

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 431/08  
5110981

BETWEEN                      ANGELA TAYLOR  
   Applicant  
  
AND                                IDEA SERVICES LIMITED  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Barry Nalder for Applicant  
   Paul McBride for Respondent  
  
Investigation Meeting:      19 September 2008 at Whangarei  
  
Determination:               22 December 2008

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**DETERMINATION OF THE AUTHORITY**

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[1]      Angela Taylor says she was forced to leave her job as a community support worker because her employer Idea Services Limited did not have proper safety measures to protect her from being assaulted by a client and unfairly accused her of incorrectly administering medication. Ms Taylor says the distress caused by events while working for Idea Services resulted in a miscarriage.

[2]      In reply ISL says Ms Taylor had proper safety training and it had acted promptly to support her after each of two assaults on her by a client with intellectual disabilities. ISL also says it was following a fair process to investigate an incident of a different client getting a double dose of medication but Ms Taylor left the job before the incident could be properly discussed with her.

**Issues**

[3] This determination resolves the following issues:

- (i) whether Ms Taylor was constructively dismissed in November 2007, which in this particular case means whether her resignation was not voluntary but caused by ISL breaching its duties as her employer to provide a safe workplace and to fairly investigate any work issues; and
- (ii) whether ISL acted fairly and reasonably in not accepting Ms Taylor's resignation through her representative and how it later dealt with the end of her employment, including arrangements for her final pay; and
- (iii) what remedies, if any, are appropriate for any unfair and unreasonable actions of ISL towards Ms Taylor?

**Investigation**

[4] Written witness statements were lodged by Ms Taylor and ISL managers Essie Te Tuhi, Jennifer Hemara and Linda Barrie. Under oath or affirmation each confirmed their written evidence and answered questions from the Authority.

[5] Evidence was also heard by telephone from Ms Taylor's GP, Dr Denise Limby, who had examined Ms Taylor on 28 September 2007, the day after she was first assaulted by an ISL client.

[6] The representatives had the opportunity to ask additional questions of the witnesses and provided closing submissions.

**Non-publication order**

[7] I record here the order made at the investigation meeting prohibiting publication of the names of ISL's clients and the addresses and locations of their residences referred to in the evidence of witnesses and background documents provided for the Authority's investigation.

[8] This order was made under clause 10 of Schedule 2 of the Employment Relations Act 2000 ("the Act").

**Was Ms Taylor forced to resign by Idea Services breaching duties to her?**

[9] Ms Taylor's claim of constructive dismissal arises from six events or actions which are said to amount to such serious breaches of ISL's duties to her that it was reasonably foreseeable that she would feel forced to resign. These six instances, in summary, were:

- (i) Ms Taylor was punched by a client and needed to be taken to a medical centre and then a hospital emergency department for examination (27 September 2007).
- (ii) The same client pushed Ms Taylor's head down towards a table and hurt her neck (10 October 2007).
- (iii) Ms Taylor was moved to another workplace and assigned to care for a client who had Hepatitis B and smeared faeces on herself and around her room (11 October 2007).
- (iv) Ms Taylor and one other worker were under investigation by their managers after a client was given a double dose of his medication (3 November 2007).
- (v) ISL did not provide a report to its accident insurance agent about the second client assault on Ms Taylor leading her to believe that treatment costs for her neck injury might not be paid.
- (vi) Ms Taylor was refused her final pay after visiting ISL's offices and was upset, after explaining that she had recently suffered a miscarriage, to be told to go to a food bank for help (29 November 2007).

[10] While Ms Taylor experienced some difficult circumstances in her work for ISL, I am not satisfied that the instances referred to, either individually or taken together, amounted to ISL breaching its duties to provide a safe workplace and to fairly deal with problems encountered by Ms Taylor. I reach that conclusion on the basis of the following evidence and reasons.

