor and Ms C as "an attempt to smear the character of my client" who would "seek separate legal advice regarding defamation if you pursue this line of attack". She said SWAT would not be conducting an external investigation.

[72] Ms Henry, through Ms Burke, responded by raising a personal grievance for unjustified disadvantage due to her suspension and the disciplinary process underway. The letter raising that grievance also expanded on the allegations made about the relationship between Mr Ensor and Ms C.

Investigation of allegations regarding Mr Ensor and Ms C

[73] SWAT responded to those allegations by pausing its disciplinary inquiry of Ms Henry and appointing Mr Treanor, with Ms Terry's assistance, to conduct an investigation of how Mr Ensor had dealt with concerns about Ms C's conduct. Through late May and early June Mr Treanor and Ms Terry held interviews with 19 SWAT employees, including Ms Militar, Ms B, Ms Lunam, Ms C and Mr Ensor. The questions were drafted and mostly asked by Ms Terry who also drafted a report that Mr Treanor adopted with some minor changes.

[74] His written report concluded there was no evidence to support claims Mr Ensor had prevented other employees submitting complaints about Ms C or had allowed any reported acts of misconduct by her to go unaddressed. It noted comments from eight staff about the strained working relationship between Ms Henry and Ms C, from ten staff criticising Ms Henry's communication style and from Ms Militar complaining she felt bullied by Ms Henry. It also noted three staff had referred to the staff meeting in February 2018 where Ms Henry and Mr Ensor addressed the gossip about them having an extra-marital affair with one another.

[75] Mr Treanor's report, dated 19 June 2018, recommended SWAT's board reject the allegations made about an inappropriate relationship between Ms C and Mr Ensor and recommence the disciplinary process with Ms Henry. The board adopted those recommendations. It then appointed Mr Sinclair to "manage" a resumed disciplinary process with Ms Henry, with Ms Terry providing him support.

The ongoing disciplinary process

[76] Ms Henry, through her representative, continued to challenge the independence of the disciplinary process, the conclusions drawn in Mr Treanor's report and request further information, including a copy of a Ministry of Health audit report on SWAT dated 28 February 2018. From the excerpt of the audit report provided Ms Burke highlighted criticism of how SWAT dealt with complaints, the adequacy of the complaints policy and an instance where Mr Ensor was said to have not complied with a requirement to provide a written response to a complaint.

[77] A further disciplinary meeting held on 27 June was adjourned so Ms Henry could prepare written answers to 33 questions drafted by Ms Terry. Ms Burke sent Ms Henry's answers, covering nine pages, on 11 July. Those answers included Ms Henry's account of how she had dealt with her discussions with Ms B and Ms Lunam in October 2017 and what she had done once she got Ms B's photos and written statement on 30 March 2018.

[78] A disciplinary meeting held on 13 July then canvassed, at length, the concerns raised by SWAT and Ms Henry's criticism of the allegations made against her. Those criticisms referred to the investigation not being independent, inadequacies in the analysis and summary of interviews of other staff, what the audit report said about operation of the complaints policy, and how Mr Ensor expected complaints or incidents to be reported.

Preliminary decision to dismiss

[79] By letter of 23 July 2018 Ms Henry was advised, through her representative, that Mr Sinclair had come to a preliminary view that SWAT should dismiss her because the first three allegations about her conduct had been substantiated. He accepted responses Ms Henry had given about the fourth allegation, concerning slamming the van door, and did not uphold it.

[80] The letter, drafted by Ms Terry in consultation with Mr Sinclair, set out the information Mr Sinclair relied on for why he had come to the conclusions he did about the first three allegations.

[81] Regarding the information from Ms B and Ms Lunam in October 2017 Mr Sinclair's letter said:

It is my view that two members of staff have raised their concerns with you as a senior manager and this should have been fully addressed and escalated at the time ... You have confirmed that you believe a complaint of this nature is serious. Naturally I agree and it is my view that it is not acceptable that you did not escalate this matter to Russell [Ensor] at the time. This should have been done regardless of whether or not this was reported verbally or in writing.

