NOTE: PERMANENT SUPPRESSION ORDER MADE BY THE EMPLOYMENT COURT PROHIBITING PUBLICATION OF THE NAMES AND IDENTIFYING DETAILS OF THE SERVICE USERS REFERRED TO IN THE PROCEEDING AS WELL AS THE LOCATION WHERE THE EMPLOYMENT RELATIONSHIP PROBLEM TOOK PLACE REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA671/2019
[2020] NZCA 239

BETWEEN	JEAN LOIS COWAN Applicant
AND	IDEA SERVICES LIMITED Respondent

Court: French and Clifford JJ

Counsel: P Cranney for Applicant
G Ballara and S Radcliffe for Respondent

Judgment: (On the papers) 17 June 2020 at 9 am

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay the respondent costs for a standard application with usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Ms Cowan brought a personal grievance of unjustifiable dismissal against her former employer IDEA Services Ltd. The claim was unsuccessful in both

the Employment Relations Authority[1] and the Employment Court.[2] Ms Cowan now seeks leave under s 214(2) of the Employment Relations Act 2000 to appeal the Employment Court decision to this Court.

Background

[2] In order to explain the arguments advanced in support of the leave application, it is necessary to set out the background in some detail.

[3] IDEA Services is the operational arm of IHC and a registered charity. It provides services for people with intellectual disabilities, known as service users. It employed Ms Cowan as a level 3 support worker. She had worked in that role for some 17 years.

[4] IDEA Services required staff to adopt a non-aversive approach to service users. Its policies included provisions that the safety and best interests of vulnerable adults were paramount and that assaulting a person with an intellectual disability was an example of serious misconduct.

[5] Ms Cowan's dismissal arose out of an incident involving two service users whom we shall call Mr C and Mr M. Both lived in the same residential housing and had received support from IDEA services for many years. Mr C was in his mid-60s with relatively high needs. At the time of the events in issue, he was terminally ill.

[6] On 26 March 2017, Mr M reported hearing a slapping sound during the morning from Mr C's room where he believed Ms Cowan was. Mr M was very upset and kept asking if Mr C was ok. An incident report was prepared and on 28 March the service manager talked to Mr C. When asked how he was, Mr C replied "Jean Cowan — bruise" and rubbed his right thigh. He was worked up and said Ms Cowan had hit him. The manager could not see any evidence of bruising.

[7] Ms Cowan was notified of the allegation and attended an initial meeting with the senior service manager. Ms Cowan confirmed she had been in Mr C's room at

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1 *Cowan v IDEA Services Ltd* [2018] NZERA Wellington 114.
2 *Cowan v IDEA Services Ltd* [2019] NZEmpC 172 [Employment Court judgment].

the relevant time but denied hitting him and had no idea why such an allegation would have been made. At the end of the meeting, she was advised there would need to be an investigation and that she was suspended pending its determination.

[8] The investigation was conducted by the senior service manager. She held a series of interviews with other staff who had worked with Mr M and Mr C, as well as speaking to both men themselves. The investigator also arranged a re-enactment of the incident in which Mr M was asked which of three sounds was the one he heard. He correctly identified a slap noise.

[9] Relevant information to emerge from the interviews included:

(a) Mr C had been unusually unsettled the afternoon of 26 March (the incident occurred in the morning of 26 March). He did not want the support worker to leave him alone in his room. He was also unsettled during the night.

(b) On 27 March, Mr M had, unsolicited, repeated his allegation to another support worker and said he had heard Ms Cowan tell Mr C to "piss off". He also stated he was surprised that Ms Cowan gave everyone a biscuit soon after the incident including offering Mr C a second one.

(c) On 29 March, Mr C had been very agitated and anxious about who was coming, seeking reassurance it was not Ms Cowan, saying she had hurt him.

(d) Mr C talked all week following the incident about his right leg being sore and wanting to go to the doctor. He calmed down when told the doctor had prescribed skin moisturiser, which was applied.

(e) One staff member thought she saw a bruise on his right leg a week after the incident, but no other staff noticed anything.

(f) In the many years the staff members had known Mr C, he had never accused anyone of hitting him before. Staff thought it unlikely he

would make something like that up and did not regard him as impressionable.

(g) Ms Cowan was considered by one staff member to have a good rapport with Mr C.

(h) Ms Cowan had a reputation for being short tempered and impatient with the service users. She had been heard to yell at them and get flustered.

(i) Mr C could be very annoying, and easily wind up someone with a short fuse.

