

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 630
3177899

BETWEEN

CHRIS WILLS
Applicant

AND

IDEA SERVICES LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Lars Hansen, counsel for the Applicant
Paul McBride, counsel for the Respondent

Investigation Meeting: 25 July 2023 at New Plymouth

Submissions received: At the investigation meeting

Determination: 25 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Chris Wills was employed by IDEA Services Limited (IDEA) as a schedule coordinator based in New Plymouth at its Taranaki office. Ms Wills first commenced work for IDEA on 9 August 2021.

[2] Ms Wills was given notice of the termination of her employment on 16 November 2021. The basis for the termination was that, according to IDEA, Ms Wills role was covered the COVID-19 Public Health Response (Vaccinations) Order 2021 (the public health order).

[3] On 16 November 2021 Ms Wills was given two weeks' notice of termination. She raised a personal grievance with IDEA on 10 January 2022.

[4] Ms Wills claims that she was unjustifiably dismissed from her employment and seeks compensation for lost wages, loss of benefit, and humiliation, loss of dignity and injury to feelings. Ms Wills also claims that she is entitled to payment of a notice period.

[5] IDEA says that because Ms Wills declined to be vaccinated that it became unlawful to engage her for work, and that as a result Ms Wills was not ready, willing and able to lawfully undertake employment. It also says that Ms Wills, after an extended process, was given notice of termination and that she is not entitled to any further payment.

Issues

[6] The issues identified for investigation and determination are:

- (a) Was Ms Wills unjustifiably dismissed;
- (b) If IDEA's actions were not justified (in relation to dismissal or disadvantage), what remedies should be awarded, considering:
 - (i) lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - (ii) compensation under s 123(1)(c)(i) of the Act
 - (iii) benefits under s 123(c)(ii) of the Act?
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Wills that contributed to the situation giving rise to her grievance;
- (d) In the circumstances, is Ms Wills entitled to payment of a notice period;
- (e) Should either party contribute to the costs of representation of the other party?

The Authority's Investigation

[7] An investigation meeting was held on 25 July 2023 in New Plymouth. Prior to the investigation meeting, and in accordance with directions issued at a case management conference on 6 September 2022, written witness statements were lodged by both parties.

[8] Ms Wills and Christine Hales, a former employee of IDEA, gave evidence in support of Ms Wills' claims. Pine Simeon, Workforce Service Manager, Michelle McIntyre, Regional Manager, and Jenny Anderson, Human Resources Business Partner, gave evidence for IDEA.

[9] All witnesses attended the investigation meeting and answered questions under oath or affirmation.

[10] As permitted by s 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. It has not recorded all evidence and submissions received.

Background and communications

[11] Ms Wills was employed to work at IDEA's Taranaki office. Her role as a schedule coordinator involved ensure rostering and scheduling of staff, primarily support workers engaged in residential and supported living, to ensure any 'gaps' in the schedule were filled, and ultimately so that the needs of the people that IDEA provided support to were met. Ms Wills had been employed for approximately one week when New Zealand went into a second lockdown on 17 August 2021.

[12] Ms Wills was relatively new to the role, having commenced employment on 9 August 2021. Ms Wills says she completed training through online modules. When the lockdown commenced on 17 August 2021, Ms Wills was told to work from home, and she did so between 17 August 2021 and 7 September 2021. She says that her job did not change at all during that period and that when she needed assistance, she would call the other schedule coordinator or Ms Simeon.

[13] A letter to all staff dated 20 October 2021 noting that IDEA had been advised that all high-risk health and disability workers would be required to be vaccinated if they were to continue to work. A list of roles was provided, including 'Administration roles (in local offices)' and 'All local office-based roles'. The letter noted that relevant employees would have until 30 October 2021 to receive their first vaccination, and until 1 December 2021 to be fully vaccinated. The letter advised that termination of employment was a possibility.