[82] His letter also said he concluded there was a breakdown in Ms Henry's working relationship with Ms C that led to her deciding to submit complaints about Ms C. He noted that Ms Henry had submitted a written complaint based on verbal reports of staff about Ms C in early March 2018. Her action in doing so contradicted her excuse that she was not able to submit a report of her own in October 2017 based only on the verbal reports of Ms B and Ms Lunam and could not have proceeded to talk to Mr Russell about that situation without first having written reports from them.

[83] He questioned the timing of her April 2018 report, six months after her October 2017 discussions with Ms Lunam and Ms B, and concluded:

It is my view that this was done for an inappropriate purpose, namely that you were disappointed that no disciplinary action was taken against [Ms C] following your earlier allegations against her, and sought out further complaints, in the hope they would give rise to disciplinary consequences for [her].

[84] He also considered responses from Ms Henry and her representative that the complaints policy in place when Ms Henry became aware of the alleged abuse of a resident was "contradictory, confusing and deficient". He noted Ms Henry trained new staff about the complaints policy so was familiar with it, including its provision that "all complaints must be directed to the CEO immediately", making no distinction between whether the complaint was verbal or submitted in writing. He concluded:

... [I]t is my views that in the capacity of 2IC you have failed to report a potentially significant matter in a timely manner. ... At the very least, even if you felt you were not in a position to make a formal report, I consider that you were under an obligation as 2IC to make Russell [Ensor] aware of the matter so that he could follow up with [Ms B] directly.

[85] His letter then stated his preliminary view was that each of the substantiated allegations were serious misconduct that “irreparably undermined the trust and confidence in the employment relationship” for which summary dismissal was the appropriate sanction.

[86] Ms Henry, through her representative, responded again questioning the evidence and process relied on in reaching Mr Sinclair’s preliminary view. She said it was unacceptable to be dismissed for “confusion over a poorly-drafted complaints policy” and said any deficiencies identified in the investigation should be addressed through a performance improvement process, not dismissal.

[87] A letter from Mr Sinclair dated 2 August 2018 reiterated the reasons for his conclusions and confirmed his decision to dismiss Ms Henry for serious misconduct. He also emphasised that the 23 July letter, setting out his preliminary view, had been his and said the responsibility for making the decision was his.

[88] The personal grievance Ms Henry raised about her dismissal said she had not been provided with requested relevant information, Ms Terry should not have been involved as both an advisor and an investigator and Mr Treanor’s report had omitted important information from staff interviews. It said Mr Ensor had breached the complaints policy without facing disciplinary action and dismissal was a disproportionate outcome for Ms Henry given her 18 years of service with SWAT.

The issues for resolution

(a) Was the decision to suspend Ms Henry, and how long that suspension lasted, justified?

[89] There were sufficiently serious allegations about Ms Henry’s conduct to warrant considering her suspension while they were investigated: failure to report or inquire further into potential abuse of a resident when first hearing of the allegation, later pursuing that historical allegation for an improper motive and then undertaking her own investigation despite difficulties in communicating with that resident. Given the tensions in the workplace outlined earlier in this determination, there was a reasonable apprehension that Ms Henry’s presence at the workplace could interfere with a fair investigation process.

[90] SWAT gave Ms Henry a somewhat truncated opportunity to comment on the proposal. However she was able to provide two detailed letters of response about the subject of the allegations on the day she was asked to comment on the prospect of suspension but mentioned it in neither. There was nothing to indicate she did object to suspension at the time or made objections that were not fairly considered.

[91] Ms Henry did not know at its outset that her suspension, albeit on full pay throughout, would eventually last 16 weeks. However the responsibility for that length of time did not rest with SWAT alone. The approach Ms Henry, through her representative, took to the investigation was responsible for a significant portion of how long the whole process of investigation and disciplinary inquiry took.

