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## Morrow v Idea Services Limited (Wellington) [2017] NZERA 2071; [2017] NZERA Wellington 71 (8 August 2017)

Last Updated: 17 August 2017

**ATTENTION IS DRAWN TO THE ORDER AT PARAGRAPH [7] OF THIS DETERMINATION PROHIBITING PUBLICATION OF CERTAIN INFORMATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON**

[2017] NZERA Wellington 71  
5600884

BETWEEN SHANE GREGORY MORROW Applicant

AND IDEA SERVICES LIMITED Respondent

Member of Authority: Michele Ryan

Representatives: Simon Meikle, Counsel for Applicant

Paul McBride and Guido Ballara, Counsel for

Respondent

Investigation Meeting: 1 and 2 November 2016

Submissions Received: On the day of the investigation meeting and;

9 November 2016 from the Respondent

17 November 2016, from Applicant

Determination: 8 August 2017

### DETERMINATION OF

THE EMPLOYMENT RELATIONS AUTHORITY

#### Employment relationship problem

[1] IDEA Services Ltd (ISL) provides community residential housing and support for individuals with intellectual disabilities. People who receive support from ISL are called service users.

[2] The applicant, Mr Shane Morrow, was employed by ISL as a Support Worker for approximately 10 years. He was dismissed for serious misconduct on 18

November 2014 following an investigation by ISL into a complaint made by the

mother of a service user on 9 October 2014. I have referred to the service user as “Ms

N”.

[3] The complaint stated Ms N had said Mr Morrow had “*been in her bed, kissing her and told her not to tell her Mum and Dad*”.

Ms N could not recall when the incident occurred other than it may have been during that, or the previous week. Ms N's mother also reported the matter to Police.

[4] Mr Morrow denied the allegations but at the conclusion of its investigation,

ISL preferred Ms N's account. ISL's decision to dismiss Mr Morrow was based on:

(a) a report drafted by a Clinical Psychologist following an assessment of Ms N which found she was able to relay the incident in a consistent manner to several people, and

(b) statements made by two Support Workers; Ms Cecelia Munn and Ms Darryl Parker, to the effect that Ms N would, if challenged, concede a story was made up if not true.

[5] Mr Morrow says the dismissal was unjustified. He claims ISL's investigation was unfair.<sup>2</sup> He makes a further unrelated claim that ISL failed to provide him with contractually agreed hours of work from 2011 until his dismissal.<sup>3</sup> Mr Morrow seeks remedies corresponding to both matters.

[6] This determination does not decide whether Mr Morrow indecently assaulted Ms N. It decides two issues: whether Mr Morrow was dismissed justifiably according to the relevant legal tests, and whether his employment agreement was breached.

### **Prohibition orders**

[7] Pursuant to Schedule 2, clause 10(1), of the Employment Relations Act, a permanent non-publication order had been made prohibiting publication of the identity of any service users of IDEA Services Ltd who were connected, either directly or indirectly, to the events leading to the applicant's claims before the

Authority.

<sup>1</sup> Written and oral evidence of Ms Helen Nicholson, on behalf of ISL

<sup>2</sup> Statement of Problem, page 4

<sup>3</sup> The amended claim referred to in Mr Morrow's written evidence received 25 August 2016

### **The Authority's investigation**

[8] I have not recorded all the evidence and submissions received but have stated relevant findings of fact and law necessary to dispose of the matter.<sup>4</sup> This determination has been issued outside the statutory period of three months after receiving the final submissions. In accordance with s 174C(4) Employment Relations Act (the Act) the Chief of the Authority decided that exceptional circumstances existed to allow a written determination of findings later than the latest date specified

at s 174C(3).

### **Additional information**

[9] Ms N is a long term service user.

[10] Mr Morrow and Ms Munn worked at the residential home where Ms N and four other service users lived. They were Ms N's key caregivers before Mr Morrow's dismissal. Over the course of a fortnightly roster each undertook separate sole charge shifts, some of which included sleep-overs. Mr Morrow and Ms Munn gave evidence to the Authority.

