

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 439
5466164

BETWEEN NICOLE BOREHAM
Applicant

AND LEANNE JAMIESON
Respondent

Member of Authority: Robin Arthur
Representatives: Shane Boreham for the Applicant
No appearance for the Respondent
Investigation Meeting: 20 October 2014 in Tauranga
Determination: 28 October 2014

DETERMINATION OF THE AUTHORITY

- A. The employment of Nicole Boreham by Leanne Jamieson ended by constructive dismissal.**
- B. Within 28 days of the date of this determination Ms Jamieson must settle Ms Boreham's personal grievance by paying her the following sums:**
- (i) \$726.75 as reimbursement of lost wages; and**
 - (ii) \$2000 as compensation for humiliation, loss of dignity and injury to feelings.**
- C. Within 28 days of the date of this determination Ms Jamieson must also pay Ms Boreham the sum of \$1395.10, comprising:**
- (i) \$1052.78 as wage arrears; and**
 - (ii) \$248.96 as holiday pay; and**
 - (iii) \$93.36 as her employer contribution for Kiwisaver.**
- D. From the date of this determination until when the sum ordered**

in C above is paid in full Ms Jamieson must also pay Ms Boreham an additional 19 cents a day as interest on that amount.

E. Ms Jamieson must also reimburse Ms Boreham for the sum of \$71.56 paid to lodge her application in the Authority.

Employment relationship problem

[1] Nicole Boreham worked as a nanny for Leanne Jamieson from 10 February to 4 April 2014 looking after Ms Jamieson's two sons in their home in Tauranga while Ms Jamieson was at work. The employment ended when Ms Boreham said she could not keep working unless Ms Jamieson paid her in full for the hours she worked. Over an eight-week period Ms Boreham was paid about two-thirds of the wages due to her.

[2] Quality Kidz, an agency for home-based childcare in the Bay of Plenty, had arranged the employment. Ms Jamieson initially blamed Quality Kidz for her shortfall in funds to pay Ms Boreham, saying it had not claimed and passed on the right level of money due under a childcare subsidy provided by Work and Income (WINZ). She later told Ms Boreham that she had deducted wages because Ms Boreham had not performed her duties correctly.

[3] Ms Boreham raised a personal grievance alleging she was constructively dismissed. Her application to the Authority sought orders for wages owed to her and for remedies of lost wages and distress compensation.

[4] In a brief reply, sent by email from her iPhone, Ms Jamieson denied there was an employment relationship, described the arrangement as "*casual babysitting*" that she was entitled to end as a 90-day trial "*situation*", and criticised Ms Boreham's work as a nanny.

Investigation

[5] At the Authority investigation meeting I heard affirmed evidence from Ms Boreham and her father, Shane Boreham. Mr Boreham had acted as his daughter's representative in various discussions about her pay with Ms Jamieson and Quality

Kidz personnel. I also referred to various documents Quality Kidz had provided at my request. This included timesheets for Ms Boreham's work and copies of emails and texts exchanged by both Ms Boreham and Ms Jamieson with Quality Kidz education team leader Marlene Beech. Following the meeting I also interviewed Quality Kidz education team leader Connie Boaza by telephone to get more information about how nannies were recruited and employed and how childcare subsidies were sought and administered.

[6] Ms Jamieson did not attend the Authority investigation meeting and I proceeded under the discretion provided to the Authority, in those circumstances, by clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act). I was satisfied she was notified of the meeting because an affidavit from a Baycorp process server confirmed Ms Jamieson was served on 16 September 2014 with a Notice of Investigation Meeting and an Authority Minute. The Minute included a timetable for Ms Jamieson to lodge written evidence in advance of the investigation meeting and also explained the potential consequences of not attending. It was written after an Authority case management conference held by telephone with Ms Boreham and Ms Jamieson on 12 September 2014. Ms Jamieson terminated her connection with the telephone conference after saying that she would not attend an investigation meeting on 20 October because she was a sole parent on ACC due to a back injury, she was moving to Wellington on 22 September, and she could not afford to return to Tauranga for the investigation meeting. The Minute set out the basis on which Ms Jamieson could seek to attend the investigation meeting by telephone instead of travelling but she did not contact the Authority to request such an arrangement. Mr Boreham and Ms Boreham also gave evidence that they had, by chance, seen Ms Jamieson walking along a street with her children in Tauranga on 6 October, some two weeks after the date she said she would be moving to Wellington.

Issues

[7] As permitted by s174 of the Act this determination has not recorded all evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

- [8] Matters for resolution in the determination were:
- (i) the nature of the employment relationship; and
 - (ii) how it came to an end – by resignation or constructive dismissal; and
 - (iii) whether Ms Jamieson was entitled to deduct any money from wages due to Ms Boreham; and
 - (iv) what wages remained due to Ms Boreham; and
 - (v) whether any other remedies should be awarded; and
 - (vi) whether any costs should be awarded.

