

C. Costs are reserved.

Employment relationship problem

[1] Sian Lucas alleges she was unjustifiably dismissed by Te Rito Daycare Limited (Te Rito Daycare). Te Rito Daycare states the dismissal was justified because of aggressive behaviour, leaving work early and an unauthorised request for a parent's medical records.

Relevant Facts

[2] Te Rito Daycare Limited runs a daycare business in West Auckland. Sian Lucas was employed as a teacher at the daycare on or around 19 October 2015. Prior to May 2016 there had been no incidents of concern. However, matters seem to change around that time.

[3] On 11 May 2016 an incident occurred during karakia. This galvanised another employee Leah Whiteoak to complain. She alleged that Ms Lucas had said to another employee Sumi Pidakala "Sumi the bloody rakau" referring to a wooden tokotoko or stick that is passed around during the morning prayer session. Pre-school aged children were present at the time. Ms Whiteoak believed this was inappropriate professional behaviour.

[4] Sheryl Max is the Manager of the daycare. After receiving Ms Whiteoak's complaint she met with Ms Lucas. Ms Lucas denied acting inappropriately but accepted she may have raised her voice to Ms Pidakala. Some discussion occurred about Ms Lucas' behaviour towards Ms Pidakala. Ms Max then sought out commentary from other teachers and a parent who was present during the incident.

[5] Matters seem to snowball from that point. On 12 May 2016 Ms Max received another complaint from a parent about Ms Lucas' behaviour. This parent alleged Ms Lucas had requested a copy of that parent's medical records on behalf of Sheryl Max and/or Te Rito Daycare Limited. Ms Max told the parent that she had made no such request.

[6] On 13 May 2017 Ms Lucas left work early. An incident arose around whether she had completed the cleaning jobs she had to do for that day. Ms Max had taken photographs of the untidy state of the daycare following Ms Lucas' departure. She was concerned Ms Lucas had left early with the daycare in that state.

[7] Ms Max decided to discuss these concerns further with Ngaire Te Hira, a member of Te Whanau Waipareira Trust. After discussing her concerns with Ms Te Hira they drafted a document which was entitled "Staff in Confidence" and dated 16 May 2016. This document was addressed to Ms Lucas.

[8] This document contained a resolution to terminate Ms Lucas' employment. It also referred to three incidences of concern. These were during karakia, her leaving work early and the parent complaint about the request for medical records.

[9] A meeting was organised between Ms Lucas, Ms Max and Ms Te Hira for 16 May 2017. At the end of the meeting Ms Lucas left and did not return to work.

Issue

[10] There is a single issue for determination – that is whether Ms Lucas was unjustifiably dismissed.

Law

[11] Whether Ms Lucas' employment was in fact terminated is somewhat uncertain. The fact of dismissal must be proven as part of any personal grievance for unjustified dismissal. The onus for proving the fact of dismissal lies with Ms Lucas, the employee.

[12] Once the dismissal has been proven the onus then falls upon employer, Te Rito Daycare Limited, to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[13] Whether a dismissal was justified or not, requires consideration of the matters set out in s.103A(3) of the Employment Relations Act 2000 (the Act). Those matters include whether having regard to an employee's resources available and the employer sufficiently investigated the allegations, raised those concerns with the employee, gave the employee a reasonable opportunity to respond and then genuinely considered the employee's explanation prior to dismissal. A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.

[14] A dismissal is not unjustifiable if the procedural defects were minor or did not result in an employee being treated unfairly.

Was there a dismissal?

[15] There was some dispute about what Ms Max said prior to the meeting on 16 May. I am not convinced on the balance of probabilities that Ms Max said "*heads will roll*". However, I do accept Ms Lucas was upset by the requirement to attend a meeting on 16 May. That was corroborated by her husband's evidence. He noted that she sounded upset but had little idea what it was about.

[16] I also accept that the document that was read out to Ms Lucas at that meeting sought to terminate her employment.

[17] Ms Lucas thought dismissal was a foregone conclusion. However, Ms Max and Ms Te Hira indicated they did not. Two of the three attendees on 16 May state that Ms Lucas told them "*just give me the letter and I'll go*". She handed her keys to Ms Whiteoak and left the premises.

[18] The document dated 16 May 2016 was unequivocal in seeking to terminate Ms Lucas' employment. If Te Rito Daycare was not seeking to terminate Ms Lucas' employment, it should have taken steps to call Ms Lucas back to complete the disciplinary process or to return to work. I also note Ms Max's evidence that the reason they didn't call Ms Lucas back

was because they had “*moved on*”. A reasonable person would have thought Ms Lucas was dismissed in these circumstances.

[19] Therefore I determine Sian Lucas was dismissed by Te Rito Daycare Limited. Having found Ms Lucas was dismissed the onus now falls upon Te Rito Daycare to prove that she was justifiably dismissed.

Was Ms Lucas justifiably dismissed?

[20] This requires answering two questions. The first is whether there was substantive justification for the dismissal and the second, whether the process leading to dismissal was what a fair and reasonable employer could have done in the circumstances.

Was there substantive justification for this dismissal?

[21] There were three bases for justification of this dismissal. The first was swearing or aggressive behaviour in front of pre-school children. The second was seeking access to a parent’s medical records in the workplace and the third issue was leaving work early without completing clean-up duties.

[22] There was some evidence given about general performance concerns. These were never raised with Ms Lucas prior to dismissal. I take the point that they were at best a basis for further discussion. They certainly were not matters that would have resulted in her dismissal.

