

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 356  
5371982

BETWEEN MAUREEN BLACKMAN  
Applicant  
AND KIWI CARE PRESCHOOL  
Respondent

Member of Authority: James Crichton  
Representatives: Applicant in Person  
Penny Swarbrick, Counsel for Respondent  
Investigation meeting: 14 September 2012 at Whangarei  
Date of Determination: 11 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Ms Blackman) alleges that she was unjustifiably dismissed by the respondent employer (Kiwi Care). Kiwi Care resists that allegation.

[2] Ms Blackman was employed by Kiwi Care at its Northland facility. She told the Authority that she worked up to 37 hours a week and it was clear from her evidence that her role had developed incrementally over time. There were essentially three elements to her position, viz a cleaning aspect, a teacher aide aspect and a food preparation aspect. The last task is particularly apposite for Ms Blackman because she is a trained chef.

[3] Ms Blackman told the Authority that she had given up other employment in a variety of different places in order to take this one role with Kiwi Care.

[4] The essence of Ms Blackman's regular weekly commitment to Kiwi Care had her attending at the workplace from 8am in the morning through until 1.30 in the

afternoon and then returning in the evening for a two hour period when she cleaned the Centre. There was no weekend work required. During her principal work hours in the morning down to 1.30pm, Ms Blackman prepared lunches for the children, did some teacher aiding work and some other general duties.

[5] The evidence is that Ms Blackman had just returned from annual leave when she was asked to attend a meeting on 2 February 2012 with the new manager of the Centre, Ms Owen. It is common ground that in this discussion, Ms Owen indicated that as the new manager of the Centre, she had taken time to look at the structural arrangements and to contemplate some changes. One of those changes that she wanted to discuss with Ms Blackman was the latter's hours of work and the type and extent of her duties. What Ms Owen proposed in simple terms was that Ms Blackman stop doing the range of tasks that she had been doing and consolidate back to just doing the cleaning and that she do that not during the week each night, as she had done, but do it in an 8 hour stretch on one of the weekend days.

[6] Of course, the effect of this proposal would have been to dramatically reduce Ms Blackman's hours from up to 37 hours a week down to 8 hours a week. Further, it would require a significant change in Ms Blackman's days of work from work done exclusively during the working week to work to be performed exclusively during the weekend.

[7] Again, it is common ground that when this proposal was advanced, Ms Blackman immediately became agitated and angry and accused Ms Owen of effectively doing away with her position. Ms Blackman also made it painfully clear that she would not be working at the weekend because that was "her family time".

[8] Clearly, that discussion did not go well. As the Authority was later to discover, the sad reality was that, based on what the managing director of Kiwi Care had in mind, Ms Owen's proposal in that meeting had gone rather too far. However, the short point is that in the discussion on 2 February, even Ms Blackman acknowledges that she swore, although she denies swearing at the employer. Ms Owen is quite clear that she was sworn at.

[9] Worse than that, while Ms Blackman denies it, the Authority heard evidence that Ms Blackman swore in the presence of the children, slammed doors and generally made such a rumpus after this discussion that neighbours emerged to find out what

was going on and there were anxieties expressed on behalf of the children. Before the Authority leaves the events of 2 February, it is important to identify one other significant conflict in the evidence. Ms Blackman maintained that Ms Owen had told her that she was effectively given an ultimatum to accept the new role or leave, and that, to confirm the truth of that contention, she referred to a statement allegedly made by Ms Owen in which the latter had asked her to confirm that she would work out her two weeks' notice before quitting.

[10] Ms Owen denies either giving an ultimatum or suggesting that Ms Blackman should work out her two weeks' notice. Her view was that she had done no more than raise the proposal concerning changed duties and hours, got a bad reaction and, having got that bad reaction, terminated the meeting forthwith.

[11] Ms Owen then effectively referred matters to Ms Anderson who was the managing director of Kiwi Care and the following day, on 3 February 2012, there was a meeting via Skype where Ms Anderson engaged from her office in Auckland with Ms Owen and Ms Blackman and another woman, Ms Maloney, who was the operations manager of Kiwi Care and who happened to be in the Northland site and who was there apparently as the support person for Ms Blackman.

[12] There are a number of oddities about this Skype meeting. First, it is an unusual forum to use for such a meeting particularly as the meeting ended up with a dismissal. Secondly, Ms Maloney was a senior manager in Kiwi Care and was delegated to be Ms Blackman's support person. Ms Blackman was as clear as could be to the Authority that she had not sought Ms Maloney's involvement, did not regard Ms Maloney as independent, and accordingly did not accept Ms Maloney was there as her support person at all.

[13] The purpose of the 3 February meeting started out as an attempt by Kiwi Care to get the relationship back on the rails. The Authority is satisfied from Ms Anderson's evidence that that was her principal motivation. The Authority is satisfied that the 3 February meeting was not intended to be a disciplinary meeting although it ended up dismissing Ms Blackman because of a conviction that she (Ms Blackman) had lost trust and confidence in Kiwi Care as her employer.