[92] The grounds for the suspension and how it was carried out were justified. No unjustified disadvantage was established on that ground.

(b) Was it fair for Ms Terry to be involved throughout all three stages of the investigation?

[93] Ms Terry provides advisory services to SWAT on an as and when required basis. Her role in this matter – through the initial inquiries, the formal investigation and subsequent stages of the disciplinary process – were akin to an in-house human resources advisor rather than a situation where an employer has engaged a third-party investigator for a particular case. She was initially advising Mr Ensor about how to deal with the reports, then worked with Mr Treanor on the part of the investigation he became responsible for and finally was assigned to assist Mr Sinclair continue with the disciplinary inquiry.

[94] SWAT did what could be expected of a fair and reasonable employer by removing Mr Ensor from a decision-making role once allegations were made about the nature of his relationship with employees who were involved in the matters to be investigated. Ms Terry had made what appeared to be an overblown reference to Mr Ensor as “my client” in an early letter about the allegations regarding Ms C but it was clear from the start of that letter she was acting for SWAT rather than Mr Ensor personally.

[95] This did not preclude Ms Terry from undertaking the ‘heavy lifting’ in carrying out the investigation through each of the stages to which SWAT’s board appointed first Mr Treanor and then Mr Sinclair as its decision-maker. The evidence of Ms Terry, Mr

Treanor and Mr Sinclair each made tolerably clear that while she drafted questions and correspondence, and asked most of the questions during the relevant meetings, the appointed decision-maker was the person who considered and decided the outcome at each stage, not Ms Terry. This conclusion was supported by the correspondence between Ms Terry, the board's chair and Mr Sinclair as decisions were being made about the outcome of the disciplinary investigation. Ms Terry drafted the decision letter but did so under directions given by Mr Sinclair. Contrary to a submission from Ms Henry, Mr Sinclair did not 'default' that role to Ms Terry.

[96] And, even if Ms Terry's involvement throughout were a defect in the process that was more than minor, this was not then shown to have resulted in Ms Henry being treated unfairly. Rather the evidence suggested Mr Treanor and Mr Sinclair were suitably assisted in carrying out a thorough and fair process, whatever disagreement Ms Henry and her representative understandably had with the conclusions it reached.

(c) Compared to Mr Ensor, Ms B or Ms Lunam, was Ms Henry treated differently and unfairly in relation to reporting and responding to complaints?

[97] There were two aspects to Ms Henry's submission that she was unfairly treated different from others over reporting incidents or responding to complaints.

[98] The first concerned Mr Ensor. The Ministry of Health audit in February 2018 identified an instance where he appeared not to have responded in writing to a complaint from a family member of a resident. It concerned a somewhat different scenario and level of seriousness to the allegation regarding Ms A. Mr Ensor also adequately explained that a verbal response had been given to the family member and the audit had occurred before a written response was sent.

[99] The second aspect concerned why Ms Henry was ultimately held to account for not reporting promptly to Mr Russell when she heard about the 1 October incident and photos concerning Ms A. As employees of SWAT Ms B and Ms Lunam were each also under an obligation at that time to promptly report any real concerns to the appropriate manager.

[100] SWAT's closing submissions correctly queried whether reference should be made to its complaints policy or, given the nature of what was said to have happened with Ms A on 1 October 2017, its Incident Reporting Policy. It was an incident

reporting form that Ms Henry used for her 2 April report (reporting the information and photos provided by Ms B on 30 March 2018 as being the incident).

[101] The Incident Reporting Policy included the following two relevant “guidelines”:

- All adverse events must be reported to the Team Leader or Manager, who will then inform the General Manager as appropriate. In the absence of the Manager or the Team Leader the General Manager should be informed directly.
- ...
- An incident report form must be completed on the same day of the incident ...

[102] The equivalent provision in SWAT’s Complaints Policy is, as already noted, that “all complaints must be directed to the CEO immediately”. The process described in the complaints policy is open to clients, their family and advocates rather than staff only.

