Employment Court of New Zealand

Idea Services Limited v Crozier [2017] NZEmpC 77 (19 June 2017)

Last Updated: 22 June 2017

IN THE EMPLOYMENT COURT WELLINGTON

[2017] NZEmpC 77

EMPC 273/2016

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN IDEA SERVICES LIMITED Plaintiff

AND LYN CROZIER Defendant

Hearing: 8, 9, 10 and 11 May 2017 (heard at Wellington)

Appearances: P McBride and F Lear, counsel for the plaintiff

G Ogilvie, advocate for the defendant

Judgment: 19 June 2017

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The issues

[1] Ms Lyn Crozier is a well respected and long serving Community Support Worker (CSW) who was employed by IHC New Zealand Inc (IHC), or its subsidiary Timata Hou Limited (THL).

[2] The work of a CSW is particularly challenging since it involves the supervised detention and treatment of persons with intellectual disabilities who might pose a danger to themselves, staff caring for them, or others in the community. Many of those persons might well otherwise be in prison, having been convicted of serious offences. They were and are cared for in residential facilities operated by IHC/THL. Most are held under the provisions of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCC&R Act), although there are others who have high and complex behaviour needs. The detained clients require

24-hour supervision and close monitoring.

[3] Ms Crozier had worked in this challenging environment since 1990. In about

2010, her medical condition gave rise to concerns on the part of her employer as to whether she was sufficiently fit to fulfil all her CSW responsibilities.

[4] Over the next four years, this issue was discussed with her from time to time. Understandably, Ms Crozier was keen to maintain her job for financial reasons and because she found the role satisfying. Her employment was eventually terminated in

2014 by reason of medical incapacity.

[5] As a result, Ms Crozier brought a personal grievance, alleging that Idea Services Limited (Idea Services) the successor of THL since 2015, had not been justified in taking this step, and that it had discriminated against her on the prohibited ground of disability. The relationship problem came before the Employment Relations Authority (the Authority) which determined that she had been unjustifiably dismissed and that she had a personal grievance on the basis of

unlawful discrimination.1

[6] In essence, this was because the Authority was not satisfied that THL had been justified in relying on Ms Crozier's ability to undertake five particular activities. These activities were not expressly referred to in Ms Crozier's job description, but they were the focus of assessment. The Authority found that these factors were at the heart of THL's decision to dismiss on the grounds of medical incapacity. The Authority was not satisfied that the employer had established there was a substantial risk that Ms Crozier's medical condition would compromise her own safety, the safety of those working with her, or the safety of her clients. The Authority also considered there were various procedural defects in the process which gave rise to the decision to terminate. The principal defect was that a THL protocol, which was supposed to apply where employees were ill, was not followed. In addition, reports given to management by staff as to Ms Crozier's ability to fulfil her role were not put to her properly.

[7] Idea Services was ordered to pay her a sum equivalent to three months' ordinary time remuneration, and the sum of $15,000 compensation for humiliation, loss of dignity and injury to feelings.2 These amounts were reduced by 10 per cent, taking into account Ms Crozier's contribution in being unable to undertake all of her tasks.3

[8] Idea Services brought a de novo challenge to the Authority's determination, which has given rise to these issues which the Court must resolve:

1 *Crozier v Idea Services Ltd* [2016] NZERA Wellington 125.

2 At [107] – [116].

3 At [117] – [112].

a) Was THL substantively and/or procedurally justified in deciding to terminate Ms Crozier's employment on the grounds of medical incapacity?

b) Separately, was there unlawful discrimination on the grounds of disability, by reason of the dismissal?

Context

Timata Hou Limited

[9] The evidence establishes that THL was initially established in the late 1990s as a subsidiary of IHC. The THL business is now operated by Idea Services. THL operated under a funding agreement with the Ministry of Health as a designated Regional Intellectual Disability Support Accommodation Service (RIDSAS) for approximately 55 clients.

THL clients

[10] THL's primary purpose was to provide secure and supervised care and/or rehabilitative support to intellectually disabled clients, principally those who are subject to the IDCC&R Act.

[11] That Act provides a system for the compulsory care and rehabilitation of persons who have an intellectual disability and who have been charged with, or convicted of, an offence. A person subject to the Act is known as a care recipient.

[12] Care recipients have the potential to be violent. The Act provides for powers that may be exercised over a care recipient to ensure the safety of that person, or others. In particular, such a person may be restrained if that is necessary to prevent that person from:4

(a) endangering the health or safety of the care recipient or of others: (b) seriously damaging property:

4 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 61(1).

(c) seriously compromising the care and wellbeing of the care recipient or of other care recipients.

[13] The IDCC&R Act provides for the preparation of a care programme for a care recipient that includes provision for "the degree of security required for the care of care recipients and for the protection of others".5 It also provides for the making of directions which enable a care recipient to receive supervised care in a secure facility or other designated facility or place.6 Where there is such a direction in force, care recipients must stay in the facility or place which has been designated.7 A care recipient who is absent without authority can be retaken if necessary obtaining a warrant to search and enter specified places.8

[14] It should also be mentioned that care recipients are consumers under the Code of Health and Disability Services Consumers' Rights, thereby possessing all the rights under that Code.9 For present purposes, Right 4 of the code is relevant, which provides that every consumer is entitled to services which are provided with reasonable care and skill; and that every consumer has the right to have services provided in a manner that minimises the potential for harm, and optimises the quality of life of a consumer.10

[15] The second category of clients are "civil clients". These are people who have the same potential to offend as care recipients, but who are not currently detained as a result of criminal charge, although they may have been previously been persons considered to have high and complex behaviour needs.

[16] The third category of clients are those who were being assessed; there are relatively few in this category at any particular time.

[17] Ms Janine Stewart, currently Chief Operating Officer of Idea Services who was involved in establishing THL from its inception, and Ms Elizabeth Ison,

5 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 26(c).

6 Section 64(4).

7 Section 111.

8 Section 112.

9 Health and Disability Commissioner Act 1994, s 48.

10 Health and Disability Commissioner (Code of Health and Disability Services Consumers'

Rights) Regulations 1996, Schedule, Rights 4(1) and 4(4).

currently Service Manager for Idea Services RIDSAS, were clear in their evidence that all such clients have the potential to be physically violent. They were described as individuals who were high risk, potentially dangerous, volatile and manipulative. That is why they are supported by THL, rather than in the community by other entities within the IHC organisation.

[18] I accept the evidence that many such persons demonstrate substantial violent and inappropriate behaviours; by and large, they have a high risk of absconding or behaving in a physically aggressive manner. They are predominantly physically fit young males, although from time to time, females are cared for. All have intellectual disabilities; their behaviour can, at times, be unpredictable.

[19] Although it will be necessary to consider later Ms Crozier's evidence that in some residential facilities for which she worked, there were relatively few occurrences of persons absconding or requiring restraint, I accept that the profile of THL clients is as just described.

[20] The Court was also advised that as at early 2017, there were eight care recipients, 23 civil clients, and two persons being assessed. Of these, 48 per cent had previously been involved in violent assaults (including attempting to kill, serious harm/assault, intent to seriously harm, and common assault), 24 per cent had previously been involved in sexual crimes against adults and children (rape, violation, indecent act and so on), nine per cent had previously presented weapons, and approximately nine per cent had previously committed crimes of arson.

[21] Ms Ison said that THL operated one facility, which was similar in nature to a secure psychiatric unit. Although clients would see any facility in which they are placed as being their home, there are a number of locked doors and gates, as well as high fences, so as to ensure that the facility is secure. Other residential facilities are also regarded as secure and locked, albeit with slightly lower levels of environmental security.

[22] Ms Stewart explained that the focus of THL management, of what in the main are physically active young men, is a regular programme of physical activity as

well as activities that can hold the attention of those people since they do not necessarily want to be in that particular environment; this is to mitigate the possibility of them absconding. The focus is on rehabilitative steps.

Community Support Worker role

[23] At the material time, CSWs such as Ms Crozier were employed under terms and conditions derived from a collective employment agreement (CEA) entered into between IHC and its subsidiary companies, IDEA Services and THL on the one hand, and the Service and Food Workers Union Nga Ringa Tota Incorporated (the Union) on the other.

[24] The CEA contained a range of terms relating to CSWs, whether those employees worked for THL or otherwise.

[25] That role was summarised in a job description. The following was included with regard to CSWs working for THL (as opposed to other services allied with IHC):

Provide support to people with high and complex needs, many of whom have been ordered to receive services by the court, under the Intellectual Disability Compulsory Care and Rehabilitation Act.

The complexities of this group require the services to be flexible and responsive to the changing needs of people.

Examples of this support could be:

• to support the implementation of therapeutic programmes,

• to help people to stay within the requirements of their Court Order,

• to work in partnership to enhance rehabilitation opportunities,

- to ensure that activities balance risk management and rehabilitation opportunities.

[26] Under "Person specifications", the following description of skills was given:

It is essential that all support workers:

- have the ability to communicate effectively in both written and spoken English;
- are able to build effective relationships both within and outside the organisation; and

• can work effectively and supportively as part of a team;

• have a basic level of physical fitness to ensure the [client's] personal care, personal development or desired lifestyle is not limited by the physical abilities of the support worker.

[27] The job description also emphasised that it was only a general summary of the functions of the job, not an exhaustive list of all responsibilities, tasks and duties. It was described as a "living document", which could change as the organisational or client support needed to be changed. It also provided that employees may be asked to undertake other tasks, as reasonably required within their support role.

[28] It will be necessary to consider the job description in greater detail later.

Statutory framework

[29] Reference should be made to health and safety obligations, since these are at the heart of the issues which the Court must resolve. The CEA expressly acknowledged the obligations of the Health and Safety in Employment Act 1992 (HSE Act). In that context, it was stated that within the "employers operations the hazards in the workplace may include challenging behaviour of service users."

[30] Sections 7 to 9 of the HSE Act11 described the obligations of an employer to both identify and manage "hazards". This Court has recognised that the behaviour of persons in care could be recognised as a workplace hazard.12

[31] Other provisions of the statute required an employer to take all practicable steps to avoid harm to any person in the workplace.13

[32] The HSE Act thereby imposed particular health and safety obligations on

THL.

Other obligations

[33] Finally, by way of context, it is appropriate to refer to the relevant contractual requirements as agreed with the Ministry of Health. Service objectives included

11 Now repealed and replaced by the Health and Safety at Work Act 2015.

12 *IHC Northern Vocational Services v Jordan* [2004] 1 ERNZ 421 (EmpC) at [78].

13. For example, see s 6 with regard to ensuring the safety of employees, and s 15 with regard to people who are not employees.

supported living in an environment "that safeguards [service users] from abuse and neglect and ensures their personal security and safety needs are met" and to ensure "support staff are well trained and qualified to positively support the Person and meet their needs".

Restraint

[34] In 2009, after consulting with the relevant parties and members of the industry, the Department of Labour published a guide titled "Managing the Risk of Workplace Violence to Healthcare and Community Service Providers: Good Practice Guide". It applied to community-based residential services, and to services provided under the IDCC&R Act. CSWs were described as being at higher risk of exposure to violence than others.

