

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 6/08
5079955

BETWEEN REBEKAH JANE McKENZIE
Applicant

AND EXTENSIONS TO LIFE
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Michael Vesty, Counsel for Applicant
Graeme Malone, Counsel for Respondent

Investigation Meeting: 16 October 2007 at Nelson

Determination: 21 January 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Rebekah McKenzie, says that she was unjustifiably dismissed from her employment with either Murray Kerr or, alternatively, Extensions to Life Limited on 4 December 2006.

[2] Ms McKenzie had been employed with either the first or second named respondent since 15 November 2006 as care coordinator for Daniel. Daniel had been involved in a serious car accident which left him with permanent physical and mental disabilities and he required full time care.

[3] Murray Kerr was the first respondent named in the statement of problem lodged with the Authority. Mr Kerr is Daniel's father.

[4] Extensions to Life Limited (*Extensions to Life*), was the second respondent named in the statement of problem and is a duly incorporated company of which

Mr Kerr is the sole director and shareholder. Mr Kerr said that Extensions to Life was incorporated in March 2005 to provide for his son's care after he suffered a motor vehicle accident in 2000. Mr Kerr said that Extensions to Life employed Ms McKenzie and that he made that clear to her.

[5] The first and second named respondents do not accept that Ms McKenzie was unjustifiably dismissed.

[6] Ms McKenzie was employed by either the first or second respondent on a full time basis. During the limited period that she was employed from 15 November 2006 until the termination of her employment on 4 December 2006, she only worked one full fortnight. The fortnight worked was from 20 November to 3 December 2006. During that period, Ms McKenzie worked 72.5 hours and stayed overnight on one occasion.

[7] Ms McKenzie was responsible for taking Daniel to and from Nelson Hospital. On or about 21 November 2006, six days after employment commenced, Ms McKenzie was required to take Daniel to Nelson Hospital to have his gastric feeding tube replaced.

[8] Ms McKenzie and another carer travelled with Daniel in the ambulance to the hospital. Mr Kerr and the previous care coordinator, Margaret, travelled to the hospital in their own vehicle.

[9] Ms McKenzie observed the procedure being undertaken on Daniel. She then arranged for an ambulance to come and collect Daniel to take him home and said she was handed a file by the nurse at the hospital which she put onto Daniel's stretcher.

[10] There was a wait for the ambulance of 30 to 45 minutes during which time the file remained on the stretcher and it remained there during the ambulance trip back to Daniel's home. Ms McKenzie said that she then took the file back inside Daniel's home and immediately placed it in the top cupboard where she said it remained and was not moved.

[11] There is no dispute that Mr Kerr saw the file and asked Ms McKenzie to return it to the hospital. There is a dispute about whether Mr Kerr was angry at the time and there is also a dispute about when he asked Ms McKenzie to return the file. The evidence from Ms McKenzie was that it was also disputed when Mr Kerr saw the file

and discussed its return. That is not a dispute I find that I need to make a finding about.

[12] I think it less likely that Ms McKenzie immediately put Daniel's file into the top cupboard. If that had occurred, then Mr Kerr would not have seen it when he visited Daniel's home after the hospital procedure. I prefer Mr Kerr's evidence therefore that the file was on the kitchen bench.

[13] Mr Kerr said he was concerned and angry to see the file at Daniel's home. Ms McKenzie said that Mr Kerr was surprised, rather than angry, about the file being at the home. Ms McKenzie said that Mr Kerr seemed to accept her explanation as to how the file had come to be at the home. Mr Kerr said that he told Ms McKenzie that it was important that the file stay at the hospital as the hospital needed the information if something went wrong.

[14] Mr Kerr said that he told Ms McKenzie to return the file the next day. Ms McKenzie does not accept that this was said. Ms McKenzie said that it was agreed that she would return the file at Daniel's next hospital visit on 6 December 2006.

[15] Mr Kerr was away for a period of seven days prior to 4 December 2006. He said that he told another staff member to put the file away on top of the fridge for safe keeping on 21 November 2006.