[14] Ms Wills says that after receiving the letter she went to see Ms Simeon as she was surprised that her role would be included as she was not directly providing care and support for IDEA's clients. She says that she asked Ms Simeon whether it would be possible to work from home, and that Ms Simeon advised her that IDEA were not

allowing that option. She says she also asked about working in a vacant office space upstairs and that she was told that that was not an option either.

[15] On 27 October 2021 a letter was sent to all staff confirming a mandatory requirement for workers to be vaccinated when undertaking certain work. This included the two roles relevant to Ms Wills previously noted on 20 October 2021. The letter noted that, given the wide-reaching nature of the public health order, it was IDEA's view that no redeployment opportunities were available. The letter noted that IDEA would not be able to schedule work for any impacted employees beyond midnight on Monday 15 November 2021. The letter advised that termination of employment was a possibility.

[16] Ms Wills says that between 20 October 2021 and 1 November 2021, she was called into Ms Simeon's office to discuss whether she was going to be vaccinated. She says that they were informal discussions.

[17] On 1 November 2021, IDEA sent a letter to Ms Wills noting that any impacted employee would need to have at least one dose of COVID-19 vaccine by 15 November 2021, and a second by 1 January 2022. The letter advised that IDEA considered that Ms Wills' role as schedule coordinator was covered by the public health order and requested she advise of her vaccination status by 8 November 2021.

[18] On 9 November 2021, Ms Wills sent an email to Ms McIntyre, including the following:

...

I have received your follow up letter. In your letter you state that Idea Services does not have any opportunities for redeployment for my job.

I believe that my job does not need to be (sic) office based as I spent many months working from home in lockdown and in all levels.

I do believe in this situation redeployment is a suitable option for myself as a Taranaki Scheduler.

I look forward to hearing from you.

[19] Ms McIntyre responded the same day, some approximately four hours later. She noted that IDEA was a "certified provider" and that as such there remained an expectation that Administration staff were vaccinated. She also responded to the request for working from home by recording IDEA expectation that scheduling staff would be in the office so long as that was permitted by the alert levels, and that schedulers were

expected to engage with and support whoever may turn up at the office. She also said that scheduling staff were expected to interact with other team members in the office and with the people they support. The email concluded:

...
Given the above considerations, which are by no means exhaustive, it is imperative that Scheduler Staff are vaccinated in order to carry out their role safely.

We believe that your role is covered by the Health Order and therefore encourage you to be vaccinated if you want to continue in your role after 15 November 2021.

[20] On 16 November 2021, Ms Wills issued a letter advising her of the termination of her employment on two weeks' notice. The letter also confirmed that she would be stood down. Ms Wills says that at no stage was she contacted "to work through a potential termination process" and that the only discussions she had were with Ms Simeon and that they were informal.

[21] On 30 November 2021, IDEA wrote to Ms Wills reminding her that the two weeks' notice period was to expire that same day, and that arrangements had been made for her final pay.

[22] Schedule 3A of the Act, provisions relating to COVID-19 vaccinations, was inserted on 26 November 2021, some 10 days after Ms Wills was given notice of termination. Schedule 3A of the Act was inserted by s 22 of the COVID-19 Response (Vaccinations) Legislation Act 2021. Neither party contend that schedule 3A applies to the matters requiring determination.

The public health order

[23] The public health order, at the relevant times in October and November of 2021, placed duties on persons performing work, and persons conducting a business or undertaking, in effect prohibiting the performance of certain work by persons that were unvaccinated.¹ 'Certain work' was defined in the public health order at all relevant times by reference to a schedule of groups of affected persons.²

[24] IDEA contends that the public health order, from 25 October 2021, extended to "care and support services" and workers employed or engaged by "certified providers".

¹ COVID-19 Public Health Response (Vaccinations) Order 2021 (public health order), clauses 7 and 8.

² Public health order, above n 1, schedule 2.

IDEA was at all relevant times a certified provider. IDEA also submitted that there was “an absolute prohibition in the Order of engaging unvaccinated workers precluded the Respondent from otherwise assessing practicable alternatives.” IDEA placed emphasis on the term “engage” as a basis for asserting it was prohibited or precluded from otherwise assessing practicable alternatives.