(j) Ms Cowan had in the past filed reports of being hit by Mr C in the van and told other service users that if Mr C hit them they should hit him back.

(k) Sometimes when Mr M wet his bed, Ms Cowan called him a baby.

(l) The relationship between Mr M and Ms Cowan was not good.

(m) Mr M and Mr C did not get along terribly well and sometimes Mr M would threaten Mr C.

(n) When the investigator spoke to Mr C he repeated his allegation that Ms Cowan had hit him on the leg.

(o) When the investigator spoke directly to Mr M, he repeated his earlier accounts about the noise he heard, and the biscuits but also added that he heard Ms Cowan say to Mr C that she "would do it again". Mr M also stated that afterwards Mr C was upset.

(p) Mr M was known to lie to get himself out of trouble.

(q) None of the staff had known Mr C to lie.

[10] The information obtained was forwarded to Ms Cowan and a second meeting with her and her union representatives was held. During the course of the meeting, Ms Cowan said that, like all staff, she might raise her voice. She acknowledged she had been spoken to in the past about being bossy and grumpy with service users but said she was being bullied by her supervisor. She denied ever hitting Mr C. Through her union representative, she accepted Mr C might genuinely believe she had slapped him but suggested the belief could be the product of the medication he was taking. She also denied ever calling Mr M a baby. Rather she had told him he was "not a baby".

[11] The union representative also stated she had spoken to one of the staff interviewed who said that Mr M would often tell staff things that may be untrue and that Mr C was prone to parrot and repeat things. The staff member in question had told the investigator that she had never known Mr C to lie.

[12] Following the meeting, the senior service manager spoke to an employment coordinator to obtain an opinion from another person who knew Mr M well. This person said she did not think Mr M would blatantly lie. She noted there was tension in the residence among staff and Mr M may overhear them talking and misinterpret what he heard.

[13] The senior service manager then concluded her investigation. After summarising the information obtained, she wrote to Ms Cowan advising that her preliminary view was that on the balance of probabilities, Ms Cowan had hit a vulnerable person with disabilities. She considered there was a pattern regarding Ms Cowan's communication, behaviour and conduct towards such people.

[14] The letter further advised Ms Cowan that when the various matters were considered individually and cumulatively, IDEA Services had reached the tentative conclusion that Ms Cowan had fallen well short of its expectations of a level 3 support worker. The letter went on to say that given these findings, termination of employment was being considered.

[15] After giving Ms Cowan a further opportunity to respond, IDEA Services terminated her employment with two weeks' pay in lieu of notice.

[16] Ms Cowan then raised a personal grievance of unjustifiable dismissal. As mentioned, the claim did not succeed before the Employment Relations Authority. Ms Cowan then brought a de novo challenge to the Authority's determination in the Employment Court where the case was heard by Judge Corkill.

The Employment Court decision

[17] Under s 103A(2) of the Employment Relations Act, the test to be applied in determining whether a dismissal was justified is whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The section goes on to identify four factors which the Court must consider in applying that test, and provides that the Court may consider any other factors it thinks relevant.[3]

[18] After referring to s 103A(2), Judge Corkill cited several decisions including decisions of this Court, from which he extrapolated the following principles:[4]

(a) The task of the Court is to examine objectively the employer's decision making process and determine whether what the employer did and how it was done were what a fair and reasonable employer could have done.

(b) It is not for the Court to substitute its decision for what a fair and reasonable employer could have done in the circumstances.

(c) There may be a range of responses open to a fair and reasonable employer.

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

4 Employment Court judgment, above n 2, at [81]–[82] citing *Angus v Ports of Auckland (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [36]–[44]; *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295 at [45]; and *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [19]–[20].

(d) The requirement is for an assessment of substantive fairness and reasonableness not a minute and pedantic scrutiny to identify failings.

(e) Regarding the standard of proof, a distinction must be drawn between the inquiry the Court makes and the inquiry of the employer. The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to a court that the dismissal was justified. The first does not involve a standard of proof. The second does.

(f) In ascertaining the facts, the employer may be presented with conflicting accounts. He or she, acting reasonably, will be entitled to accept some in preference to others. That does not call for the application of any standard of proof.

(g) But when required to prove that dismissal was justified the employer will need to show that both the course taken to ascertain the facts and the determination that those facts warranted dismissal were reasonable. That must be shown on the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances.

[19] After identifying what he considered the relevant legal principles, the Judge then summarised the employer's reasoning process leading to its conclusions that the totality of the information established the slapping allegation, and that the information regarding Ms Cowan's general temperament and her calling Mr M a baby was reliable. The Judge traversed the employer's evaluation of the information, and in particular the basis on which it had made key findings about the truth and reliability of Mr C and Mr M.