Swearing/Aggressive behaviour

[23] It is accepted as serious misconduct for a teacher to swear or act aggressively before the pre-school children in their care. I note the uncontested evidence Ms Pidakala and Ms Lucas did not get on. This indicates that it is more likely Ms Lucas would have snapped at Ms Pidakala.

[24] There is also evidence from at least three other witnesses - two teachers (Ms Whiteoak and Pidakala) and a parent. All confirmed that they heard Ms Lucas swear at Ms Pidakala. I also note Ms Whiteoak's evidence. She was a friend and work colleague of Ms Lucas. She had no reason to make trouble and was genuinely concerned about Ms Lucas behaviour that week.

[25] An employer is not a judge. They do not require evidence to prove matters beyond doubt. In my view, there was sufficient evidence before this employer to determine there was serious misconduct.

Access to parents medical records

[26] This is an issue of dishonesty. It would be serious misconduct if Ms Lucas was dishonestly seeking access to medical records on behalf of Te Rito Daycare or Sheryl Max. Ms Lucas had denied this occurred. Te Rito Daycare at that time had one statement from the parent concerned.

[27] To make a finding of dishonesty is a serious matter. Although employers are entitled to prefer one person's evidence over another, there was insufficient evidence here to make a finding of dishonest behaviour. There was significant relevant history between Ms Lucas and the parent that needed to be investigated and taken into account.

[28] There was also the fact that Ms Lucas had denied asking the parent for her medical records. She was certain she had asked the parent for minutes from a meeting. She believed the parent may have been mistaken possibly due to Ms Lucas' strong accent or somewhat confused about the request. I accept that evidence. An employer could not have excluded the reasonable possibility of mistake without further investigation.

[29] There was insufficient evidence before the employer for it to have concluded that this was serious misconduct.

Leaving work early

[30] This issue raises performance issues about Ms Lucas leaving work early without completing clean-up duties resulting in an untidy workplace. There were several explanations for the untidy workplace shown in the photographs. A reasonable possibility was another employee may not have completed their clean-up duties. Ms Lucas was only assigned one area to clean. From Ms Lucas' point of view, she had done everything she had to do except for the washing four boards to be replaced on a table. This would not have resulted in an untidy workplace generally.

[31] That evidence may have justified performance review but there was insufficient evidence for this employer to have concluded this was serious misconduct.

Was the process leading to dismissal fair and reasonable?

[32] The process leading to dismissal was clearly defective. There was no evidence Te Rito Daycare met all of the mandatory obligations under s.103A(3).

[33] Te Rito Daycare had access to human resources advice through Te Whanau o Waipareira Trust but did not appear to utilise it. There was insufficient investigation. Only one allegation was properly investigated prior to dismissal. The way Te Rito Daycare then raised its concerns with Ms Lucas while at the same time indicating she was dismissed was unfair and indicated pre-determination. There was no reasonable opportunity for Ms Lucas to respond in those circumstances. Te Rito Daycare cannot have genuinely considered any explanation given dismissal had occurred.

[34] Although there is a finding of serious misconduct, the process leading to dismissal was defective. These defects were not minor and they did result in Ms Lucas being treated unfairly.

[35] Sian Lucas was unjustifiably dismissed.

Remedies

[36] Because Ms Lucas has proven she has a personal grievance she is entitled to seek remedies of lost remuneration and compensation.

Lost Remuneration

[37] Employees are required to mitigate their lost remuneration or wages by seeking alternative employment. Failure to mitigate means they have not lost remuneration and no award may be made.

[38] There is evidence Ms Lucas was unable to find a job for at least two weeks due to depression. However she gave evidence of being selective about the jobs she applied for. There was evidence that if she had signed up earlier with Randstad New Zealand she could have been working immediately as a relief teacher to offset any losses. The fact she took time to engage with Randstad means she has failed to offset her lost wages. I decline to award any lost remuneration.

Compensation

[39] However compensation is a different matter. I have determined there should be a moderate level of compensation subject to reduction for contributory behaviour of \$10,000. This is because:

- a) this was employment of short duration (less than twelve months) and
- b) there was also no other corroborative evidence in the form of medical evidence to justify any higher award.

Contributory behaviour

[40] An employee's conduct may be relevant to remedies. Section 124 requires consideration of the extent to which the actions of the employee contributed towards the

situation that gave rise to the personal grievance and if required reduce remedies accordingly. In order for contributory behaviour to be taken into account, the actions of the employee must be both causative of the income and blameworthy.¹

[41] In my view there is sufficient evidence to justify a reduction of 50%. This is because there has been a finding of serious misconduct. That conduct was also blameworthy and caused the disciplinary process leading to termination.

[42] There is an order that Te Rito Daycare Limited pay compensation of \$5,000 including a reduction of 50% for Ms Lucas' contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

Costs

[43] Costs are reserved. If either party seeks an order for costs a memorandum is to filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply. Any party seeking costs must file:

- (a) Detailed copies of their fee arrangements; and
- (b) Copies of their legal tax invoices which should set out the time they have spent on matters and how they are charging.

[44] Any party that fails to provide that information in support of a costs application shall find their costs application declined.

TG Tetitaha
Member of the Employment Relations Authority

¹ *Goodfellow v Building Connection Limited trading as ITM Building Centre* [2010] NZEmpC 82 at para.[49].