[11] Ms Parker provided support to Ms N for 16 years until 2011. She also attended the Authority's investigation.

[12] Two other Support Workers covered the remaining shifts between them each fortnight when Ms Munn or Mr Morrow were not rostered. These individuals were not present for the Authority's investigation.

[13] Ms Helen Nicholson, who was at that time employed by ISL as an Area Manager, investigated the complaint and was the decision maker. She provided evidence to the Authority as did Consultant Clinical Psychologist, Ms Annetta Bouius.

### **The Police investigation**

[14] Ms N was interviewed by a Senior Constable on 10 October 2014. Over the ensuing fortnight Police interviewed Ms N's parents, Ms Munn, Ms Parker and Mr

Morrow. On 24 October 2014 the Police advised the parties that charges would not

<sup>4</sup> As permitted by s 174E Employment Relations Act

be laid against Mr Morrow as the threshold for prosecution under the Solicitor

General's guidelines had not been met.

### **ISL's investigation**

[15] Relatively soon after ISL received the complaint Ms Nicholson says she spoke very briefly with Ms N who confirmed the complaint. Mr Morrow was not advised of the discussion.

#### ***The first meeting with Mr Morrow***

[16] I need to record that throughout ISL's investigation aspects of Mr Morrow's response to the complaint were disparaging of Ms N and her conduct. Her behaviour is not relevant to this determination, nor is there evidence before the Authority that affirms Mr Morrow's views regarding Ms N. It has however been necessary to record his statements to provide necessary context to ISL's investigation into the complaint.

[17] Mr Morrow was accompanied by a union representative on 14 October 2014 to provide ISL with his initial comments. He said Ms N "*lies*" and "*tells stories to get what she wants*". He said Ms N had recently threatened to have Ms Munn sacked, and that her parents were unaware of how she behaved at the residence. He asked Ms Nicholson to speak to Ms Munn and Ms Parker on those matters.

[18] Mr Morrow also alleged Ms N has a history of sexual behaviour towards staff.

[19] Counsel for ISL referred the Authority to s 116 of the Act which prohibits taking into account evidence of a complainant's sexual experience or reputation where a personal grievance involves allegations of sexual harassment.<sup>5</sup> In any event no evidence of that nature was placed before the Authority. The link between Mr Morrow's assertion and Ms N's recent complaint was not made clear in the meeting (or subsequently), but Mr Morrow advised of three incidents, including one that involved him, in or about 2011. He said incident reports had been completed in connection with two of the incidents.

[20] Ms Nicholson's testimony was that she was unable to find the incident reports during ISL's investigation. In the lead up to the Authority's investigation the incident reports were discovered in ISL's archives. Whilst I find ISL should have made greater effort to locate the incident reports at the time of its investigation, having

#### **5 Employment Relations Act 2000**

reviewed those documents I am satisfied there is nothing in that material to support Mr Morrow's assertion. Each report describes an occasion where Ms N hugged a staff member which was considered unusual for her. Neither document characterised the behaviour as a sexual advance. Ms Nicholson says she spoke informally with the Service Manager, whom Mr Morrow said was involved in the third instance, who said she did not think the touching was purposeful. This matter is not relevant to this determination.

[21] During the first meeting Ms Nicholson also referred briefly to the possibility of inappropriate conduct occurring in the residence's office. The allegation appears to have arisen from a comment made by Ms N to Police that Mr Morrow "*sometimes he gives me a massage on the back, I have to talk to him in the staff room*". The statement formed an aspect of ISL's investigation, although Mr Morrow was not told of it. The law requires an employer to advise an employee of a concern, (and an

opportunity to respond) before it can take action<sup>6</sup> but I accept Ms Nicholson's

evidence that no conclusions were reached on the matter and it was not a factor on which ISL relied when Mr Morrow was dismissed. I do not need to take the matter further.

#### ***Interviews with Ms Munn and Ms Parker***

[22] Ms Nicholson met with Ms Munn and Ms Parker separately. She recorded their responses on an individual questionnaire sheet, which each contained the questions below.

(i) how had Ms N been during the last three months?