[20] The Judge then turned to address Ms Cowan's submission that those conclusions could not have been reached by a fair and reasonable employer in all the circumstances because of the following: the absence of physical injury, the possible effect of medication, inconsistencies in Mr M's account, his propensity

for lying, reliance on hearsay and conjecture, alleged flaws in the re-enactment, and whether those interviewed were in a position to provide reliable information about Ms Cowan's general temperament.

[21] The Judge considered each of these factors. He was satisfied on the evidence that issues regarding lack of bruising, the possible effects of medication, and differences in the accounts given by M had been taken into account by IDEA Services and that the approach it had taken regarding those issues was an approach open to a reasonable and fair employer. He was further satisfied on the evidence that the re-enactment process could reasonably be regarded as a fair process and that the observations of Ms Cowan made by staff were not hearsay.

[22] The Judge also rejected an argument that IDEA Services should have put the information obtained from staff and Ms Cowan to Mr C and Mr M. He accepted IDEA Services' explanation that such questioning of vulnerable people suffering intellectual disabilities would have been wholly inappropriate and emphasised that the test of what is fair and reasonable has to be assessed in all the circumstances which must include the nature of the employer's enterprise.

[23] Finally, the Judge held that in light of Ms Cowan's admission that she had told Mr M he was not a baby, the allegation that she called him a baby was made out.

The application for leave

[24] The formal application sets out what purport to be nine legal errors or questions of law on which leave is sought.

[25] However, in written submissions filed on Ms Cowan's behalf, these were distilled by counsel Mr Cranney to one question formulated in the following terms:[5]

> Was the approach of the Employment Court in determining whether IDEA Services Limited had sufficiently investigated the allegations against Ms Cowan for the purposes of s 103A of the Employment Relations Act 2000 correct in law?

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5 The question as formulated in the applicant's submissions referred to s 103 but that is clearly an error and was intended to be s 103A.

[26] Mr Cranney argued this was the same question in respect of which leave was granted in *A Ltd v H* in the very different context of the Employment Court imposing a standard of inquiry on an employer that was too stringent.[6] The present case was the flip side of *A Ltd v H* because it involved the Employment Court tolerating and endorsing a standard of inquiry and decision making that was insufficient.

[27] Developing that central submission, Mr Cranney argued that the Judge's statement of the relevant legal principles guiding the Employment Court's s 103A inquiry was incomplete and inaccurate.

[28] First the Judge had overlooked the statement of this Court in *Air Nelson Ltd v C* that within the inquiry into fairness and reasonableness, the Court is "empowered to determine whether [the employer] had a sufficient and reliable evidential basis for concluding that [the employee] had been guilty of misconduct".[7]

[29] Secondly, according to Mr Cranney the Judge had misdirected himself on the standard of proof. The Judge had relied on the decision of this court *Whanganui College Board of Trustees v Lewis* as authority for the proposition that the ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct does not involve any standard of proof.[8] However, according to Mr Cranney, the Judge failed to appreciate or acknowledge that the statement to this effect in *Whanganui College Board of Trustees* was obiter. Moreover, it was contrary to other decisions of this Court, most notably *Honda New Zealand Ltd v NZ Boilermakers etc Union*[9] and *Airline Stewards and Hostesses of New Zealand Industrial Union of Workers v Air New Zealand Ltd*.[10] And further that the Court in *Whanganui College Board of Trustees* had itself stated that in light of its comments on the standard of proof it might be necessary to revisit some of the remarks in previous judgments including *Airline Stewards*.[11]

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6 *A Ltd v H* [2015] NZCA 99 at [2]–[3].
7 *Air Nelson Ltd v C* [2011] NZCA 488, (2011) 8 NZELR 453 at [19].
8 *Whanganui College Board of Trustees v Lewis*, above n 4, at [19]–[20].
9 *Honda New Zealand Ltd v New Zealand Boilermakers etc Union* [1991] 1 NZLR 392 (CA) at 394, citing *New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Ltd* [1989] 3 NZILR 82 (LC) at 4.
10 *Airline Stewards and Hostesses of New Zealand Industrial Union of Workers v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA).
11 *Whanganui College Board of Trustees v Lewis*, above n 4, at [21].

[30] As we understand the argument, Mr Cranney contends that *Honda* and *Airline Stewards* are authority for the propositions that (a) an employer is required to apply the civil standard of proof to its consideration of whether serious misconduct has occurred and (b) that the employer must apply the standard of proof flexibly, so that the more serious the allegation, the more compelling the evidence required.