[25] Clause 7 of schedule 2 of the public health order included within its scope, at the relevant time, a prohibition on the carrying out of certain work as follows:

- Part 7: Groups in relation to health and disability sector
- 7.1 Health practitioners providing health services to patients in person
 - 7.2 Workers who carry out work where health services are provided to members of the public by 1 or more health practitioners and whose role involves being within 2 metres or less of a health practitioner or a member of the public for a period of 15 minutes or more
 - 7.3 Workers who are employed or engaged by certified providers and carry out work at the premises at which health care services are provided
 - 7.4 Care and support workers

[26] I am satisfied that the work required to be performed by Ms Wills’, including the carrying out of work at the office, was covered by the public health order³. IDEA were not able to allow Ms Wills to carry out certain work required by her role in the absence of her being vaccinated⁴, and that she was not permitted to carry out certain work required by her role⁵.

[27] The public health order did not mandate termination of Ms Wills’ employment, nor do I find that it necessarily prevented her from the performance of work outside of the office. However, the public health order did effectively prohibit the performance of the work, in the way, and at the location at which, she was engaged to carry it out.

Was Ms Wills unjustifiably dismissed?

[28] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether IDEA’s actions, and how IDEA acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.⁶ Also relevant to the Authority’s consideration are the good

³ Public health order, above n 1, schedule 2, clause 7.3.

⁴ Public health order, above n 1, clause 8.

⁵ Public health order, above n 1 clause 7.

⁶ Employment Relations Act 2000, s 103A.

faith obligations in s 4 Act. Having regard to the nature of this matter, s 4(1A) of the Act has particular relevance in relation to the actions of IDEA relating to the dismissal.

[29] The onus is on IDEA to justify its actions and justification requires the consideration of both substantive and procedural fairness.

Was IDEA's decision substantively justified?

[30] Counsel for Ms Wills submitted that the termination was a 'no fault' dismissal given that it was influenced by factors outside of the employment relationship. On that basis, Ms Wills says that consultation was required, and with it the provision of relevant information, but in submissions did not contest the substantive justification for the dismissal.

[31] IDEA says that Ms Wills' employment was justifiably brought to an end because she was not lawfully able to undertake her role. It submitted that as of 25 October 2021, all of IDEA's relevant employees were covered by the public health order. It says that, as a result, Ms Wills could not lawfully be engaged to undertake her employment and that it conducted a process, including the consideration of alternatives, and that Ms Wills was provided her notice period.

[32] It is submitted by IDEA that it had no reasonable alternative options available to it under the public health order and that compliance with the law is invariably justifiable and need not be consulted about.

[33] The public health order did not mandate the termination of Ms Wills' employment. Instead, it precluded her from carrying out certain work in circumstances where she was unvaccinated. That prohibition or mandate was uncertain in duration as at October and November 2021. In those circumstances, subject to procedural considerations, I consider IDEA had a substantive justification for the dismissal.

[34] I find that the decision to dismiss was substantively justified.

Did IDEA follow a fair process?

[35] In assessing whether the dismissal and IDEA's actions were procedurally justified, the Authority must consider the matters set out at s 103A(3) of the Act. I have also already noted the relevance of s 4(1A) of the Act to this matter.

[36] IDEA detailed the background communications sent both in relation to correspondence sent to all employees, and that sent to Ms Wills individually. It says that gave Ms Wills two weeks' notice of termination on 16 November 2021, noting that, despite consultation, there was no opportunity for redeployment and that no redeployment options had been identified or suggested by Ms Wills.

[37] It was accepted by IDEA that it was initially indicated that meetings would potentially be held. However, it says that once the public health order was implemented, its scope was broader than had been contemplated and that no meetings were seen as necessary. It contends that, as a large organisation, it was impracticable to engage in extensive and personalised consultation. It says that, instead, the responsibility was fairly put onto employees, at first instance, to discuss with IDEA their concerns.