(ii) do the people living at [the residence] come into the office, if so when?

(iii) how does Ms N act if she doesn't like staff?

(iv) how does Ms N act if she does like staff?

(v) how factual is Ms N when she is giving information? (vi) does [Mr Morrow] favour any service users?

[23] In differing ways, both Ms Munn and Ms Parker said Ms N's behaviour could be unpredictable. Each attributed that to her medical condition. Neither had seen Mr Morrow act inappropriately towards Ms N.

6 Ibid at [s 103A\(3\)\(b\)](#)

[24] In answer to the question (v); "how factual is Ms N when giving information" Ms Munn replied "*no[t] sure – haven't heard anything that's not factual*". The notes reflect Ms Parker as saying:

Do need to double check. She will go away, come back, and say that's not the truth. If you ask her she will say that it[s] not truthful.

[25] Ms Munn confirmed Ms N had recently told her that she wanted to get rid of her and Mr Morrow. She regarded this as a "*new comment*" for Ms N.

[26] In contrast, Ms Parker said that Ms N frequently told staff she would get them sacked. She commented that Ms N's allegation was unusual and not like her. Ms Parker volunteered that Ms N can become fixated on male staff which creates difficulties. She reported that in the late 1990's Ms N had told her that another service user visited her bed at night. Before the Authority Ms Parker's evidence stated that when Ms N was later questioned on this matter she agreed her statement was not true. That information was not conveyed during the interview although Ms Nicholson agrees she did not explore the issue further.

[27] ISL accepts Mr Morrow was not provided with copies of the completed questionnaire sheets until after he was dismissed.

### ***The Clinical Psychologist's assessment and report***

[28] Ms Bouius assessed Ms N on 29 October 2014. Her preference was to avoid obtaining too much detail about Ms N before meeting with her and she did not review Ms N's medical file.<sup>7</sup>

[29] The parameters of the assessment were not recorded in writing but were verbally agreed with Ms Nicholson immediately prior to meeting with Ms N. Ms Bouius also interviewed Ms Nicholson, who advised her of Ms Parker's statement that Ms N would concede if she had made a story up. Ms Bouius also contacted, by phone, Ms N's mother and the Police Officer who had interviewed Ms N.

[30] Ms Bouius' report (the report) was finalised on 4 November 2014 and sent to Ms Nicholson. Notes taken during the interviews conducted by Ms Bouius were not furnished to Mr Morrow or Ms Nicholson. Neither were they produced at the Authority's meeting, and ISL have been unable to locate these.

### **7 Ms Bouius' oral evidence**

[31] The report set out two purposes to the assessment. The first was to determine whether Ms N was able to consistently describe the alleged indecent assault. The second purpose was:

To determine if this allegation is consistent with, and therefore an example of, a pattern of behaviour in which she gives inaccurate information.

[32] Amongst other things, the report records that Ms N terminated the assessment before all tools to determine consistency were completed. Mr Morrow claims the report's conclusions are flawed on this basis.<sup>8</sup> Ms Bouius says when Ms N halted the interview it was unlikely any further questioning would have altered the findings. No substantial evidence was produced on Mr Morrow's behalf to challenge Ms Bouius' expert opinion on this matter and I accept her evidence on this point.

[33] Ms Bouius found that Ms N was consistent in the retelling of the alleged event to her mother, the Senior Constable, and to herself. She found:

Given that abstract concepts such as time is complex for Ms N it is highly likely that the abstract thinking required to maintain an inaccurate story that is not based on actual experience, would also be complex for her.<sup>9</sup>

[34] Ms Bouius referred to Ms Nicholson's statement that a staff member had advised "*Ms N would sometimes make inaccurate statements but would come back within a short time and state what she said is not correct.*"<sup>10</sup> Ms Bouius noted that it was not entirely clear what these statements consist of and if they are misunderstandings or deliberate misrepresentations.<sup>11</sup>

[35] The report concluded:

There does not appear to be good evidence that [Ms N] has a pattern of maliciously telling untruths, nor is there good evidence that Ms “lies” for specific purposes.

