

NOTE: This determination includes an order prohibiting publication of some evidence.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 155
5530660

BETWEEN

ISABELLA TAYLOR
Applicant

AND

IDEA SERVICES LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Alison Bendall, Counsel for the Applicant
Paul McBride, Counsel for the Respondent

Investigation Meeting: 2 and 3 March 2016

Determination: 23 May 2016

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Isabella Taylor by IDEA Services Limited (ISL) was unjustified.**
- B. In settlement of her personal grievance for unjustified dismissal ISL must pay Ms Taylor the following sums, to which a 10 per cent reduction has been applied for contributing behaviour:**
- (i) \$10,706 as reimbursement of wages lost; and**
 - (ii) \$10,800 as compensation for humiliation, loss of dignity and injury to her feelings.**
- C. Costs are reserved with a timetable set for memoranda to be lodged and served if an Authority determination of costs is necessary.**

Employment Relationship Problem

[1] Isabella Taylor, known as Bella Taylor, was dismissed from her position as a support worker at an IDEA Services Limited (ISL) residential home in Gisborne on 20 October 2014. In a letter advising Ms Taylor of the termination of her employment ISL area manager Michele Duley set out the following conclusion from a disciplinary investigation she had conducted:

My findings are that on 30 September 2014 you spoke to a service user in an inappropriate manner that was not in line with Idea Services expectations and values. You have agreed that you used inappropriate language. I believe, from my investigations, that your tone and the message you conveyed to the service user was abusive and threatening.

[2] Ms Duley wrote that her findings led her to believe Ms Taylor's actions "constituted serious misconduct in breach of the IHC staff policy". She concluded there were no factors that "might excuse this behaviour" and dismissed Ms Taylor.

[3] In an application to the Authority lodged in August 2015 Ms Taylor claimed her dismissal was unjustified because ISL had not conducted a sufficiently thorough and fair investigation, had relied on illegally obtained evidence to support the allegations made about her conduct, had not genuinely considered her explanation and failed to follow its own policies. She said ISL's decision was not one a fair and reasonable employer could have made in all the circumstances at the time of her dismissal because what she was said to have done did not amount to serious misconduct and dismissing her was not consistent with ISL's own policies because there were no previous incidents or disciplinary warnings.

[4] ISL replied that its decision followed a full and fair investigation from which its decision-maker, Ms Duley, had actually and reasonably believed Ms Taylor had engaged in "aversive conduct" towards a service user she was employed to support.

Order prohibiting publication of certain evidence

[5] Under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) publication is prohibited of the names of ISL services users and the address at which the two service users specifically referred to in the evidence and in this determination resided. The house was home to five intellectually disabled people who were supported in their various daily activities by ISL workers rostered to work there.

[6] For the purposes of this determination the service user to whom Ms Taylor was said to have spoken inappropriately is referred to as Ms A. Another service user who lived at the same address is referred to as Ms B. Ms B was mentioned in evidence about what happened at their home on 30 September 2014 and in other interactions between her and Ms A.

The issues and the Authority's investigation

[7] The issues for investigation and determination were:

- (i) Did ISL conduct a full and fair investigation of its concerns about Ms Taylor's conduct?
- (ii) Did its investigation disclose conduct a fair and reasonable employer could have found was serious misconduct in all the circumstances at the time?
- (iii) In light of conclusions reached on issues (i) and (ii), was ISL's decision to dismiss Ms Taylor, and how it was made, justified?
- (iv) If ISL's actions were not justified, what remedies should she be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (v) Was there blameworthy conduct by Ms Taylor that contributed to the situation giving rise to her grievance that warranted a reduction under s124 of the Act of any remedies awarded to her?
- (vi) Should either party contribute to the costs of representation of the other party?

[8] For the Authority's investigation written witness statements were lodged by:

- Ms Taylor; and
- Ms Duley; and
- Keni Waikari, an ISL community service manager who wrote the incident report about Ms Taylor's conduct on 30 September 2014 that Ms Duley then investigated; and
- Aroha Te Hau, a former ISL community services manager who also attended the two meetings Ms Duley held with Ms Taylor about the reported incident – one on 15 October 2014 described as a 'please explain'

meeting and a second on 20 October 2014 at which Ms Taylor was dismissed; and

- Dayvinia Mills, a community support worker and union delegate who attended the two meetings with Ms Taylor; and
- Judy Halbert, a community support worker who attended the first of those meetings as a support person for Ms Taylor; and
- Richard Rangihuna, a community support worker and union delegate who also attended the first meeting; and
- Thomas O’Neill, an organiser for the union to which Ms Taylor belonged, then called the Service and Food Workers Union.