[16] Mr Kerr returned to Daniel's home on 4 December 2006. He was approached by his daughter and other staff who raised several concerns and complaints to him about Ms McKenzie.

[17] The specific complaints were:

- That Ms McKenzie had been recommending staff should read Daniel's file and that it had good stuff in it;
- That Ms McKenzie advised one of the staff, Bonnie Campbell, that the file said Daniel should not be resuscitated but that she did not know about that because she needed the job a bit longer;
- Failing to give Daniel medicine;

- Unwillingness to drive the van and encouraging a restricted licence holder to drive the van instead;
- Driving Daniel in the van without securing his wheelchair;
- Leaving Daniel in the van on a hot day to show off her new house;
- Leaving the home between 3.30 and 3.45pm each day to pick up her children from school;
- Putting Daniel to bed at 1pm rather than allowing him to watch TV or carrying out activities with him;
- Failing to do housework;
- Spending time on the phone to friends, sleeping and undertaking study rather than carrying out work duties.

[18] After receipt of the complaints from staff, Mr Kerr took Daniel's file from his home to the hospital. He raised his concerns with the Chief Nurse about how the file could have left the hospital in the first place with Ms McKenzie.

[19] A letter was produced at the investigation meeting from the District Manager, Clinical Support Services, Nelson/Marlborough District Health Board dated 10 July 2007. The letter stated, amongst other matters, that it appeared Daniel's file had been left on his bed and the file was therefore transported home when Daniel was taken by ambulance. In the letter, the District Manager apologised on behalf of the District Health Board for this happening.

[20] When Mr Kerr returned home from the hospital on 4 December 2006, he met with Ms McKenzie. At the end of the meeting, Ms McKenzie's employment was terminated and she was required to leave that day.

The test in s.103A Employment Relations Act 2000

[21] Section 103A of the Act requires justification for a dismissal to be determined by evaluating the actions of the employer at all stages of the process, including the decision to dismiss, against the objective standard of what a fair and reasonable employer would do.

The issues

[22] The issues for the Authority are as follows:

- Who was Ms McKenzie's employer;
- What was the reason for Ms McKenzie's dismissal on 4 December 2006;
- Was the investigation into allegations concerning Ms McKenzie's actions fair and reasonable;
- Was either the first or second respondent justified as a result of that investigation in concluding that there had been misconduct which justified dismissal;
- Was the decision to dismiss justifiable in all the circumstances;
- If the decision to dismiss was not justifiable, then what remedies should be awarded and are there issues of contribution;
- Should there be a penalty for the failure of either the first or second respondent to provide Ms McKenzie with a copy of an intended written individual employment agreement under s.63A of the Employment Relations Act 2000?

Who was Ms McKenzie's employer?

[23] There was no written employment agreement between the parties.

[24] Ms McKenzie responded to an advertisement in the newspaper for a care coordinator position and attended an interview with Mr Kerr and the previous care coordinator, Margaret. The advertisement mentioned Extensions to Life but did not make it clear that Extensions to Life was a limited liability company.

[25] The interview took place at Daniel's address. Ms McKenzie said that there was no mention of the company during the interview. Importantly, she said in her evidence that Mr Kerr told her that he was starting up a company to care for his son Daniel and that Daniel was the only client.

[26] Extensions to Life was incorporated in March 2005. Mr Kerr said that at the interview he gave Ms McKenzie a business card that had the company name printed on it. Ms McKenzie denies that. Mr Kerr said that he invited Ms McKenzie to look at the company website but Ms McKenzie denies that she was advised about any website. Extensions to Life does have a website.

[27] Mr Kerr said that he explained to Ms McKenzie that the company would expand to offer services to others but at that time Daniel was the only client.

[28] Ms McKenzie placed some reliance on Mr Kerr telephoning her after the interview and advising *I would like to take you on board*. Mr Kerr said that is not the type of language he would normally use. He accepted it was unlikely during the telephone call that he referred to the company by name. He said that Ms McKenzie already knew that her employer was a company and that was the position she had been accepted for.