It would seem on the balance of evidence that [Ms N’s] description of events were accurate as they were based on a real experience.

8 Statement of Problem

9 [Page 5](#) of the report

10 [Page 4](#) of the report

11 Ibid

[36] In evidence Ms Bouius confirmed that she did not personally assess whether there was a pattern of Ms N telling lies. She said that finding reflected the outcome of Ms Nicholson’s investigation into the matter as conveyed to her.

### ***Preliminary findings***

[37] Mr Morrow received a copy of the Clinical Psychologist’s report on 7

November 2014 together with a letter setting out ISL’s preliminary findings. Ms Nicholson indicated that ISL accepted the report’s conclusions and was inclined to believe Ms N.

### ***The dismissal meeting***

[38] The notes from the meeting portray Mr Morrow’s union representative stating she had spoken to Ms Parker whose views contradicted the statement in the report. She also said Ms Parker had recalled to her two additional instances where Ms Parker believes Ms N had incorrectly alleged another individual had either got into or onto her bed. She said Ms Parker believes Ms N would have been very vocal if the incident had occurred. She told Ms Nicholson that ISL’s investigation was insufficient; it should go wider and asked ISL to interview other staff.

[39] Ms Nicholson considered the submissions made on Mr Morrow’s behalf during an adjournment. When the meeting resumed Ms Nicholson observed that the complaint and Mr Morrow’s denial left ISL in a difficult situation. Ms Nicholson concluded that she remained persuaded by Ms N’s retelling of the complaint and believed “*something has happened*”. Mr Morrow was dismissed with two weeks’ pay in lieu of notice. A personal grievance was raised on 20 January 2015.

[40] On 15 December 2015 a statement of problem was lodged at the Authority on Mr Morrow’s behalf. The parties subsequently attended mediation but have been unable to resolve their differences.

## **Discussion**

### ***The law***

[41] It is not for the Authority to substitute its view for that of the employer. The role of the Authority is to assess whether ISL’s decision to dismiss Mr Morrow was one that a fair and reasonable employer could have made in all the circumstances at

the time of the dismissal.<sup>12</sup> The inquiry involves not only examining the reason for the dismissal but how the employer acted; the process leading to the dismissal.

[42] [Section 103A\(3\)](#) provides a range of factors the Authority must consider when assessing the employer’s procedural actions at the time of the dismissal.

[43] To determine this case I must assess whether ISL sufficiently investigated the complaint. In *Ritchies Transport Holdings Ltd v Merennage*<sup>13</sup> Judge Inglis (as she was then) held:

An employer must satisfy the Court on the balance of probabilities that, as a result of a complete and fairly conducted inquiry, it was justified in believing that serious misconduct had occurred. That decision must be made out not only on the evidence known to the employer at the time but that which would have been available after proper inquiry by it. An employer must base the decision on a reasonably founded belief, honestly held, that serious misconduct had occurred.<sup>14</sup>

[44] The Authority may also consider any other factors it thinks appropriate. It is notable that the allegation for which Mr Morrow was dismissed is very serious. A relevant consideration in this matter is whether the evidence in support of the allegation is as convincing in its nature as the charge is grave.<sup>15</sup>

[45] A fair and reasonable employer could also be expected to provide an employee access to information relevant to the

continuation of his or her employment, and an opportunity to comment on that material before a decision is made.<sup>16</sup>

**The issues:**

[46] In determining whether ISL's investigation was fairly conducted and completed I need to examine:

(a) whether ISL made sufficient general inquiry including whether the interviews with Ms Munn, Ms Parker and Ms N were adequate;

(b) whether the information ISL did obtain was provided to Mr

Morrow and whether he had an opportunity to comment on it;

<sup>12</sup> [Section 103A\(1\)](#)

<sup>13</sup> *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198

<sup>14</sup> *Ibid* at [78]

<sup>15</sup> *New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Limited* [1989] 3

NZILR 82 (LC)

<sup>16</sup> [Section 4\(1A\)\(c\)](#)

(c) whether the information obtained could be relied on;

***Did ISL make sufficient general inquiry including whether the interviews with Ms Munn, Ms Parker and Ms N were adequate?***

[47] There is no dispute that ISL is well-resourced, including having its own HR advisors, to conduct a thorough investigation.

