

ATTENTION IS DRAWN TO
THE ORDERS AT PARAGRAPHS [23]
TO [25] PROHIBITING PUBLICATION
OF CERTAIN INFORMATION
REFERRED TO IN THIS
DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch
142
3001328

BETWEEN KAYE GILLAN
Applicant

AND

BIRCHLEIGH
MANAGEMENT SERVICES
LIMITED trading as Birchleigh
Residential Care Centre
Respondent

Member of Authority: Christine Hickey

Representatives: Russel Hyslop and Allan Halse, advocates for the
Applicant

Rachel Brazil, Counsel for the Respondent

Investigation meeting: 22 and 23 March and 23 April 2018

Submissions and further 8,9, 21 & 22 May, 15 & 28 June & 1 October 2018
documents received:

Determination: 8 October 2018

DETERMINATION OF THE AUTHORITY

- A. Birchleigh Management Services Limited unjustifiably dismissed Kaye Gillan.**
- B. Taking contribution into account, Birchleigh Management Services Limited is to pay Kaye Gillan:**
 - (a) Reimbursement of lost wages calculated as set out in the determination; and**
 - (b) Compensation of \$18,750 without deduction.**
- C. Costs are reserved and failing agreement a timetable has been set.**

Employment relationship problem

[1] Kaye Gillan claims that Birchleigh Management Limited (Birchleigh) unjustifiably dismissed her from her role as an aged care worker at Birchleigh's residential care centre on 5 July 2016. She had worked for Birchleigh as a carer since 2004.

[2] Birchleigh says that it justifiably dismissed Mrs Gillan for serious misconduct. It says it followed a fair process and was justified in dismissing her after she took a small bag of potato chips for herself from a locked cupboard containing food and drink for residents.

[3] The investigation meeting took place over three days. I heard from numerous witnesses in person and by telephone. All witnesses gave sworn or affirmed testimony and most of them answered questions put to them by me and/or the parties' representatives. Some witnesses that had written letters or other evidence were not questioned after they swore or confirmed that their written evidence was true. That was because what they wrote was not contested.

[4] New evidence was presented a number of times during the investigation meeting, which required me to determine its relevance to the proceedings.

[5] Both parties were represented by representatives who robustly advanced their client's positions.

[6] There were challenges for all involved in this process, in least in part because of Mrs Gillan's fragile state of health.

[7] In this determination, I set out my findings on relevant issues of law and express my conclusions on the issues I consider require determination in order to dispose of this matter. I also specify the necessary orders. However, I am not required to, and do not, set out a record of all the evidence, record or summarise all the submissions made by the parties or indicate why I made, or did not make, specific findings as to credibility of any evidence or person.¹

¹ Section 174E of the Employment Relations Act 2000.

[8] The Authority has the jurisdiction granted to it by the Employment Relations Act 2000 (the Act)². It has no inherent jurisdiction. The Act sets out time limits within which personal grievances must be raised and time limits within which actions for recovery of penalties may be commenced.

Issues to be resolved

[9] In advance of the investigation meeting, I explored the issues that I needed to resolve with the parties. I set out the issues that I would be investigating and determining in the Notice of Direction dated 30 November 2017:

The issues for investigation and determination are:

- (i) Were the respondent's actions, and how it acted, culminating in Mrs Gillan's dismissal, what a reasonable employer could have done in all the circumstances at the time? This includes a consideration of the procedural aspects of the dismissal including as set out in s 103A(3)-(5) of the Employment Relations Act 2000.
- (ii) Did the respondent breach any terms of Mrs Gillan's employment agreement? This is likely to be a consideration in determining whether a fair procedure was followed by the respondent culminating in Mrs Gillan's dismissal.
- (iii) If the respondent's actions were not justifiable, what remedies should Mrs Gillan be awarded? Mrs Gillan claims 6 months lost wages and \$35,000 for humiliation, loss of dignity and injury to her feelings.
- (iv) Was there any contribution by Mrs Gillan to the situation leading to her unjustified dismissal?
- (v) If so, was it so blameworthy that there should be any reduction in any remedies awarded?
- (vi) A consideration of costs, which is likely to be reserved.

²

Section 161 of the Act sets out the Authority's exclusive jurisdiction.

[10] The further issues that my investigation and the parties' submissions have revealed I need to resolve are:

- (i) Should I make an order for non-publication of the residents and their family members' names, the names of staff who did not give evidence, and the alleged bully's name?
- (ii) Can I consider imposing penalties on Birchleigh?
- (iii) Are there other personal grievance/s I can consider?
- (iv) Does the allegation of bullying amount to a separate cause of action?
- (v) What does constructive dismissal mean?
- (vi) What do clauses 74, 75 and Schedule C of Mrs Gillan's employment agreement mean? Did Birchleigh breach those clauses of Mrs Gillan's employment agreement at any time during her employment?

Consideration of prohibition from publication

[11] The Authority's determinations, like its investigation meetings, are public and are often reported in the media, including very frequently by the Otago Daily Times.

[12] I requested Mrs Gillan and her representatives to consider whether she wished her name to be published in the Authority's determination. I was informed prior to the investigation meeting that Mrs Gillan did not wish to ask for name suppression and had consulted her medical team on this issue.

[13] Mr Halse confirmed to me again after the investigation meeting that Mrs Gillan wished her name to be published and that Mr Gillan's name and Mrs Gillan's daughters' names could also be published.

[14] Prior to the investigation meeting, Birchleigh was very clear that wants its name published. Mrs Gillan's representatives were aware of that. Its position has not changed. Birchleigh's name will be public, and so will the names of its two main witnesses.

Non-publication of the alleged bully's name as well as other staff mentioned in the proceedings from whom I did not hear any evidence

[15] It is common in Authority's determinations not to publish the names of people mentioned during the investigation who were not parties and who were not witnesses.

[16] I sought submissions from the parties on whether I should prohibit from publication the name of the alleged bully, who was summoned, and gave evidence in the investigation meeting.

[17] Birchleigh says that there is no need to publish the name of the staff member that Mrs Gillan alleges was bullying her. It says that the case has caused enough distress and it also says that this case is not about bullying.

[18] Mr Halse says that the alleged bully should be named because "abuse survives in secrecy" and "secrecy enables more abuse."

[19] Mrs Gillan's application, evidence and submissions mention this witness extensively as part of the background events and as part of the process that lead to Mrs Gillan's dismissal.

[20] The witness is not a party to these proceedings, and does not represent Birchleigh. At the relevant time, she was an employee there, on the same level as Mrs Gillan. She was not part of management. She was not the Birchleigh decision maker.

[21] Mrs Gillan seeks to expose what she considers was bullying by the witness. However, that is not what these proceedings are about. This case is one in which I am investigating and determining whether Birchleigh, Mrs Gillan's employer, is able to justify its decision to dismiss her.

[22] I do not consider publishing this witness's name to be in the interests of justice. I consider it would be contrary to the purpose of the Authority's role, which is to determine a claim of unjustified dismissal by Birchleigh, to allow these proceedings to be used to name and shame, or to seek revenge on the witness, who did not make the decision to dismiss Mrs Gillan.