[35] The Guide also stated:

Although individuals are sometimes unpredictable, violent episodes or incidents in this industry happen with sufficient frequency in certain settings to make them a predictable event.

[36] With regard to training and staffing issues for persons employed in such an environment, it was emphasised that staff rosters should be prepared on the basis that emergencies could be adequately responded to on all shifts; and that physical strength and fitness of staff should also be considered. In managing such a risk, all practical steps would need to be taken to keep employees safe, by eliminating, isolating and minimising risk. Minimisation would include having mechanisms in place to ensure an adequate response by suitably trained staff who could deal with any violent episodes.

[37] Ms Crozier said she was unaware of the document. That may be so, but it describes the obvious risks which THL, as an operator in this field, needed to acknowledge, and I am satisfied that it did. Moreover, these factors were reflected in its

training for CSWs. That is evident, for instance, from its Restraint Minimisation and Safe Practice Policy. It described the steps which would need to be taken where there was an imminent risk of a client harming himself or herself, or others. Various types of restraint processes, including a personal restraint, could be

utilised as described in that person's support plan and under relevant THL protocols. Regular training on all aspects of restraints was given annually. Training included an emphasis on staff knowing the principles of reducing someone's strength and mobility. This was undertaken in a classroom setting with staff that were compliant in that they would not fight or resist; real life scenarios were not practiced. That meant that even where a staff member was able to demonstrate that he or she knew how to undertake a restraint, that person was not actually tested on whether they could successfully restrain a client who was fighting or struggling, which was likely in an actual situation which required restraint.

[38] Ms Ison said that all restraints were to be conducted by two people, who had to be mobile and able to put good practice into effect. The restraint, she said, had to be carefully and precisely executed in order to avoid harm. She said that the minimum amount of time which a typical restraint might take would be five minutes, but such an intervention could extend for 20 to 30 minutes. Ms Crozier said that based on her experience, a restraint could extend for up to two hours.

Absconding

[39] The risk of clients absconding is real and ever present. When this occurs, THL staff are responsible for tracking or following such a client so as to return that person to a secure facility. The primary responsibility for this would rest on a CSW, although all THL staff, including managers, needed to be able to track and restrain clients. Such an activity would require a person undertaking tracking to keep up with, and if necessary, physically interact with an absconding client. This could mean running whilst at the same time being able to phone the on-call support service, or the police, so as to obtain assistance to apprehend the client. It may also be necessary to walk for some distance to keep up with a client who has absconded. I will need to consider later Ms Crozier's contention that the use of a vehicle could suffice when tracking a client.

Physical activities

[40] Physical exercise is an important feature of rehabilitation. CSWs are required to fully participate in and support such activities.

[41] It is against these contextual matters that the particular circumstances relating to Ms Crozier's circumstances must be assessed.

Chronology

[42] The parties gave lengthy evidence as to the events that occurred over some four years, from 2010 to 2014.

[43] An issue as to reliability of the evidence given by the witnesses who were called must be considered. In particular, Ms Crozier's description of some events was contradicted by letters or file notes made at the time. It is therefore necessary to consider whether these are accurate, especially when they were relied upon by THL witnesses.

[44] Briefly, when assessing the reliability of witness testimony, the Court must carefully evaluate all the evidence, looking for inconsistencies between witnesses, and whether there are any external indications which can assist in a determination as to what has occurred. As has frequently been observed in the past, the evidence has to be evaluated in a commonsense but fair way. All aspects of the evidence have to be assessed. It may be necessary to consider a range of factors. Important are contemporary materials, objectively established facts, and the apparent logic of

events.14 I will refer to some examples of the problem of reliability when these arise

in the following summary of events, and in the later analysis of the circumstances giving rise to the dismissal.

Events of 2010 - 2011

[45] For some time until 2010, Ms Crozier was employed in THL's secure unit at Kenepuru. Ms Collette Ellison-Hack, at that time the National Manager of THL, became concerned with Ms Crozier's physical ability to undertake her role. This was based on her own observations and on conversations with Mr Paul Moles,

Residential Service Manager and Ms Crozier's Line Manager.

14 *Fox v Percy* [2003] HCA 22, (2003) 214 CLR 118 at [31]; *R v Munro* [2007] NZCA 510, [2008]

2 NZLR 87 at [77].

[46] The matters of concern at that stage related to Ms Crozier struggling with breathlessness on some occasions, for instance when getting into or out of a van which had a step. This concern led to whether Ms Crozier would have the physical ability to restrain and track service users, if required.

[47] On 12 August 2010, Mr Moles wrote to Ms Crozier, stating that THL intended to move her from Kenepuru. This was because of the "increasing risk of potential harm to yourself due to both the changes to the working environment and your physical status". A meeting was held a short time later, when Ms Crozier expressed unhappiness that her level of physical fitness/health was being raised as an issue. She said she wished to obtain "legal clarification" about the issue.

[48] On 29 September 2010, an organiser from the Union wrote to Ms Ellison-Hack; that letter acknowledged that THL was considering redeployment of Ms Crozier and another worker to another facility "due to their health issues".

[49] Ultimately, Mr Moles advised Ms Crozier of the decision to transfer her from Kenepuru, in a letter dated 13 October 2010. The transfer was discussed at a further meeting on 18 October 2010, wherein it was recorded Ms Crozier was happy to move.

[50] Ms Crozier confirmed in evidence that she had agreed to leave Kenepuru, although she said that the reason for this did not relate to her health. She said the transfer occurred because it was explained that clients who were to be introduced to the Kenepuru environment would be more violent and difficult to deal with than those that had been there previously. She said that she and her colleague assumed they were being transferred because THL did not want to keep "two older women there when they were upgrading the site to very high risk clients". Having regard to the clear references in the contemporaneous correspondence, I doubt the accuracy of Ms Crozier's recollection on this point.

[51] From December 2010 to May 2011, there were a series of further exchanges regarding Ms Crozier's health status. At one stage, her General Practitioner (GP), Dr Lancaster, recommended that she should reduce her hours (15 February 2011)

and that she should not be involved in heavy physical work or lifting (28 February 2011). Ms Crozier's hours were reduced for a short period in part because of Chronic Obstructive Pulmonary Disease (COPD), a long term condition which was affecting Ms Crozier. However, she later resumed full-time work.

[52] In a further report dated 14 June 2011, Dr Lancaster said that Ms Crozier had "clearly documented Moderately Severe COPD". She advised that Ms Crozier could suffer a sudden and severe deterioration, and that should this occur, she would be physically unable to work, "probably for a few days". Given the onset of winter, it would be too difficult to make a predictive judgement as to Ms Crozier's fitness to continue working full-time. But it was also inappropriate to class her as medically unfit, since she had just managed three full-time months without major issue. She suggested there be a further review of Ms Crozier's health status in six to eight weeks' time.

[53] After receiving this report, Ms Ellison-Hack wrote to Ms Crozier, stating that the medical report raised a number of questions with regard to her health and as to ongoing safety in the work environment. She was concerned for Ms Crozier herself but also had concerns as to the potential impact of Ms Crozier's physical impairment on other staff and clients. She proposed that THL arrange for a report from an IHC Occupational Therapist, Dr Hartshorn. She said this would entail Dr Hartshorn reviewing Ms Crozier's medical circumstances in light of her work obligations. However, the parties were not able to reach agreement as to this possibility.

Events of 2012

[54] On 29 August 2012, Mr Moles met with Ms Crozier after she had some time off. The question of her physical ability to work was discussed again. Mr Moles advised Ms Crozier that he would continue to monitor this issue, reviewing it again in two months' time. Ms Crozier was recorded as agreeing that this was a "good interim solution". From the evidence, it appears that whilst this conversation included reference to Ms Crozier's physical health, family issues were also affecting Ms Crozier's ability to undertake her work.

[55] No further formal steps were taken with regard to the health concerns held by THL managers until November 2012. At that time, Mr Moles sought advice from Ms Michelle Atkins-Gilbert, an IHC Human Resources Consultant, as to the appropriate process were he to raise concerns as to Ms Crozier's physical ability to perform CSW duties because of increased health problems. When seeking advice, however, Mr Moles acknowledged that THL did not have hard evidence of occasions when she had not been able to perform the role. Mr Moles explained to the Court that by this he meant that staff had raised issues, but they were not willing to put their concerns in writing. Ms Atkins-Gilbert advised Mr Moles that the employee should be invited to discuss the concerns at an informal meeting.

[56] Mr Moles said that he continued to raise his concerns with Ms Crozier at about this time, although he did not document their conversations. He was concerned about Ms Crozier's apparent inability to be able to undertake the minimum requirements of her role. He also held weekly meetings with Ms Crozier at which he often discussed her health issues. Ms Crozier said in evidence that she did not recall such discussions, and that the assertion that they occurred was simply not true and inconsistent with contemporaneous correspondence. However, the letter she relied on to support this statement was one sent to her in mid 2014, not in the period under review. I find that it is more likely than not, having regard to the events which both preceded and followed this period, that such concerns were raised with her from time to time, but no formal steps were taken.

[57] Through this period, Ms Crozier continued to be rostered in various residential facilities. She commenced working in a

particular facility at Grays Road, Plimmerton, from April 2012; she worked there, in the main, until August 2014.

Events of 2014

[58] In early 2014, Mr Moles prepared a letter to Dr Lancaster. As I shall shortly discuss, there is a debate as to what happened to the letter, but it serves at least as an indication of the circumstances at the time. Mr Moles recorded that he had recently met with Ms Crozier due to some concerns raised from other staff with regard to her ability to complete some of the physical aspects of her job. He said she was reported

to have shortness of breath, not being able to keep up with clients when walking, and concerns on how Ms Crozier might manage in a crisis situation.

[59] The letter went on to state that Ms Crozier was employed to support people with intellectual disabilities with challenging behaviour, and that some of her duties were:

• Walking with clients to/from activities, i.e. to complete walks (up to

5 kms)

• Catching public transport

- Following/supporting clients (who are required to remain in our service) at a steady pace

• Working on her feet for long periods of time (i.e. 2 - 4 hours)

• Using physical restraining with clients

[60] Mr Moles said that he was extremely concerned that Ms Crozier might not have the capacity to meet these criteria. He asked for a written response to these concerns after Dr Lancaster had discussed them with Ms Crozier.

[61] Mr Moles believed he sent the letter; Dr Lancaster said that she did not receive it. She said she maintained appropriate records of her various consultations with Ms Crozier who consulted with her from time to time, and there was no relevant reference to the letter, nor was a response given. Furthermore, subsequent communications from Dr Lancaster did not refer to any of the factors mentioned in Mr Moles' letter, which also suggests she did not see it. In addition, she informed the Court that she was unaware of the fact that Ms Crozier might have to restrain patients, which is again consistent with her not having seen the letter. Accordingly, I accept her evidence that she did not see this correspondence.