*Enquiry with individuals connected to the residence*

[48] Ms Nicholson interviewed Ms Parker and Ms Munn at Mr Morrow's request. She agrees she did not interview the other service users who lived in the residence (although I accept her testimony that two of these individuals would not have been capable of responding to questions). Nor did she interview the additional staff who regularly worked or visited the residence over the period in which the alleged assault

is said to have occurred.<sup>17</sup> Ms Nicholson said she had been advised that due to the nature of the allegation, she should keep the investigation as narrow as possible.

[49] I consider it was unwise of ISL to have restricted its inquiry to the individuals Mr Morrow initially elected to have interviewed. Ms Parker had not worked at the residence for four years and was not in a position to provide first-hand knowledge of Ms N's recent behaviour and activities and I do not accept it was reasonable of ISL to rely solely on Ms Munn's appraisal on those matters.

[50] I find a fair and reasonable employer could not have failed to identify and question those staff and services users who might have observed or heard something relevant to the complaint, particularly where there was no certainty as to when the event may have occurred. Someone may have been able also to provide information on that matter or Ms N's recent demeanour or the activities and interactions in the residence over the material timeframe that might have been helpful. ISL's failure to expand its enquiries to those connected to the residence and who were reasonably available casts doubt as to whether it was able to assure itself that there was no further information it needed to consider.

*The interviews with Ms Munn and Ms Parker*

[51] The constraints ISL placed on its investigation are further reflected in its interviews with Ms Munn and Ms Parker.

<sup>17</sup> Refer to para [11] and in particular the two staff who worked 3 cover shifts each fortnight at the residence

[52] I find it problematic that Ms Munn and Ms Parker were not informed of the allegation at the time they were interviewed by ISL. That omission, together with the imprecisely worded questions they were asked to answer (which appear to have little apparent connection to the substance of Ms N's complaint or Mr Morrow's response) raises doubt about whether either of them, particularly Ms Munn, fully understood exactly what was being asked.<sup>18</sup> When questioned by the Authority Ms Munn conceded when asked "how factual is Ms N when giving information" she did not understand the question. Her reply "no[t] sure – haven't heard anything that's not

*factual*" was sufficiently vague it could not fairly be relied on without added enquiry.

[53] I also consider it problematic that ISL did not extend its questioning beyond those listed on the pre-prepared questionnaire (set out at [23]) or explore the answers given. Ms Parker's statement that Ms N would correct a previously made inaccurate statement was taken at face value, ISL did not query whether there were instances where Ms N would maintain a story despite it being incorrect. As noted, ISL did not seek additional information from Ms Parker about the 1990s incident Ms N was reported as making, or how Ms N's fixation with male staff manifested. These were issues that required further examination. In evidence Ms Parker agreed she did not advise Ms Nicholson of the two instances of similar allegations she later reported to Mr Morrow's union representative. She says she was not asked.

[54] Given ISL's decision to confine its inquiry to Ms Munn and Ms Parker, it needed to ensure the pair were properly appraised of the allegation and of Mr Morrow's response so as to provide information on those matters. That was the purpose for which Mr Morrow asked ISL to interview each of them. I find ISL's questioning was insufficient. The questions were unclear and there was no examination or exploration of answers given. The approach taken by ISL when interviewing Ms Munn and Ms Parker further undermines its claim that it conducted a full and fair investigation.

#### *The interview with Ms N*

[55] Ms Bouius' involvement with Ms N and the complaint was solely to evaluate

whether Ms N could report the allegation in a consistent manner. I find ISL's

18 Ms Parker was likely to be aware of the nature of the complaint as she had been interviewed by

Police prior to her interview with Ms Nicholson

decision to limit the assessment to that issue alone, where no other interviews were planned or held with Ms N on the substance of her complaint, was unreasonable.