[23] Therefore, I prohibit from publication this witness's name, and any other information about her that would be likely to lead to identifying her name. She is to be known only as Ms A.

[24] I also prohibit from publication the names of any residents, their family members and any other staff that either gave evidence or were mentioned in this determination who I have not named.

[25] For the avoidance of doubt, these non-publication orders cover:

- any reference to these proceedings and this determination in connection with the name of the alleged bully, other Birchleigh staff who did not give evidence in these proceedings, any residents and residents' family members; and
- apply to all media, including any digital or electronic publication or comment about this determination on any website, including on Culture Safe's Facebook page and website.

Can I impose penalties?

[26] In submissions for Mrs Gillan, her representatives applied for the Authority to impose penalties on Birchleigh. The request for penalties was made for the first time in submissions in May 2018. Birchleigh dismissed Mrs Gillan in July 2016.

[27] I dismiss applications for penalties because under s 135(5) of the Employment Relations Act 2000 (the Act) an action for the recovery of a penalty must be commenced within 12 months after the earlier of:

- the date when the cause of action first became known to the person bringing the action (Mrs Gillan); or
- when the cause of action should reasonably have become known to the person bringing the action.

[28] The causes of action Mrs Gillan's representatives seek to rely on are breaches of Mrs Gillan's employment agreement. Mrs Gillan was dismissed in July 2016. So far as I understand the claims and submissions on this issue, the breach/es are:

- As asserted in Schedule A 2(b) of the application, that Birchleigh had breached various clauses of Mrs Gillan's individual employment agreement; and
- "the same schedule at 2(c) also alleges that Birchleigh breached its good faith obligations by delegating parts of its investigation to [Mrs Gillan's] equal and that same equal was the alleged bully".

[29] Schedule 2(c) of the application did not allege a breach of good faith, which it did not. You can see this at paragraph [21] of this determination. Nowhere in the application to the Authority did Mr Hyslop ask for penalties as part of the orders sought.

[30] Given that Birchleigh dismissed Mrs Gillan in July 2016, submissions lodged in May 2018 are far outside of 12 months after Mrs Gillan became aware of the alleged breach/es of her employment agreement and the (now) alleged breach of good faith. Therefore, I have no jurisdiction to consider imposing penalties. I dismiss the request for penalties to be imposed.

Are there any personal grievance/s, other than for unjustified dismissal that I can determine?

[31] I made it very clear before commencing the investigation meeting that the only personal grievance I could investigate and determine is the alleged personal grievance of unjustified dismissal. That is the only personal grievance that was contained in Mrs Gillan's application.

[32] During the investigation meeting and in submissions for Mrs Gillan I was asked to condemn the process and outcomes of the events in June 2015, the process and outcome of events in January as well as in June/July 2016, which culminated in Birchleigh dismissing Mrs Gillan.

[33] Mrs Gillan's submissions appear to argue that I need to deal with the events in June/July 2015 and the final written warning as if it was a separate personal grievance of unjustified disadvantage without which Mrs Gillan would not have been dismissed almost a year later.

[34] Mrs Gillan also submits that:

a determination on this arm of the application will automatically effect the correctness of the [resident's name] investigation and its outcome, and:
g) Birchleigh's punitive disparity's (sic) for identical breaches of its House Rules.

[35] However, below is the sequence of events leading up to me investigating an unjustified dismissal personal grievance only, with the other matters to be background information Mrs Gillan wished me to be aware of.

Post-dismissal correspondence

[36] After Birchleigh dismissed Mrs Gillan, her husband wrote to Birchleigh outlining a number of matters that they believed amounted to personal grievances, and asked for her personnel file. He did so within 90 days of the date of her dismissal. However, he did not raise a grievance of unjustified dismissal.

[37] Mr Hyslop wrote to Birchleigh on 17 October 2016 raising personal grievance/s about a warning Mrs Gillan received in July 2015, and about her dismissal.

[38] On 31 October 2016, Ms Brazil responded for Birchleigh denying the claims made, stating that personal grievance of unjustified dismissal was not raised within the 90-day period and that Birchleigh did not consent to Mrs Gillan raising the grievance out of time.

Application to the Authority

[39] Mr Hyslop lodged Mrs Gillan's application in the Authority on 21 December 2016. The covering letter stated:

The event that caused the **Personal Grievance** was the Applicant's dismissal notice dated 5 July 2016. Notwithstanding that the Respondent was on notice from the Applicant that a grievance **would be raised if and because of her dismissal ...**

[emphasis in the original]

[40] The cover sheet of the application is entitled "Application for Determination by The Applicant against The Respondent for unjustified dismissal."

[41] Schedule A of the application outlined three claims being that the Respondent:

- (a) Constructively and unjustifiably dismissed her employment as set out in Schedule B, and;
- (b) breached the terms of the employment agreement by failing to settle several disputes (but predominantly the June 2015 and July 2016 disputes) using the express terms set out in clause 75 and Schedule C of that agreement
- (c) ... through [its] various managers and management teams, unlawfully delegated all or parts of its investigations into alleged serious misconduct allegations against the Applicant.

[42] Schedule B of the application states:

The following is a record of the series of background events of 2015 that led to the problem/matter.

[43] Schedule B goes on to set out Mrs Gillan's view of:

- the events, process and outcome of a disciplinary matter in 2015 that ended in a final written warning; and
- events leading to Mrs Gillan's complaint against another caregiver, Ms A, who Mrs Gillan alleged was bullying her by constantly interfering with Mrs Gillan's workplace tasks, the process Birchleigh undertook to deal with that complaint, and the result of that;
- Mrs Gillan's March 2016 performance review; and

- two incidents in June 2016, one being a complaint against Mrs Gillan by another care worker (Ms Q) that Mrs Gillan was bullying her, and a complaint made by Ms A that Mrs Gillan had committed theft by taking the bag of chips for her own use.

[44] Schedule B also contains the orders Mrs Gillan seeks from the Authority:

1 Pursuant to the above submissions and a hearing on this matter, the Applicant prays that the Authority will make the following orders against the Respondent:

- a) That the Authority order that the Respondent's termination of the Applicant's employment was unjustified, and;
- b) That the Respondent pay the Applicant the equivalent of 6 months wages. This amount is calculated by the Applicant as being \$16,800.00, and;
- c) That the Respondent further and additionally pay the Applicant the sum of \$35,000 in damages for hurt and humiliation it caused to the Applicant, and;
- d) Order of costs and incidentals to this application and hearing.

Case management conferences and directions on what Mrs Gillan's claim/s were

[45] After a case management conference on 2 February 2017, I decided to determine, on the papers, the jurisdictional claim of whether the applicant raised her personal grievance of unjustified dismissal within 90-days. If I found she had not, I was also going to consider Mrs Gillan's application whether the Authority to grant leave to raise her grievance out of time.

[46] I set a timetable for submissions and evidence. However, no submissions arrived. In the meantime, I understand that the respondent consented to Mrs Gillan raising her claim of unjustified dismissal out of time, because it conceded it was only out of time by a few days.

[47] I referred the matter to mediation, which I understand took place in April 2017. The matter did not settle at mediation.