[62] On 26 March 2014, Mr Moles met with Ms Crozier at the Grays Road facility. He then made a file note in which he recorded the concerns he had as to her sick leave balance and as to her health in general. He said that he advised Ms Crozier that her sick leave had been fully utilised, that he had concerns about her health since winter was approaching, and he was also concerned as to her ability to perform her role given feedback he had been receiving from her colleagues. He told Ms Crozier that he would need to set up a meeting with her, and he advised her to bring a support person if she wished to. He recorded that Ms Crozier stated she

would bring a support person, and the two agreed to be in touch to arrange a suitable time.

[63] Ms Crozier said that in this conversation, the possibility of her having to cease her CSW role was raised because of her breathing issues. As a result she consulted her GP.

[64] On 31 March 2014, Dr Lancaster certified that she had seen and examined Ms Crozier that day. She recorded that Ms Crozier's COPD remained stable, and had been under reasonably good control over the previous six to 12 months. There was a well-established action plan which would operate if she felt herself becoming unwell, which would enable her to recover quickly. She said that over the past year, she had only required a maximum of three to four days sick leave for each acute episode. Accordingly, she was physically able to continue in her role as a support worker for "IHC" at 40 hours per week.

[65] In late April 2014, Mr Moles resigned, and Ms Ison was seconded to his role of Residential Service Manager from then until August 2014. That meant that she became Ms Crozier's direct Manager in respect of the Grays Road facility.

[66] Ms Ison had previously been the On-call Support Manager, and in that role had seen Ms Crozier on a weekly basis so that she was familiar with the circumstances. She already had a number of concerns, which she had raised with Mr Moles in the past about Ms Crozier's ability to undertake her work. She gave examples of her own observations, which involved breathlessness when Ms Crozier walked a relatively short distance, the fact that she was often seated at the Grays Road facility when she should have been undertaking tasks which would have required her to stand, and that staff had complained to her in various respects raising questions as to shortness of breath.

[67] When Ms Ison took over direct management of Ms Crozier, she also reviewed client progress notes from January 2014, which indicated Ms Crozier was undertaking little activity to support clients, such as playing cards, going for walks, taking them swimming or helping them to prepare dinner.

[68] Accordingly, in early May 2014, Ms Ison wrote to Ms Crozier to continue the discussion which Mr Moles commenced.

[69] On 21 May 2014, Ms Crozier, and her advocate, Ms Fiona Kale, met with Ms Ison and a Senior Manager from Idea Services, Mr Marc Tonkin, to whom Ms Ison reported. At the meeting, Dr Lancaster's comparatively recent report was discussed.

[70] According to a letter which Ms Ison wrote soon after, on 2 June 2014, there was a discussion as to certain allergy issues which Ms Crozier said were affecting her sinuses. It was also recorded that if she became unwell her GP had recommended she have three to four days leave to recover completely.

[71] Ms Ison said in the letter that THL would continue to monitor and work with Ms Crozier to ensure that such episodes would not impact on her work. It was also recorded that Ms Crozier had agreed to communicate with managers if there was any change in her ability to perform the expected tasks of her role.

[72] The letter did not refer to the five bullet points mentioned earlier. However, three weeks later, a further letter was written, in circumstances I shall describe shortly, which referred again to the meeting of 21 May 2014. The second letter was written on 24 June 2014. In that letter, Ms Ison referred to the fact that at the meeting of 21 May 2014, Ms Crozier had confirmed that she was capable of performing the tasks described in the five bullet points which had originally been referred to by Mr Moles in his letter to Dr Lancaster.

[73] Soon after, when Ms Ison was visiting the Grays Road facility, she noticed that Ms Crozier's vehicle had a mobility parking permit placed on its dashboard. Ms Ison had worked previously with a client who held such a permit and was familiar with the relevant eligibility criteria. This included such factors as a permit holder being unable to walk thus requiring the use of a wheelchair; the ability to walk distances being severely restricted by a medical condition or disability; or having a medical condition or disability that required the permit-holder to have

physical contact or close supervision to safely get around, and who could not be left unattended.

[74] That Ms Crozier held such a permit immediately concerned Ms Ison because the physical nature of the CSW role could not be undertaken by a person who met the criteria for a mobility parking permit.

[75] She spoke to Ms Crozier, who told her that she had possessed it "for years". Ms Ison did not take the matter further with Ms Crozier then and there, but she spoke to Mr Tonkin about her concerns. Mr Tonkin agreed that this was surprising, and agreed that the holding of a permit was of concern.

[76] Accordingly, Ms Ison wrote again to Ms Crozier on 24 June 2014, referring to the five bullet points as explained earlier. She also referred to the fact that Ms Crozier held a mobility parking permit which, she said, raised concerns as to Ms Crozier's ability to undertake her role as a support worker. It was suggested that an independent assessment be undertaken by Dr Hartshorn. The letter went on to state that based on concerns and information held to that point, there was a possibility of Ms Crozier and clients being placed at risk. THL was therefore reviewing Ms Crozier's employment. Termination of employment was a possibility given the information THL now held. It was also stated that if she was not willing to attend the assessment with Dr Hartshorn, a decision would need to be made as to her continued employment with THL on the basis of the available information.

[77] On 2 July 2014, Ms Crozier agreed to Dr Hartshorn assessing her ability to undertake the full range of duties of CSW by countersigning the letter to her of

24 June 2014. She acknowledged that his report would be provided to THL for the purpose of reviewing her employment, as outlined in that letter.

[78] It was some weeks before Dr Hartshorn's report was available. Ms Crozier was seen by Dr Hartshorn on 19 August 2014, and his report was subsequently written on 21 August 2014.

[79] Before meeting with Dr Hartshorn, Ms Crozier travelled to Australia for a holiday, in the course of which she was hospitalised for an upper respiratory tract viral infection for a period of six days. Ms Crozier said that she was vulnerable to a virus, which affected her and her niece during the course of her visit. However, it appears from Dr Hartshorn's report, which referred to the hospitalisation as a recent event, that Ms Crozier had been particularly vulnerable to the infection and that whilst hospitalised issues as to the medication on which she had been placed previously had required consideration.

[80] After the consultation with Dr Hartshorn, he recorded that he had taken a full medical history and examined Ms Crozier; he also undertook lung function testing.

[81] In his introduction to his report, he stated that Ms Crozier had been observed within the work environment experiencing significant shortness of breath, and that there had been concerns raised with respect to her physical capacity as a result.

[82] He confirmed that Ms Crozier had worked for THL for approximately

23 years on a variable shift roster. He recorded that nightshifts occurred every six to eight weeks and were generally performed five shifts in a row. In such a shift, work activities would be performed “in a solo fashion”. Dayshifts involved three caregivers. Ms Crozier was noted as saying that residents for whom she cared were “generally capable from a physical perspective and largely require supervision”. Dr Hartshorn went on to describe the five bullet points mentioned earlier.

[83] Then he recorded that following the history-taking and clinical examination, it was apparent Ms Crozier had a number of medical issues. The primary issue which impacted on her physical capacity and thus her medical work fitness was that which related to her breathing. Then he referred to the recent events in Australia, which he regarded as being part of “a pattern of significant symptomatic exacerbation during periods of upper respiratory tract viral infection”. He noted that her breathing had been better over recent weeks than it had been for a number of years. However, lung function testing had identified moderately severe impairment that would be consistent with her reported history of shortness of breath upon relatively minor exertion. She said she would be unable to walk five kilometres on

the flat, and this would be consistent with the lung function testing. She was also observed to become significantly more short of breath with relatively undemanding examination procedures. He considered that it was quite possible her current presentation was largely representative of her usual respiratory status.

[84] Then he said:

The history obtained suggests that Ms Crozier does have limitation with respect to her capacity for vigorous or physically demanding activity on the basis of her respiratory disorder. This is consistent with the response to minor exertion during the examination procedure at today’s assessment. This is also consistent with the level of impairment noted upon her lung function testing [performed] at today’s assessment. The level of impairment noted on lung function testing would be generally compatible with work activity, of a sustained nature, within the sedentary to light physical demand range. The level of respiratory impairment would not impact upon Ms Crozier’s capacity to work on her feet for prolonged periods as long as this did not involve sustained periods of walking activity. It would not in itself prevent her from catching public transport. It is however likely to prevent her from being able to follow clients at a steady pace for more than a very short distance. It is likely to impact upon her capacity to manage physical restraint with clients and is highly unlikely to be compatible with a capacity to walk at a steady pace for anything approaching a 5km distance.

[85] He concluded by stating that it was likely Ms Crozier would continue to experience permanent respiratory impairment and permanent functional limitation when considering activities outside of the light to sedentary physical demand range.

[86] In August 2014, the clients at the Grays Road facility were transferred to another facility at Herewini Street in Titahi Bay. At that point, Ms Jo Baker was the relevant Residential Service Manager. It was her responsibility to consider Dr Hartshorn’s report. Having done so, Ms Baker wrote to Ms Crozier on

3 September 2014, traversing the history of issues which had been under review. She went on to say that THL had health and safety obligations to ensure Ms Crozier’s safety and the safety of others whilst she was working. She said that based on the medical information, the tentative view had been formed that Ms Crozier was not able to safely perform the CSW role either then or in the immediate future. That left the organisation to consider whether there were any other roles that she could safely undertake or whether termination of employment for medical reasons was the only available option. At that time, it did not appear that there were any alternative employment options.

[87] Ms Crozier’s input, preferably in writing, was invited. She said this would be considered prior to a final decision being made. Ms Baker also said that if Ms Crozier wished to meet with her, a meeting could be arranged.

[88] Finally, Ms Baker said that THL did not consider that it was safe for Ms Crozier to continue to work, so she was to be placed on paid special leave immediately.

[89] On 8 September 2014, Ms Crozier responded. After referring to

Dr Hartshorn’s report, she made reference to Dr Lancaster’s medical certificate of

28 February 2011 which confirmed that due to her COPD, she was fit to continue to work, provided she was not involved in heavy physical work/lifting. She said that she had carried out her duties without incident, and without “the implementation of any well being support plans by you as a good employer”; instead, the employer had focused on making her employment “difficult and stressful”. There had been a focus on finding ways to end her employment rather than on work strategies to enable her to perform well despite the medical limitations.

[90] Then Ms Crozier said that she had discussed Dr Hartshorn’s assessment with her GP who continued to hold the view that she was fit to work provided she was not involved in heavy physical lifting. She said that as the physical demands on her for

95 per cent of each shift were light to medium, there were no grounds for ending her employment due to her medical condition.

[91] She went on to say that THL had been aware of health and safety issues since

2011. That those concerns were being raised again some three years after they were first raised indicated that the focus was being placed on health and safety issues only because earlier attempts to end her employment for other reasons had not been successful.

[92] She suggested that the manner in which her employment arrangements were being dealt with suggested the case was one of constructive dismissal. She ended her letter by stating that if THL wished to pursue options to end her employment, it

should provide a proposal which she could consider. She said that she expected to return to rostered duties on 18 September 2014.

[93] Ms Baker responded to Ms Crozier on 12 September 2014. She reiterated that THL had health and safety obligations to ensure her safety as well as the safety of others while she was working. Accordingly, any return to work could not be considered until the parties had met. A meeting was proposed at which, Ms Baker said, she would be accompanied by Ms Michelle Atkins-Gilbert from HR. Ms Crozier would have the right to bring a support person with her to the meeting.