The nature of the employment relationship

[9] Information from Quality Kidz files recorded that Ms Jamieson had contacted the agency on 9 February 2014 seeking a nanny on an urgent basis because her existing nanny had suffered a stroke.

[10] Ms Boreham started work for Ms Jamieson the next day. She had registered her interest with Quality Kidz in getting work as a nanny after completing a certificate-level course in early childhood education and care at Bay of Plenty Polytechnic.

[11] Quality Kidz provided Ms Jamieson with a template employment agreement for her to use in recording details of the arrangement with Ms Boreham. Its correspondence with Ms Jamieson confirmed that the relationship between her and Ms Boreham was to be one of employment with regular hours at an agreed rate of \$14 an hour. In the first week of work Ms Boreham, Ms Beech and Ms Jamieson discussed how Ms Boreham's hours would be set, based on Ms Jamieson's own work rosters that she got three weeks in advance. Those arrangements were the basis on which Quality Kidz then confirmed the on-going payment of Ms Jamieson's childcare subsidy with WINZ. Objectively assessed the discussion and those arrangements confirmed the parties' expectation of on-going work and the obligation on Ms Boreham to be available for it. It marked the nature of the employment relationship as continuous and not, as Ms Jamieson later alleged, "*casual babysitting*".

[12] Ms Jamieson was not entitled to end the employment on the basis of what she referred to in her brief reply email as "*a 90-day trial period*". Because no written

employment agreement containing such a trial period provision was completed before the employment began, the statutory provisions allowing for a 90-day trial did not apply.¹ However the absence of a written employment agreement (despite requests from Ms Boreham and Ms Beech for Ms Jamieson to complete one) did not negate the nature of the relationship or the mutual obligations of Ms Jamieson and Ms Boreham.

The end of the relationship

[13] From her first week of work Ms Boreham was not paid the full amount she was due for the hours she had worked. After five weeks' work she had been paid a little over \$1200 in wages but a Quality Kidz administrator calculated Ms Boreham was 'short paid' by around \$700. This was not remedied after Ms Jamieson received a WINZ payment on 18 March 2014 of more than \$1200 for arrears of childcare subsidies due to her.

[14] I have accepted Ms Boreham's evidence that Ms Jamieson promised payments that she then did not make and that both Ms Boreham and Mr Boreham had talked with Ms Jamieson about what arrangements could be made to sort out difficulties with the childcare subsidy and to pay Ms Boreham in full for her work each week.

[15] Ms Jamieson initially told Ms Boreham that the short payments were due to the delay in receiving the childcare subsidy from WINZ. The money for the subsidy was paid on a fortnightly basis by WINZ to Quality Kidz. Ms Jamieson also believed she was entitled to receive a subsidy for 50 hours a week even if Ms Boreham worked fewer hours than that (as she did). Ms Jamieson was annoyed that, on the basis of the timesheets for Ms Boreham's hours of work provided to Quality Kidz as part of its role in administering the subsidy, WINZ reduced the amount to be paid to her. On 2 April Ms Jamieson terminated her arrangement as a client of Quality Kidz after being told there was no subsidy amount to be paid that fortnight due to earlier overpayments.

[16] Ms Beech let Ms Boreham know about that development but she had already recommended, during a work visit in the previous week, that Ms Boreham should leave the job. Ms Boreham had reported that Ms Jamieson had asked her to sign

¹ Section 67A and 67B of the Employment Relations Act 2000 (the Act).

timesheets showing longer hours than she actually worked. She had also asked Ms Beech why Ms Jamieson said she did not have the money to pay her but was able to get the carpets cleaned, get a new tattoo and had a fridge full of food.

[17] After 2 April Ms Boreham worked only one more day – Friday, 4 April. On 5 April Mr Boreham sent an email to Ms Jamieson on Ms Boreham's behalf. It stated that Ms Boreham was unable to work for Ms Jamieson until she sorted out an alternative agency and Ms Boreham could be "*assured of being paid moving forward*".

[18] Ms Boreham's refusal to work in the circumstances she faced was not, as it appeared, a resignation but rather a predictable response to the conduct of Ms Jamieson in not paying her correctly, not responding to requests to make arrangements to meet the back pay due over time, not making promised payments, and not providing a written employment agreement. It was clear that those breaches of the obligation to pay her wages would continue and it was a situation that Ms Jamieson knew Ms Boreham could continue to tolerate. In that sense, at law, Ms Boreham's apparent resignation was compelled by the unlawful conduct of her employer such that it amounted to a constructive dismissal.

No entitlement to deduct wages

[19] On 2 April Ms Jamieson told Ms Boreham that she was entitled to deduct money from Ms Boreham's wages due to lateness. On 5 April she also made criticisms of the quality of Ms Boreham's care for the two boys. Later still she alleged that Ms Boreham had unauthorised visitors at Ms Jamieson's home.

[20] As a matter of credibility I have not accepted those reasons for wages deductions were established or, even if true, would have justified the short payments Ms Jamieson made in Ms Boreham's pay. If there were genuine performance concerns, Ms Boreham would have been entitled to proper warning of them rather than have them raised as an arbitrary, belated and unproven rationale for not paying her for hours worked.