*Client assaults*

[11] After starting work for ISL on 16 August 2007, Ms Taylor received initial training and was assigned to a particular ISL house. Her job was to care for ISL

clients who lived at the house. The clients have intellectual disabilities.

[12] On 27 September 2007 an adult male client punched Ms Taylor in the stomach. He punched Ms Taylor after being startled by a vacuum cleaner turned on by another client. The client ran out of the house and was followed by Ms Taylor. She found him and brought him back to the house with help from another staff member.

[13] Ms Taylor's stomach was sore from the client's punch and shortly afterwards she noticed some vaginal bleeding. Her manager Ms Te Tuhi took Ms Taylor to a private medical centre. After examination at the centre Ms Taylor was referred to Whangarei Emergency department for further examination. Ms Te Tuhi stayed with Ms Taylor for most of this time, between 3 and 8pm, leaving only when Ms Taylor suggested she go home.

[14] Ms Taylor returned to work briefly on 28 September to pick up her car and then took three days of special paid leave provided by ISL. During those days she saw her doctor, had a pelvic ultrasound scan and arrangements were made for EAP counselling sessions paid for by ISL. On returning to work she attended a staff "debrief" about the incident with the client.

[15] I accept Ms Te Tuhi's evidence that Ms Taylor said she was eager to return and to continue working with the same client. This is supported by a text sent by Ms Taylor to Ms Te Tuhi on 29 September which said: "*yes will[l] love to be back*" and described the support she received from Ms Te Tuhi as "*so lovely*".

[16] Ms Taylor returned to work on 3 October. Seven days later a second incident occurred with the same client. He pushed Ms Taylor's head towards a table hurting her neck. She reported the incident to Ms Te Tuhi who said she was concerned that the client was now "*going for*" Ms Taylor. Ms Te Tuhi advised Ms Taylor that she needed to be redeployed immediately to another house to work because of the risk to her safety. Arrangements were made for that move to occur the next day.

[17] I am satisfied that these events do not disclose a breach by ISL of its duties to take reasonably practicable measures, proportionate to known and avoidable risks, to

ensure Ms Taylor's safety at work.<sup>1</sup>

[18] Ms Barrie's evidence was that behaviour of some clients is identified as a hazard in ISL's hazard identification process, including potentially violent behaviour by the client involved in the incidents with Ms Taylor. That particular client was identified as needing a high level of support. The funding ISL received for providing his care also included a requirement that staff working with him got specific "*Positive Support*" training in dealing with what is described as "*challenging behaviour*". Such behaviour may include violence towards others. Ms Taylor had attended some of those special training sessions. She had missed other sessions but for her own reasons and not caused by ISL. There were measures in place to enable her to get further training from an advisor.

[19] The employer is not a guarantor of the safety and health of the employee.<sup>2</sup> I find that ISL took reasonable care to avoid unnecessary risk to Ms Taylor. In reaching that conclusion I take account of Ms Barrie's evidence of the low level of reported incidents of assaults by clients on ISL staff in the Northland area. The two assaults suffered by Ms Taylor were the only ones reported for all of 2007 and up to the investigation meeting in September 2008.

[20] Following the first incident ISL responded with a full range of post-assault care and held a staff debriefing meeting to consider what could be done to avoid repeat of such an incident. Ms Taylor continued to work in that particular workplace with that particular client because she wished to do so. As soon as the second incident occurred – so that the first was no longer as isolated event – Ms Taylor was moved to another workplace for her safety.

[21] I also find that the evidence does not support the assertion that the client assaults of 27 September and 10 October caused the miscarriage Ms Taylor suffered on 22 November 2007. In doing so I rely on evidence from Dr Limby as to the likelihood of those events causing the miscarriage.

[22] While Dr Limby quite properly emphasised before giving her evidence that

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<sup>1</sup> *Attorney General v Gilbert* [2002] 2 NZLR 342, 359-360 at para [83] (CA).