[103] Whichever policy was applied, however, required prompt reporting by staff either directly or indirectly to the CEO or General Manager (both referring to the role held by Mr Ensor).

[104] What Ms Lunam did in October 2017 clearly complied with the intention of both policies. Despite Ms B’s reluctance, she had promptly contacted Ms Henry and understood from what Ms Henry told her that suitable steps would be taken. Ms Lunam was entitled to rely on Ms Henry, in her role as a senior manager, to then do the right thing.

[105] Ms B’s situation was more complex. It was apparent from the record of what she said when asked during the 2018 investigation process, including statements she wrote, that she did not have a clear view that an adverse event had actually occurred for Ms A. As she subsequently told Mr Ensor, she had experience of Ms A sometimes saying things that were not true and suffering bruises from her own actions.

[106] On any measure there was, however, no doubt that the policies Ms Henry was involved in training SWAT staff about required her to do more than what she did when she heard from Ms Lunam about Ms B’s concerns and then first spoke to Ms B in October 2017. Ms Henry accepted this was so in answering questions during the disciplinary inquiry. Asked what was expected of her as 2IC when she became aware

of a potential case of physical abuse, Ms Henry answered: “To take the complaint of abuse seriously and to get a written complaint/statement so I can give it to Russell [Ensor]”. In that light there was no disparity of treatment or in what was required of her compared with Ms Lunam or Ms B.

(d) Did SWAT fairly investigate concerns about the relationship between Ms C and Mr Ensor and whether any issues about her conduct were properly looked into?

[107] SWAT reasonably took the step of pausing in its disciplinary investigation of Ms Henry and having a board member, Mr Treanor, look into allegations of an inappropriately close relationship between Ms C and Mr Ensor.

[108] Ms Henry, through her representative, criticised the analysis made of the interviews with staff and excerpts quoted from them in the report.

[109] The full set of notes of staff interviews conducted in that investigation were provided in evidence for the Authority investigation. They were reviewed in preparing this determination. Comparing those notes with the description and selection of quotes given in the report did not identify differences or omissions sufficient to say conclusions reached from them were unfairly or unreasonably drawn.

[110] Importantly the report addressed the allegation that there was a history of misconduct by Ms C going unexamined and undisciplined. Three formal complaints on Ms C’s file for the years 2011, 2013 and 2016 were reviewed and Mr Ensor was found to have consistently applied the appropriate process. Similarly, issues raised about Ms C in early March 2018 and in Ms Henry’s 2 April report were subject to formal disciplinary processes with Ms C – one resulting in a formal reprimand and one being dismissed for insufficient evidence. In that respect there was no disparate treatment between how SWAT dealt with such matters with Ms C and Ms Henry.

(e) Were there defects in the process followed by SWAT which resulted in Ms Henry being treated unfairly?

[111] Ms Henry’s personal grievance letter about her dismissal said SWAT had failed to provide relevant information she had requested. These were identified as being a full copy of the auditor’s report and the reasons for differences in Ms B’s descriptions of what happened.

[112] Ms Henry was provided with the relevant parts of the auditor's report and copies of statements given by Ms B. What Ms B said was described and analysed in Mr Sinclair's preliminary letter on which Ms Henry had the opportunity to comment.

[113] As summarised in SWAT's closing submissions its disciplinary inquiry into Ms Henry's conduct had met each element of the requirements in s 103A(3) of the Act. Ms Henry was provided with the relevant information, told of SWAT's concerns and given a reasonable opportunity to respond during an extensive investigation. The preliminary outcome letter of 23 July 2018, carefully setting out the information and reasons for conclusions drawn, showed Ms Henry's explanations were genuinely considered and how Mr Sinclair, as SWAT's decision-maker had come to the views expressed.

[114] No material defect in that process has been established.

(f) Were SWAT's findings of serious misconduct by Ms Henry ones that a fair and reasonable employer could have made?