[48] After mediation, Mr Hyslop requested a case management conference to set a timetable for an investigation meeting. However, he then requested that I delay

holding the case management conference because he had requested an opinion on Mrs Gillan's case from a barrister specialising in employment law.

[49] I instructed the Authority officer to respond that the Authority would wait to hear further from Mr Hyslop before holding a case management conference.

[50] On 6 November 2017, Mr Halse contacted the Authority officer informing him that he was Mrs Gillan's new representative. Initially, I understood that he had replaced Mr Hyslop, but it emerged that Mr Hyslop and Mr Halse were jointly acting for Mrs Gillan.

[51] On 30 November 2017, I held another case management conference. At the conference, Ms Brazil informed me that Birchleigh had consented to Mrs Gillan's personal grievance of unjustified dismissal being raised out of time.

[52] In the Notice of Direction I issued on the same day I noted:

After some discussion about a claim of unjustified disadvantage for alleged bullying, Mr Halse confirmed that the applicant will proceed with the personal grievance claim and breaches of contract claims. Mr Halse confirmed that [Mrs Gillan] does not want to proceed with [an] application for leave to raise a personal grievance of unjustified disadvantage outside of the statutory timeframe based on exceptional circumstances.

I understand that [Mrs Gillan] wishes to raise evidence of alleged bullying as part of the historical context for her claim of unjustified dismissal.

[emphasis added]

[53] I held a number of other case management conferences before the investigation meeting and after the first two days of the investigation meeting.

[54] I have never agreed that I can determine what happened in relation to the complaint by a patient's wife that ended in a final written warning. It is not a personal grievance that I could investigate and determine, as it was not part of an application to the Authority. For the avoidance of doubt, that means that this determination cannot

and will not decide whether the warning, and the process Birchleigh took to get there, was what a fair and reasonable employer could have done in all the circumstances at the time.

Does the allegation of bullying disclose a cause of action in addition to the personal grievance of unjustified dismissal?

[55] Mrs Gillan's representatives made separate written submissions on the issue of bullying of Mrs Gillan in her workplace and their allegation that Birchleigh failed to deal properly with that issue.

[56] The submissions conclude that:

the Authority should, and indeed is obliged to, condemn both the bullying as described above and Birchleigh's purported investigation process with a finding that there was bullying within Kaye's workplace and Birchleigh's procedures and processes were below the required standard to recognise that bullying with the intention of fixing it.

[57] However, I can only consider this issue and make findings on it insofar as it is relevant to the personal grievance of unjustified dismissal.

[58] An allegation of bullying in and of itself is not a cause of action under the Act. I can take into account how Mrs Gillan felt about her alleged bully's involvement in uncovering what became the allegation for which she was ultimately dismissed, but only as that impacts on my consideration whether Birchleigh justifiably dismissed her.

[59] However, I cannot make a separate determination on the process carried out by Birchleigh after Mrs Gillan's January 2016 complaint about Ms A bullying her, because there is no claim before me about that as a personal grievance of unjustified disadvantage. Therefore, I will not be making any finding about whether Birchleigh acted as a fair and reasonable employer could have acted in all the circumstances at the time in relation to Mrs Gillan's complaint of bullying and Birchleigh's reaction to that complaint.

What is constructive dismissal?

[60] The application sets out a claim that Birchleigh ‘constructively and unjustifiably dismissed [Mrs Gillan’s] employment.’

[61] It is clear that Birchleigh actually dismissed Mrs Gillan. No-one denies that. My task is to determine whether that was a justified dismissal.

[62] A constructive dismissal is a different kind of unjustified dismissal to an actual dismissal of an employee by and employer. The legal principles around constructive dismissal are well established. A constructive dismissal occurs when an employee resigns, but their resignation was effectively brought about in one of three ways:

- (i) The employer gives the employee a choice between resigning or being dismissed;
- (ii) The employer follows a course of conduct designed to get an employee to resign; or
- (iii) The employer breaches an express or implied term or terms of the employee’s employment in such a serious way that the employee is justified in ending the contract of employment because of the employer’s breach.

[63] Birchleigh actually dismissed Mrs Gillan so this case is not and cannot be a case of constructive dismissal.

[64] Therefore, submissions for Mrs Gillan on that basis, if that is what they are, cannot succeed.

[65] Insofar as the submissions allege Birchleigh was acting in a deliberate way designed to get Mrs Gillan to resign, or to put her in apposition in which it would be justified in dismissing her, I also reject those submissions.

What is the meaning of clauses 74 and 75 and Schedule C of Mrs Gillan’s employment agreement?

[66] Clauses 74 and 75 of Mrs Gillan’s employment agreement read:

74. **DISPUTE/GREIVANCE PROCEDURE**

75. See “Schedule C” for the procedure to be used in the event of any grievance.

[67] The heading of Schedule C is “Procedure for Resolving Employment Relationship Problems”. Schedule C sets out the type of information that s 65(2)(vi) of the Employment Relations Act 2000 (the Act) requires every individual employment agreement to include, which is :

(vi) a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised;

[68] Submissions for Mrs Gillan seem to suggest Schedule C sets out the procedure an *employer* must follow when it has concerns about an *employee’s* behaviour. However, the purpose of Schedule C is clear from its first words:

If the Employee believes that an employment relationship problem exists, or feels aggrieved because of some action by the Employer ...

[69] The Schedule details what an employee needs to do to raise concerns with their employer and what an employee’s options are for resolving problems they consider to exist.

[70] Under the heading, “IMPORTANT NOTES” the Schedule includes information on the necessity for an employee to raise a personal grievance within 90 days of the event that gave rise to the grievance or came to the employee’s notice.

[71] It follows that in the disciplinary process and decision to dismiss Mrs Gillan Birchleigh has not breached clauses 74, 75 or Schedule C of Mrs Gillan’s individual employment agreement.

[72] Insofar as the submissions instead refer to Mrs Gillan's dissatisfaction with Birchleigh's decision to issue her the final written warning in July 2015, I do not consider Birchleigh breached clauses 74, 75 or Schedule C of Mrs Gillan's employment agreement.

[73] If Mrs Gillan was dissatisfied with Birchleigh's action at the time it issued the written warning, she could have followed the process in Schedule C to raise her concern either informally or as a personal grievance, within 90 days of the date of the warning. She did not do so.

Background against which the issues are to be determined

[74] As set out in the application to the Authority, and in evidence given during the investigation meeting, Mrs Gillan considers that the following are necessary background to the dismissal.

June 2015

[75] On 16 June 2015, Mrs Gillan returned from three days off work. She asked a resident "what the hell are you doing in that chair?" She also spoke to the resident's wife and told her she would report back to her in a couple of days about whether her husband was walking.

[76] That conversation resulted in the resident's wife writing a letter that expressed concern about her husband's mobility.

[77] Birchleigh saw the communication between Mrs Gillan and the resident's wife as inappropriate. On 25 June 2015, Malcolm Hendry, the Chief Executive of Birchleigh, wrote to Mrs Gillan inviting her to a disciplinary meeting on the basis that Birchleigh believed that the information she gave the resident's wife:

Was both inappropriate and completely inaccurate...