[38] IDEA said that Ms Wills informed Ms Simeon that she would not be vaccinated on 21 October 2021 and that she wanted to discuss redeployment options. It said that redeployment options were considered, but that there were no redeployment options.

[39] IDEA says that reasonable alternatives were explored, but that there were none available given the scope of the public health order. It says that the public health order did not provide for Ms Wills to continue working, nor allow IDEA to explore other options to maintain Ms Wills' employment. IDEA says that it considered Ms Will's proposal that she be permitted to work from home but did not accept it. As to its reasons, IDEA contended that, amongst other things, the prior change during lockdowns was only temporary, that Ms Wills' role was necessarily an office-based role, and that it required interaction with other staff and required face to face contact with Support Workers. It says that Ms Wills did not appreciate or understand the relevant factors given her limited period of employment.

[40] Ms Wills focused on an alleged absence of adequate consultation and the consideration of alternatives to dismissal. She says that it was not incumbent on her to raise redeployment options and that the onus to consider those matters rested with IDEA.

[41] Ms Wills says that IDEA had good faith obligations requiring it to maintain and promote the employment relationship and to genuinely consult, with termination as a last option. She says that IDEA represented that they would engage in such a process in the correspondence issued to her, but that it failed to consult with her.

[42] Ms Wills referred to the statement of Ms Anderson where she asserted that “[i]t was not practicable for IDEA to contact and setup meeting times with everyone” as indicating a failure to adequately consult. In submissions, Ms Wills says there were four relevant matters for consultation being redeployment, working from home, the risk assessment, and Ms Wills’ view that the public health order did not apply to her role.

[43] Ms Wills says that IDEA failed to genuinely consult with her as to potential redeployment options. On 20 October 2021, IDEA noted in its correspondence to all employees, “redeployment options are limited”. Subsequently, on 27 October 2021, IDEA wrote to employees confirming the introduction of the public health order and its view that given its scope it did not consider redeployment opportunities were available. Ms Wills says that IDEA failed to proactively engage in consultation and to provide all information regarding redeployment, including as to what changed IDEA’s approach as between 20 and 27 October 2021.

[44] Ms Wills says that enquiries made as to the possibility of working from home were immediately rejected. She contends that IDEA had an obligation to discuss and provide all relevant information, including the reasons which IDEA has now provided as to why working from home was not a feasible option. Ms Wills’ evidence is that many of the reasons put forward by IDEA as to why working from home was not a suitable alternative in these proceedings were not raised with her at the relevant time.

[45] Ms Wills says that IDEA failed to consult with her in relation to the application of the public health order and their own risk assessment to her role. In doing so, Ms Wills referred to the statement of Ms Anderson that IDEA were “...uncertain if there were roles that might be permit unvaccinated staff to undertake them...” and policy of engaging vaccinated staff. I consider that evidence to be limited to the period prior to the application of the public health order at which time matters became significantly clearer.

[46] While IDEA may not have been required to consult as to the lawfulness of the public health order, I consider it clear they were obligated to genuinely engage and consult with Ms Wills regarding the potential impacts of it in terms of Ms Wills’ employment, and as to potential alternatives. More specifically, I find that IDEA were required to provide access to relevant information and an opportunity to comment on the relevant information prior to making a decision in terms of s 4(1A)(c) of the Act.

Further, in terms of s 103A(3) that a fair and reasonable employer necessarily would have to genuinely consider and respond to any reasonable proposals made by the employee, and additionally to actively consider any reasonably available alternatives to dismissal at its own initiative.

[47] Ms Anderson gave evidence as to the role of scheduler and the need for the tasks involved in that role to be informed by knowledge of the people IDEA support as well as through engagement with other staff and support workers. She also gave evidence that the office was used as a 'hub' for transportation of the people IDEA support and for other activities such as training. She gave evidence as to the difficulties IDEA faced with a working from home trial period implemented from November 2020 and for periods of lockdown. Those difficulties were said to include IT and connectivity issues. I do not accept that they were significant barriers to the possibility of Ms Wills working from home. However, I do accept that other evidence as to the need for supervision, collaboration, necessary knowledge being acquired in the workplace for the proper performance of the scheduler role. Ms McIntyre also gave evidence as to the need to work from the office, including having regard to critical meetings.