Wages remaining due

[21] I have accepted Ms Boreham's evidence about the hours that she worked and the part payments she received for those hours. Those details were included with her statement of problem that was served on Ms Jamieson on 30 July 2014. The hours were based on what Ms Boreham said she worked, not Quality Kidz timesheets to which (according to Ms Boreham) Ms Jamieson added extra hours for the purposes of justifying a higher childcare subsidy from WINZ.

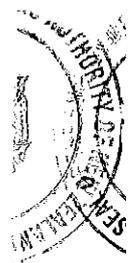
[22] The hours claimed also excluded the first week of March during which Ms Boreham did not work because Ms Jamieson went away with her children. Ms Boreham could have claimed for her usual, minimum hours for that week but did not.

[23] She received four net payments of wages totalling \$1637.36 for 222 hours worked on 26 days. Allowing for student loan repayments and PAYE that should have been deducted to reach those net payments, Ms Boreham was paid a gross equivalent of \$2059.22 over an eight-week period. At the rate of \$14 an hour up until 31 March and at the new statutory minimum hourly rate of \$14.25 from 1 April 2014 Ms Boreham was entitled to have received gross pay of \$3112 for her work. The wage arrears due to her as a result totalled \$1052.78.

[24] In addition to that amount she was also entitled to holiday pay of eight per cent on her gross earnings (being \$248.96) and a Kiwisaver employer contribution at the rate of three per cent (being \$93.36).

[25] Those wages arrears for short payment, holidays and Kiwisaver totalled \$1395.10. Having confirmed the amount due, I also considered it fit to order interest on that amount to apply at the annual rate of five per cent from the date of this determination until payment is made.² On the sum due the interest ordered amounts to 19 cents a day.

² Clause 11 of Schedule 2 of the Act.



Other remedies

[26] In light of the finding that Ms Boreham's employment ended by way of constructive dismissal I considered remedies of lost wages and distress compensation.

[27] Assessment of Ms Boreham's lost wages had to allow for what the case law refers to as the 'contingencies of life'.³ The reality was that even if Ms Jamieson had treated Ms Boreham fairly, her job was not sustainable. An email from Ms Beech to Ms Jamieson on 6 March referred to Ms Jamieson saying she had expected to only pay around \$100 a week on top of the amount paid by the WINZ subsidy. However Ms Beech had earlier provided Ms Jamieson with calculations showing she would have to pay between twice and four times as much as that amount. On that basis it was likely Ms Jamieson would have terminated the employment in the near future anyway, and would have been entitled to do so if she did it in a fair way, with notice, and paid Ms Boreham what she was due.

[28] Another contingency was that, as a result of not being paid properly by Ms Jamieson, Ms Boreham could have sought and got a job elsewhere as a result of not being paid properly by Ms Jamieson.

[29] On that basis I assessed Ms Boreham's actual loss of wages as being equivalent to the notice period due to her. Ms Boreham was paid on a fortnightly basis so the implied term for notice was two weeks. Based on a minimum of 25.5 hours at \$14.25 an hour from 1 April 2014, the weekly amount was \$363.38 and the award of lost wages for the equivalent of two weeks' paid notice was \$726.75.

Compensation under s123(1)(c)(i) of the Act

[30] Ms Boreham was aged 17 when she began work for Ms Jamieson. She had previously only worked part-time in a children's play centre and described getting a job as a nanny for Ms Jamieson's children as 'a foot in the door'. She described feeling disappointed that she had let her parents down as the shortfall in her pay meant it was difficult to keep a promise she had made to pay them board once she had a job.

³ *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 (CA) at [76] and [81].



[31] She was also distressed by allegations about her work, and how she carried it out, that Ms Jamieson had made as reasons not to pay her properly. She said it made her “*feel real down about myself when I knew it wasn’t true*”. Mr Boreham described his daughter as being upset for a few weeks after the employment ended. There was no evidence of long-term or on-going negative effects from the experience.

[32] On the basis of that evidence I considered an order for compensation of \$2000 should be made under s123(1)(c)(i) of the Act reflecting – at a modest level and at the lower end of the range of awards generally made – the distress caused to Ms Boreham both during and at the end of her employment by Ms Jamieson’s unfair treatment of her.

No reduction for contributory conduct

[33] As required by s124 of the Act I considered whether the evidence established there was conduct by Ms Boreham, of a sufficiently blameworthy nature, that had contributed to the situation giving rise to her personal grievance. I concluded it had not, so no reduction was required from the remedies awarded to her.

Costs

[34] Youth Law assisted Ms Boreham in initially raising her personal grievance. She gave no evidence of having incurred any legal costs in bringing her application to the Authority. She was entitled to be reimbursed by Ms Jamieson for the cost of the fee of \$71.56 charged to lodge her application.



Robin Arthur
Member of the Employment Relations Authority