We are very concerned you would discuss [the resident's] care with [the resident's wife] in this way. Because you had just started at 4:30 pm at that day after three days off, there is no way that you could have known with any certainty what actions were being taken to mobilise [the resident] in the previous two days.

[78] Mr Hendry wrote that when Kathy Shepherd, Birchleigh's Nursing Manager, spoke to Mrs Gillan her recollection of the conversation was very different to what the resident's wife reported in her email and in subsequent discussions with Ms Shepherd. Birchleigh wrote:

If proven correct you have breached Birchleigh's rules regarding passing on information about a resident and you have potentially brought Birchleigh into disrepute.

We also have concerns regarding our ability to place trust and confidence in you given your denial that you discussed these matters with [the resident's wife].

[79] Birchleigh invited Mrs Gillan to a disciplinary meeting with Ms Shepherd and Mr Hendry. The letter went on to say:

If there is no satisfactory explanation for your actions and we conclude that your behaviour was a serious breach of our rules, this may be considered misconduct, warranting disciplinary action up to and including instant dismissal.

We take this very seriously and strongly recommend you bring a representative with you to this meeting.

Please contact Kathy as soon as possible if the suggested meeting date or time are unacceptable.

[80] The meeting took place on 2 July 2015. On 6 July 2015, Mr Hendry sent a letter to Mrs Gillan conveying his preliminary view that Mrs Gillan had sworn at the resident when she said "what the hell are you doing in that chair?".

[81] Mr Hendry wrote that information that Mrs Gillan provided at the disciplinary meeting led Birchleigh to have a number of concerns:

1. The manner in which you initially spoke to [the resident] was inappropriate and in breach of our house rules.
2. The suggestion that you would "report back" to [the resident's wife] later in the week on what you had found out regarding [the resident's] walking was totally improper. It is the responsibility of our Nurse Manager and/or Registered Nurses to discuss with family ALL clinical issues relating to residents. By suggesting you would report back you undermine the role of our clinical staff and run the risk of conflicting information being reported back to family.

3. It is your account of your conversation with [the resident's wife] causing us the greatest concern, however:
 - a. You indicated it was a brief conversation. In [the resident's wife's] email to Kathy the very next morning she indicated that this was a long conversation initiated by you.
 - b. You were adamant that you made no comment about [the resident] being in the chair all day, yet [the resident's wife] specifically states in the email she sent the next day that you told her that he "had not been out of it all day". As discussed with you in our meeting, [the resident's wife] extended on this at the meeting ... when she stated that the conversation with you was intense. She again confirmed that you had told her that [the resident] was in the chair all day when she indicated that you had claimed that "staff were lazy about moving him and took short cuts with his cares." When we queried you regarding the comment about other staff you denied that you had made any such remark...

The breaches of rules in this case would, on their own, typically result in a formal warning. The loss of trust and confidence is, however a much more serious matter.

... Despite what we consider to be very clear evidence, you have completely denied anything of this nature occurred. We therefore have significant concerns regarding our trust and confidence in you and have made an interim decision to dismiss without further notice for serious misconduct.

[82] Mr Hendry then asked Mrs Gillan to provide any reasons why Birchleigh should not dismiss her or give any alternative to her dismissal. He also required her to take paid leave from her rostered shifts until the issue had been resolved.

[83] On 8 July 2015, Mrs Gillan wrote a letter of explanation to Mr Hendry. In it she said that she had no intention of undermining the clinical staff and that her intention had only ever been to put the resident's wife's mind at rest. She wrote that she was aware that she must follow the procedures and policies that Birchleigh had but noted "no resident or staff member was put at risk as a result of me using the word "hell" or as a result of offering to inform [the resident's wife] that her husband was walking." Mrs Gillan then indicated that now that she was aware of Birchleigh's policy and accepted that she must follow it.

[84] On 9 July 2015, Mr Hendry responded to Mrs Gillan that he considered her points and had decided to change the disciplinary action to a final written warning, which would go on her employment file.

[85] Mr Hendry said that he still had serious concerns about Birchleigh's ability to place trust and confidence in Mrs Gillan but he suspected her behaviour was the result of very poor judgment and not designed to specifically or intentionally bring Birchleigh or its staff into disrepute. He requested that Mrs Gillan:

...make every effort to ensure your communication with residents and/or family members remains professional and within expected boundaries and protocols at all times.

Clearly, any subsequent breaches of your employment contract will be treated very seriously indeed and would result in further disciplinary action. Further disciplinary action could result in dismissal.

January 2016 complaint of bullying

[86] On 19 January 2016, Mrs Gillan went to see Mr Hendry's administrative assistant in the morning. She was upset and asked if she could leave early. She said she wanted to do that because she was upset because Ms A "was always on to her and had got the backing of other staff who were at her."

[87] Mrs Gillan was concerned because Ms A had come to her and asked whether she had put a resident's teeth in yesterday because the family might put in a complaint that the teeth had not been cleaned. Mrs Gillan was concerned that if she was accused of not cleaning the resident's teeth she might be dismissed because of the July 2015 final written warning.

[88] She said that she did not think that Ms A should have talked to her about this but that the registered nurse on duty should have been the one to talk to her about that.

[89] Later that day Mr Hendry's assistant assured Mrs Gillan that not cleaning teeth was not a dismissible offence and not to worry about it at all.

[90] Either later that day or the following day, Mrs Gillan gave a handwritten letter to Mr Hendry's administrative assistant. The letter set out Mrs Gillan's concerns about the fact that Ms A did not like her and had been picking on her. Towards the end of the letter Mrs Gillan wrote that she had mentioned to other staff previously that Ms A was:

... bullying me all the time. ... She had seen it all, all staff were aware of the way she treats me. ... All I want is for Ms A not to be at me all the time it is a standing joke that I am the one that is always told off. She also said that she is sick of me going into rooms and not feeding people, not sure where that came from.

[91] On 28 January 2016, Ms Shepherd arranged a meeting between Mrs Gillan and Ms A, Mr Hendry's administrative assistant and herself. The administrative assistant took notes. Ms Shepherd explained to everyone that it was not a disciplinary meeting but a meeting to work through the issues and find a way to move forward. Both Mrs Gillan and Ms A were asked to talk about their work interactions with one another. Mrs Gillan says she feels like Ms A disliked her and picked on her. Mrs Gillan also raised the issue of her final warning and said she "feels that it is still an issue."

[92] Ms A apologised to Mrs Gillan and said that by telling her the family might put in a complaint she thought she was letting her know and looking out for her and nothing else. Ms A says she never intended to upset her.

[93] Mrs Gillan and Ms A agreed not to talk to other staff about any issues they had with each other but to talk to each other.

[94] Ms Shepherd says that she understood the meeting had resolved all issues between Mrs Gillan and Ms A.

[95] She says that she told both of them separately that if any further issues arose between them they should report directly to her.

[96] Mrs Gillan says that the way her complaint was handled was inadequate and enabled Ms A to continue bullying her. However, she did not raise that as a personal grievance or complain to Birchleigh about it again until June/July 2016, when she was the subject of the disciplinary process that led to her dismissal.