[48] I also accept that the need to work from the office, at least at times, was necessary having regard to Ms Wills particular employment situation having only recently commenced with IDEA. I also accept Ms Anderson's, Ms McIntyre's, and Ms Simeon's evidence was that whilst Ms Wills had some understanding of her role, she did not necessarily have a full appreciation of how the role would be performed in ordinary circumstances. Ms Simeon gave evidence as to the need for the role to be office based given an inability to obtain necessary information, which is constantly changing, when working from home.

[49] While I accept IDEA's evidence as to these matters, I consider it failed to provide that relevant information to Ms Wills prior to terminating her employment. The extent to which IDEA engaged with Ms Wills' proposal to work from home was extremely limited and was in effect limited to the email response from Ms McIntyre on 9 November 2021. That email, such as it provided reasons that were not exhaustive did little other than to inform Ms Wills of IDEA's expectation that the role be performed from the office. The exception to that was a reference to an expectation that scheduling staff interact with the wider team members. I consider that was entirely insufficient in the circumstances.

[50] As noted above, I consider the basis for IDEA's position as to working from home, as it is now articulated, to be sound. Ultimately, I consider IDEA's actions in declining Ms Wills proposal would have been reasonable had it properly engaged with Ms Wills, explained in reasonable detail the basis on which it disagreed, and given genuine consideration to what Ms Wills was proposing. A response was clearly provided, but I do not consider that response indicative of genuine consideration being given to her proposal.

[51] I do not accept that it was impracticable for IDEA to consult with individual employees who might be subject to adverse outcomes. Nor do I consider such a process was made impossible by reason of time constraints imposed by the public health order.

[52] One could have some sympathy with IDEA position as to the time constraints impacting consultation or the consideration of alternatives. I accept that the relevant time periods, and the situation more generally, were such that action was required. So were the circumstances generally. However, I am not persuaded that any of the time periods led to impracticability. Whilst not an acceptable medium or long term solution, working from home for a short period of time whilst alternatives were consulted on, meetings were held, and a final decision reached, would not have been unreasonable. If necessary, I consider discretionary leave would have been appropriate in the circumstance whilst IDEA undertook those reasonable steps.

[53] IDEA also says that leave was not an option. It says Ms Wills had no accumulated annual leave and leave without pay was impracticable given the employment of any other person as an interim measure would have been impossible given there would have been no defined end date. I do not accept those submissions, including because, albeit the circumstances involved were unique, leave without pay is specifically contemplated by the collective agreement at clause 8.4. Making arrangements for temporary cover may have been inconvenient. However, I do not consider doing so would have been impracticable. Such arrangements are commonly made for various reasons, for example, in circumstances where the timing of an employees return to work is uncertain due to illness or injury. Again, these were matters that were not genuinely considered and discussed with Ms Wills at the relevant time prior to dismissal.

[54] I also do not accept that IDEA's actions, by purporting to 'instruct' Ms Wills to raise any issues with it rather than actively engage in considering alternatives itself, were consistent with what would have been open to a fair and reasonable employer in all of the circumstances.⁷

[55] I do not consider the dismissal unjustifiable solely because of defects in the process that were minor and that did not result in Ms Wills being treated unfairly.⁸

[56] I find that the dismissal was procedurally unjustified.

Is Ms Wills entitled to remedies?

Is Ms Wills entitled to compensation for lost wages?

[57] Ms Wills seeks compensation for lost wages in the amount of \$10,286.64 representing a total of 13 weeks based on 36 hours per week at the rate of \$21.98 per hour. She also seeks an award representing the employer KiwiSaver contribution at the rate of three percent.