[29] IRD also understood that Ms McKenzie's employer was Extensions to Life as set out in the IRD summary of earnings for the relevant period provided after the investigation meeting.

[30] The one wage slip that Ms McKenzie was provided with did not have the company name on it, but neither did it have Mr Kerr's. The evidence supports that funding for Daniel's care was paid to Extensions to Life and wages were paid from the company account to Ms McKenzie.

[31] Ms McKenzie was mistaken I find about Mr Kerr saying that he intended to set up a company in the future. Extensions to Life was incorporated over a year prior to the interview. It is very unlikely that the advertisement for the position of care coordinator would refer to Extensions to Life but Mr Kerr talk about setting up a company in the future. I find that evidence from Ms McKenzie about those matters supports that there was some discussion about a company but that she may have misunderstood the relevance or importance of that. I accept Mr Malone's submission that the reference to Daniel being the only client is more likely to have been made in the context of a discussion about a company than Mr Kerr himself being Ms McKenzie's employer. In the latter case, it would have been unlikely that Mr Kerr would have referred to his son as a client.

[32] The evidence that Ms McKenzie has of any intention by Mr Kerr to enter personally into an employment relationship with her is largely reliant on the telephone conversation after the interview. I do not place much weight on that in circumstances where I think it likely there were some discussions about the company at the interview itself.

[33] Extensions to Life was the company to which ACC provided funding to provide for Daniel's care and wages for those who were employed by the company. In those circumstances I consider it likely that Mr Kerr would have talked about matters involving the company and provided a business card at the interview.

[34] Significantly, too, Extensions to Life was mentioned in the advertisement for the position. In circumstances where I do not think the identity of her employer was something that Ms McKenzie gave much thought to until after she was dismissed, it was probably not an important matter for her.

[35] Having considered all of the relevant factors, I am of the view that it is more probable than not that Ms McKenzie's employer was Extensions to Life Limited and not Mr Kerr. I do not find that there is evidence for me to conclude that Mr Kerr held himself out as Ms McKenzie's employer or was her employer.

[36] In conclusion, I find that it was the second named respondent in the statement of problem, Extensions to Life Limited, which employed Ms McKenzie.

What was the reason or reasons for Ms McKenzie's dismissal on 4 December 2006?

[37] Mr Kerr said that the reasons for dismissal concerned issues about Daniel's hospital file and the complaints/concerns which he said he was advised of by other staff on 4 December 2006.

[38] Mr Kerr said in his evidence that he told Ms McKenzie that he could not trust her and could not work with a person who lied. He said that he could not trust Ms McKenzie to properly care for Daniel.

[39] Ms McKenzie says that many of the matters now relied on were not put to her on 4 December 2006.

[40] Having heard the evidence, I conclude that the reasons for Ms McKenzie's dismissal are her failure to return the file to the hospital and the complaints/concerns other staff raised with Mr Kerr on 4 December 2006. It was as a result of those matters combined that Mr Kerr felt he could no longer trust Ms McKenzie and dismissed her.

Was the investigation into allegations concerning Ms McKenzie's actions fair and reasonable?

[41] Ms McKenzie was dismissed after meeting with Mr Kerr on 4 December 2006. Mr Kerr initially offered to pay Ms McKenzie two weeks' wages but did not in fact pay those wages because he received notice of a personal grievance from Ms McKenzie. I conclude that the dismissal was summary in nature.

[42] Mr Kerr accepted, at least in some respects, that he had not followed what would be the basic elements of procedural fairness in terminating Ms McKenzie's employment on 4 December 2006.

[43] Ms McKenzie was not advised prior to meeting with Mr Kerr on 4 December 2006 about the nature of the allegations she was facing. She was not advised that her employment could be terminated. She was not advised to obtain a representative. In respect of those matters, Mr Kerr says that Ms McKenzie brought the situation on herself and he had to take immediate action to protect Daniel.