[97] Submissions for Birchleigh says that the approach they took in dealing with the complaint in a low-key way, was in line with “Best practice guidelines – preventing and responding to workplace bullying”, a joint Worksafe and MBIE publication.

[98] Ms Shepherd says that nothing further was mentioned to her about problems between Mrs Gillan and Ms A over the six-month period until June 2016, when Ms A came to Ms Shepherd and said that she had seen Mrs Gillan take a packet of chips.

Mrs Gillan’s March 2016 performance review

[99] In March 2016, Ms Shepherd completed a review of Mrs Gillan’s performance from March 2015. Ms Shepherd gave Mrs Gillan a favourable report scoring her as good, very good or competent in all categories. Mrs Gillan did not raise any ongoing issues with Ms A’s treatment of her. Ms Shepherd did not check with Mrs Gillan about Ms A’s treatment of her since the January meeting.

June 2016 incidents

Allegation of bullying against Mrs Gillan

[100] On 3 June 2016, Ms X, another caregiver, filled in an exception report³, which she gave to Ms Shepherd. She said that morning that Mrs Gillan started to argue with her and the registered nurse on duty about the number of patients they were each caring for. Ms X said she told Mrs Gillan that that information should be coming from Ms Shepherd and that it was not her place. Ms X said that Mrs Gillan:

started to reply that I was being lazy on my shifts which I feel was bullying. This confrontation was done in front of staff and residents.

[101] Ms Shepherd did not act on that report on 3 June but appears to have filled in an exception report investigation form later that month, possibly on 13 June 2016.

³ An exception report is an all-purpose form that staff were encouraged to fill in if they had any serious concerns. It appears to have been initially drafted mainly to deal with any issues of health or safety relating to residents, as it lists injuries and accidents. However, there is also a category of “other” that Birchleigh uses for inter-staff concerns and anything else it wants its staff to report to it. The relevant manager then has another form to fill in entitled “exception report investigation.” That lists the type of preventive or corrective action taken after the manager has investigated the issue.

The chips incident

[102] On 17 June 2016, Mrs Gillan sought permission from Ms Shepherd to provide some refreshments for family members of a recently deceased resident who were clearing out his room. She wished to give them lemonade. There was no lemonade in the fridge so Mrs Gillan took a key from Ms Shepherd's office to unlock a cupboard in which refreshments were stored for residents' activities and happy hours. Ms Shepherd was aware she was getting lemonade out of the cupboard.

[103] Mrs Gillan says that when she was reaching in for a bottle of lemonade a small packet of ready salted potato chips, from a multi pack, fell onto the floor in front of the cupboard.

[104] She says she is not sure why she did not put the bag back in the cupboard. She says her hands were full. Mrs Gillan picked up the chips from the floor and put them in her uniform pocket. She then relocked the cupboard, put the key away and took the lemonade to the resident's family.

[105] A registered nurse completing paperwork near Mrs Gillan heard and saw her pick up the bag of chips and put them in her pocket. It is not clear whether Ms A also saw that. Mrs Gillan and her representatives do not believe that Ms A saw that happen but consider that the registered nurse must have told her about it.

[106] Ms A told Ms Shepherd that she had seen Mrs Gillan take a bag of ready salted potato chips from the locked resident's cupboard and put them in her pocket.

[107] Ms Shepherd was having her lunch and told Ms A she would deal with it and that Ms A should go and fill in an exception report. However, instead of just filling in an exception report Ms A decided to confront Mrs Gillan.

[108] Ms A asked Mrs Gillan to come with her and they walked away from where other staff or residents were. Mrs Gillan says that Ms A then:

demanded I empty my pockets. She said she had seen me take a packet of potato chips and put them in my pocket and that was theft. The look on her face I was absolutely numb with fear. I told her I had tasted them and they were stale so I put them in the rubbish bin. If she had seen me take them she would have known that.

[109] Ms A took a photograph of the rubbish bin with the opened small bag of chips in it. That photograph has not been presented as evidence. However, it is unnecessary as evidence in the light of Mrs Gillan's admission she took the chips.

The disciplinary process

[110] On 20 June 2016, Mr Hendry sent Mrs Gillan a letter inviting her to a disciplinary meeting based on two allegations, removal of residents' food for personal use and inappropriate behaviour to Ms X, based on her complaint about Mrs Gillan.

[111] Mr Hendry's letter strongly advised Mrs Gillan to being a representative to the meeting and warned her that an outcome might be instant dismissal. Ms Gillan took Judith McMahon, then a kitchen worker and fellow caregiver at Birchleigh, with her to the meeting.

[112] The first meeting was on 24 June with a second meeting being held on 28 June 2016 after Mrs Gillan walked out of that first meeting.

[113] Mrs Gillan and Ms McMahon and the Birchleigh witnesses differ on whether Mrs Gillan stated she was not being listened to or that she would not be called a liar before she walked out. Ultimately, the reason she gave for not staying in the first meeting is not crucial to my determination so I make no finding on what Mrs Gillan said when she left the meeting.

[114] Mr Hendry and Ms Shepherd asked Ms McMahon to bring Mrs Gillan back to the meeting. However, Mrs Gillan refused to come back in that day.

[115] A second meeting was arranged, and Mrs Gillan attended that. After that meeting, Mr Hendry sent a letter conveying his preliminary decision to dismiss her because he decided she was guilty of serious misconduct proved in relation to the chips. He did not find the complaint against her by Ms X amounted to serious misconduct not find the complaint of bullying against Mrs Gillan amounted to bullying.

[116] Mr Hendry gave Mrs Gillan an opportunity to respond, which she did. On 9 July 2016, he conveyed his decision to dismiss her in writing because:

... you have admitted that you knowingly took a food item from Birchleigh for your own use without authorisation, which is serious misconduct. This occurred after a Final Written Warning was given to you on 9 July 2015.

Was the decision to dismiss one a fair and reasonable employer could have made in all the circumstances at the time?

[117] So far as I understand them, submissions for Mrs Gillan are that:

- Birchleigh wrongly delegated its investigation to Ms A allowing her to continue bullying Mrs Gillan;
- Ms A's bullying ended in Mrs Gillan's dismissal because they believed Ms A's allegation that Mrs Gillan had committed theft;
- It was unfair to characterise Mr Gillan's action as theft.
- The decision was predetermined because "[Ms A's] investigation would be believed and that [Ms Shepherd and Mr Hendry's] decision had already been made." This was demonstrated by them sitting in different chairs to where they usually sat and not listening to Mrs Gillan in the disciplinary meetings.
- Mrs Gillan faced disparity of treatment because Ms Shepherd and other staff ate Birchleigh food frequently and had not been disciplined for it; and
- If the July 2015 final written warning had not been unfairly issued Mrs Gillan would not have been dismissed.

The law on unjustified dismissal

[118] Once an employee has established that they were dismissed, the employer has to prove to the Authority's satisfaction that they were justified in the decision to dismiss and the process they used to make that decision.