[58] Ms Wills says that she started looking for alternative work straight after her dismissal from IDEA. She says that there 'wasn't anything around' and that she ended up having to go on a benefit. Ms Wills says she looked for jobs online and provided the Authority with cover letters relating to the jobs applied for dated 12 September 2022. In questioning at the investigation meeting, Ms Wills stated that she didn't apply for other roles earlier because she had not been vaccinated.

[59] IDEA submitted that Ms Wills has not provided sufficient evidence of attempts at mitigation between late 2021 and late 2022. It says that any limitation in choices as to alternative employment because of her vaccination status is properly not a reason to award lost wages.

[60] Such as Ms Wills submitted that the matter is analogous to a redundancy situation as being a 'no fault' termination, it would be appropriate to consider whether the situation was such that, regardless of consultation, the termination of employment was inevitable in any event. IDEA says that the operation of the law meant that the loss of employment was inevitable, and that compensation is not properly available. I cannot

⁷ I reach this conclusion having regard to s 4(1A)(c) of the Employment Relations Act which specifically applies to employers.

⁸ Employment Relations Act 2000, s 103A(5).

conclude that dismissal was inevitable in the circumstances including as to what I have found was an absence of genuine consideration given to alternatives.

[61] I am satisfied that Ms Wills' lost wages as a result of her personal grievance and that an award of an equivalent of three months wages is appropriate. I decline, having regard to Ms Wills' limited steps in mitigation, to make any additional award in terms of s 128(3).

[62] I order that IDEA make payment to Ms Wills, within 21 days, of:

- (a) \$10,286.64 as compensation for lost wages; and
- (b) \$308.60 being the employer contribution to KiwiSaver.

Is Ms Wills entitled to compensation for humiliation, loss of dignity and injury to feelings?

[63] Ms Wills seeks compensation for humiliation, loss of dignity and injury to feelings. In her written evidence Ms Wills said that she felt angry as a result of the termination because she enjoyed her job, was able to do it, but no longer could. It is clear that for at least a reasonable period of time that Ms Wills struggled financially. I also accept her evidence that she felt stressed and depressed and that she felt humiliated and embarrassed as a result of losing her job. At the investigation meeting, Ms Wills said that the situation had caused her a huge amount of stress.

[64] As submitted by IDEA, Ms Wills' evidence as to the impacts of termination largely go to the fact that she was dismissed, as opposed to any necessarily unjustified action on the part of IDEA. Put another way, Ms Wills' evidence as to humiliation, loss of dignity and injury to feelings largely arises from the implications of the public health order rather than unreasonable actions by IDEA and is therefore not fully compensable. I find that is not exclusively the case and that invariably Ms Wills was impacted negatively by the inadequate and unjustifiable approach taken to the provision of information and the inadequate consideration of her proposals. However, I consider the impact resulting from IDEA's actions to be minimal as compared to the impact of the substantive issue.

[65] I order that IDEA make payment to Ms Wills, within 21 days, of \$5,000 as compensation for humiliation, loss of dignity and injury to feelings.

Contribution

[66] Section 124 of the Act requires that I consider the extent to which Ms Wills' actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.⁹

[67] IDEA contends that Ms Wills would have contributed in a significantly blameworthy way. It says that the question of vaccination status in terms of contribution is a matter that must be considered objectively rather than subjectively having regard to Ms Wills' personal decisions. It says Ms Wills was provided ample time to consider the matter and took no steps to obtain an exemption. It says Ms Wills did not respond to IDEA's instructions to communicate with them at the earliest opportunity and delayed doing so.

[68] I have found that the dismissal was unjustified on procedural but not substantive grounds. I do not consider Ms Wills' decisions as to her vaccination status are actions which contributed towards the situation that gave rise to her personal grievance. Nor do I consider such actions are blameworthy on either an objective or subjective basis.