[44] Mr Kerr said that Ms McKenzie did have an opportunity to give an explanation to all of the allegations. I am not satisfied that all of the matters Mr Kerr now relies on as reasons for the dismissal were put to her. There was some dispute as to the length of the meeting. Ms McKenzie put the length of the meeting at 10-20 minutes and Mr Kerr said the meeting was 30 minutes long.

[45] In any event the allegations were not put in a satisfactory way so as to conclude that Ms McKenzie was provided with a real option to be heard and offer explanations about them. Ms McKenzie could only recall the issue about the file being put to her and an issue about driving the van. During the meeting, Ms McKenzie said that she understood she was to take the file back to the hospital when she took Daniel for his next appointment on 6 December 2006. She denied the allegation about the van.

[46] Mr Kerr said that Ms McKenzie essentially denied all the allegations. There was no further investigation and Ms McKenzie was dismissed.

[47] Mr Kerr said in his evidence that he had made up his mind to dismiss Ms McKenzie before the meeting after talking to hospital staff about the file and hearing the complaints from other staff and his daughter about Ms McKenzie.

[48] It really did not matter, therefore, what Ms McKenzie said because Mr Kerr had already made up his mind about the outcome of the disciplinary meeting. I do not find that Ms McKenzie's explanations were considered with an open mind. A fair and reasonable employer would have approached the matter with an open mind.

[49] I do not find that the investigation into the allegations that Ms McKenzie was facing was that which a fair and reasonable employer would have undertaken in these circumstances.

[50] Having concluded that the investigation into the allegations was deficient and was not full and fair, I now consider whether there was misconduct that would have justified a summary dismissal.

[51] I accept Mr Vesty's submission that the hospital accepted responsibility for the way in which the file had left the hospital. The matter to be considered in terms of misconduct is whether Mr Kerr gave a clear instruction to Ms McKenzie to return the file to the hospital the day after he spoke to her and she failed to do so.

[52] Objectively viewed, it is difficult to understand why Ms McKenzie, who had only been in the job at the time of the discussion with Mr Kerr for a matter of days, would not have done what Mr Kerr asked of her if it was clear. This is particularly so in circumstances where Mr Kerr says he was angry and insistent.

[53] A fair and reasonable employer, as part of an investigation into this matter, would have considered whether Ms McKenzie's failure to return the file to the hospital was the result of a misunderstanding rather than wilful.

[54] In the circumstances of this case, I do not find that a fair and reasonable employer would have found the failure to return the file amounted to misconduct that would justify summary dismissal.

[55] Ms McKenzie answered the other allegations in her evidence because they were not put properly to her before dismissal. Ms McKenzie denied encouraging staff to read the file or disclosing matters about its contents to other staff.

[56] Evidence was given about the file at the investigation meeting by another then staff member, Bonnie Campbell. Ms Campbell said that staff were aware that the file was at the house. Ms Campbell said that she heard Ms McKenzie make an inappropriate comment about the resuscitation of Daniel. Ms Campbell said she found the comment in bad taste and *did wonder if it was just her* [Ms McKenzie's] *sense of humour*. Ms Campbell said that Ms McKenzie told staff that the file made for good reading and that all staff should read it.

[57] Whether or not Ms McKenzie told staff that the file made for good reading and that they should read it, was a matter that required investigation, given Ms McKenzie's denial. A fair and reasonable employer would have considered if the comment was made whether it was a one off comment and whether any staff did actually look at the file. A fair and reasonable employer would not have concluded that that matter would have justified summary dismissal.

[58] I find it more likely than not that Ms McKenzie did make some comment about resuscitation of Daniel. Not surprisingly, Ms Campbell found the comment in bad taste. Whether it was before or as a result of looking at the file, was never investigated properly at the time.

[59] I can understand why Mr Kerr was very upset about the comments. People do at times make inappropriate comments to others in the workplace. It was necessary for Mr Kerr to reach a view as to the nature of the comments, the context and whether it was inappropriate humour not designed to be malicious or something more sinister. Viewed objectively, the comment was not in good taste but would not be misconduct of a nature that a fair and reasonable employer should decide should lead to the end of the employment relationship.