[94] A two-hour meeting duly took place on 24 September 2014. It was attended by Ms Baker and Ms Atkins-Gilbert for THL on the one hand, and Ms Crozier and her support person, Ms Kale, on the other.

[95] Ms Baker outlined the background circumstances. She referred to the fact that staff had complained about Ms Crozier's health. Ms Crozier said she knew who had complained, but Ms Baker clarified that a number of people had raised concerns. Ms Baker told the Court that she said that she did not provide details except to explain to Ms Crozier that people felt unsupported because of her health limitations.

[96] Ms Baker then referred to Ms Crozier's mobility parking permit, which Ms Crozier confirmed she had held for 15 years. She said that there needed to be a discussion of the correspondence which had passed between them. Ms Kale said that Ms Crozier had performed 95 per cent of the job for the last three and a half years, and had thereby completed her role as expected.

[97] With reference to the first of the five bullet points, which referred to walking up to five kilometres, Ms Kale said that THL was, in effect, disestablishing her role. New criteria had been introduced which could not be met by Ms Crozier having regard to her "medical limitations". Ms Kale said that Ms Crozier had been unaware of these requirements, although she confirmed that Ms Crozier was aware that walking with clients was part of her job.

[98] Ms Kale then said that there were concerns as to the way a voluntary redundancy offer had been dealt with, in 2013. It was implied that THL had been unfair to Ms Crozier who had wished to take up this option; but it had been declined due to her long service and the likely cost to THL.

[99] Then Ms Crozier said that she did not want to consider another job with THL and did not now want to work for the organisation. Ms Kale said that a payment should be made to Ms Crozier in the circumstances.

[100] Ms Kale then stated that there were two options; this was taken to mean that it was being asserted she was entitled to redundancy compensation since her job was being disestablished; or, there should be a negotiation as to compensation since she was being required to leave. With regard to these options, Ms Kale said there were six areas which needed further investigation.

[101] At this point, there was a break of approximately an hour. Ms Baker discussed the circumstances not only with Ms Atkins-Gilbert, but also Mr Tonkin; at one stage, an HR practitioner was telephoned. Ms Baker said that matters that were considered during the break included Ms Crozier's service of some 23.5 years; THL's health concerns, including Ms Crozier's ability to undertake the CSW role; and whether there were other roles to which she could be redeployed. It was concluded that there were no sedentary to light physical demanding roles which could be considered for redeployment. Support worker opportunities which existed elsewhere within the organisation would not be appropriate given Ms Crozier's health issues.

[102] When the meeting resumed, Ms Baker clarified what had happened in the previous year when voluntary redundancies had been offered. She said that, in fact, no voluntary redundancies were given to any staff as this was beyond the terms of the CEA, a matter which had been discussed with the Union at the time and communicated to all staff.

[103] Then, Ms Baker referred to the fact that in January 2014, staff had raised concerns as to Ms Crozier's breathlessness which impacted on her support of clients

and that others had to support her and her clients. She said that not being able to keep up with clients was an issue. She also said that other staff had to undertake longer walks with clients, and that they were no longer willing to do so. She stated that there were no available roles with light or sedentary work.

[104] Then, she stated that it was believed Ms Crozier did not have the capability to complete the requirements, duties and

tasks required of a support worker at THL. However, before making a final decision, she asked whether Ms Crozier wished to take a further break before responding further.

[105] Such a break was taken. Upon resumption Ms Kale stated that she and Ms Crozier had nothing further to add; that legal advice would be sought on six matters, namely key changes to Ms Crozier's job description; and that it was believed Ms Crozier was being made redundant. Ms Baker confirmed that THL's final decision was to terminate Ms Crozier's employment with a payment of two weeks' wages in lieu of notice.

[106] The next day, Mr Ogilvie, Ms Crozier's advocate, wrote to THL raising personal grievance claims on the grounds of unjustified action and unlawful discrimination. For her part, Ms Baker wrote to Ms Crozier on 29 September 2014, summarising the sequence of events that had occurred since May 2014 which resulted in the decision to terminate her employment due to medical incapacity. Her last day of service was recorded as being 8 October 2014. The letter referred to the fact that concerns had been raised by staff. It was recorded that an independent medical assessment had been obtained from Dr Hartshorn. This assessment had been provided to Ms Crozier. Dr Hartshorn stated that Ms Crozier could continue to work as a support worker with light to sedentary duties. There were no permanent roles elsewhere within THL which would fit such a description. Ms Crozier had stated she did not want to return to work at THL in any event. Ms Baker said that in making the decision to terminate, she had taken into consideration information provided from staff, Ms Crozier's and Ms Kale's responses, medical reports from her GP, Dr Hartshorn's report as well as the role and responsibilities of a CSW.

Unjustified dismissal grievance?

Submissions

[107] A summary of the assertion that the Court should uphold Ms Crozier's

dismissal grievance is as follows:

a) The evidence did not establish that Ms Crozier had at any time not undertaken her work in accordance with her employment agreement or as required under any relevant client plan.

b) Issues of non-performance were never raised with her at any relevant time.

c) Whilst THL witnesses claimed that other staff were complaining about

Ms Crozier's performance, those concerns were never raised with her.

d) The five bullet points, as considered by Dr Hartshorn, did not fairly or accurately describe Ms Crozier's role as a CSW, nor could these factors be described as minimum job requirements. In any event, Dr Hartshorn's assessment was brief and cursory.

e) There was no evidence that Ms Crozier was unable to fulfil any duty which related to health and safety requirements. In particular she could and did track clients by vehicle; and she was current with regard to her restraint training. There was no evidence that her health had prevented her from fulfilling these or related obligations.

f) Her health did not prevent her from carrying out her full-time duties.

If, at the time dismissal was being considered, there had been a health issue which had implications for the continuation of Ms Crozier's employment, THL would have been required to follow the normal requirements. This would have required it to hold her position open for a reasonable time and then investigate whether she could have returned to work in sufficient health to perform her duties. She had not taken sick leave beyond her entitlement to do so, yet she was treated less

favourably than an employee who had been absent from work in excess of their sick leave entitlements.

g) There was accordingly no substantive justification for Ms Crozier's

dismissal on the grounds of medical incapacity.

h) Nor was the process leading to her dismissal undertaken in a procedurally fair way. In particular, inadequate notice of a possible dismissal was given. There was no discussion as to Dr Hartshorn's conclusions, prior to THL reaching a preliminary decision to dismiss so there was predetermination. Details of staff concerns were never given or raised adequately or at all. Finally, a proper opportunity to take legal advice was not given.

[108] The key elements of the case for Idea Services on the alleged unjustified dismissal was as follows:

a) The CSW role required physical activity, actively supporting and participating in physical exercise, outings, work experience, shopping and cooking.

b) Risks inherent in the nature of the job and workplace required that CSWs would be ready and capable at any given

moment to track an absconding client, including on foot, and to undertake restraint if required. Such a need could arise at random but it was fundamental to the role.

c) Serious concerns arose about Ms Crozier's ability to undertake such essential requirements. The issue was not about Ms Crozier's absences from work on sick leave but rather her ability to physically perform the role when she was attending the workplace.

d) THL investigated the circumstances properly. Based on information from Ms Crozier including medical reports from her GP as well as a report from an independent specialist, it concluded she was unable to

perform essential requirements of the role. Ms Crozier and her advocate were properly consulted throughout the investigation.

e) There were substantial safety and security issues for Ms Crozier, clients, and the public, arising from the inquiries that were made.

f) There were no other realistic alternatives for work within THL.

g) After a protracted process in which Ms Crozier was paid, and after considering relevant information and alternatives, Ms Crozier's employment was ended after appropriate notice.

h) A decision to terminate was accordingly justifiable in terms of s 103A

of the Act.

Legal principles

[109] Section 103A of the Employment Relations Act 2000 (the Act) provides that the question of whether a dismissal or an action was justified must be determined on an objective basis by applying the test in subs 2, which provides:

103A Test of justification

...

(2) 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 dismissal or action occurred.

...

[110] The section goes on to stipulate four factors which the Authority or Court must consider namely:15

...

(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

15 Employment Relations Act 2000, s 103A(3).

(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.

[111] The Court may consider any other factors it thinks relevant.16 It cannot determine that a dismissal or an action is unjustifiable solely because of defects in the process followed by the employer if the defects were minor, and did not result in the employee being treated unfairly.17

[112] It is not for the Court to substitute its decision for what a fair and reasonable employer could have done in the circumstances and how such an employer could have done it. In *Angus v Ports of Auckland Ltd,* it was emphasised there may be a range of responses open to a fair and reasonable employer, and that the Court's task is to examine objectively the employer's decision-making process and determine whether what the employer did, and how it was done, were what a fair and

reasonable employer could have done.18 Recently, the Court of Appeal discussed

s 103A, observing:19

[46] It is apparent that the effect of the statute is that there may be a variety of ways of achieving a fair and reasonable result in a particular case. As the Court in *Angus* observed, the requirement is for an assessment of substantive fairness and reasonableness rather than "minute and pedantic scrutiny" to identify any failings.

[113] Turning to cases where dismissal for incapacity has occurred, again the applicable principles are well established.

[114] Dismissal for illness or other incapacity must be justified both substantially and procedurally. So in *Barnett v Northern Regional Trust Board of the Order of St John,* Judge Colgan, as he then was, summarised the principles in this way:20

[35] It is always unfortunate when prolonged and debilitating illness precludes an employee from returning to work or even from being able to

16 Section 103A(4).

17 Section 103A(5).

18 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466 at [36] – [44].

19 *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295.

20 *Barnett v Northern Regional Trust Board of the Order of St John* [2003] NZEmpC 136; [2003] 2 ERNZ 730 (EmpC).

provide an estimate when that can take place. The interests of both parties, employer and employee, must be balanced in these circumstances. The law is that after a fair investigation, an employer may dismiss an employee justifiably where its reasonable needs cannot be met by an employee who is not fit and able to perform the work required and is not in a position to be able to do so within a reasonable time in all the circumstances. That test is encapsulated in the typical and admirable style of the former Chief Judge of the Arbitration Court in *Hoskin v Coastal Fish Supplies Limited* ... when he wrote: "There can come a point at which an employer ... can fairly cry halt."21

[115] *Hoskin v Coastal Fish Supplies Ltd*, to which reference was made in the extract just cited, is of some relevance in the present context, since it also raised safety issues.22 Mr Hoskin was employed as a shop manager in a fish shop. He became ill and was admitted to hospital. His illness was diagnosed as campylobacter, a notifiable disease. The Department of Health advised that the employee had to be regarded as a hazard to public health given the food situation in

which he worked. The Arbitration Court held that dismissal was justifiable, as even although the illness was contracted at work, the worker could not work safely, or legally, because of the notifiable disease.

