

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 579
3158544

BETWEEN MARGARET ROBERTSON
Applicant

AND IDEA SERVICES LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: Lawrence Anderson, advocate for Ms Robertson
Guido Ballara, counsel for the Respondent

Investigation Meeting: 26 and 27 July 2022 at Tauranga

Submissions and other 4 August 2022
material received from
the Applicant and the
Respondent:

Determination: 7 November 2022

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] IDEA Services Ltd (IDEA) sought a non-publication order over any information identifying the service user (SU). This was not opposed. I am satisfied it is appropriate to make an order under clause 10(1) of the second schedule of the Employment Relations Act 2000 (the Act) that any information identifying the SU prohibited from publication.

Employment relationship problem

[2] Margaret Robertson claims she was unjustifiably disadvantaged and unjustifiably dismissed from her employment with IDEA Services Ltd. She seeks wage arrears, compensation, as well as reimbursement of legal costs.

[3] IDEA does not agree that it unjustifiably disadvantaged or dismissed Ms Robertson.

The Authority's investigation

[4] This matter was set down for an investigation meeting on 26 and 27 July 2022. During the investigation meeting, I heard evidence from Ms Robertson. I heard evidence for IDEA from the area manager Ms Stephanie Parker, service manager Joanne Gates and associate clinical nurse manager at Tauranga hospital, Mary-Ann Versteynen.

[5] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before me, including all the evidence by the parties and their submissions.

Issues

[6] The issues for investigation and determination were:

- (i) Was Ms Robertson unjustifiably disadvantaged by IDEA?
- (ii) Was Ms Robertson unjustifiably dismissed by IDEA?
- (iii) If IDEA's actions were found to have unjustifiably disadvantaged and/or dismissed Ms Robertson, what remedies should be awarded considering:
 - (a) lost wages (subject to evidence of reasonable endeavours to mitigate this loss); and
 - (b) interest awarded on any lost wages; and
 - (c) compensation for hurt, humiliation and injury to feelings?
- (iv) If any remedies are awarded, should they be reduced under s 124 of the Act for any blameworthy conduct by Ms Robertson that contributed to the situation giving rise to his grievance.

- (v) Should either party contribute to the cost of representation of the other party?

Background

[7] IDEA is wholly owned by IHC (New Zealand) Incorporated. Both are registered charities. IDEA provides community care services, supporting people with intellectual disabilities to live within their communities.

[8] IDEA employed Ms Robertson as a support worker (Level 3) on 2 December 2019. Ms Robertson had previously been employed by IDEA for a period between 2009 and 2014.

[9] One of the role functions of a support worker is to care for and support vulnerable people with intellectual disabilities in their own homes and in the community. IDEA refers to these people as “service users” (SU).

Events leading to dismissal

26 August 2020 incident

[10] On 26 August 2020, Ms Robertson arrived at SU’s unit at Miro Street at approximately 11.30am to uplift medical documents. Ms Robertson said she found SU to be in a heightened state. She believed SU had a false belief that an ambulance was coming for SU. The SU was in the care of another support worker at the time. Ms Robertson was scheduled to undertake a shift in caring for SU later that afternoon

[11] Around noon Ms Robertson met with Ms Joanne Gates, service manager at IDEA’s office. Ms Robertson said she explained to Ms Gates her concerns regarding the SU. Ms Gates advised Ms Robertson that she would attend the unit at around 2pm.

[12] Ms Robertson went to SU’s unit to take over care from the other support worker at around 1.15pm. Ms Robertson said that the SU was again asking for an ambulance to take him to hospital. Ms Robertson said that as a distraction she suggested that the service user help her make his bed, during which Ms Robertson alleged that SU slapped her bottom.

[13] Ms Robertson sent a text message to Ms Gates referring to the situation and the incident. Ms Gates responded saying that she would be there soon.

[14] Ms Gates arrived at the unit around 2.20pm. Ms Robertson and Ms Gates sat in the lounge area observing SU. Ms Robertson said that several times SU got up off the sofa approached Ms Robertson attempting to grab hold of her. SU managed to pinch Ms Robertson.