[60] A fair and reasonable employer would have reprimanded Ms McKenzie about the inappropriate nature of her comment, whether it was as a result of reading the file or otherwise, and reiterated the importance of privacy and confidentiality in terms of the file and Daniel.

[61] The staff complaints should have been properly put to Ms McKenzie on 4 December 2006. Mr Kerr had not personally witnessed any of the matters and had simply been advised of them on the day of dismissal. Most of the complaints were in the nature of performance issues that would not have justified dismissal but could, if properly investigated and it was found there was substance to them, have resulted in a warning.

[62] There were two matters that Ms Campbell raised in her evidence and described at the investigation meeting as behaviour from Ms McKenzie that was not nice and was possibly even cruel. One was Ms McKenzie having fish and chips in front of Daniel when they were his particular favourite and not sharing them, and the other matter concerned a comment made to Daniel at showering time.

[63] This is a serious allegation and not one that a fair and reasonable employer would have reached a view on without further investigation. Ms Campbell accepted that Ms McKenzie was *pleasant enough* and took an interest in Daniel's medical condition. She also accepted that there were occasions when Ms McKenzie did have fish and chips with Daniel.

[64] Ms Campbell accepted that in terms of one of the allegations that Ms McKenzie had failed to give Daniel his *microlax* that Ms McKenzie may have consulted with a health nurse about that decision. This demonstrates the importance of a proper investigation.

[65] The matters about sleeping, housework and undertaking study at work were not properly investigated. The matters about the van were not properly investigated.

[66] Ms Campbell said that Ms McKenzie put Daniel to bed every day at 1pm. Ms McKenzie denied this and said she only did this on about three occasions. Ms McKenzie also said in her brief of evidence that Ms Campbell did not work every day. Ms Campbell said that she worked part time about three mornings a week and weekends looking after Daniel. Whether Ms Campbell was present at the same time as Ms McKenzie during her short period of work should have been investigated and was not.

[67] Ms McKenzie denied failing to sign off Daniel's antibiotics correctly and said that she gave him his antibiotics and signed them off appropriately.

[68] I do not find, in terms of the file and the staff complaints and concerns, that a fair and reasonable employer would have concluded that they justified Ms McKenzie's summary dismissal on 4 December 2006. These matters had never been put to Ms McKenzie prior to the meeting on 4 December 2006 and she had never been warned about them prior to dismissal.

Determination

[69] Mr Kerr was certainly entitled to raise his concerns with Ms McKenzie on 4 December 2006. He should have given her fair notice of the allegations she was facing so that she could have had a real opportunity to be heard about them. Mr Kerr should have conducted an investigation with an open mind and considered the explanation before reaching his decision. The process in this case was unfair.

[70] I accept Mr Malone's submission that Ms McKenzie was entrusted with the care of a vulnerable person entirely dependent on his caregivers. That is a matter which a fair and reasonable employer would consider when reaching a justifiable decision. In this case, the process, in light of the allegations and potential consequences for Ms McKenzie, was unfair. A fair and reasonable employer would not, as a result of the investigation, have reasonable grounds to believe that there was conduct capable of amounting to serious misconduct that would justify summary dismissal.

[71] For completeness, I should add that this is not a situation where the employer was entitled to act without further inquiry.

[72] The procedural and substantive respects in this case are really inseparable. In conclusion, for the reasons set out above in terms of substantive and procedural matters, the dismissal was unjustified. A fair and reasonable employer would not have dismissed Ms McKenzie.

[73] Ms McKenzie has a personal grievance as she was unjustifiably dismissed and she is entitled to remedies.

Remedies

Contribution

[74] The Authority must, if it determines that an employee has a personal grievance, consider the extent to which the actions of the employee contributed towards the situation. If the actions so require, the remedies that would otherwise be awarded should be reduced.