<sup>2</sup> *ibid.*

she was not an expert or specialist in this area, she has had 15 years experience in general practice, including seeing women for gynaecological and obstetric matters in which she holds a diploma. In light of her practical experience I consider I can reasonably rely on Dr Limby's evidence to assist in assessing Ms Taylor's medical records, including hospital reports.

[23] Ms Taylor had a negative pregnancy test at the hospital on 27 September prior to having an x-ray. That negative test, and later estimates by hospital doctors that her miscarriage on 22 November was at around the tenth week of the pregnancy, suggest that she was probably only in the first fortnight of the pregnancy at the time of the first assault. Dr Limby's evidence was that if assault were the cause of the miscarriage, the miscarriage would most likely have occurred much earlier.

[24] Ms Taylor had already had two earlier miscarriages, the most recent in January 2007, but Dr Limby said this did not statistically increase the risk of future miscarriage. Usually it is not until there have been three or more miscarriages that the risk increases. In that light it should also be noted that Ms Taylor had one child before starting work at ISL and has had a second child since resigning.

#### *Transfer of workplace*

[25] On 12 October 2008 Ms Taylor began work at a different ISL house where she was to be responsible for the care of one of two female residents. She was distressed to learn that the client was a "*faeces smearer*" and had Hepatitis B. On her second day of work at that house she sent Ms Te Tuhi a text saying she did not "*feel comfortable*" with one of the clients having hepatitis and asked to be moved to another workplace. Ms Te Tuhi promptly arranged a further change of workplace so that Ms Taylor did not work at that house again.

[26] I find ISL did not breach its safe workplace duties by having Ms Taylor assigned to that workplace at short notice and where she worked for only two days in total. Although Ms Taylor would have been offered a hepatitis immunisation if she continued to work there, she had received earlier training in infection control so she was not at an unacceptable level of risk. She was also moved, without any query or criticism from her manager, as soon as she expressed discomfort at the placement.

*Medication inquiry*

[27] Ms Taylor, in her evidence, accepted that ISL was entitled to conduct an inquiry into an incident of a client being given a double-dose of medication. This incident occurred while Ms Taylor was on duty at the residence to which she was assigned to work from 15 October.

[28] She says that on 3 November 2007 she had checked the medicine administration sheet and identified what appeared to be an omission by a fellow worker to give one client his medicine due to be taken at breakfast. She called out to that worker, who was busy showering another client, and asked if she should give the client that medicine. She says the other worker replied yes so she gave the client the medication and then signed the administration records.

[29] At work the next day the fellow worker told Ms Taylor that the medication she had given the client on the previous day was his evening medication.

[30] On the afternoon of 3 November another worker telephoned Ms Hemara, the manager responsible for that residence, to report that a client appeared to have been given both his morning and evening medication in the morning. That worker also filled in an incident report form. Ms Hemara then began a standard process for investigating incidents where medication errors may have occurred.

[31] Early on the morning of 5 November Ms Taylor rang Ms Hemara and said she was being “*blamed*” for the medication error but did not do it. She also asked who had provided the incident report. Ms Hemara said she did not want to talk with Ms Taylor until she had spoken to other staff. Ms Hemara’s evidence, which I accept, was that she did not blame Ms Taylor for what had happened because “*I didn’t know the full facts*”.

[32] Ms Hemara did talk to other staff and intended to speak with Ms Taylor during her next rostered day at work, 7 November. She never got the opportunity to do so because on 6 November Ms Hemara received a letter from Ms Taylor’s representative, Barry Nalder.

[33] Mr Nalder's letter, dated 4 November, said Ms Taylor was "*struggling to continue with her employment*" because of the assaults on 27 September and 10 October and was "*presently examining her options*". Later that same day Ms Hemara received a second letter from Mr Nalder, dated 6 November, saying that "*the allegation of dispensing the wrong medicine has significantly worsened the situation*". He advised that Ms Taylor was "*not well enough*" to report to work on 7 November.