[115] There was a sufficient evidential foundation for the two main elements of the serious misconduct findings SWAT made – that Ms Henry had done too little in October 2017 to explore and report a potential instance of a physical abuse of a resident and, secondly, had belatedly pursued that issue in March 2018 for an inappropriate purpose.

[116] In her oral evidence in the Authority investigation meeting Ms Henry said she “could not do anything” and “could not force” Ms B when she said in October 2017 that she did not want to make a report to Mr Ensor and had refused to show Ms Henry the photos of Ms A' bruises. It was an inadequate explanation on two levels.

[117] Firstly, Ms B was an employee of SWAT and Ms A was in SWAT's care. In her management role Ms Henry could have done more to have Ms B provide information as an employee about a potential ongoing risk to a resident.

[118] Secondly, even if Ms B would not co-operate, Ms Henry should have promptly reported the matter to Mr Ensor for him to consider and deal with. There could be no real doubt SWAT policy required this action. Ms Henry's explanation that she understood Mr Ensor would only act if the staff member directly involved made the report was inconsistent with Ms Henry's own conduct in March 2018. On that later occasion she made a written complaint about Ms C based only on verbal reports of other

staff, taking that action herself rather than saying something could only be done if those staff members themselves provided a written report.

[119] The underlying issue was that Ms A was a disabled person with limited communication skills. Whether or not there was any foundation to the concern about how Ms C had treated her, Ms Henry was obliged as a SWAT employee and as a senior manager to ensure appropriate steps were taken to check whether more needed to be done to protect Ms A, including from the risk of repetition if she had been subjected to physical abuse. In those circumstances it was open to a fair and reasonable employer to find, as SWAT did, that what Ms Henry had done or omitted to do was serious misconduct.

[120] The other element, of belatedly pursuing the issue as a form of retaliation against Ms C in late March 2018, relied on an inference Mr Sinclair ultimately made from an analysis of the circumstances and available information.

[121] The evidence overall established that he had a reasonable basis for preferring one conflicting version of events over another on how Ms B came to write a statement and provide the photos and Ms Henry's motivation for pressing Ms B do so at that time.

[122] In those circumstances it was open to a fair and reasonable employer, as SWAT did, to find Ms Henry's belated action for an ulterior purpose was serious misconduct.

(g) Was SWAT's conclusion that Ms Henry's conduct had irreparably damaged its trust and confidence in her open to an employer in the circumstances?

[123] In light of the position Ms Henry took throughout the disciplinary inquiry SWAT's conclusion of irreparable damage to its trust and confidence in her was within the range of responses open to a fair and reasonable employer.

[124] In interviews held or in correspondence from her representative, there was no real acknowledgement by Ms Henry of the significance of the shortcomings in how she had acted. In her view others remained substantially at fault, not her. In those circumstances SWAT could reasonably conclude the damage done to the trust it could have in Ms Henry as a senior manager was beyond repair.

(h) Was SWAT's decision to dismiss within the range of responses open to it?

[125] Having reached the conclusion of irreparable damage, a fair and reasonable employer should still consider whether some lesser sanction, such as additional training for Ms Henry in her role as a manager, might be an adequate sanction rather than dismissal.

[126] Mr Sinclair's evidence established that he had done so, particularly in light of Ms Henry's long service with SWAT. He decided however recognition of her service was "overridden by service to those in our care".

[127] In all the circumstances at the time, including the care-related setting and Ms Henry's responsibilities within it, Mr Sinclair's decision was one a fair and reasonable employer could have made.

Outcome

[128] For the reasons given the actions of SWAT in investigating concerns about Ms Henry's conduct, and what SWAT did in coming to the decision to dismiss her, were within the range of responses open to a fair and reasonable employer in all the circumstances at the time. Accordingly Ms Henry's claims of personal grievances for unjustified disadvantage and unjustified dismissal are declined.

Costs

[129] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[130] If they are not able to do so and an Authority determination on costs is needed SWAT may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Henry would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[131] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Robin Arthur
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].