[119] Section 103A of the Act requires the Authority to determine on an objective basis whether the employer's actions and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[120] In assessing whether Birchleigh’s dismissal of Mrs Gillan was justified, I need to be satisfied that Birchleigh had substantive grounds to find that Mrs Gillan was guilty of serious misconduct for which dismissal was one of a range of options open to a fair and reasonable employer.

[121] Birchleigh must have made its decision on evidence known to it at the time as well as evidence that would have been available to it after proper enquiry.

[122] I also need to be satisfied that Birchleigh carried out its investigation and disciplinary processes fairly. Section 103A(3) of the Act sets out the basic procedural process that need to be followed before an employer can prove that its process was one a fair and reasonable employer could have used in all the circumstances at the time

[123] I need to assess overall principles of fairness and be aware Birchleigh did not have to conduct an investigation “akin to a judicial inquiry”.⁴

[124] The test of justification requires me to look at the whole situation in the round and decide whether it was what a fair and reasonable employer could do in all the circumstances at the time.

Allegation that Birchleigh wrongly delegated its investigatory role to Ms A

[125] Submissions for Mrs Gillan argue that Ms Shepherd directed or allowed Ms A to “search” Mrs Gillan for the chips. Mrs Gillan says that it was degrading to have the person who bullied her searching her.

[126] Ms Shepherd and Ms A deny that Ms Shepherd told Ms A to ask Mrs Gillan to empty her pockets. Ms Shepherd did not know that Ms A intended to do that.

[127] Mrs Gillan’s evidence and submissions on her behalf make much of the fact that Mrs Gillan does not believe that Ms A was telling the truth when she said she saw Mrs Gillan put the chips in her pocket. Instead, Mrs Gillan says that it must have been the registered nurse who saw her and told Ms A.

[128] Ms A reported on Mrs Gillan and it may be that she made out that she had seen Mrs Gillan pick the chips up and put them in her pocket, when she had not.

⁴ *A Limited v H* [2016] NZCA 419; [2017] 2 NZLR 295 at [25]

[129] Because of Mrs Gillan's admission of taking the chips, Birchleigh did not have to carry out any further investigation into what had happened. In particular, because of Mrs Gillan's admission Birchleigh did not have to investigate whether Ms A actually saw Mrs Gillan put the chips in her pocket.

[130] Mrs Gillan criticised Ms Shepherd's question of whether Ms A touched or hurt Mrs Gillan when she "searched" her. Mrs Gillan thinks that was an inadequate response because Birchleigh should not have allowed Ms A to question her at all.

[131] I am satisfied that Ms Shepherd did not direct or allow Ms A to search Mrs Gillan. Ms Shepherd's response in asking whether Ms A touched Mrs Gillan was appropriate.

[132] Birchleigh cannot be blamed for any humiliation Mrs Gillan felt or that she felt "numb with fear" when Ms A confronted her about the chips.

[133] When I asked Ms A why she asked Mrs Gillan to empty her pockets she told me that she did so because she "just wanted to know". That seems unusual to me particularly if Ms A had seen Mrs Gillan put the chips in her pocket. It was not how a disinterested peer would be likely to act. I can understand why Mrs Gillan saw it as evidence of a co-worker who did not like her deliberately trying to get her into trouble.

What is the relevance of Ms A and Birchleigh characterising Mrs Gillan's action as theft?

[134] This is one of the aspects of the dismissal that has most badly affected Mrs Gillan. She and her representatives are very clear that she never thought of what she did as an act of theft. She is deeply aggrieved that Birchleigh characterised her behaviour that way. She submits that they copied the term from Ms A's exception report, thus allowing Mrs Gillan's bully to frame the allegation in criminal terms.

[135] In his letter to Mrs Gillan on 20 June 2016 inviting her to the disciplinary meeting, Mr Hendry labelled what Mrs Gillan had done as the "removal of resident food for personal use".

[136] It appears the first time Birchleigh referred to 'theft' was during the disciplinary meeting in response to Mrs Gillan saying that she saw what she had done

as “being similar to staff consuming afternoon tea before it is given to residents.” In response to that statement, Mr Hendry apparently agreed and said that “both would be treated as theft of food from Birchleigh.”

[137] Mr Hendry repeated that conclusion in the letter proposing Mrs Gillan’s dismissal.

[138] Theft requires some kind of dishonest intention. Mrs Gillan was not able to explain why she did what she did beyond “I don’t know” and a “momentary lapse of judgement”, but she never admitted to a dishonest intention. However, Mr Hendry appears to have inferred a dishonest intention when saying that her action would be considered theft.

[139] Mr Hendry’s evidence was directed at showing why Birchleigh saw the taking of resident’s food so seriously. By way of proving that staff knew that Birchleigh disapproved of them consuming resident food, Mr Hendry provided the Authority with a number of memos he had written over the years from 2007 up to January 2016. The seven memos ranged from 2007 until January 2016:

- a. There were two from 2007 that were about instances of residents’ money having been taken. These instances were labelled as “theft” by Mr Hendry. The Police were informed.
- b. One memo dated 6 March 2009 – refers to what it discovered after a:
recent investigation into theft of an amount of fruit in Braeside it is apparent that many staff have ... been eating fruit that has been purchased for residents. Under different circumstances I may have taken a slightly more relaxed attitude to this. However, it is the latest in a string of thefts over recent months, with other food items such as bread, milk, and biscuits going missing, as well as clothing and linen. Regrettably, ... I am forced to take a harder line and restrict staff consumption of all Birchleigh food.
Just so there’s no confusion:
 - While at work you can use our tea, coffee, cordial and any leftovers from the ACE meals.
 - You are not to eat Residents’ fruit, bread, ice cream, biscuits, cheese, etc.
- c. The memo dated 25 February 2013 was about a number of unspecified thefts from Birchleigh:

... we view dishonesty of any type very seriously and will take the strongest possible action when we find the person or people responsible. In the past we have reported thefts to the Police, and criminal charges have been successfully laid.

- d. The memo of 27 August 2014 was about suspected theft of toilet paper. Mr Hendry referred again to the possibility of Police involvement and criminal charges.
- e. The memo of 20 January 2016 was:

A reminder to all staff that you are not permitted to remove food or other items from Birchleigh premises without the specific authorisation of your Manager.

Removal of any item without permission will be treated as theft.

Anyone suspected of taking food or other items from Birchleigh will face disciplinary action. If proven, this would be considered serious misconduct and could result in severe consequences, including dismissal.

Note that this applies to ALL food items, including left-overs from meals or other catered events.

[140] Mr Hendry's evidence is that through the memos he had made it clear to all staff that if they consumed any items of food, other than leftovers on the premises, Birchleigh would consider that to be theft. Mr Hendry gave evidence that the concern behind staff taking left-overs off the premises was one of food safety, not dishonesty.

[141] He says he reached his view that staff taking food was serious misconduct for three reasons:

- (1) Removal of any item, especially from a locked "Residents' Activities" cupboard and not belonging to you is theft, but at what value does theft become OK? If removal of a 10 cent item was overlooked, what about an item worth one dollar? Five dollars? Where do we draw the line?
- (2) If every staff member on each shift could take a 10 cent packet of chips with impunity, we would be facing a food bill increase in the thousands of dollars each year.
- (3) Birchleigh is responsible for the 24/7 care of 83 of society's most vulnerable residents.