[34] I find ISL's actions in seeking to investigate concerns about medication administration did not amount to breaches of its duties to treat Ms Taylor fairly and to ensure her safety at work.

[35] At best Ms Taylor's reaction to the inquiry process begun by Ms Hemara was premature. If there were any fault, it was just as likely to be that of the other worker on duty at the time or both workers. There is no evidence that ISL was being unfair or had a preconceived intention to blame Ms Taylor or do anything other than arrange additional training and supervision if she had made a mistake in dispensing medication on 3 November.

#### *Insurance form*

[36] On 6 November Ms Taylor received a letter from the company managing ISL's ACC programme. It advised that a work injury claim for a neck sprain would not be accepted unless her employer provided a copy of the incident form she completed at the time of the accident. She was told that without the form her "*claim could be declined for cover due to insufficient information*". She was asked to provide a copy of the form within 10 days.

[37] An employee injury report about the 10 October incident was not sent to the claims management company because of what Ms Te Tuhi accepts was "*confusion*" on her part. She knew Ms Taylor had been pushed but did not know she was injured.

[38] This administrative oversight did not amount to a breach of duty by ISL. Ms Taylor's claim had not been denied. She was simply asked to help chase up the paperwork from her employer.

**Did Idea Services act fairly over the end of Ms Taylor's employment?**

[39] By 12 November Mr Nalder had received no response to his two letters to ISL dated 4 November and 6 November – both received by Ms Hemara on 6 November.

[40] In a further letter, dated 12 November, and sent by fax that day, Mr Nalder advised ISL of Ms Taylor's resignation in the following way:

*I have to advise that Angela remains unwell, and is unable to continue her employment with your Company. Angela has asked me to advise you she feels she has no option but to resign her position with your Company.*

*Please treat this as her resignation. Would you please calculate her final pay and provide her with a copy of those calculations.*

[41] After seeking advice from an ISL human resources advisor, Ms Barrie delegated to Ms Hemara the task of contacting Mr Nalder to arrange a meeting. An internal email shows ISL knew Ms Taylor had resigned but ISL decided to take the position that it would not “accept” the resignation until a meeting had been held with Mr Nalder to address issues raised by Ms Taylor.

[42] That meeting occurred on 20 November between Ms Hemara and Ms Te Tuhi and Mr Nalder. According to a file note made by the two ISL managers, Mr Nalder advised them that he would take the case to the “*Employment Tribunal*”. By letter two days later Mr Nalder confirmed that he intended lodging proceedings in the Authority alleging a personal grievance for “*constructive dismissal based on failure by her employer to deal with the issues in a competent manner*”. He asked ISL to attend mediation.

[43] Between 15 and 19 November Ms Taylor sent a number of text messages to Ms Te Tuhi and Ms Hemara. She also left telephone messages for Ms Hemara. It is clear from those messages – most of which were recorded in documents provided by ISL – that Ms Taylor considered she had resigned and that ISL managers were aware of her resignation. She complains about not having received her “*resignation pay*” and her “*resigning pay*”.

[44] Despite these requests – by text and telephone message, and through her representative Mr Nalder – Ms Taylor had not received her final pay by 29 November.

[45] That day she went to the offices of ISL in Whangarei and demanded her pay. A file note made by a manager at the time describes Ms Taylor as “*upset*”, saying she had no food for her son and partner, and saying she “*just had a miscarriage*”.

[46] After telephoning for advice from a human resources adviser, the manager told Ms Taylor that she could get her holiday pay if she wrote out a letter of resignation. Ms Taylor wrote out a resignation letter but then would not sign it because she “*was still owed money*”. Ms Taylor was then told she should see WINZ and go to the Salvation Army food bank if she needed money and food. She left the office in a distressed state. In her oral evidence Ms Taylor said she did not sign the letter because “*something just didn’t seem right because I hadn’t had my holiday pay*”.