[116] In this case, discrimination on the grounds of disability is alleged. Mr McBride, counsel for Idea Services, submitted that cases of this class also emphasise that the ability to carry out a job safely may well be a primary issue. He referred, for example, to *X v The Commonwealth of Australia,* where the High Court

of Australia considered discrimination in the context of employment.23 There, the

plaintiff applied for enlistment with the Australian Regular Army. He was told he would be tested for HIV after his training commenced; a blood test was taken, the results of which showed he was HIV positive. He was accordingly discharged. When considering a claim of discrimination on the grounds of disability under the Disability Discrimination Act 1992 (Cth), Gummow and Hayne JJ emphasised that it would be necessary to assess the circumstances in which the particular employment

would be carried on. They said:24

21 See also *Barry v Wilson Parking New Zealand (1992) Ltd* [1997] NZEmpC 311; [1998] 1 ERNZ 545 (EmpC) at 548-549.

22 *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124.

23 *X v The Commonwealth of Australia* [1999] HCA 63, (1999) 200 CLR 177.

24 At 103. Reference was also made to *Archibald v Fife Council* [2004] UKHL 32, [2004] 4 All ER 303.

... It may be necessary to consider whether the employee is to work with others in some particular way. It may also be necessary to consider the dangers to which the employee may be exposed and the dangers to which the employee may expose others.

[117] Counsel also referred to dicta of Kirby P in *Jamal v Secretary, Department of Health,* a discrimination case on the ground of physical impairment under the Anti-Discrimination Act 1977:25

... A person suffering from the physical handicap or impairment of total blindness could not be an airline pilot, at least in the current state of technology. A person who had lost both hands in an industrial accident could not carry out the work of a concert pianist. These are extreme examples ...

[118] Although these statements were made in overseas' judgments which considered statutory provisions which are different from those applying in New Zealand, they nonetheless reflect common sense. They emphasise the need to make the relevant assessments in a practical way. In short, if, for any reason, an employee is not able to safely or fully undertake the requirements of the contracted employment, then it might follow that there is no obligation on the part of the employer to maintain that employment. This is subject to any relevant employment obligations and to the provisions of any applicable legislation. In this case, the question is what a fair and reasonable employer could have done in all the circumstances.

[119] A final legal point which should be mentioned is that the present circumstances differ from many of the well known illness or incapacity cases, because in this instance, Ms Crozier had not been absent for a prolonged period. She was still engaged in employment, albeit she did need to take sick leave from time to time. But the central point is that there was an issue as to whether she was physically able to perform the job, according to the requirements of her employment agreement when considered in the particular context in which that employer operated, and having regard to the safety of herself, fellow employees working

alongside her, and clients.

25 *Jamal v Secretary, Department of Health* (1988) 14 NZWLR 252 at 262.

Substantive justification

Context of Ms Crozier's employment

[120] As already discussed, I am satisfied that CSWs were employed by THL in a workplace where there was a significant risk that clients would unexpectedly demonstrate violent and inappropriate behaviours. There was a significant risk of those persons behaving in a physically aggressive manner, and there was a high risk of absconding.

[121] It was accordingly necessary to regulate the environment in which such clients were cared for; that was achieved through the detailed provisions of the IDCC&R Act, which I outlined earlier in detail. The nature of the industry required both restraint and tracking, and the IDCC&R Act provided a statutory basis for both.26 Equally important were the more general provisions of the HSE Act, as also described earlier. THL was authorised and required to ensure that all clients, staff and members of the public who may come in contact with clients would be safe.

[122] In addition, THL was contractually obliged to meet these objectives under the Service Objectives contained in its funding contract with the Ministry of Health. It also subscribed to appropriate best practice guidelines so as to manage the risks of workplace violence.

[123] This was the context in which CSWs were required to work, and in which their job requirements had to be assessed. The CEA contained a range of particular terms and conditions that were applicable to those CSWs who were employed by THL. These included enhanced provisions for the commencing requirements, progress of such workers, and enhanced rates of pay. The parties specifically acknowledged health and safety obligations, with specific reference being made to the fact that "... hazards in the workplace may include challenging behaviour of

service users".

26 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 61 in respect of restraint and ss 110 – 111 in respect of returning clients who escape the care of a facility; see paras [11] – [14].

[124] The job description recognised the special role of CSWs employed by THL in provisions which indicated the need to provide support to people with high and complex needs, many of whom would be under court orders. It recorded that given the complexities of such persons, employees would have to be flexible and responsive to changing needs. There would be a need to ensure that activities balanced risk management and rehabilitation opportunities. Also emphasised was the fact that each CSW have a basic level of physical fitness to ensure that the service users' personal care, development and desired lifestyle were not limited by the physical abilities of a CSW; this was said to be an essential requirement.

[125] Not all requirements were expressly mentioned in the job description. For instance, the need to restrain clients or to track them if they absconded was not referred to. However, it is well established that an employee can be required to perform duties as part of their employment agreement even if these are not

specifically spelled out in the job description.27 In this case, the job description

expressly stated that it was a summary of functions only, not an exhaustive list of all responsibilities, tasks and duties. Other tasks may have to be undertaken, as may be reasonably required.

[126] Regular training was also conducted; for present purposes the importance of restraint was emphasised at annual restraint courses, at which CSWs were assessed so as to confirm that they knew the principles for conducting a restraint.

[127] Moreover, each client's service plan included the requirement to track, as well as a reference to the risk level of an individual. The Client Supervision Policy provided that if a client was on constant supervision, staff must be with that client at all times. Ms Ison said that the practical consequence of this was that if a client left a facility, staff would have to track on foot.

[128] Ms Ison also told the Court that data from incident reports filed between

October 2012 and October 2014 for clients which Ms Crozier supported showed a number of breaches of courtyard (that is, escape or absconding attempts) and a large

27 *New Zealand Central Region etc Local Government Officers' Union v Hastings District Council*

[1991] 2 ERNZ 630 (LC) at 643.

number of physical aggression and criminal behaviour incidents, which involved verbal threats to kill/serious harm, inappropriate sexual behaviour, the presence of a weapon, intent to harm, aggression between service users or towards staff, property damage to buildings/chattels, breach of court orders, theft, and public disturbance issues.

[129] The evidence focused particularly on two aspects of a CSW's role: the ability to restrain clients, and the ability to track absconding clients. To a lesser extent, reference was also made to the need to support the physical activities as described in individual service plans. It is necessary to consider each of those responsibilities in more detail.

Restraint

[130] Ms Crozier agreed that a CSW might have to care for a high risk client at a residential facility, just as was the case at the secure facility at Kenepuru. She agreed with the proposition that CSW's cared for high risk clients and very high risk clients; she accepted that clients who are actually low risk would not be supported by THL, but might, for instance, be supported by the allied entity, Idea Services. She also agreed that at any time a client might require physical restraint, and that whether or not a CSW was a key worker for a particular client responsible for administrative issues such as documentation, medical appointments and assistance with bank accounts, all CSWs needed to support all clients. She also accepted that all staff had to be ready, willing and able to conduct a restraint at any time, which she said could be for up to two hours.

[131] There is no doubt that the undertaking of restraints safely was an essential part of a CSW's role, and it can be seen that Ms Crozier readily agreed that this was the case. Her point, however, was that the requirement to do so in a residential facility occurred very infrequently, and there was no evidence to suggest that she had been unable to fulfil this particular requirement.

[132] THL's response to this, however, was that the nature of the clients under care was such that there was an ever present risk of unpredictable behaviour which could give rise to a restraint situation at any time. CSWs must, accordingly, be able to

respond to such a circumstance immediately when and if the need arose. I accept that a fair and reasonable employer in THL's circumstances could reach such a conclusion.

[133] As to whether Ms Crozier could in fact meet such challenges in 2014 is an issue I shall address shortly after considering the evidence as to her health issues.

Tracking

[134] Ms Crozier also accepted that all staff needed to be able to track or follow a client when they absconded or tried to abscond.

[135] Evidence was given as to a number of the clients for whom Ms Crozier had responsibility, with other staff, at the Grays Road facility where she chiefly worked from 2012 to 2014. One of those was described as being under high risk of absconding, with an indication in his service plan that staff must follow him if he left the residential facility. This client was but one example of persons who Ms Crozier needed to be able to follow if they attempted to abscond. Furthermore, the analysis of the incident reports undertaken by Ms Ison confirmed that such behaviours did occur from time to time.

[136] Ms Crozier said that when working at Kenepuru, she had been instructed in the pursuit process which was to follow or search for a person in a vehicle. Ms Ellison-Hack, Mr Tonkin, Mr Moles and Ms Ison all disputed this, stating that there are a number of reasons as to why the use of a vehicle in such a circumstance may not be appropriate. It could be the case that a vehicle was not available. Furthermore, absconding clients would not necessarily stick to a roadway. Such persons would

inevitably be escaping on foot. An absconding client may choose to move to areas not accessible by road, such as a park or farmland. An example was given in respect of a client leaving the Grays Road facility to go to a nearby railway station, where foot access would be different to road access. A person moving on foot in this example would not necessarily proceed by road but could take a more direct route using a separate walkway. On this point, the balance of the evidence favours the conclusion that a CSW obviously had to be able to follow such a client on foot.

[137] Indeed, in cross-examination, Ms Crozier appeared to accept that there were circumstances where a client would need to be followed on foot, and that this might have to be conducted at a "steady pace".

[138] Then, she said that it had never been a requirement that a CSW would need to follow an absconding client for five kilometres. Whether this was a "new rule", as she described it, is a topic I will discuss below.

[139] To this point, I find that a fair and reasonable employer in THL's circumstances could have concluded that the ability to track an absconding client on foot at a steady pace was an essential requirement of the CSW role.

Physical activities

[140] The third area which potentially involved physical exertion by a CSW related to participation is the physical activities which were part of a client's service plan. Ms Ison said that each client undertook a two-hour "personal outing" each week, as part of their rehabilitation. Examples were given of walking such a client around shops for some time or walking along a beach. Ms Crozier accepted that this was part of her role, although, as will be discussed shortly, she denied that her health precluded her from fulfilling this responsibility. I accept that a fair and reasonable employer could conclude these were essential aspects of the CSW role.

The five bullet point requirements

[141] These apparent requirements became central to THL's assessment of Ms Crozier's fitness for her role. She raised two issues about them. First, she disputed whether they were discussed at the meeting of 21 May 2014; and secondly, she said that they were new requirements, apart from the obligation to participate in restraints.

[142] I have already touched on the issue as to whether those responsibilities were indeed discussed on 21 May 2014. Ultimately, Ms Crozier conceded that she simply could not recall whether that was the case. It is apparent that the issue from her perspective was one of recall, rather than outright denial that examples of the five requirements were in fact discussed.

[143] Given the point that was reached after the meeting of 21 May 2014, it was not considered necessary to refer to the five requirements, but when Ms Ison became more concerned as to Ms Crozier's health, they were. Having regard to all the surrounding circumstances, including the incorporation of these requirements in the letter Mr Moles wrote to Dr Lancaster which would have been available to Ms Ison and Mr Tonkin, it is more probable than not that the issues were indeed discussed on that occasion.

[144] Turning to the related issue as to whether these were new rules, I accept the evidence of the THL witnesses that they were all part of a CSW's responsibilities. They were given as examples, and understandably so given the work environment.