[9] Each witness attended the Authority investigation meeting. Under oath, each witness confirmed their own written statement and answered questions from me and counsel for the parties. Counsel gave oral closing submissions, speaking to written synopses setting out their arguments on the facts and legal issues for resolution.

[10] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The reported incident – 30 September 2014

[11] On 1 October 2014 Ms Waikari gave Ms Duley an ISL incident report form with the following account of an event she dated and timed as occurring on 30 September 2014 at 4:45pm:

I was talking to Bella; Asked how [Ms A] was, she said [Ms A] told her she was good. My cell phone was on the loudspeaker setting. Bella did not hang the phone up and I heard her yelling at [Ms A] “sit down, shut up and eat your tea, or you can get outside and eat”. I was able to take my other cell-phone and record Bella yelling “I’m not gonna muck around with you. Those/the ones that look after you during the day think they know everything”.

[12] On the evening of 30 September Ms Waikari had telephoned Ms Duley and told her what she had heard. Ms Duley instructed Ms Waikari to visit the house, tell Ms Taylor what she had heard and to tell Ms Taylor that Ms Duley would look into the matter. Ms Duley also asked Ms Waikari to prepare an incident report. Ms Waikari followed those instructions. The following morning she gave Ms Duley her

incident report and a digital copy of the recording she had made on her second mobile phone.

[13] As well as being as an ISL service manager Ms Waikari was the niece of Ms A. Over recent months there had been concerns about changes in Ms A's behaviour. Ms Waikari frequently called the support workers at Ms A's home to check how her aunt was.

[14] In late August 2014 Ms Waikari wrote a comment on an earlier incident report that Ms A had "been displaying unusual behaviour towards staff and flatmates" and had "been verbally and physically abusing/hitting out at everyone". She wrote the comment after speaking to Ms Taylor and two other support workers at the house. She noted staff at the home had requested extra assistance as they felt unsafe and "double staffing" had been introduced.

[15] The arrangement for extra staffing was no longer in place by 30 September. Ms Taylor was the sole support worker at the house at the time of the incident reported by Ms Waikari.

[16] During late August and through September a further 11 incident reports had been made by eight different support workers regarding Ms A's behaviour. The incidents included seven of Ms A screaming, one of pinching Ms B, one of hitting Ms B, and one of banging the roof of the van when travelling to activities. One report described Ms A as being "known for outlandish behaviour". On one report Ms Waikari wrote a comment that staff needed to ensure Ms A and Ms B were not alone with one another during the day. On another report, about Ms A screaming at 8.50 am that she wanted her lunch and throwing things around, Ms Waikari wrote that staff needed to reply to Ms A "with a calm/low tone of voice". Her comments on those two latter reports were dated 26 September 2014.

[17] In the late afternoon of 30 September Ms Waikari had telephoned Ms A's residence while driving from the ISL office to the hospital. She used the hands-free loudspeaker function on a mobile phone placed in a space on the dashboard of her vehicle. Ms Waikari spoke briefly to Ms Taylor to inquire about Ms A. The call was not disconnected after Ms Taylor put the telephone down at her end of the conversation. Ms Waikari did not turn off her phone which remained on its

loudspeaker function as she drove to the hospital. The comments she reported hearing were made several minutes later. She said her vehicle was stationary in the hospital carpark at the time that she used a second mobile phone to make a recording of the latter part of what Ms Taylor could be heard saying.

Ms Duley's investigation

[18] Three days after receiving Ms Waikari's report Ms Duley wrote to Ms Taylor calling her to "a preliminary interview" about the allegation that she was heard speaking to a service user in an inappropriate manner. The letter said that if her explanation at the interview did not resolve the matter, "the next step would be to conduct a full and fair investigation". Ms Taylor was advised that she could bring a representative and that if misconduct on her part was determined, disciplinary action was a possibility.

[19] The interview, referred to by all witnesses as a 'please explain' meeting, was held on 15 October. Ms Duley was accompanied by Ms Te Hau who took notes. Ms Taylor was accompanied by four other support workers, including Ms Mills, Ms Halbert and Mr Rangihuna. During the meeting Ms Taylor was shown Ms Waikari's report. Everyone present also listened to the recording Ms Waikari had made. Whether Ms Taylor accepted during the course of the meeting that she had "yelled" at Ms A was a point in dispute throughout the Authority investigation. Ms Taylor's evidence was that she denied telling Ms A to 'shut up' and had said to Ms Duley that she told Ms A "to hurry up, sit down and eat her dinner".

[20] The meeting ended with Ms Duley saying the situation was of a serious nature and that a possible outcome was disciplinary action up to and including dismissal. She told those present that she would need some time to consider what she had heard at the meeting and would let them know her decision by Friday, 17 October.