[14] Certainly, it is a fact that the 3 February 2012 meeting resulted in the termination of Ms Blackman's employment. Curiously, Ms Blackman had taped

some of the Skype meeting covertly and even more curiously, she did not make this clear in her evidence to the Authority until the very end of the investigation meeting when she produced the recording itself and a transcript. She contended that the effect of the recording was to prove that Ms Anderson had committed some fundamental indiscretion in the meeting but the Authority does not accept that that is the case at all.

[15] The particular matter that Ms Blackman alleges constitutes wrongdoing is the implication from the transcript that Ms Anderson was seeking to settle the employment relationship problem by making a payment to Ms Blackman. First of all, there is nothing improper about settling employment relationship problems. Secondly, it was apparent that both parties had legal advice or had claimed legal advice and on that footing, Ms Anderson's observations are entirely sensible. She would be failing in her duty if she did not contemplate trying to resolve matters by agreement.

[16] Unfortunately, the bit of the meeting that is taped and transcribed is not of particular significance in terms of the overall thrust of the Skype meeting and the Authority must rely on the recollection of the parties about that. For the avoidance of doubt, the Authority is satisfied that the Skype meeting was characterised by a reluctance on Ms Blackman's part to engage in a calm and rational fashion and that in addition, she made a number of observations which illustrated her contempt for the employer and its history or track record. In particular, Ms Blackman appears to have been convinced that Kiwi Care had a poor record with staff and that there had been a number of employment relationship problems in the past.

[17] It is also clear, and indeed common ground, that the applicant, Ms Blackman, maintained during the Skype meeting that she had been given an ultimatum the previous day by Ms Owen despite Ms Owen's categorical denial.

[18] In effect, the Skype meeting proceeded from the employer's standpoint on the footing that it sought to reassure Ms Blackman that she had not been given an ultimatum, had not been dismissed, and had merely participated in a first discussion about a change in her hours, a change which, as the Authority attempted to make clear to Ms Blackman during the investigation meeting, the employer was absolutely entitled to do, of its own motion.

[19] Conversely, it seems as if Ms Blackman went into the Skype meeting with an entirely different mindset and indeed the description in the submissions advanced by Kiwi Care of her *“dogged insistence that she cannot be wrong”* was borne out by her behaviour at the investigation meeting. Ms Blackman seems to have attended the 3 February meeting with a completely negative mindset about Kiwi Care, a conviction that she had been dismissed the previous day, a failure to acknowledge that the change in hours was available to the employer, and an evident conviction that she had lost trust and confidence in Kiwi Care as her employer.

[20] So while Ms Blackman says that she was dismissed by Ms Owen on 2 February 2012 when Ms Owen effectively told her to take the new job or leave it (the ultimatum), Kiwi Care says that Ms Blackman was dismissed on 3 February 2012 during the Skype interview when it became apparent to Kiwi Care on Ms Blackman’s demeanour that she had lost trust and confidence in her employer and was not prepared to work through any of the outstanding issues between the parties.

### **Issues**

[21] It will be convenient if the Authority considers the following questions:

- (a) When was Ms Blackman dismissed; and
- (b) Was the dismissal a justified one or not?

### **When was Ms Blackman dismissed?**

[22] The Authority is satisfied on the evidence it heard that Ms Blackman was not dismissed on 2 February 2012 in the interview that she had with Ms Owen but was in fact dismissed the following day in the interview that she had with Ms Anderson. The Authority reaches this conclusion because it is not satisfied that Ms Owen had the chance to issue the ultimatum or require the working out of notice because, on Ms Owen’s evidence, she was genuinely taken aback by the ferocity of the response that she got from Ms Blackman when she proposed the change and it seems unlikely that, given that fact, she would have taken matters to the stage of issuing the ultimatum claimed.

[23] What is more, Ms Owen herself absolutely denies the ultimatum, denies the contention about working out notice and simply says that her conclusion at the end of

the discussion was that she needed to get Ms Anderson's help to try to get matters back on an even keel.

[24] The Authority is not satisfied that Ms Owen would have taken the step to engage with her employer, if she had already terminated the relationship. What would the point of having Ms Anderson becoming involved be, if the employment relationship had already been brought to an end?

[25] While Ms Blackman is adamant that she was given an ultimatum in this first meeting and asked to work out her notice, the Authority is not satisfied that that is what happened and prefers Ms Owen's evidence. However, having said that, the Authority would add that it is difficult to not conclude that the meeting between Ms Owen and Ms Blackman was doomed to failure from the start, given Ms Owen's apparent failure to take any cognisance of the fact that a discussion with an employee suggesting that they might be happy to reduce their hours down to a quarter, was unlikely to be an entirely straightforward discussion. While it is plain that Kiwi Care had the legal right to do what it did, ( the individual employment agreement specifically provided for unilateral changes to hours at the behest of the employer ) Ms Owen can take no particular satisfaction in the way in which she conducted that first meeting.