[145] Ms Crozier contended that there had never been a requirement to walk five kilometres with a client. The language that was used, in fact, was that a CSW might have to walk for "up to" five kilometres. It was not suggested that walking such a distance was routine.

[146] Examples were also given where staff had needed to track clients for such distances. Given the nature of the clients and the support responsibilities held by CSWs, such examples could not be regarded as surprising. As already discussed, I also accept the evidence of THL witnesses to the effect that tracking by van was not a normal practice.

[147] As I have already found, Ms Crozier countersigned the letter of 24 June 2014 which contained reference to these requirements. She said that she did not "see" them until the consultation with Dr Hartshorn in early August 2014. I do not accept that evidence, since she countersigned the letter in which they were described. Further, she discussed these matters with Dr Hartshorn without stating to him that they did not apply to her role.

[148] I find that Ms Crozier thereby acknowledged that these factors were relevant when assessing the CSW role. Although she contested the application of these criteria at the meeting of 24 September 2014, I conclude that was perhaps an

understandable reaction to the fact that the termination of her employment was being discussed.

[149] Having regard to the totality of the evidence on this point, I find that a fair and reasonable employer in THL's circumstances could conclude that the stated requirements were examples of essential responsibilities held by a CSW.

Ms Crozier's health

[150] Ms Crozier's health had been a live issue, as far as THL was concerned, since

2010.

[151] Despite the express references in correspondence sent to Ms Crozier with regard to the possibility of her being transferred away from the secure facility at Kenepuru in 2010, Ms Crozier said that her health was not a factor in the transfer. She said that the move away from that facility was because clients would be cared for there who would be "pretty rough and hard clients to work with and it wasn't good for us too because we were older". However, she also said that 2010 was a long time ago, and she did not recall the relevant discussion.

[152] A contemporaneous file note was made by Mr Moles in which Ms Crozier was recorded as saying that she was unhappy that THL had raised the issue of her physical fitness/health as an issue.

[153] I find that Ms Crozier's health was indeed raised and discussed with her in late 2010, and that it was a factor in the transfer from the secure facility at Kenepuru.

[154] In early 2011, as recorded earlier, there were further exchanges regarding Ms Crozier's health. These involved the provision of several medical reports from Dr Lancaster, at a time when she was working part-time, for reasons which included issues arising from her COPD. For this reason, Dr Lancaster recommended a reduction in regular hours. However, THL could not accommodate this. Soon after, Ms Crozier recommenced working full-time.

[155] In the course of these events, Dr Lancaster confirmed that Ms Crozier was not to be involved in heavy physical work/lifting (28 February 2011), and that she had moderately severe COPD, which meant she would be susceptible to sudden and severe deterioration (22 November 2010, 15 February 2011 and 14 June 2011). I recorded earlier that in the last of these reports, Dr Lancaster stated that it was too difficult to make a predictive judgement as to Ms Crozier's fitness to continue working full-time. However, she also said it was inappropriate to class her as medically unfit, since she had just managed three full-time months without any major issue.

[156] Although it was proposed in mid 2011 that Ms Crozier see an occupational specialist, so that issues of safety could be addressed and appropriate decisions made, Ms Crozier declined to do so. She stated that her GP had assured her that all information which had already been provided was appropriate and should meet THL's information needs. THL decided to continue to monitor the situation.

[157] On 29 August 2012, Mr Moles met with Ms Crozier to discuss several issues, including her health status. In a file note he made at the time, he recorded that he would be monitoring her physical capacity to work her full duties as required in her job description, a matter which would be reviewed in two months' time. Ms Crozier was recorded as agreeing that this would be a good interim solution.

[158] Ms Crozier said that she could not recall any discussion in 2012/2013 relating to the undertaking of essential requirements and that it was "simply not true" that this occurred. However, I have no reason to doubt the accuracy of Mr Moles' file note.

[159] Matters lay there until March 2014, when Mr Moles prepared the letter to Dr Lancaster which recorded the five requirements discussed earlier. This was followed up by the brief meeting with Ms Crozier on 26 March 2014 at Grays Road. Ultimately the more formal meeting of 21 May 2014 was held to discuss a brief certificate Ms Crozier had obtained from Dr Lancaster. This stated that on

31 March 2014, Ms Crozier's COPD remained stable and under reasonably good control. She would require only three to four days' sick leave if an acute episode

occurred. It was agreed that THL would continue to monitor Ms Crozier's health

issues.

[160] The discovery of a mobility parking permit in June 2014 led to a decision to investigate Ms Crozier's health issues further, but it is apparent that it was of no greater significance than that. Ms Crozier later explained that the permit had been issued some years previously due to leg and back issues. Dr Lancaster confirmed that this was the original reason for obtaining the permit, but it came up for renewal when Ms Crozier's "chest was particularly bad". This issue, however, can be placed to one side, since THL did not rely on its existence when making the decision to terminate, as is evident from the letter recording its reasons for the dismissal where its discovery was mentioned only as a step in the chain of events.

[161] A health issue which also affected Ms Crozier at this time related to an issue which was not recorded by Dr Lancaster, namely sinus issues which affected Ms Crozier's breathing independently of her COPD. She advised Ms Ison and Mr Tonkin about this at the meeting on 21 May 2014, stating that she was to see a specialist in June.

[162] The next medical assessment of Ms Crozier's condition is found in Dr Hartshorn's report of 21 August 2014. As seen earlier, he described a "fairly long history of respiratory issues" and the identification of "moderately severe impairment" arising from the lung function testing, which he considered were consistent with her reported history of shortness of breath

upon relatively minor exertion. Those results would, he said, be compatible with work activity within "the sedentary to light physical demand range". He also said that she would continue to experience quite significant respiratory impairment.

[163] In a subsequent letter, of 8 September 2014, Ms Crozier focused on the assessment that she could only carry out work within the sedentary to light physical demand range, which she considered was 95 per cent of each shift. She did not make any reference to the sinus issues.

[164] Ms Crozier told the Court that by September 2014, she was enduring "truly severe breathing problems". These related to her nose, although people mistook it for her lungs. She said that surgery was eventually undertaken for this problem "after the summer" of 2015. She said this improved her breathing issues.

[165] Ms Crozier relied heavily on the various statements made by Dr Lancaster over several years. He had said she was fit for her work, in spite of her moderate to severe COPD, providing she did not undertake heavy physical work or lifting. However, those assessments have to be viewed with some caution, since Dr Lancaster told the Court that she was unaware that Ms Crozier was required to be physically able to undertake the restraint of clients. That is not a criticism of Dr Lancaster, but the extent of her knowledge must be considered when assessing the accuracy of her reports over a period of several years.

[166] She went on to say, however, that Ms Crozier had physical strength. However, she could not express an opinion as to whether Ms Crozier could engage and maintain a restraint for any period of time. Dr Lancaster thought that with co-workers, she could be capable of undertaking that function. It is to be noted, however, that Ms Crozier worked night shifts alone.

[167] Dr Lancaster confirmed that in terms of Ms Crozier's ability to walk any distance, she could have walked "hundreds of metres". She could not run such a distance. The pace at which she may be able to move such a distance was not referred to.

[168] It is also to be noted that Dr Lancaster ceased to be Ms Crozier's GP on

1 June 2014. This is relevant because in a subsequent letter (sent by Ms Crozier on

8 September 2014, but unlikely to have been drafted by her), she said that her GP continued to hold the view that she was fit to work provided she was not involved in heavy physical work or lifting. Having regard to Dr Lancaster's evidence that she had long since ceased to be Ms Crozier's GP, I doubt the accuracy of that statement.

[169] Finally, on this consideration of the medical evidence held by THL relating to

Ms Crozier's health, it is necessary to consider the accuracy of Dr Hartshorn's

report, since Ms Crozier raised issues as to the adequacy of the opinions expressed by him.

[170] Whilst it is correct that Dr Hartshorn referred expressly to the five bullet pointed responsibilities, these were assessed in the context of information which Ms Crozier herself had provided, as well as physical observations made by Dr Hartshorn in the course of the consultation. Furthermore, corroborative evidence was provided by lung function testing. Although Dr Lancaster thought that Ms Crozier's breathlessness could be catalysed by anxiety, she agreed that the lung function test undertaken by Dr Hartshorn and his acknowledgment of her moderately severe COPD were significant findings that had to be acknowledged.

[171] Dr Lancaster agreed that Ms Crozier was capable of light duties, as assessed by Dr Hartshorn. She also agreed with his opinion that Ms Crozier was "highly unlikely" to be able to walk at a steady pace for any distance approaching five kilometres and that her condition was likely to impact on her capacity to manage a formal physical restraint. She could, however, follow a client at a steady pace for a "short distance".

[172] Dr Lancaster also acknowledged that as an occupational health specialist, Dr Hartshorn was particularly well placed to assess an employee's fitness to work. As she said, such a practitioner would often receive a lot more information about the complexity of the work, although there might be a disadvantage in not having had extended contact with the particular employee on any previous occasion.

[173] An issue which Ms Crozier raised as to the accuracy of Dr Hartshorn's report related to her capacity to walk any distance. Ms Crozier said that in the listed five criteria, the reference to being able to maintain "a steady pace" referred to following absconding clients, and not to walking activities with clients, where THL had said it was necessary to be able to complete walks of up to five kilometres.

[174] Dr Hartshorn said Ms Crozier could not undertake "sustained periods of walking activity", "follow clients at a steady pace for more than a very short distance" or "walk at a steady pace for anything approaching a 5 km distance". I

infer that what he meant was whether a CSW was walking with a client, or following an absconding client, Ms Crozier could not maintain a steady pace of more than a short distance.

[175] I am satisfied that in considering Dr Hartshorn's findings against the background circumstances as fully described in evidence, including Dr Lancaster's reports, a fair and reasonable employer could have concluded that it was entirely appropriate to accept the accuracy of his findings when considering ongoing health issues.

THL's conclusions as to medical incapacity

[176] At the point of decision in September 2014, THL assessed what it knew of

Ms Crozier's health circumstances in light of her responsibilities.

[177] THL had been concerned about those issues for some years and had raised these concerns with her from time to time.

[178] There is no doubt, on Ms Crozier's own evidence, that by September 2014, she was significantly affected by breathing issues.

[179] Dr Hartshorn had concluded that Ms Crozier's health issues would likely impact on her capacity to manage physical restraint. Ms Crozier responded to this by saying that restraint problems had not been an impediment for her whilst working at THL's residential facilities, and that there had since 2010 been very few, if any, occasions where she needed to restrain a client.

[180] THL, however, considered that the issue was not whether she had proved wanting in this regard, but whether there was a risk of her having to restrain a violent person.

[181] As discussed earlier, the risk of a situation requiring a CSW to restrain a struggling and possibly violent client could never be ruled out. That Ms Crozier was familiar with the correct holds and calming techniques was not considered to be an adequate response, because training did not involve the application of the

appropriate techniques to an active or violent person, as would be the case if the risk eventuated.

[182] In my view, a fair and reasonable employer could have concluded that this factor alone was sufficient to justify termination on medical incapacity grounds.