[21] In the following days Ms Taylor requested assistance from a union official and Mr O'Neill, who was based in Napier, contacted Ms Duley about attending the next meeting. By email Ms Duley advised Mr O'Neill she had held a please explain meeting, heard Ms Taylor's explanation and was "currently considering my decision". Arrangements were made for the next meeting to be held on 20 October so Mr O'Neill could attend. Ms Duley sent him a copy of Ms Te Hau's notes of the 15 October meeting.

[22] After the 15 October meeting Ms Duley talked again with Ms Waikari. She said that was to “double check” Ms Waikari’s account. She conducted no formal interview with her and did not make any notes of that conversation. She did not tell Ms Taylor about the conversation.

[23] Ms Duley opened the 20 October meeting by advising its purpose was to provide a decision. Mr O’Neill asked for her preliminary decision which Ms Duley declined to give. According to Ms Te Hau’s notes Ms Duley said Ms Taylor had not admitted to acting inappropriately but had “talked about semantics” in her explanation. After a discussion about whether Ms Taylor had threatened Ms A and whether she had adequate training Ms Duley advised that her preliminary decision was to dismiss Ms Taylor. Following an adjournment in the meeting Ms Taylor apologised for her behaviour, said she wanted to keep working for ISL and would prevent such matters happening again. Ms Duley asked Ms Taylor how she could prevent this from happening. Ms Taylor said she would be keeping quiet and using the technique of ‘redirecting’ service users in a better way. Ms Duley said she was concerned about “the overall culture of the organisation” but it was not fair to use Ms Taylor as an example so she had to determine “if dismissal as a punishment fits the crime”. She said words used by Ms Taylor “were intended to intimidate” and she did not consider Ms Taylor had a good understanding of what she had been done wrong or shown any real remorse. She said Ms Taylor had sufficient training but had not shown a willingness to embrace changes in thinking and practice. Ms Duley then confirmed that her decision was to dismiss Ms Taylor for serious misconduct.

The evidence and the standard of proof

[24] The recording Ms Waikari made on 30 September 2014 was accepted and considered as part of the evidence in both Ms Duley’s inquiry and the Authority’s investigation. Arguably the recording was not lawfully made. Ms Waikari could lawfully record her telephone conversation without letting Ms Taylor know she was making a recording.¹ However that exchange had ended and Ms Taylor was not aware that the connection remained open when she put the telephone down after talking with Ms Waikari. From then on Ms Waikari was only an eavesdropper, not a participant, in whatever was said between Ms Taylor and the residents of the house, including Ms A. The communication included Ms Taylor calling the residents to the dining room

¹ Crimes Act 1961, s 216B(2); *D’Arcy-Smith v Natural Habitats Limited* [2015] NZEmpC 123 at [53] and *Talbot v Air New Zealand* [1995] 2 ERNZ 356 (CA).

for dinner, whatever could be heard of what the residents said to her or to one another, and whatever Ms Taylor said to Ms A.

[25] In carrying out its role of investigating and determining matters according to their substantial merits and without regard to technicalities the Authority has a discretionary power to take account of evidence that is not strictly legal evidence.² In the particular facts of Ms Taylor's case, the contents of the recording, what was said about it, and whether it was reasonably relied on by Ms Duley in the conclusions she reached had to be considered to determine the fairness of the employer's inquiries and decision. On that basis the recording could not fairly or sensibly be excluded as evidence for the Authority investigation. Whether such a recording could fairly be used by an employer or admitted as evidence in another case, even a similar one, was a matter that would depend on the particular facts of the case.³

[26] In justifying its decision to dismiss Ms Taylor ISL had to establish on the balance of probabilities that, as a result of a complete and fairly conducted inquiry, it was justified in believing serious misconduct had occurred. Ms Duley's decision had to be made out not only on the evidence known to the employer at the time but on what would have been available after proper inquiry. Her decision to dismiss Ms Taylor had to be based on a reasonably founded belief, honestly held, that serious misconduct had occurred. Even if Ms Duley genuinely believed Ms Taylor had committed serious misconduct and her dismissal was the appropriate outcome, deficiencies in the investigative and decision-making processes could result in a finding that Ms Duley's belief was not reasonably founded.⁴

[27] In conducting such inquiries and making such a decision ISL had to meet only a standard of reasonableness. However if required to justify its actions in proceedings in the Authority or the Employment Court ISL had to be able to provide reliable evidence of a sufficient basis for its conclusion that Ms Taylor committed serious misconduct. The nature and quality of that evidence is assessed on the balance of

² Employment Relations Act 2000, s 160(2) and s 157 (1).

³ *Talbot v Air New Zealand* [1995] 2 ERNZ 356 (CA) at 369 per Justice Richardson.