[56] ISL was obliged to assess the accuracy of the allegation, including the possibility (as Mr Morrow contended) that Ms N had lied about the event for some alternative reason. I note Ms Bouius recorded that Ms N made numerous comments to her that she did not want Mr Morrow to return to residence. These statements may be a direct result of the events complained of. But there is no evidence of any inquiry with Ms N as to whether there were additional reasons for not wanting Mr Morrow to return to the residence, or more generally, whether there was any other influence which prompted her complaint. Nor did Ms Bouius question Ms N or assess whether the allegation was fabricated because she had been advised by Ms Nicholas that Ms N would retract a lie. ISL's failure to directly enquire with Ms N on these matters was a significant omission given Mr Morrow counter-claims.

#### ***Did Mr Morrow have access to and an opportunity to comment on information relevant to the continuation of his employment?***

[57] ISL's approach to its investigation was compounded by the way it dealt with

the information it obtained over the course of the investigation.

#### *Ms Bouius' assessment notes*

[58] Mr Morrow was provided with a copy of Ms Bouius' report but not the corresponding assessment notes. The assessment was the only occasion on which ISL obtained (for itself)<sup>19</sup> detail from Ms N on the substance of the complaint. That information, as later analysed by Ms Bouius, formed the first limb of ISL's decision to dismiss.

[59] While the report sets out Ms N description of the alleged assault it remains unclear whether the entirety of Ms N's account is recorded in the document. Mr Morrow did not request the notes but I consider he was entitled to be provided with a complete copy of Ms N's full statement about the alleged assault. The failure precluded him from the possibility of identifying aspects of Ms N's account which may have provided an alternative explanation for the complaint or support his position. This impacted on his ability to fairly challenge or provide additional

comment on those matters.

19 Ms N had been interviewed by Police and the jobsheet notes had been provided and referenced in

Ms Bouius assessment, but these had not be furnished to Mr Morrow.

*Ms Munn and Ms Parker's interview notes*

[60] As noted, Mr Morrow did not receive copies of the interviews ISL had with Ms Munn and Ms Parker. Ms Munn and Ms Parker's individual responses as to whether Ms N (in effect) would be truthful, formed the second limb on which ISL based its decision to dismiss. I have already indicated ISL's use of Ms Munn's equivocal response could not fairly be relied on. There is no evidence that Mr Morrow was aware of Ms Munn's comment and he was unable to challenge it.

[61] Ms Munn and Ms Parker both made statements in their respective interviews that provided some suggestion that there might be another explanation for the complaint. For example, Mr Morrow was unaware that Ms N had told another service user that she wanted him get rid of him in the weeks preceding the complaint. That remark tended to support Mr Morrow's contention. While there is some evidence that Ms N often made similar comments I find he was entitled to be made aware of it and to have ISL examine the matter further.

***Could the information obtained be relied on?***

[62] It is clear that in the final meeting the statement that Ms N would retract an incorrect account, as recorded in the report, was strongly challenged as being inconsistent with Ms Parker's views on that matter.<sup>20</sup> It was further contended that Ms Parker could advise of additional instances where Ms N had made similar accusations.<sup>21</sup>

[63] These circumstances obliged ISL to return to Ms Parker to ascertain whether its appraisal of Ms N's conduct on the issue was accurate. While ISL may have had reservations that Ms Parker's statement were now being re-interpreted second-hand, having become aware that it was contested, I am unwilling to ISL could continue to rely on it without undertaking further inquiries. ISL was similarly obliged to check whether Ms Parker had additional information, particularly concerning whether Ms N had made other comparable allegations, which it needed to consider. ISL's decision not to follow up on these key issues precludes it from asserting it conducted and concluded a procedurally fair investigation.

*Was Ms Bouius report sufficient?*

[20 Page 2](#) of the interview notes

[21 Page 1](#) of interview notes

[64] ISL did not argue Ms Bouius' conclusion that the event leading to the complaint likely occurred, was in itself a sufficient basis to justify Mr Morrow's dismissal. Nevertheless I have considered it. Whether Ms Bouius' finding was informed by the conclusion she was given by Ms Nicholson, that there was no pattern of Ms N lying for a specific purpose, remains unclear. Mr Morrow should receive the benefit of doubt on this issue.