[142] Mr Hendry also concluded that if someone was prepared to take resident food for their own use, they might also be tempted to take other items belonging to the residents. He says that Birchleigh has to be able to trust that staff will respect residents' possessions as well as Birchleigh's possessions.

[143] Effectively, Mr Hendry says that if a staff member takes employer or resident property Birchleigh considers that to be serious misconduct. That being the case, Mr Hendry says it was clear when Mrs Gillan took food from a locked cupboard and consumed it knowing she was not entitled to do she committed serious misconduct.

[144] Mrs Gillan admitted taking the chips for the locked cupboard. However, she did not admit that she knew she was not authorised to do so. Mrs Gillan denied any dishonest intention.

[145] The House Rules, attached to Mrs Gillan's employment agreement, give "unauthorised possession of property belonging to ... Birchleigh residents,[or] Birchleigh" as an example of serious misconduct.

[146] I consider that it was open to Birchleigh, as a fair and reasonable employer, to conclude that in taking the chips for her own consumption, even if she lacked any intention to "steal" them, Mrs Gillan committed serious misconduct.

Could a fair and reasonable employer have reached a decision to dismiss?

[147] The House Rules provide that:

Serious Misconduct ... may, at the Manager's discretion, result in
Summary or Instant Dismissal.

[148] The fact that the policy says serious misconduct "may" result in dismissal means that there may be other outcomes. In particular, Birchleigh needed to weigh up all the circumstances and decide whether dismissal was the appropriate sanction. Therefore, Mr Hendry was not entitled to go straight from finding serious misconduct to deciding to dismiss without considering all the circumstances at the time.

[149] The memos provide evidence that staff, including Mrs Gillan, had been fairly warned that eating food, other than leftovers, meant for residents would be considered to be theft. However, the memos do not set out that the result of eating residents' food would inevitably be dismissal.

[150] After my investigation, I am satisfied that Mr Hendry applied a hard-line or 'zero tolerance' approach to the eating of food meaning that in his mind the only appropriate disciplinary outcome for Mrs Gillan was dismissal. To that extent, I consider that there was some pre-determination about the outcome once Mrs Gillan admitted taking the chips.

[151] However, I do not accept that pre-determination was demonstrated by any unwillingness to hear from Mrs Gillan or by where Ms Shepherd and Mr Hendry sat during the disciplinary meetings. For example, there was no pre-determination about Ms X's complaint against Mrs Gillan, which Birchleigh did not find proved.

Was there disparity of treatment?

[152] Although this was not clearly articulated the flavour of Mrs Gillan's case was that a number of staff ate food, other than leftovers, that was meant for residents while at work. However, she was the only one who had been held to account for this, which was unfair.

[153] During the disciplinary meeting, the parties agree that Mrs Gillan raised as an explanation for why she did not see her behaviour as dishonest or unusual the allegation that other staff ate food meant for residents, such as afternoon tea, that were not leftovers. Ms Shepherd or Mr Hendry told her during the meeting that she should fill out an exception report naming the staff so the allegation could be investigated.

[154] Mrs Gillan and Ms McMahon say that Mrs Gillan specifically mentioned Ms Shepherd as being one of the people who ate residents' food before the residents were served. Mr Hendry and Ms Shepherd deny that Ms Shepherd was named and Ms Shepherd denies that she eats residents' food in that way.

[155] Both parties agree that Mrs Gillan did not name any other staff she alleged did the same or a similar thing to her.

[156] Mr Hendry and Ms Shepherd were adamant in the Authority's investigation meeting that there was no widespread behaviour of staff eating food meant for residents. Mrs Gillan brought witnesses to the investigation meeting to give evidence that she was correct. However, none of that evidence was available to Birchleigh before it made its allegation to dismiss Mrs Gillan.

[157] That is partly because Mrs Gillan was not aware of some of that evidence herself until well after her dismissal. I can only consider what Birchleigh knew at the time it made its decision to dismiss Mrs Gillan, and what it could reasonably have discovered. It could not have discovered, for example, Sandra Stacey's evidence because she was first employed in February 2017, seven months after Mrs Gillan's dismissal.

[158] However, I consider that when Mrs Gillan raised the possibility that she was not the only one eating food meant for residents, Birchleigh needed to investigate this allegation fully. It was not sufficient to say that Mrs Gillan needed to make an exception report and to carry on with the disciplinary process. That was unrealistic while Mrs Gillan was suspended and undergoing a disciplinary process.

[159] I consider that to have been unfair and a failure in Birchleigh's process.

[160] Mrs Gillan has not been able to demonstrate disparity of treatment, but that may partly be because no one else had been caught out and admitted doing something similar. Mr Hendry's evidence was that he had caught a former staff member in the act of stealing supplies from the kitchen. He was adamant that person would have been dismissed if he had not resigned.

What other factors should Mr Hendry have considered in deciding whether to dismiss?

[161] At the investigation meeting, Mr Hendry said that Mrs Gillan taking the small bag of chips, worth under one dollar, led him to lose trust in her and suspect that she may be dishonest about resident's personal money and possessions. He thought there would have been no circumstances in which he would have accepted that her actions did not destroy the trust Birchleigh needed to have in her.

[162] However, Mrs Gillan had a long record of service with no like incidents. She had recently had a favourable performance review. Ms Shepherd and Mr Hendry acknowledged that Mrs Gillan had a genuinely caring attitude to the residents.

[163] There is a significant difference between Mrs Gillan taking a small bag of chips and her being of any risk of taking a resident's personal possessions or money. There is also a difference between taking the chips for an on-duty snack and taking the larger quantities of food and/or toilet paper off site that had been problems in the past, after which Birchleigh issued memos.

[164] Also, I am concerned that Mrs Gillan's final written warning of 9 July 2015 had a disproportionate influence on how Mr Hendry saw the disciplinary options open to him.

[165] From his evidence at the investigation meeting, I find that Mr Hendry considered that the fact of the final written warning, issued less than a year before the new allegation, meant that the further finding of serious misconduct must result in dismissal. For reasons given earlier, I cannot determine whether that warning was justified

[166] For two reasons I consider Mr Hendry's approach not to have been a fair and reasonable approach. First, his belief was that the effect of the final written warning was limited to one year. By letter dated 9 July 2015, Mr Hendry issued the warning for behaviour that occurred on 16 June 2015. The new behaviour of concern happened on 17 June 2016, a year and day after the earlier behaviour. Mr Hendry's dismissal letter was issued on 5 July 2016, only four days before the earlier warning expired in Birchleigh's view. I do not consider Mr Hendry took the timeframes sufficiently into account.

[167] Secondly, the behaviours were of a very different kind. The warning was over Mrs Gillan mistakenly, but with the best of intentions, giving what turned out to be inaccurate information to the resident's wife. She undertook to comply with relevant Birchleigh policies from then on and did so. Birchleigh considered Mrs Gillan's behaviour in relation to the chips to be of a dishonest nature, which was not at all the same kind of behaviour.