⁴ *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198 at [78].

probabilities, flexibly applied according to the gravity of the alleged conduct that led to the dismissal.⁵

[28] A crucial aspect of that evidence was the notes taken by Ms Te Hau during the two meetings on 15 and 20 October 2014. While both Ms Duley and Ms Te Hau confirmed those notes were not verbatim, they both described them as accurate. From questions asked of and answered by all the witnesses I was not satisfied their description could be accepted. At best the notes captured some of what was said or Ms Te Hau's interpretation of what was said, but not what the comments noted were in response to or even the actual order in which they were made. As a result I have not accepted her notes could be relied on to confirm a supposed admission by Ms Taylor of "yelling" at Ms A. Neither could they be relied on to confirm that a note of Ms Taylor saying she agreed she used inappropriate language meant she was agreeing with Ms Duley's conclusion about what words she had actually said or the tone in which she said them.

A full and fair investigation?

[29] In its closing submissions ISL described Ms Duley's inquiry as a conventional process that in hindsight could have been done differently. However it submitted the process was sufficient because Ms Taylor was given prompt advice of the issues, "accorded access to all information held", and given the opportunity to explain herself at two meetings at which she has union assistance or representation. It submitted that, in the context of care for intellectually disabled people, case law established that any inappropriate conduct directed at a service user, regardless of provocation, was likely to comprise serious misconduct.

[30] From my review of the evidence and submissions I have concluded, for the following reasons, that Ms Duley's investigation was not sufficiently full and fair to reasonably support the conclusions she reached:

- (i) The case law does not authorise a lesser standard of investigation because of the vulnerability of service users or ISL's policy regarding aversive conduct; and
- (ii) Ms Duley demonstrated no critical assessment of the reliability of Ms Waikari's evidence; and

⁵ See [Whanganui College Board of Trustees v Lewis \[2000\] 1 ERNZ 397](#) (CA) at [19] and [20] and [Ritchies Transport Holdings Ltd v Merennage \[2015\] NZEmpC 198](#) at [108].

- (iii) Ms Duley received information from Ms Waikari she did not disclose to Ms Taylor or give her the opportunity to comment on but which, more likely than not, affected Ms Duley's assessment of Ms Taylor's explanation; and
- (iv) Ms Duley did not make inquiries of others who reasonably could have provided information relevant or useful for her assessment; and
- (v) Ms Duley did not follow the disciplinary process she had advised she would follow, which caused some confusion in the second meeting and resulted in Ms Taylor's explanation not being genuinely considered.

Findings require a full and fair investigation

[31] ISL referred, in its closing submissions, to previous Authority and Court cases that emphasised its reliance on staff to care for its service users in a non-aversive way. Those determinations or decisions also refer to the requirement for a full and fair inquiry into allegations about an employee's conduct. They only confirmed dismissals were justified in circumstances where the employer was found to have made such an inquiry.⁶ The scope of the obligation was captured in this passage from the Employment Court's decision in *IHC NZ Inc v Fitzgerald* (with my emphasis added in bold print):⁷

In the context of IHC's responsibilities to its service users it was not able to take any risks about their welfare. I accept that **the allegation made by A was serious and required convincing evidence. At the time of the dismissal that evidence had been obtained.** I hold that Ms Bell, **by reason of her investigation**, was justified in her belief that serious misconduct with adverse consequences to one of its clients had occurred and in the circumstances the dismissal was an option that she could justifiably have taken.

The allegations against Ms FitzGerald were serious but in terms of the *Honda* test I find that Ms Bell **had evidence** which justified her belief that Ms FitzGerald had seriously misconducted herself.

[32] The reference to the *Honda* test is the assessment, on the balance of probabilities and referred to earlier in this determination, of whether the employer has

⁶ See, for example, *Hansen v Idea Services Limited* [2015] NZERA Wellington 87 at [48]; *Fleet v Idea Services Limited* (ERA, AA 73/09, 10 March 2009) at [28]; and *Randall v IHC* (ERA, WA 64/03, 30 April 2003) at [40].

⁷ [2006] 1 ERNZ 932 at [83] and [84].

convincing evidence to show it had a reasonable basis at the time of the dismissal for believing serious misconduct had occurred.⁸

No critical assessment of Ms Waikari's evidence

[33] Ms Duley's evidence showed no real critical assessment of Ms Waikari's report of what she said she heard on 30 September 2014. A full and fair inquiry by an employer's representative acting fairly and reasonably could not have failed to make such an assessment and to establish that it had been done. Rather Ms Waikari's allegation was simply put to Ms Taylor, with Ms Duley's view being that she then only had to decide if she believed Ms Waikari or Ms Taylor. That was not a sufficient basis on which to meet the requirement for a decision-maker to have a reasonable belief.