[183] Turning to tracking, Dr Hartshorn's views were necessarily of a general nature. I find they were not inaccurate. I also find that a fair and reasonable employer could have considered such findings to be relevant to the possibility that Ms Crozier as a CSW may need to walk when following a person who was intent on escape.

[184] This finding is also relevant to THL's concern as to Ms Crozier's ability to

participate in physical activities which were described in the service user plans.

[185] I find that a fair and reasonable employer in THL's circumstances could have relied on these conclusions to determine that Ms Crozier was medically incapacitated.

[186] I accordingly conclude that there was substantive justification for terminating

Ms Crozier's employment due to medical incapacity.

Procedural justification

Complaints by other staff

[187] An alleged procedural defect on which Mr Ogilvie placed considerable weight related to the submission that although THL had received complaints as to Ms Crozier's physical ability to carry out her responsibilities, she was not at any time advised as to the identity of those who had complained or as to the particular circumstances which gave rise to those complaints.

[188] First, it is necessary to trace the development of this issue. In his letter to Dr Lancaster of 17 March 2014, Mr Moles referred to the concerns which had been raised by staff. As already discussed, the letter was not received by Dr Lancaster, but it does serve as a description of his views when he said:

Recently we met with Lyn Crozier due to come concerns raised from other staff in regard to [her] ability to complete some of the physical aspects of her job. She was reported to have shortness of breath, not being able to keep up with clients when walking, and concerns on how [Ms Crozier] might manage in a crisis situation.

[189] The matter of staff concerns was also referred to at the final meeting of

24 September 2014; Ms Baker touched on this topic in her opening statement. The language which recorded her reference to this aspect of the background was almost identical to that of the letter which had previously been sent to Dr Lancaster. It is probable that Ms Baker was referring to the statement recorded in that letter. The core concern related to shortness of

breath, an issue which had been discussed with Ms Crozier over a long period of time.

[190] This issue was then referred to in two letters sent after Ms Crozier's

termination. The first was in the letter which recorded the termination dated

29 September 2014. She said that at the meeting held a few days earlier, the concerns raised by staff, as to the limited support Ms Crozier could provide to clients and staff while on shift, had been discussed.

[191] Then, in response to a letter of 20 October 2014 sent by Ms Crozier's advocate raising a personal grievance, THL referred again to this matter. It was recorded that "in March 2014", concerns had been expressed both as to the impact of Ms Crozier's health on her ability to complete her tasks and the potential risk that thereby could arise.

[192] I find that staff concerns were expressed early in 2014. They acted as a trigger for what then occurred. A meeting was held. In preparation for it, Ms Crozier obtained a medical certificate. Clearly, shortness of breath was again a central issue. After this had been discussed, it was agreed Ms Crozier's condition would be monitored. Soon after, however, the situation was regarded by THL as being such that it was necessary to obtain an independent medical view from an occupational specialist. That coincided with two staff members telling Ms Baker in late August/early September that Ms Crozier was not physically well, a fact which she herself acknowledged. Moreover, she had recently been hospitalised in Australia for some six days, which confirmed her ill health.

[193] Ultimately, it was the advice received from Dr Hartshorn which became the focus of consideration, as Ms Baker confirmed in her evidence. It was the contents of Dr Hartshorn's report which led directly to the possibility of termination being considered.

[194] It is also evident from the evidence that the views of staff were peripheral in their significance. More important, within THL, were the views of managers. They had been concerned for some time, as the history of events from 2010 shows. These concerns had been discussed by those managers with Ms Crozier from time to time.

[195] Best practice might have suggested that the names of the persons who had raised their concerns in March and late August/early September 2014 could have been disclosed, along with details of their observations. However, in the circumstances of this case, a failure to do so could not be regarded as a procedural flaw. But even if one was to conclude there was such a flaw, it would be a situation which would fall within the parameters of s 103A(5) of the Act. That is, THL's dismissal could not be regarded as unjustifiable because the apparent defect in process would have to be regarded as minor. The views of staff were not the focus of THL's decision; the expressed concerns started THL on an independent inquiry of its own. What was in issue was not a performance assessment, but a prospective judgement as to the extent of Ms Crozier's medical circumstances, as these impacted on her work responsibilities. Nor did the non disclosure of staff comments about Ms Crozier's health issues result in her being treated unfairly given the discreet reliance by THL on a very detailed medical assessment from an occupational health specialist, about which she was fully consulted.

Pre-determination

[196] The next procedural issue which was raised relates to an assertion of pre-determination. This assertion was advanced by Mr Ogilvie for several reasons.

[197] First, he referred to the fact that Ms Crozier's support person stated on three occasions at the 24 September 2014 meeting that legal advice would be sought; the implication was that THL moved to the point of decision before such advice could be obtained, relying on a view that had already been reached.

[198] The context for that statement needs clearly to be understood. It followed a discussion where Ms Crozier had made it clear that she did not wish to return to work. However, there was still an issue because THL was proposing termination of Ms Crozier's employment on the grounds of medical incapacity, a situation which would not have involved any compensatory payment. Ms Crozier's argument, supported by Ms Kale, was that additional terms of employment were being imposed on her so that her position was, in effect, redundant. Accordingly, it was argued she should receive compensation. It was not contested that her employment would end. Rather, the dispute related to whether she should in those circumstances be paid compensation.

[199] Ms Baker told the Court that she understood this was the position. She went on to say that had she been asked to defer making a decision to dismiss so that legal advice could be obtained, she would have done so. I accept this evidence. It is clear from the notes of the meeting that were taken that there was no such request, and that the only matter in contention related to compensation.

[200] Mr Ogilvie raised a related concern that THL knew Ms Crozier was not represented, and that Ms Kale who attended the meeting was only a "support person". The inference appeared to be that Ms Baker should have provided Ms Crozier an opportunity to take advice in these circumstances, and she did not do so because she was determined to proceed with dismissal. I do not accept this submission. There is no evidence that THL wanted to make a decision so as to preclude Ms

Crozier from taking advice if she wished to. As I have found, the sole issue related to compensation not termination.

[201] Then Mr Ogilvie made a number of submissions derived from the fact that upon receiving Dr Hartshorn's report, THL wrote to Ms Crozier stating that based on the medical information it had received, a tentative view had been formed that she could not safely perform her role as a CSW, either then or in the immediate future. The letter went on to state that there would have to be a consideration of whether she could be offered any other roles, although at that stage, no alternative options were available. He also submitted that immediately on receiving Dr Hartshorn's report, THL moved suddenly to the possibility of termination of employment. He said this

was procedurally unfair, especially given Ms Crozier's very long and satisfactory service.

[202] I do not accept this submission. It is clear that THL had been concerned about Ms Crozier's health issues for some years and that it continued to have those concerns. It referred to the possibility of termination well before Dr Hartshorn's report was obtained. The employer was transparent in indicating the options which arose when it received Dr Hartshorn's report.

[203] Moreover, THL had concluded that it was not safe for Ms Crozier to continue to work so that she needed to be placed on special leave immediately. It was appropriate for THL to consider this possibility given the opinions received from Dr Hartshorn. THL was entitled to reach the view that the situation was serious enough as to require not only this step but also that termination of employment had to be considered. It was appropriate to advise Ms Crozier as to its tentative views about the consequences of Dr Hartshorn's opinions. The disclosure of these views was a step which a fair and reasonable employer could have taken in the circumstances.

[204] THL acknowledged that redeployment would, in those circumstances, have to be considered. Again, the employer was entitled to raise the possibility and to indicate the extent to which there were suitable alternative options. This was a topic which was later discussed at the final meeting. In the course of that process, Ms Baker and Ms Atkins-Gilbert met with other colleagues for about an hour to discuss not only the possibility of termination, but the possibility of redeployment. They reported their conclusions in that regard to Ms Crozier and Ms Kale when the meeting resumed. In particular, it was stated that there were no CSW roles where light or sedentary work could be undertaken. There is no evidence to suggest this was not in fact the case.

[205] In summary, I find that the process which was undertaken was genuine and conscientious. THL accurately described the options it was considering; it asked for and received a response to its tentative views in a letter sent by Ms Crozier of

8 September 2014, to which it replied in its letter of 12 September 2014. That

process was followed by the final meeting, which included, as I have just mentioned, a deliberative process by which all relevant information was considered before deciding to terminate Ms Crozier's employment.

[206] I do not consider that it can be concluded that its ultimate decision was pre-determined.

Compliance with Medical Incapacity Quick Guide?

[207] The final procedural issue which Mr Ogilvie raised related to whether THL complied with its Medical Incapacity Quick Guide. Step 1 of that guide required an assessment of the situation, but it noted that each case was unique. It then relevantly

stated:

• How long has the employee been off work? *Generally any employee off work for medical reasons for more than 6 weeks should be considered.*

...

• What is the current medical situation? *Is there any indication that the employee will likely be able to resume normal duties in the immediate future*

...

[208] Ms Crozier's circumstances did not fit neatly with the questions contained in the Medical Incapacity Quick Guide. It was not a situation where Ms Crozier had taken time off well in excess of her sick leave entitlements.

[209] Reference had been made to her ability to actually perform work when attending. In that regard, at the final meeting, she said she was able to perform

95 per cent of her job, which could be construed as an acknowledgment that she was unable to completely fulfil her responsibilities. Indeed, when giving evidence, Ms Crozier said that by September 2014, she had "truly severe breathing problems".

[210] It is evident that the key issue related to whether she could fulfil her responsibilities safely, rather than whether she

had taken too much time off.

[211] Then, an issue was raised as to whether her medical condition was likely to improve. At the hearing, reliance was placed on the fact that she was particularly

troubled by a sinus issue, which was in fact able to be addressed in the course of

2015, when a procedure was undertaken by an ear, nose and throat specialist.

[212] The prospect of that particular issue being addressed, however, could not have meant that the employer should have waited for this to occur. THL had medical evidence it was entitled to rely on from Dr Hartshorn; significantly, that included reference to a lung function test, to which I have referred earlier. The reality was that Ms Crozier's COPD condition was not capable of being addressed to the point where her ability to be physically active and where she could undertake restraint and tracking requirements could be restored. The possibility of improvement by nasal surgery was not raised with Dr Hartshorn. Nor did Ms Crozier suggest when meeting with representatives of THL that such an improvement could or would occur once a medical procedure was undertaken, and/or that this could mitigate the effects of her COPD condition.

[213] In short, I find that the fact that THL did not rely on the Medical Incapacity Quick Guide was not a procedural flaw; even if one was to conclude that such a flaw occurred, it could not be regarded as one which rendered the decision to terminate as being unjustified.

[214] For completeness, I refer to the assertions made by Ms Crozier in her letter of

8 September 2014 when she suggested she was being a constructively dismissed.28

That assertion was not pursued and was in effect waived. In any event, I do not consider that the circumstances could have justified such a conclusion.

Conclusion as to dismissal grievance

[215] For the foregoing reasons, I am not satisfied that Ms Crozier's dismissal

grievance is established, on either substantive or procedural grounds.