[26] This is particularly the case when it became apparent during the investigation meeting from Ms Anderson's evidence to the Authority that she did not have it in her contemplation that Ms Blackman would have her hours reduced so dramatically; indeed, Ms Anderson's view was that there could well have been a change made which would have had minimal impact on Ms Blackman's total earnings but would have addressed the needs of the employer. In any event, nothing turns on that difference now; it is plain that the basis on which the proposed change was put to Ms Blackman was on the basis that her hours would reduce by three quarters and her response to that proposal has already been briefly described.

### **Was Ms Blackman unjustifiably dismissed?**

[27] Having established that Ms Blackman was dismissed from her employment not on 2 February but in the Skype meeting the following day on 3 February 2012, the Authority now needs to consider whether the dismissal was available to Kiwi Care to make. The Authority's conclusion is that the dismissal was what a fair and reasonable

employer could have done in the particular circumstances that Kiwi Care was in at the relevant time. Remembering the test for justification in the law requires only that what the employer did is one of the outcomes that are possible when looking at the position from the standpoint of the fair and reasonable employer, it seems to the Authority clear that the conclusions reached by Kiwi Care, although arguably on an unusual basis, were one of the possible justifiable outcomes that a fair and reasonable employer could reach: *Angus v. Ports of Auckland* [2011] NZEmpC 160 applied.

[28] In essence, Kiwi Care concluded in the 3 February Skype meeting that Ms Blackman had lost trust and confidence in the employer. Ms Blackman told the Authority as much at the investigation meeting. While she did not articulate the matter as precisely during the Skype meeting with the employer, she certainly made it clear that she was not prepared to engage in working through the issues with Ms Anderson and she presented at the 3 February meeting with a rigid stance that she had been dismissed the previous day and that the employer was a bad employer who had treated other staff unfairly in the past.

[29] In making the decision to dismiss, Kiwi Care relied first of all on the apparent loss of trust and confidence exhibited by Ms Blackman in it as her employer (and this was demonstrated by Ms Blackman's behaviour in the Skype meeting), and second, if the matter should be in any doubt, by Ms Blackman's behaviour the previous day.

[30] The Authority has already sketched that behaviour. Ms Blackman acknowledges swearing, acknowledges banging a cupboard door but denies swearing at the employer or in the presence of the children. The employer is adamant that it was sworn at, that Ms Blackman made sufficient noise to attract the anxiety of the children and the interest of neighbours.

[31] In the Authority's opinion, if there is any chance that swearing and loud banging should distress young children, then an employer responsible for those young children would be failing in its duty if it did not act to remove such a person from the workplace. Ms Blackman, while acknowledging swearing and the banging, denies that the swearing was directed at the employer or in the hearing of the children but the employer's evidence is adamant that there was a huge commotion and that it was evident to everyone including the children that there was something seriously wrong. The Authority heard evidence from Ms Maloney and from Ms Owen about the extent of the commotion and even Ms Blackman's evidence goes some way to confirming

that. The only difference is that Ms Blackman denies upsetting the children and denies swearing at the employer, although she does acknowledge swearing and she does acknowledge banging cupboard doors.

[32] The Authority thinks it more likely than not that Ms Blackman is mistaken about the extent of her behaviour on 2 February and it is the Authority's conclusion that Kiwi Care was entitled to conclude that it could no longer have any trust and confidence in Ms Blackman to behave appropriately in the workplace, even if the basis for the conclusion that Ms Blackman had herself lost trust and confidence in the employer, could not stand for any reason.

### **Determination**

[33] The Authority's considered view is that a fair and reasonable employer could dismiss in the circumstances that Kiwi Care was in on 3 February 2012. At that date, Kiwi Care was confronted with conflicting evidence about what had happened the previous day. On balance, it could have concluded, as the Authority has, that the views of its senior staff were to be preferred over the view advanced by Ms Blackman, as to the extent of her behaviour.

[34] Further, in the Authority's view, a fair and reasonable employer could conclude that, when confronted with an employee who appears to have developed a strong negative mindset against her own employer and who appears to be unwilling to work through employment issues in a rational and commonsense way, such an employee has lost trust and confidence in her employer to such an extent that the only reasonable course of action is to bring the employment to an end.

[35] Looked at another way, even if the termination of the employment were held to be unjustified, it is difficult not to conclude that Ms Blackman would be held, in law, to be completely responsible for the events giving rise to the personal grievance and thus, with contribution at 100%, she could not reasonably expect any remedy.

[36] It follows from the foregoing analysis that the Authority rejects Ms Blackman's contention that she was unjustifiably dismissed from her employment, the Authority having concluded that the dismissal was, in all the circumstances, a justified one.

## **Costs**

[37] Costs are reserved, but the successful respondent is encouraged to reflect on whether, in all the circumstances, it is reasonable for it to seek a contribution to its costs.

James Crichton  
Member of the Employment Relations Authority