[34] Two aspects of what Ms Waikari said required more assessment than Ms Duley made or could show that she had made. Firstly, no analysis appeared to have been done of Ms Waikari's connection with Ms A and whether that changed her perception of what she heard and reported. Secondly, the relatively objective information available through the recording of part of what was said by Ms Taylor enabled some assessment to be made of the reliability of Ms Waikari's allegation.

[35] At my request ISL provided copies of incident reports made in 2014 concerning Ms A's behaviour. A significant proportion of those reports included comments added by Ms Waikari where she appeared to criticise the support workers (not just Ms Taylor) for instances where Ms A was reported to be screaming, yelling or swearing. In one instance a support worker (not Ms Taylor) reported finding Ms A in the lounge with her fists raised and standing over Ms B. Ms Waikari wrote on that report that Ms B was known to pick on Ms A when staff were not around and that was the cause of Ms A yelling and swearing.

[36] Ms Duley knew that Ms A was the aunt of Ms Waikari and told her that she would not be involved in Ms Duley's inquiry into her allegations about Ms Taylor's conduct. However I was not satisfied from the evidence available to the Authority investigation that Ms Duley really considered the context of ongoing concerns about

⁸ *Honda New Zealand Limited v New Zealand Boilermakers Union* [1991] 1 NZLR 392 (CA) at 395-396 and *New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Ltd* [1989] 3 NZLR 82 (LC) at 85.

Ms A's behaviour or how Ms Waikari's connection with Ms A may have influenced what she reported. It was a relevant consideration given the reliance that Ms Duley later placed on Ms Waikari's account for conclusions she drew about the "tone" Ms Taylor was said to have used in speaking to Ms A on 30 September.

[37] Ms Duley had one relatively objective means by which she could test the account of Ms Waikari – the partial recording. Ms Waikari's account, provided in writing early the following morning, was unequivocal in its description of how she heard Ms Taylor talking to Ms A. Referring to the comments she recorded, Ms Waikari described Ms Taylor as "yelling". She used the same verb to describe the earlier comment that she had not recorded: "I heard her yelling at [Ms A]".

[38] In her oral evidence Ms Duley accepted Ms Taylor was not yelling at Ms A in the recording. She said that at the time of her inquiry she did not believe the recorded comment was yelling or "overly loud". However she said she believed that the first comment was louder than the second comment but said in a similar tone. She said Ms Waikari told her the first comment was yelling. Ms Duley did not tell Ms Taylor that she understood the first comment was said louder than the second one. Instead Ms Duley said she relied on Ms Waikari's written incident report. In doing so she could not have reasonably concluded that Ms Waikari was necessarily correct, or more believable than Ms Taylor, given Ms Duley accepted the recording did not show the volume of speech Ms Waikari said it did. The contradiction between Ms Waikari's written account and her recording could not rationally or logically result in her version of events being accepted as uncritically as Ms Duley did.

[39] A further aspect demonstrating the lack of critical assessment of Ms Waikari's report was that there was no evidence that Ms Duley asked Ms Waikari anything about what she heard over the open phone connection in the several minutes before the reported comments of Ms Taylor or after those comments, from Ms A or any of the other residents. It was an inquiry that reasonably could have been made by an employer considering the context or circumstances in which the alleged comments were said. It was a point relevant to Ms Taylor's account of what had happened that evening although, for reasons discussed later in this determination, Ms Duley did not hear that account at the 15 and 20 October meetings.

Evidence gathered but not put to Ms Taylor for comment

[40] There were at least three further items of information that Ms Duley gathered from Ms Waikari that Ms Duley did not tell Ms Taylor about and therefore failed to give her a proper opportunity to address. From Ms Duley's evidence it was apparent this information influenced both her assessment of Ms Taylor and the decision to dismiss her. It was a defect in the process Ms Duley followed that was more than minor and resulted in Ms Taylor being treated unfairly.

[41] Firstly, although supposedly having excluded Ms Waikari from involvement with the inquiry, Ms Duley then spoke informally with her after the 15 October meeting about Ms Taylor's response to the allegations. She asked Ms Waikari to confirm her account of what was said. She said she did so to "double check" whether Ms Waikari's words changed but they did not. The apparent consistency of Ms Waikari's version impressed Ms Duley as making it more likely to be true. She made no note of that conversation, did not tell Ms Taylor that she had talked again with Ms Waikari, and did not tell Ms Taylor that it had influenced her view.