[15] After some discussion, Ms Gates and Ms Robertson decided to remove themselves to the staffroom. After approximately 10 minutes SU's behaviour deteriorated, and Ms Robertson said they both could hear him throwing things and tipping furniture over. Ms Robertson went to check on SU. Ms Robertson said she saw SU pick up the television and throw it.

[16] Ms Robertson returned to the staff room and a decision was then made to call the police. Ms Gates called the police. Ms Robertson said that while waiting for the police to attend she again said to Ms Gates that SU's behaviour was scaring her and that she did not want to be left alone with SU.

[17] When the police arrived, they spoke with SU, who repeated to them that he was waiting for an ambulance to take him to hospital. The police advised Ms Robertson and Ms Gates that a senior sergeant had given permission for a police officer to accompany Ms Robertson in transporting SU to hospital and that his role was only to assist with transportation, and it would not be done as a formal police incident.

[18] Ms Robertson said that during the drive to the hospital SU made several attempts to grab her, with the police officer preventing SU from getting to her from the rear passenger seat.

[19] On arrival at Tauranga Hospital emergency department the police officer advised Ms Robertson that he was going to have to leave to attend an incident. Ms Robertson said she was expecting there to be another support worker to be either waiting for Ms Robertson or on the way to the hospital, however this did not eventuate.

[20] At approximately 5.30pm that day Ms Robertson and SU entered the emergency department. Ms Robertson explained to the triage nurse what they were there for and that they were seeking an assessment and review of SU with the mental health crisis team.

[21] Ms Robertson and SU were taken through to the Whanau Room. SU was seated. Ms Robertson said after a few minutes SU stood up and came towards Ms Robertson. Ms Robertson's reaction was to shout at SU and slap SU's hand causing SU to cry.

[22] A nurse who witnessed the incident intervened and exclaimed to Ms Robertson that it was wrong of her to hit SU. Robertson apologised for hitting SU and explained to the nurse what had been happening that day. She stated that she had not meant to hurt SU. It was Ms Robertson's belief that the nurse only saw a snapshot of what was happening.

[23] Hospital security guards were called to be present with SU. Ms Robertson text messaged Ms Gates about the incident and events leading up to the incident.

[24] Ms Gates arrived at the hospital at approximately 7.30pm and relieved Ms Robertson so that she could have dinner. Ms Robertson then later relieved Ms Gates. Ms Robertson left the hospital the next morning 27 August 2020 at or about 7.45am.

[25] Ms Robertson met Ms Stephanie Parker, area manager, at the area office to return keys. Ms Robertson spoke to Ms Parker and showed Ms Parker the bruise on her arm. Ms Robertson did not file an incident report,

IDEA's Investigation into the incident

[26] On 28 August 2020, Tauranga Hospital sent through its incident reporting information about events on 26 August 2020..

[27] On 31 August 2020, Ms Parker wrote to Ms Robertson seeking her response to what had been alleged. The letter also referred to the possibility of suspension pending the outcome of any investigation due to the potential seriousness of the matter. The letter also sought Ms Robertson's views about that possibility. The letter also reminded Ms Robertson that IDEA's employee assistance programme was available to her, and how she could access the same. The letter also noted her right to representation. Ms Robertson was also placed on temporary paid leave.

[28] On 4 September 2020, Ms Parker sent copies of the hospital's incident reporting information to Ms Robertson's E tū representative, Derek Tarawa, for Ms Robertson's response.

[29] An initial "please explain" meeting occurred on 11 September 2020. Ms Robertson attended with Mr Tarawa. Having reflected on what had been said, Ms Parker advised that there would need to be further investigation. Ms Parker also addressed Ms Robertson's potential suspension, which Ms Robertson agreed to.

[30] Later that same day, Ms Robertson's suspension was confirmed in writing. As part of the investigation, Ms Parker then spoke with the clinical nurse manager at the hospital. On 18 September 2020, Ms Parker wrote to Ms Robertson, care of Mr Tarawa, setting out Ms Parker's preliminary findings of serious misconduct, for Ms Robertson's response at a further meeting proposed for 22 September 2020.

[31] On 21 September 2020, Ms Parker sent Mr Tarawa a timeline document for Ms Robertson's response at the proposed meeting. On 22 September 2020, the meeting with Ms Robertson and Mr Tarawa took place. Ms Robertson provided responses to the preliminary findings. After a break to consider what had been said, Ms Parker advised Ms Robertson that her preliminary view was to dismiss.