[69] I also do not accept that Ms Wills is in any way to blame. I consider the personal grievance arises from IDEA's failure to appropriately engage and communicate with Ms Wills and to consider alternatives to dismissal. That was its failure, not Ms Wills' and I do not consider any of her actions led to that situation. I do not accept as valid IDEA's apparent expectation that it could make Ms Wills responsible for discharging its own obligations.

[70] I decline to make any deduction on the basis of contribution.

Is Ms Wills entitled to payment of notice?

[71] Ms Wills claims that she is entitled to payment of two weeks' notice in accordance with the collective agreement. The collective agreement provides, at clause 13.1 provides a notice period of at least two weeks that must be given.

[72] Ms Wills says that IDEA never advised her that the notice period would be unpaid, nor did they suggest to her that she was not ready or willing to perform work.

⁹ Employment Relations Act 2000, s 124.

She also says that she was willing and ready to perform work and that she was only unable to work due to IDEA's direction. She maintains also that she could have worked from home for the relevant period. Ms Wills contends that hours of work were agreed but not performed and that she is entitled to payment. She says that, when it became apparent that she was not to be paid for the notice period, that she then sought to contact IDEA in order to receive some sort of payment.

[73] Ms Wills referred in submissions to *Raggett v Eastern Bays Hospice Trust t/a Dove Hospice*¹⁰ in which the Authority did not accept that an argument by the employer that they were released from the obligation to pay wages on the basis that the employees, during a period of lockdown, had not performed services or work.

[74] Ms Wills sent a list of dates to payroll on 29 November 2021. The last day worked was recorded as 15 November 2021, and the dates that followed, through to 26 November 2021, were recorded as either sick leave or annual leave. Later the same day, Ms Wills was provided a response noting that IDEA required a medical certificate for the sick days, and that 17 November 2021 was a day not normally worked. The email also referred to clause 8.5, regarding sick leave, of the 2018 to 2020 collective agreement.

[75] IDEA submitted that it gave Ms Wills her contractual notice period and that the obligation as to notice is one that relates to time, not necessarily payment. It says that Ms Wills ultimately sought to receive payment for the period through a mix of annual and sick leave. It says that two of the sick days claimed were not working days for Ms Wills and that she was otherwise advised that IDEA required medical certification which was not provided by her.

[76] I consider it relevant that the termination of employment was at the initiative of IDEA and that it determined when the relevant notice period would commence. Further, I find that, in terms of the relevant two-week period, that IDEA could have had Ms Wills perform work from home on a short-term temporary basis. It did so during earlier periods when there was an inability to operate from the office. I do not consider that that was an approach that would have been reasonable in the medium or long term, as I have detailed above in relation to the dismissal. However, I find that there were

¹⁰ [2020] NZERA 266.

options available such as could have allowed Ms Wills to work without having to attend the relevant premises contrary to the public health order directive.

[77] Ms Wills says that IDEA gave no indication that the notice period would be unpaid. Having regard to the evidence, I accept that was the case. I also consider, in that context and having regard to the wider circumstances, that had IDEA intended that the period be unpaid, that they had a separate obligation to engage with Ms Wills regarding that particular issue.

[78] I find that Ms Wills is entitled to payment of two weeks' notice.

[79] I order that IDEA, within 21 days, make payment to Ms Wills in the amount of \$1,582.56 in relation to the two week period, and \$47.47 being three percent employer contribution to KiwiSaver.

Summary of orders

[80] IDEA Services Limited is ordered, within 21 days of the date of this determination, to make payment to Chris Wills of:

- (a) \$10,286.64 as compensation for lost wages;
- (b) \$308.60 as being the employer contribution to KiwiSaver relating to the lost wages;
- (c) \$5,000 as compensation for humiliation, loss of dignity and injury to feelings;
- (d) \$1,582.56 as the unpaid notice period; and
- (e) \$47.47 being the employer contribution to KiwiSaver.

Costs

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

[82] If they are not able to do so and an Authority determination on costs is needed Ms Wills may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum IDEA 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.

[83] 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.¹¹

Rowan Anderson
Member of the Employment Relations Authority

¹¹ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.