[47] In a letter to Mr Nalder on 5 December, Ms Barrie refers to this incident and says it was interpreted by ISL as meaning Ms Taylor was “*unclear as to whether she had resigned or even desired to do so*”. She also said ISL had no written authority from Mr Nalder to represent Ms Taylor and did not consider it had a genuine resignation from Ms Taylor on which it could rely to “*action her final pay*”.

[48] I find the actions of ISL in the period from 12 November to 5 December 2007 in responding to Ms Taylor’s resignation and providing any final payment due to her were not consistent with its duty of good faith to her. Having taken the stance that it did not “*accept*” her resignation, and therefore that the employment relationship was still on foot, ISL must also accept its obligations of good faith continued.

[49] ISL knew on 12 November 2007 that Ms Taylor considered the employment relationship at an end. It had no problem with Mr Nalder’s authority to represent her in a meeting on 20 November and in telephone contact with him prior to that meeting. The evidence of Ms Hemara and Ms Te Tuhi’s confirmed that. To take the stance ISL later took on 5 December regarding Ms Taylor’s resignation and the authority of her representative was cynical and ill-advised. Ms Barrie was aware of the texts Ms Taylor had sent earlier, which included references both to “*resigning pay*” and to Mr Nalder. It is unlikely Ms Barrie or her advisors had any genuinely-held doubt on

either point.

[50] Ms Taylor's employment agreement did require a resignation in writing but that was, I find, provided through her representative on 12 November and was known to Ms Barrie, Ms Hemara and a human resources advisor by no later than 14 November 2007.

[51] Section 236(3) of the Act provides that a person purporting to act for an employee or employer must establish that person's authority do so. However it was not consistent with its good faith obligations for ISL to demand such authority on 5 December having recognised Mr Nalder's representative role in a meeting on 20 November and by writing to him on 29 November without making any such query.

[52] ISL was also aware through a 22 November letter from Mr Nalder that Ms Taylor had suffered a miscarriage and believed that assaults by a client were its cause.

[53] In that light, the frustration and distress exhibited by Ms Taylor when she went to the ISL offices on 29 November is understandable. Arguably a rational solution to getting her final pay would have been to sign a resignation letter as requested. However she appeared to be under the misunderstanding that doing so would prevent her getting any final pay due to her. Rather than handling the situation sensitively, ISL's actions made it more distressing for Ms Taylor.

[54] That event alone, however, does not support Ms Taylor's case of constructive dismissal, in the sense of being forced to resign by breaches of duty by ISL. By 29 November Ms Taylor cannot be said to have been forced to resign. On her own account she had resigned by 12 November, as shown by her own text messages in the following week asking why her "*resigning pay*" had not already been paid.

[55] In contrast with how its local managers had earlier acted promptly and compassionately over the assaults and need to relocate Ms Taylor, ISL's later actions over her final pay and representation were breaches of its good faith obligations. Under s122 of the Act I find those breaches give rise to a personal grievance for unjustified disadvantage. That disadvantage warrants a remedy.

**Remedies**

[56] An award of \$2000 under s123(1)(c)(i) of the Act is appropriate to compensate Ms Taylor for the distress and humiliation caused by refusing to acknowledge her resignation and delaying her final pay. I order ISL to pay Ms Taylor that amount.

[57] No reduction of that remedy is required for conduct by Ms Taylor contributing in to the situation giving rise to the grievance established. While Ms Taylor's demands for her final pay, including on 29 November, may have been abrasive and were not expressed in an entirely rational manner, I do not consider her conduct to be sufficiently blameworthy in all the circumstances to require any reduction in remedy.

**Costs**

[58] The parties are encouraged to agree any matter of costs between them. If they are unable to do so, Mr Nalder may lodge a memorandum as to costs by 9 February 2009 and Mr McBride may lodge a reply by 23 February 2009. No application will be considered outside this timeframe without prior leave.

Robin Arthur  
Member of the Employment Relations Authority