[32] After Ms Parker's further consideration of the feedback provided about that, she decided to terminate Ms Robertson's employment. She advised Ms Robertson of her decision. On 23 September 2020, Ms Parker wrote to Ms Robertson to confirm her decision to dismiss, as made on 22 September 2020

Personal grievance raised

[33] Ms Robertson wrote to IDEA on 16 December 2020 raising a personal grievance and seeking arrears of wages.

The Authority's view of the employment relationship problem

Unjustified disadvantage

[34] Ms Robertson initially raised a claim of unjustified disadvantage for harassment and bullying in her letter of 16 December 2020 raising a personal grievance. Ms Robertson has not continued this claim in the statement of problem, or in her submissions. However, as the claim was raised in her personal grievance letter, I will address the issue. After reviewing the evidence, I am not satisfied that had Ms Robertson continued with this claim I would have found IDEA bullied or harassed Ms Robertson. Based on this assessment, I would have concluded that IDEA did not fail

to provide a safe workplace as was initially alleged. It follows that the personal grievance relating to this allegation would not have succeeded. Ms Robertson has not established a personal grievance for unjustified disadvantage.

Unjustified dismissal

[35] Under s 103A(2) of the Act the test to be applied in determining whether a dismissal was justified 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 occurred.¹ The section goes on to identify four factors which the Court must consider in applying that test, and provides that the Court may consider any other factors it thinks relevant.²

[36] In applying the matters set out in s 103A(3)(a)-(d) of the Act I need to have consideration whether having regard to the resources available, IDEA sufficiently investigated the allegations, raised the concerns with Ms Robertson, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal. A failure to meet any of the s 103A(3) tests that is more than minor and results in actual unfairness to an employee will in most cases render the conclusions reached and the action taken by the employer unjustifiable, because the scope and quality of information on which they are based will be less than it ought to be.³

[37] My conclusion is that through the processes adopted for the disciplinary matter, IDEA proceeded in a manner in which a fair and reasonable employer could have acted in the circumstances. I am satisfied that it was objective, and it kept an open mind, listening to Ms Robertson throughout the process. Ms Robertson had the fullest opportunity to understand what was alleged and respond to it and was able to raise any concerns about the process and the outcomes at the time, with any concerns being reviewed by IDEA.

[38] Turning to the substantive justification, that is, whether dismissal was an outcome that a fair and reasonable employer could have come to, my conclusion is that the finding of dismissal was justified.

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

² *Cowan v IDEA Services Ltd* [2020] NZCA 239 at [40].

³ *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110 at [39].

[39] Ms Robertson's conduct was independently witnessed by a nurse. Ms Robertson in evidence admitted she slapped SU and evidence was given that she shouted at SU, making SU cry. She later stated to a nurse who intervened after the incident "I am sorry and that it was wrong of me to hit (SU)...". This incident was a serious breach of both professional practice and IDEA's policy and code of conduct.

[40] Ms Robertson gave explanations for her actions on 26 August 2020. She believed her explanations justified her actions and explained her conduct. The consequence of IDEA not accepting her explanations is that she does not accept any dismissal was an available outcome to IDEA and was not appropriate. Just because Ms Robertson thought she was right and therefore IDEA was wrong does not mean the outcome is unjustified.

[41] The other relevant aspect here is that my role is not to determine whether Ms Robertson was right in the view she had and whether the explanations she gave excused her conduct. My investigation is not a re-hearing of the disciplinary processes and therefore replacing the outcome with my own findings on what occurred and any sanction to be imposed. Rather I must objectively consider the dismissal within the context of s 103(A) of the Act. My conclusion is, given the evidence, a fair and reasonable employer in this disciplinary process could have concluded that dismissal was an appropriate outcome.

Conclusion

[42] Based on my findings, I conclude that Ms Robertson's personal grievance relating to the dismissal is not supported and the claim based on the grievance is unsuccessful.

Costs

[43] In the particular circumstances of this case, I consider it may be appropriate that costs lie where they fall. However, if DEA seeks costs, the parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, they should serve a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Robertson would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[44] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.⁴

Andrew Gane
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-payingcost.