28 Described at paras [89] to [92] above.

Discrimination grievance

Submissions

[216] Mr Ogilvie clarified that Ms Crozier's discrimination grievance focused on the alleged introduction of the five bullet pointed criteria and the reasons for doing so. The key elements of the claim were, he submitted:

a) The decision to dismiss was discriminatory because Ms Crozier had not utilised excessive sick leave and was actually performing her duties.

b) THL's reliance on the five criteria was introduced solely because of Ms Crozier's medical condition, and the employer's inappropriate reliance on the fact that Ms Crozier held a mobility parking permit.

c) Other staff, with or without medical conditions, were not being required to undergo the same medical assessments, or being tested for their ability to meet the five bullet point criteria.

d) In short, the five criteria were introduced because Ms Crozier had a disability; the duties referred to in the five criteria were not representative of the day to day work of a CSW and were not applied to other employees as they were applied to Ms Crozier.

[217] For Idea Services, it was submitted by Mr McBride:

a) Ms Crozier bore the onus of establishing discrimination.

b) She could not undertake all requirements of the CSW role, particularly where there was a risk of emergency responses having to be undertaken from time to time.

c) Determining whether THL sought to treat Ms Crozier differently from other similarly placed employees by reason of her disability required comparison with other employees who similarly could not undertake the requirements of their employment for reasons other than disability.

d) Ms Crozier had failed to establish that she was treated differently from similarly placed staff, that is, a staff member who is unable to safely undertake the requirements of the role by reason of disability.

e) Accordingly, THL did not discriminate, unlawfully or at all, against

Ms Crozier in her employment on the grounds of disability.

Ninety-day issue

[218] Mr McBride also submitted that there was a potential 90-day issue with regard to the discrimination grievance. He argued that the personal grievance was raised in a letter from Mr Ogilvie to THL of 25 September 2014, with regard to a dismissal which had occurred the previous day. That letter raised a discrimination claim on the basis of the alleged imposition of five new criteria. He argued that the five criteria had been discussed orally with Ms Crozier on 21 May 2014 and were confirmed in writing to her on 24 June 2014. He said that to the extent that the discrimination grievance was brought on a stand-alone basis, it was raised more than

90-days prior to the raising of the personal grievance.

[219] However, Mr Ogilvie confirmed that Ms Crozier's case was put on the basis, in effect, that the discrimination grievance crystallised upon dismissal. There was discrimination because the five criteria had been introduced purely because Ms Crozier suffered a disability, and this alleged discrimination had resulted in her dismissal.

[220] Since the personal grievance was raised the day following the dismissal, it was obviously raised in time, so that there is no issue under s 114 of the Act.

[221] Section 103(1)(c) of the Act provides that a personal grievance may arise where there is a claim that the employee has been discriminated against in the employee's employment.

Relevant statutory provisions

[222] Section 104 describes discrimination for the purposes of such a grievance. It relevantly states:

104 Discrimination

(1) For the purposes of section 103(1)(c), an employee is **discriminated against in that employee's employment** if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section

105, ...

(a) ...

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

...

[223] Section 105 provides that the prohibited grounds of discrimination, as referred to in s 104, are those which are set out in s 21(1) of the Humans Rights Act

1993 (the HR Act), which includes disability.29 The section goes on to state that the

prohibited grounds of discrimination are to be given the meanings ascribed to them by s 21(1) of the HR Act.30 Disability is defined in that sub-section and relevantly includes physical disability or impairment,31 and physical illness.32

[224] Finally, s 106 of the Act provides that various exceptions, as defined in the

HR Act, apply;33 included is s 29 of that Act, which states:

29 Further exceptions in relation to disability

(1) Nothing in section 22 shall prevent different treatment based on disability where—

(a) the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or

(b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

29 Employment Relations Act 2000, s 105(1)(h); Human Rights Act 1993, s 21(1)(h).

30 Section 105(2).

31 Human Rights Act 1993, s 21(1)(h)(i).

32 Section 2(1)(h)(ii).

33 Employment Relations Act 2000, s 106(1).

(2) Nothing in subsection (1)(b) shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

...

Legal principles

[225] I summarise the basic principles which apply to a consideration of a discrimination grievance, which are not in issue in this case:

a) The burden of proving all elements for claim in a discrimination case of this kind lies on the employee: *Post Office Union (Inc) v Telecom (Wellington) Ltd.*34

b) There must be a causative link between the prohibited ground and the treatment complained of. The question raised by the phrase "by reason of" is whether the prohibited ground was a material ingredient in the making of the decision to treat the employee in the way in which he was treated: *Air New Zealand Ltd v McAlister*.35

c) Deciding discrimination cases requires a court to compare the position of the claiming employee with that of other employees who are "employed ... on work of that description".36 As the Supreme Court noted in *McAlister*, "the choice of a comparator is often critical".37

Cases from other jurisdictions may well be of limited assistance. On this point, Elias C J said in *McAlister*:38

The task of a Court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue, taking full account of all facets of the scheme, including particularly any defences made available to the person against whom discrimination is alleged. ...

In the same case, Tipping J said:39

34 *Post Office Union (Inc) v Telecom (Wellington) Ltd* [1989] 3 NZILR 527 (LC).

35 *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [49] per Tipping J.

36 Employment Relations Act 2000, s 104(1)(b).

37 *Air New Zealand Ltd v McAlister*, above n 35, at [34].

38 At [34].

39 At [51].

... In general terms discrimination by reason of a prohibitive ground involves one person being treated differently from someone else in comparable circumstances. The approach of the court to the comparator issue should be guided by the underlying purpose of anti-discrimination laws and the context in which the issue arises. Anti-discrimination laws are designed ... to prohibit employment and other relevant decisions from being influenced by any feature which amounts to a prohibited ground of discrimination. Exceptions allow what would otherwise be a discriminatory feature to be taken into account if there is a good cause for doing so. A comparator is not appropriate if it artificially rules out discrimination at an early stage of the inquiry. By artificiality I mean that the comparator chosen fails to reflect the policy of the legislation, which is to take a purposive and untechnical approach to whether there is what I will call prima facie discrimination, while allowing the alleged discriminator to justify that prima facie discrimination if the case comes within an exception.

d) Section 29 of the HR Act comes into play only if there is in fact

"different treatment based on disability".

Discussion

[226] There is no doubt that Ms Crozier's COPD meets the statutory definition of "disability". She suffered a physical impairment at the time the decision to dismiss was made.

[227] Mr Ogilvie's primary point was that discrimination arose because THL relied on the fact that Ms Crozier held a mobility parking permit and because of the five criteria which were introduced solely because of Ms Crozier's medical condition. I have already concluded that this was not the case. The discovery of the permit was a trigger for the obtaining of an independent medical report; she was not dismissed because she held such a permit. Moreover the five criteria were given as examples of particular requirements of the CSW role on which there needed to be a focus, having regard to the issues of safety which arose from Ms Crozier's health condition.

[228] These conclusions are reinforced when considering the comparator issue: that is, was Ms Crozier treated differently from other THL employees?

[229] I consider that the correct comparator under para (b) of s 104(1) of the Act is other CSWs who were not affected by the disability which affected Ms Crozier.

When undertaking the comparative analysis, the Court is required to consider Ms Crozier's circumstances on the one hand, and any other CSW who differed from her only in respect of her particular health issues.

[230] There is simply no evidence that other CSWs if affected by these issues would have been treated differently. The evidence clearly establishes that it was compulsory for all staff to undertake physical restraint; that they were all expected to track an absconding client, which would involve following such a person at a steady pace; and that all CSWs were expected to actively participate in physical activities or exercise, including walking up to five kilometres.

[231] The job description emphasised that it was essential that all CSWs have a basic level of physical fitness to ensure that the personal care development and lifestyle of service users was not limited by the physical abilities of the CSW. Ms Stewart stated that the five criteria were the "absolute minimum requirements for any CSW to perform his or her job".

[232] Indeed, at the hearing, Ms Crozier agreed that all staff needed to be ready, willing and able to conduct a restraint at any time; that CSWs had to be able to track a client on foot for potentially a number of kilometres at a steady to fast pace; and that all CSWs were required to undertake physical activity, which was critical to managing the behaviour of clients.

[233] Since it is common ground that all CSWs were required to meet these essential requirements, I must conclude that Ms Crozier was treated no differently by being required to meet those requirements. It is not established that she was treated differently or discriminated against on the prohibited ground of disability.

[234] However, even were I to have concluded that there was a qualifying discrimination under s 104(1)(b) of the Act, it would have been necessary then to consider s 29 of the HR Act. I would have considered that this was a situation which fell within the criteria of s 29(1)(b). This allows for different treatment on the basis of disability where the environment or nature of duties means that the person can

only perform their duties with a risk of harm to that person or others and that it is not reasonable to take that risk.

[235] As my earlier findings confirm, the particular environment in which THL operates requires all CSWs to be able to restrain intellectually disabled persons, the predominance of which are fit young males, so as to contain any harm that either they or others may suffer, and to track them if they abscond for the same reason.

[236] I accept Mr McBride's submission that these are potential issues of safety for CSWs and members of the public, given the violent and sexual nature of offending in which some service users have the potential to engage. I am satisfied that the evidence establishes that THL was entitled to conclude that Ms Crozier was unable to undertake those aspects of her role which impacted on safety, particularly with regard to the unplanned emergency response functions of a CSW.

[237] Although not binding on this Court, it is worth mentioning the Authority's determination in *Lealaogata v Timata Hou Ltd.*40 In that case, the Authority was required to consider the dismissal of a CSW who had difficulty standing for long periods or walking any distance due to damaged knees and other health issues. A discrimination grievance was raised. The Authority was satisfied that s 29(1)(b) of the HR Act applied, finding that the employee's inability to undertake the full range

of duties of the CSW position compromised his own safety and that of his co-workers.41 It was not a situation where the employer could, without reasonable disruption, take reasonable measures to reduce the risk to a normal level.

[238] Although the health issues were different in kind in that instance, the case provides an illustration of the application of the sub-section which resonates with the circumstances which this Court has considered.

[239] In short, different treatment based on disability would have been appropriate having regard to the risks inherent in the CSW position. There was a risk of harm to

Ms Crozier and/or to others. This was a risk that it was not reasonable to take.

40 *Lealaogata v Timata Hou Ltd* [2013] NZERA Wellington 1.

41 At [36].

Moreover, there were no reasonable measures which could be expected to reduce the risk to a normal level; the only plausible alternative would have been the employment of additional staff, which I am not satisfied has been proven to be a realistic or reasonable option.

[240] Accordingly, I find that the discrimination grievance has not been established.

Conclusion

[241] Since I am not satisfied that either of the asserted personal grievances are established, the challenge succeeds.

[242] This judgment replaces the determination of the Authority.

[243] A plaintiff is normally entitled to apply for costs where that party brings a successful challenge. However, the Court was advised that Ms Crozier was in receipt of legal aid for the challenge. That said, Mr McBride informed the Court that he may need to consider whether an application should be made under the Legal Services Act 2011. I direct that Idea Services file and serve such an application within 21 days of the date of the judgment; and that any response on behalf of Ms Crozier is to be filed and served 21 days thereafter.

B A Corkill

Judge

Judgment signed on 19 June 2017 at 4.20 pm