[168] In addition, I consider that Mr Hendry did not sufficiently consider Mrs Gillan's length of service as a mitigating factor, or her positive performance report of March 2016.

Conclusion on unjustified dismissal claim

[169] A fair and reasonable employer could have found that Mrs Gillan was guilty of serious misconduct. However, such an employer could not have concluded, in all the circumstances, that the essential foundation of trust and confidence in Mrs Gillan had been undermined to such a significant degree to warrant her dismissal. I am not suggesting that no disciplinary sanction would have been justified, but that dismissal was an unnecessarily severe sanction in all the circumstances. Therefore, Mrs Gillan has a personal grievance of unjustified dismissal.

Remedies

Lost wages for the three months after the dismissal

[170] In her application, Mrs Gillan sought lost wages of \$16,800. In submissions, she sought \$18,000 for lost wages from the date of dismissal until 13 May 2018.

[171] Section 123(1)(b) of the Act allows me to order Birchleigh to reimburse Mrs Gillan for the whole or any part of wages or other money she lost as a result of her grievance. Section 128(2) of the Act provides that I must order Birchleigh to pay Mrs Gillan the lesser of a sum equal to her lost remuneration or to three months' ordinary time remuneration.

[172] Three months from the date of the unjustified dismissal was 4 October 2016. Birchleigh paid Mrs Gillan two weeks' pay when it dismissed her. Mrs Gillan began her new job on 17 August 2016. However, she earns a lower hourly rate than she earned from Birchleigh and some weeks worked fewer hours.

[173] Mrs Gillan is entitled to an order that Birchleigh pay her actual lost wages for the initial three-month period (13 weeks) after her dismissal. The parties should seek to agree to the amount owed. In order to calculate that the parties must take Mrs Gillan's usual weekly gross earnings at Birchleigh x 13 weeks. They should then subtract the two weeks' pay she received at the end of her employment as well as the amount she earned over the following 11 weeks ending on 4 October 2016.

[174] If the parties are unable to agree on this Mrs Gillan has permission to return to the Authority for me to make a further order.

Compensation

[175] In her application to the Authority, Mrs Gillan sought \$35,000 in compensation for humiliation, loss of dignity and injury to her feelings. In submissions, she sought an amount “at the extreme top end of the hurt and humiliation spectrum”.

[176] The submissions set out Mrs Gillan’s reasoning. They say that amount originally sought was \$50,000 less \$15,000 for admitted contributory conduct. However, Mrs Gillan now submits that there should not be any deduction under s 124 of the Act for contribution.

[177] Submissions for Mrs Gillan say that Birchleigh dealt with her bullying allegation inadequately and that Mrs Gillan “gave up” at that stage. Evidence for Mrs Gillan suggests that her depression either first occurred around the time of the bullying allegation, or six months earlier when Birchleigh gave her the written warning.

[178] I accept that Mr Hendry and Ms Shepherd had no way of knowing Mrs Gillan’s mental health was poor at the time of the investigation and disciplinary meetings. Mrs Gillan was actively concealing her unhappiness related to her job from her husband and daughters. If her family had no idea of Mrs Gillan’s deteriorating mental health, Mr Hendry and Ms Shepherd could not be expected to have been aware of that. In fact, Mrs Gillan had even concealed the fact she was going through a disciplinary process from Mr Gillan.

[179] In February 2017, her medical team commented that depression was a serious illness “which does impact on decision making and could lead to could of character behaviours.” However, the team acknowledged that they were not involved in her care at the time she took the chips. Birchleigh could not be expected to take Mrs Gillan’s state of mental health into account at the time of the disciplinary meeting and decision, as it had not been drawn to its attention.

[180] Mrs Gillan attempted suicide within days of being dismissed by overdosing on medication prescribed by her doctor. Thankfully, Mr Gillan was able to call for help and her attempt was unsuccessful. Mrs Gillan has had a long period of psychiatric and psychological care and recuperation. She and her family have been deeply affected by her dismissal.

[181] Medical evidence for Mrs Gillan is that she had severe depression with suicidal ideation. Mrs Gillan continued to suffer severe depression for some time, and was only discharged from the care of the community mental health team shortly before the investigation meeting in March 2018. It was my observation during the investigation meetings that Mrs Gillan's mental state was still precarious and that these proceedings were more difficult for her than she had anticipated.

[182] I find that Mrs Gillan suffered harm under the three heads of s 123(1)(c)(i) of the Act as a result of her dismissal. However, Birchleigh was not aware of what may have been some pre-existing vulnerability.

[183] At the investigation meeting, Mrs Gillan gave evidence that her new employer had discovered the reason that she was dismissed from Birchleigh, which she says almost resulted in her dismissal from her current employment. It was her submission that Mr Hendry had told the manager of her new place of employment. Mr Hendry denied that he had told anyone why Mrs Gillan had been dismissed. During the investigation, Birchleigh gave evidence that a current employee of Birchleigh who had previously worked for Mr Gillan's current employer had told a number of staff there about the reason Mrs Gillan left Birchleigh. Mrs Gillan was very distressed at this talk and saw it as another example of being unfairly treated by Birchleigh.

[184] I am unable to consider compensating Mrs Gillan for the distress she suffered as a result of her new employer learning why she had been dismissed. That is because I am not satisfied that her employer was to blame for the gossip getting to Mrs Gillan's current employer.

[185] Considering the evidence about the effect on Mrs Gillan of the dismissal, the range of awards in cases of this kind, and subject to contribution, Birchleigh must pay Mrs Gillan \$25,000 in compensation.

Contribution

[186] Having determined that Mrs Gillan has a personal grievance, in deciding both the nature and the extent of remedies, the Authority must consider the extent to which Mrs Gillan's actions contributed to the situation that gave rise to her personal grievance. If her actions were sufficiently blameworthy, I must reduce any remedies accordingly.

[187] Mrs Gillan took a packet of chips out of a locked cupboard containing what she knew to be refreshments and snacks for the residents' use. While she may not have had sufficient dishonest intention at the time she put the chips in her pocket to amount to committing theft, I consider that Mrs Gillan did know that what she did was wrong. That action was the only thing that led to her personal grievance and Mrs Gillan must take some responsibility for it.

[188] What she did contributed, in a blameworthy way, to the situation giving rise to her personal grievance. I consider that her contribution should be reflected in a 25% reduction in the compensation payable and the limitation of lost wages to the three month period immediately following her dismissal.

Orders

[189] Taking contribution into account, Birchleigh Management Services Limited is to pay Kaye Gillan:

- (i) a gross sum of three months lost wages calculated as set out in paragraph [173] above; and
- (ii) compensation of \$18,750 without deduction for humiliation, loss of dignity and injury to her feelings.

Costs

[190] Costs are reserved. Failing agreement between the parties, the party seeking costs must make an application for costs to the Authority within 28 days of the date of this determination. The other party must respond within 14 days of receiving those submissions.

[191] The parties can expect the Authority to apply its usual daily tariff of \$4,500 for the first day and \$3,500 for any subsequent days.

Christine Hickey
Member of the Employment Relations Authority