[42] Secondly, Ms Waikari told Ms Duley that Ms Taylor was involved in a previous incident of talking to a service user "in a disrespectful way". She told her that the incident was dealt with informally by another manager. It was said to have occurred before Ms Duley became ISL's regional manager in June 2014. There was no evidence to confirm the nature of the supposed incident, whether it involved Ms Taylor only or whether any culpability actually attached to her as a result. However Ms Duley did not disclose she had that supposed information or give Ms Taylor an opportunity to comment on it. On the balance of probabilities her knowledge of a supposed previous, similar incident involving Ms Taylor was a factor in Ms Duley's assessment of the incident under investigation and influenced her decision on whether a lesser sanction than dismissal was appropriate. Ms Duley formed and expressed a clear view that Ms Taylor was not committed to ISL's policies and values about interactions with service users. Her conclusion was based in part on the undisclosed impression created by what Ms Waikari had said to Ms Duley about a supposed previous incident which Ms Taylor did not get the opportunity to address, and if necessary correct.

[43] Thirdly, in her oral evidence at the Authority investigation in response to questions from Ms Taylor's counsel, Ms Duley said she knew Ms A was "traumatised" by what had happened on 30 September. She accepted her supposed knowledge did not come from talking directly to Ms A. She said she had relied on Ms Waikari's report for that view. Ms Waikari had visited the house briefly on the morning of 1 October where she spoke briefly to Ms A and to Ms Taylor. No information suggesting Ms A was traumatised by what Ms Taylor had said to her the previous evening was put to Ms Taylor during Ms Duley's inquiry.

Relevant inquiries not made

[44] Ms Duley's inquiry consisted of no more than her discussions with Ms Waikari, some of which were disclosed to Ms Taylor, and the two meetings she held with Ms Taylor. A fair and reasonable employer could not have failed to seek further available information to assist its understanding of the context in which the alleged comments were made by Ms Taylor to Ms A and thereby to assist it with a reasonable assessment of what had happened.

[45] Two relevant sources were available to Ms Duley. She knew from Ms Waikari that another support worker was at the house when Ms Waikari visited in the early evening of 30 September. Ms Duley accepted in her oral evidence that it would have been useful to have spoken to that worker, who had called into the house within 30 minutes of the recorded interaction, about her observations of the residents and Ms Taylor and anything that Ms Taylor told her about what had happened. Ms Taylor's evidence was that she and some of the residents, including Ms A, were washing the dinner dishes at the time that the worker arrived. Ms Taylor also talked with the worker after Ms Waikari left the house that evening. What the worker saw and heard at the time may have assisted with a fair assessment of whether Ms A was 'traumatised' by whatever Ms Taylor had said to her.

[46] Ms Duley also sought no information from the service users at the house, including Ms A. While talking to them would have need to have been done promptly and sensitively, an ISL manager could reasonably be expected to be able to do so (or have it done by someone who could appropriately do so) and to then properly assess that information. In the light of the allegation that Ms A had been 'traumatised' by what had happened, a fair inquiry would have talked to Ms A as part of assessing the

overall quality of Ms Taylor's working relationship with her. Ms Mills' evidence at the Authority investigation, which no reason was shown to doubt, was of a warm relationship between Ms A and Ms Taylor as a support worker in her home. Ms Mills said Ms A had "loved Bella" and "did heaps of things with Bella like cooking tea with her".

A flawed disciplinary process

[47] Ms Duley's letter calling Ms Taylor to the 'please explain' meeting expressly stated that a disciplinary investigation could follow if her explanation did not resolve the issue. Ms Duley's evidence was that she expected her inquiry might, at most, result in a first warning being issued to Ms Taylor. However by the end of the 'please explain' meeting Ms Duley had already formed a view that she needed to decide on whether to impose a more severe disciplinary sanction. She told the participants she would let them know her decision at a meeting in two days' time. The result was that the next meeting, held five days rather than two days later, opened with Mr O'Neill assuming Ms Duley was going to deliver a preliminary decision that he and Ms Taylor would need to address. This proved to be at cross purposes with Ms Duley's expectation that she would first hear further from Ms Taylor before doing so.

[48] Ms Duley already had an impression formed in the 15 October meeting that Ms Taylor was not prepared to provide an explanation of what had happened on 30 September. Ms Taylor had a different view of what had happened in that first meeting. She said Ms Duley had interrupted her when she tried to respond to questions and she formed the impression Ms Duley would not listen to her. Ms Duley then interpreted Ms Taylor's reluctance to speak defiant or off hand behaviour. Ms Duley described the meeting as being "hijacked" by the union supporters who accompanied Ms Taylor with questions that, in her view, were "muddying the waters" and "red herrings". The result was that Ms Duley never got to hear Ms Taylor's explanation of what was happening at the house at the time that Ms Waikari heard her talking to Ms A. Ms Duley said the first time she did so was when she read Ms Taylor's witness statement for the Authority investigation.

[49] The atmosphere or dynamic of the meetings were also affected by two wider factors.