***Summary***

[65] There is no evidence that ISL's investigation was predetermined. At its core ISL was required to decide which of two opposing accounts it preferred. An employer is entitled to prefer one account over another<sup>22</sup> but that choice can only be made after a full investigation where all relevant information that is reasonably available to it is obtained and fairly considered.

[66] I accept that ISL wished to conduct its investigation sensitively but I find that approach compromised its obligation to ensure it conducted and concluded a full and fair investigation. ISL's process was defective in the following ways.

(i) no inquiry was made with staff and service users who were in regular contact with the residence and who might have had some information that was relevant to the investigation;

(ii) the questioning of Ms Munn and Ms Parker was inadequate; the questions were unclear, with no assessment or exploration of answers given on issues that ISL later relied;

(iii) no inquiry or assessment was undertaken with Ms N about whether she lied about the allegation or whether there was alternative causes for the complaint;

(iv) the notes taken during Ms N's assessment and the interviews of Ms Munn and Mr Parker were not disclosed to Mr Morrow which precluded him from a proper opportunity to challenge or comment on the allegation or receive information that was a

benefit to him;

<sup>22</sup> *Chief Executive Ministry of Maori Development v Travers-Jones* [2003] NZEmpC 52; [2003] 1 ERNZ 174 at [33]

(v) ISL did not follow up on new and additional information that was reasonably available to it nor did it revisit information that was challenged as unreliable, and was therefore unable to consider potentially relevant information.

[67] The defects were individually and cumulatively significant and resulted in Mr

Morrow being treated unfairly.

[68] Overall I am not persuaded ISL sufficiently investigated the concerns or concluded its investigation to the extent that it could be objectively said that ISL met its obligations under [s 103A\(3\)\(a\)](#) whereby it was able to form an honestly held and reasonably founded belief that Mr Morrow had engaged in serious misconduct. This finding leads me to conclude that the decision to dismiss was not the action of a fair and reasonable employer in all the circumstances. Mr Morrow has a valid personal grievance.

### **Is Mr Morrow owed arrears of wages?**

[69] Mr Morrow claims ISL was contractually obliged to provide to him 64 hours of work (separate to the sleep over component of duties) per fortnight but did not do so between 19 November 2011 and his dismissal.<sup>23</sup> He seeks \$11,850.52 in arrears of wages which he says reflects the difference between the hours he worked and that which should have been provided to him. He requests interest on the sum ordered and a penalty for breach of an employment agreement.

[70] The alleged breach of the employment agreement was raised by Mr Morrow's representative at the meeting of 18 November 2014. The penalty claim was not lodged until 14 December 2015. The law requires a claim of this nature be brought either within a year of when the breach became known to the claimant or have reasonably become known.<sup>24</sup> Mr Morrow's claim for penalty is outside the statutory required timeframe and is dismissed.

[71] Mr Morrow produced documents signed in 2010 and 2011 which reflect his agreed hours of work as 65 per fortnight, although Mr Morrow says he always worked

<sup>23</sup> Mr Morrow's claim was amended in his written statement to the Authority dated 25 August 2016

<sup>24</sup> [Section 135\(5\)](#)

64 hours per fortnight.<sup>25</sup> However I note those documents pre-date the advent of the period in time Mr Morrow's wishes to commence this claim.

[72] There is no dispute that in or about mid-September 2011 and by his own choosing, Mr Morrow transferred from one ISL residence to another. His written evidence states in the year or so before the transfer, the hours of work offered to him were slowly reduced. Following his transfer he says he routinely worked 57 hours per fortnight.<sup>26</sup>

[73] ISL rejects Mr Morrow's version of events and says he declined offers of further hours in circumstances where he had other commitments and did not wish to report to a particular manager.