[31] In Mr Cranney's submission, the errors of legal principle in this case led the Judge to endorse an approach that was precluded by *Honda*. The assault allegation against Ms Cowan was "profoundly serious" and instead of requiring evidence commensurate with the gravity of that allegation, the Judge endorsed an approach that relied on vague gossip and innuendo, inadequate questioning of Mr C and Mr M, a peculiar and illogical slapping re-enactment and the use of "uninvestigated" yelling allegations to bolster the assault conclusion.

[32] Further, the Judge's conclusion that reprimanding Mr M for wetting his bed by saying "you're not a baby" was capable of amounting to serious misconduct warranting dismissal was wrong on any test.

[33] In Mr Cranney's submission, the proposed appeal raised issues of job security and human rights that were of importance to all employees and employers especially those in the residential care sector.

Analysis

[34] Under s 214(3) of the Employment Relations Act, this Court may only grant leave to appeal if the question of law raised by the proposed appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to this Court for decision.

[35] In our view, the proposed appeal does not satisfy those criteria.

[36] Mr Cranney's argument hinges on the *Honda* and *Airline Stewards* decisions being relevant to the application of s 103A and capable of affecting the outcome in this case. In our assessment, they plainly are not.

[37] The first point is that the comments in *Honda* on which Mr Cranney relies related to the way in which a grievance committee (not the employer) should approach *its* decision making. We note too that since *Honda* was decided, the Supreme Court has clarified the concept of a flexible standard of proof. In *Z v Dental Complaints Assessment Committee*, the Supreme Court rejected the suggestion — which is implicit in some of Mr Cranney's submissions — that the degree of probability to meet the standard increases with the gravity of the misconduct.[12] The Court also held that flexibility in terms of the notion of requiring stronger evidence in relation to serious allegations should not be regarded as a legal proposition.[13] Rather it simply reflected the reality of what judges do.

[38] We accept that the dicta in *Airline Stewards* regarding the burden of proof are expressed to relate to the employer's decision making. However, like *Honda*, *Airline Stewards* was decided under differently worded provisions in a different statute, namely the Labour Relations Act 1987. The Labour Relations Act did not provide any definition of a justifiable dismissal or a statutory test for justification. The statutory test under the section at issue in this case was only enacted in 2011.[14]

[39] It is not, as this Court noted in *Whanganui College Board of Trustees*, usual to impose the application of a legal standard of proof on the decisions of a litigant. It is not needed. There is already the standard of reasonableness. Further, to fail to draw the distinction between the employer's inquiry and the Court's inquiry may result in the view of the employer reasonably formed being over-ridden by the views of the Court. And that is something that s 103A makes very clear is not to happen. It clearly contemplates that a range of responses is available to a fair and reasonable employer.

[40] Our assessment of recent case law is that the legal principles articulated by Judge Corkill appear to be regarded as well established in the Employment Court and

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12 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [28] per Elias CJ dissenting and [102] per Blanchard, Tipping and McGrath JJ.

13 At [105].

14 The first formulation of a statutory test of justification was enacted in 2004. In 2011 the test of justification was amended from what a fair and reasonable employer 'would' have done to what a fair and reasonable employer 'could' have done in all the circumstances.

have not occasioned any controversy.[15] They accord with the statutory provision and do not require further guidance from this Court.

[41] Finally, for completeness we record two further points. First, although the Judge may not have cited *Air Nelson* he did in effect examine the existence and sufficiency of the evidential basis for IDEA Services' decision. That examination was an intensely factual inquiry and outside this Court's jurisdiction. In fairness to the Judge, we would add the criticism that he adopted an approach that relied on vague gossip and innuendo etc is unfounded. It is not an accurate reflection of the evidence and IDEA Services' evaluation of it.

[42] Secondly, according to the decision, the reason given by IDEA Services at the time of dismissal was based on the three allegations (the assault, the bad-tempered interactions and calling Mr M a baby) being considered individually and cumulatively. Although the Judge discusses the three allegations separately, he does not — contrary to Mr Cranney's submission — make any finding that calling Mr M a baby on its own constituted serious misconduct warranting dismissal.

Outcome

[43] The application for leave to appeal is declined.

[44] The applicant must pay the respondent costs for a standard application with usual disbursements.

Solicitors:
Oakley Moran, Wellington for Applicant
McBride Davenport James, Wellington for Respondent

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[15] See for example the very clear analysis of Chief Judge Inglis in *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198 at [98]–[109].