[50] Firstly, ISL had carried out a retraining exercise, described as a 'Reset', during April that year. It followed some criticism of how some ISL staff in the Gisborne area treated service users. At the Reset meeting ISL staff were put on notice disciplinary action could be taken against them if they did not treat service users respectfully. They were reminded of ISL's policy about "non-aversive" communication with service users.

[51] Secondly, while Ms Duley was an experienced private health sector manager, she was a relatively recent appointment as ISL's Gisborne area manager. She took up the post in June 2014. At the time that she held her meetings with Ms Taylor and Ms Taylor's union representatives Ms Duley's likely approach to disciplinary matters, particularly in light of the Reset exercise, was still a largely unknown factor.

[52] Both aspects contributed to a heightened tension in the meetings which distracted from addressing the particular circumstances of the allegations about Ms Taylor's conduct. Ms Duley referred to a rumour she heard between the 15 and 20 October meetings that she was planning to make an example of Ms Taylor. It was a rumour she openly addressed, by saying she would not make an example of Ms Taylor, although there was disagreement between the witnesses whether Ms Duley said so in the first or the second meeting.

[53] Those different expectations and apprehensions resulted in Ms Duley not getting a clear account from Ms Taylor about what she said was happening at the time of the overheard comments. It was information relevant to a reasonable assessment of her conduct. Without attributing blame to either side of the discussion in those meetings, Ms Duley could not safely have moved to the conclusions she reached without doing more to address that deficit in the information available to her. Because Ms Duley did not, Ms Taylor did not then get a reasonable opportunity to respond to her employer's concerns or have whatever explanation she could make genuinely considered.

[54] Overall the defects in the process followed were more than minor and resulted in Ms Taylor being treated unfairly. The result was that how ISL carried out its inquiry and then decided to dismiss Ms Taylor on the basis of it was not what a fair and reasonable employer could have done in all the circumstances at the time.

Conduct capable of being serious misconduct?

[55] While ISL's decision and how it was reached were not justified for the reasons already given, there were also three reasons to doubt that a finding of serious misconduct could reasonably have been made even if its inquiry were fairly conducted.

[56] Firstly, the conduct of which Ms Taylor was accused was most similar to categories of unsatisfactory conduct, as defined in ISL's disciplinary procedure, that would result in first or final written warnings being issued before a dismissal occurred. It was similar to the examples given in that policy of "using abusive language", "failing to carry out as far as possible IHC's (sic) philosophy and policy" or "behaving in a manner not deemed suitable for the position held". Her alleged conduct was less similar to examples of serious misconduct given in the policy such as assault or gross neglect of an intellectually disabled person. The policy does state they are examples but says other actions may be considered serious misconduct if they are "of a similarly serious nature". Given the gravity of the allegation, convincing evidence would be required to establish that the employer had reasonably reached the conclusion that a worker's actions amounted to serious misconduct. In the example of the *Fitzgerald* case the employer's representative was found to have been justified in her belief that was so where the evidence established adverse consequences to a client had occurred. No such evidence was established in Ms Taylor's case.

[57] Secondly, a finding that Ms Taylor's conduct, if established as alleged, was misconduct rather than serious misconduct was consistent with the approach that Ms Duley herself took in another case around year later. The point relates not to any alleged disparity of outcome but only to the categorisation of the conduct. The other case concerned an allegation that Ms Halbert was overheard saying to a service user: "Hurry up and eat that food you, you're just being lazy". Ms Duley described the case as being "strikingly" similar to the allegation made about Ms Taylor. The significant point was that what Ms Halbert accepted she had said to the service user was categorised by Ms Duley as misconduct and Ms Duley issued Ms Halbert with a first warning. Ms Duley's explanation for the difference of outcome for Ms Halbert and Ms Taylor was not the actual or alleged behaviour but the difference in their responses to the allegations put to them. Ms Halbert was said to have made no excuse

and accepted what she did was wrong. She met with Ms Duley on her own, without union assistance.

[58] Thirdly, the deficient process resulted in Ms Duley not getting Ms Taylor's explanation of the context in which she had spoken to Ms A in the early evening of 30 September 2014. She did so for the first time on reading Ms Taylor's witness statement for the Authority investigation. Ms Taylor's statement said that soon after ending the phone conversation with Ms Waikari, Ms Taylor had returned to setting out meals for the service users in the dining room of their home and:

As I did so, I heard a commotion coming from the direction of the service users who were still in the passage. I heard [Ms B] cry out as if she had been hit or pinched because this is what had become normal.

So I called out to [Ms A] who was in the passage to "hurry up and sit down and eat your tea". I wanted [Ms A] away from [Ms B]. Apparently I had not hung up the phone properly and [Ms Waikari] overheard what I was supposed to have said.