[74] On balance, I do not accept Mr Morrow has provided a complete account of the circumstances in which his hours were reduced. I prefer ISL's evidence. In particular I note Mr Morrow did not raise any issue as to his hours of work for over the course of 27 months. In March 2014 he received notice that his hours of work

were 57.5 per fortnight.<sup>27</sup> He agrees he did not challenge the contents of the

document and I do not accept his evidence that he did not do so because he "*did not want to make a fuss*". I further note Mr Morrow did not claim the additional hours on timesheets, and he recorded his ordinary hours of work as "57" when making applications for annual leave.<sup>28</sup>

[75] I consider it more likely that it was Mr Morrow's preference to generally work

57 hours per fortnight. There is no evidence of his seeking to obtain 64 hours per fortnight but being denied. I am unwilling to find he is now able to enforce the terms of his employment in circumstances where, by his conduct, he effectively varied this condition of his employment. The breach of contract claim is dismissed.

### **Remedies**

[76] The Authority is required to decide what, if any, remedies should be awarded associated with his personal grievance.

#### ***Reimbursement of wages***

<sup>25</sup> ISL 'Renewal Of Employment Agreement' documents dated 27 October 2010, and 1 March 2011

<sup>26</sup> not including the sleep over component of his work

<sup>27</sup> Document 15 of the Respondent's Bundle of Evidence, letter dated 12 March 2013

28 By way of example on 3 February 2014, and 1 October 2014.

[77] Section 128(2) provides that where the Authority determines that an employee has a personal grievance and has lost remuneration because of the grievance, the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months' ordinary time remuneration. At s 128(3) the Authority has discretion to award more than three months loss of wages. Mr Morrow initially sought wages for almost 21 months but this was amended to 3 months during the investigation meeting.

[78] Mr Morrow says he has not been able to find a job since his dismissal. His written evidence purports he applied for "at least 50 jobs" via 'Seek', 'Trade Me' and newspapers. These assertions were not supported by any documentary material despite a request to provide evidence of mitigation of loss at the case management call leading up to the Authority's investigation.

[79] The law relating to mitigation of loss was recently canvassed by the Full Employment Court in *Xtreme Dining t/a Think Steel v Dewar*.<sup>29</sup> The Court held that evidential burden lies with the employee to provide relevant information (as to mitigation) if called to.<sup>30</sup> But the Court also noted that the Authority (or Court) cannot be too stringent in its expectations of a dismissed employee. What has to be proved by the employer is that the employee acted unreasonably.<sup>31</sup>

[80] In his oral evidence Mr Morrow was able to give some particulars in respect of five positions he sought. Whilst I consider his evidence was marginal I am not satisfied it was established he acted unreasonably to mitigate his losses. On balance Mr Morrow is entitled to the sum equal to 3 months' wages (13 weeks).

### **Compensation**

[81] Mr Morrow seeks \$10,000 in compensation for humiliation, loss of dignity and injury to feelings.<sup>32</sup> I accept he was distressed by the decision to dismiss him without giving proper consideration to his colleague's statements. I accept also that he was humiliated by the nature of the allegation leading to his dismissal. Mr

Morrow's claim for compensation is granted.

<sup>29</sup> [\[2016\] NZEmpC 136](#) at [\[89\]](#)- [\[104\]](#)

<sup>30</sup> *Ibid* at [101]

<sup>31</sup> *Ibid* at [103]

<sup>32</sup> Mr Morrow's claim for compensation was amended to \$10,00 in oral submissions at the conclusion of the investigation meeting

### **Contribution**

[82] There is insufficient evidence to find Mr Morrow contributed to the situation that led to his dismissal.

### **Costs**

[83] Costs are reserved.

### **Summary of orders**

[84] To remedy Mr Morrow's personal grievance IDEA Services Ltd is ordered to reimburse and compensate Shane Morrow with the following;

(a) \$10,903.75 (subject to PAYE deductions) pursuant to s 123(1)(b).<sup>33</sup> and

(b) \$10,000 pursuant to s 123(1)(c)(i).<sup>34</sup>

### **Michele Ryan**

Member of the Employment Relations Authority

<sup>33</sup> [Employment Relations Act 2000](#)

<sup>34</sup> *Ibid*