[Ms A] was still grumbling and mucking around and her chicken stir fry was getting cold so that is when I told her "I'm not going to muck around with you" ... After that [Ms A] settled down and ate her dinner quite happily.

All the service users settled down and ate their meals. They were quite happy, no one was upset. I had to go and get the fifth service user who is in a wheel chair. I sat at the table with them all and fed him his dinner.

[59] A fair and reasonable employer could have, on considering that explanation, concluded Ms Taylor's actions (even if she used the words that Ms Waikari alleged) were motivated by concern about some form of physical altercation between Ms A and Ms B, which was an acknowledged problem. In that context a firm direction to Ms A could have been considered an appropriate redirecting activity. It was certainly a conclusion that could have been open to Ms Duley. As she noted in her oral evidence, at the time of making her decision to dismiss Ms Taylor, Ms Duley had no information about why Ms Taylor had spoken to Ms A: "As far as I knew, there was nothing that caused Bella to say them".

A justified decision?

[60] For the reasons given Ms Taylor established her personal grievance for unjustified dismissal. Ms Duley's inquiry and the decision she reached was not what a fair and reasonable employer could have done in all the circumstances at the time. Ms Taylor was entitled to an assessment of remedies.

Remedies

Lost wages

[61] Ms Taylor sought an award of lost wages for one year. ISL submitted no award was warranted because she had not proved she made reasonable endeavours to look for other work in order to mitigate her loss.

[62] Ms Taylor suffered a stroke on 19 March 2015. It was a contingency of her life that limited the extent of the loss of wages that could be awarded for her personal grievance. It affected her speech and she was prevented from driving. On her own assessment it was at least three months before she felt she had really recovered. She could not have worked through that period. Allowing for that event and the necessary recovery, the period for assessing Ms Taylor's loss of wages was limited to the five months from 20 October 2014 to 19 March 2015.

[63] During that period Ms Taylor enquired about jobs at four workplaces. She also made enquiries through friends and family. She did not have regular access to a computer for online applications. ISL criticised Ms Taylor for not applying for jobs in the disability support services industry but given the stigma associated with the reason for which ISL dismissed her, it was unlikely she would be successful in that sector if she properly disclosed why her employment by ISL had ended. She sought catering work which was her area of experience prior to work for ISL. Back problems made cleaning jobs, another area of prior experience, unsuitable for her.

[64] In the context of the employment opportunities in the Gisborne region, Ms Taylor's age (69) and her physical health, her mitigation evidence was sufficient to establish she made reasonable endeavours to find alternative work for three months of the five month period of her assessed loss. Accordingly Ms Taylor was entitled to an award of three months lost wages. Taking her evidence of her annual income at ISL being \$47,585, the award under s 123(1)(b) of the Act for reimbursement of wages lost as a result of her grievance totalled \$11,896.25.

Compensation for humiliation, loss of dignity and injury to feelings

[65] Ms Taylor keenly felt the stigma of her dismissal, particularly because of the reason given for it. She was embarrassed by having to explain to family and friends what happened. Her confidence in seeking other work was significantly undermined.

She gave evidence of experiencing sleeplessness and avoiding people she would otherwise socialised with as result of her embarrassment and loss of her sense of self-worth.

[66] The sum of \$12,000 was an appropriate level of award under s 123(1)(c)(i) of the Act to compensate Ms Taylor for the loss of dignity and injury to her feelings resulting from her dismissal and how it was carried out. It was a relatively modest sum but set mindful of the need not to keep compensatory payments artificially low.⁹

Reduction for contribution

[67] ISL submitted any remedies awarded to Ms Taylor should be reduced under s 124 of the Act for conduct by her that contributed to the situation giving rise to her grievance. It pointed to what it described as an admission by Ms Taylor at the first meeting that her conduct was inappropriate. Such a comment is recorded in Ms Te Hau's notes but for reasons already given, no reliance can reasonably be placed on the notes. They were inconsistent with another comment recorded in Ms Te Hau's notes of the second meeting in which Ms Duley is recorded as saying Ms Taylor had not admitted acting inappropriately.

[68] However, in seeking an alternative to dismissal, Mr O'Neill did propose Ms Taylor be given a written warning instead. While that proposal occurred in the context of a flawed disciplinary process, it was some acknowledgement Ms Taylor had contributed to the situation which was being investigated by Ms Duley. A modest reduction of ten per cent to the value of her remedies was appropriate in those circumstances.

Costs

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

[70] If they are not able to do so and an Authority determination on costs is needed Ms Taylor may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum ISL would then have 14 days to lodge any reply

⁹ *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[71] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰

Robin Arthur
Member of the Employment Relations Authority

¹⁰ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].