[75] The return of Daniel's file to the hospital was not properly investigated. The complaints made about Ms McKenzie by the other staff were not properly investigated either.

[76] The only contribution by Ms McKenzie to the situation that gave rise to the personal grievance, I find, is in respect to the inappropriate comment that I found was made. Standing back and viewing the matter objectively, the comment contributed to Mr Kerr's decision that he could no longer trust Ms McKenzie to take care of his son. I assess the contribution at 10%

Lost wages

[77] I am satisfied that Ms McKenzie did make attempts to obtain other work following her dismissal. I do not accept Mr Malone's submission that there is such insufficient detail about earnings that there should be no award made for lost wages. After the investigation meeting I was supplied with the earnings schedule from IRD for Ms McKenzie.

[78] I do intend, however, to limit the award with respect to lost wages to three months from 4 December 2006 to 4 March 2007.

[79] Ms McKenzie received \$14 per hour. I have taken the pay that she received for the only full fortnight that she worked as the basis for the calculation of lost wages. Ms McKenzie received for that fortnight the sum of \$1,092.50 gross. I have divided that sum in half for a weekly rate of \$546.25 gross.

[80] The calculation of three months' lost wages on the basis of \$546.25 per week is \$7,101.25 gross. I have deducted from that amount gross earnings Ms McKenzie received from Chubb of \$1,224. I have not deducted the Department of Corrections earnings as Ms McKenzie was working part time for that organisation when employed by Extensions to Life. I have deducted a third of the earnings from Talleys being the sum of \$542.33. I make no deduction in terms of the Order of St John because the earnings were for March 2007.

[81] By deducting these amounts I arrive at a gross figure of \$5,334.92 from which I deduct the contribution I have earlier assessed to arrive at a figure for lost wages of \$4,801.43 gross.

[82] I order Extensions to Life Limited to pay to Rebekah McKenzie the sum of \$4,801.43 being reimbursement for lost wages under s.123 (1)(b) of the Employment Relations Act 2000.

Compensation

[83] Ms McKenzie was clearly humiliated and upset by her unexpected dismissal on 4 December 2006. She cried during the meeting with Mr Kerr on that day. After her dismissal, Ms McKenzie did not apply for other caregiver roles because she said she had no confidence to do so. Ms McKenzie said that she also felt she needed to advise her other employer, Department of Corrections, and St Johns for whom she worked as a volunteer ambulance driver of the allegations following her dismissal. She described this as humiliating.

[84] Although Ms McKenzie was only employed for a short time, I find it was a particularly undignified, unexpected and quite a shocking end to her employment.

[85] In all the circumstances, I am of the view that a suitable award before taking contribution into account would be \$7,000.

[86] Taking contribution into account, I order Extensions to Life Limited to pay to Rebekah McKenzie the sum of \$6,300 without deduction being compensation under s.123 (1)(c)(i) of the Employment Relations Act 2000.

Penalty

[87] Ms McKenzie was not provided with a written employment agreement before commencing her employment or during the short period of her employment as required by s.63A of the Employment Relations Act 2000. There was a dispute about whether or not she asked for one. An employer has an obligation to provide an employment agreement, whether an employee asks for one or not. I find it more probable, having heard the evidence, that Ms McKenzie did on one occasion ask Mr Kerr for an employment agreement but it was not forthcoming.

[88] As a result of the absence of a written employment agreement, there has been considerable confusion about the identity of Ms McKenzie's employer. Ms McKenzie did not have the benefit of an employment agreement with respect to the meeting of 4 December 2006 or after that meeting.

[89] I find there should be an order for a penalty. In the circumstances where there has been disadvantage to Ms McKenzie I order that the whole of the penalty be paid to her.

[90] I order Extensions to Life Limited to pay a penalty of \$300 for a breach of s.63A of the Employment Relations Act 2000 for failing to provide Ms McKenzie in writing her intended individual employment agreement under s 135 of the Employment Relations Act 2000.

Costs

[91] I reserve the issue of costs.

Summary of orders made

- I have found that Ms McKenzie was employed by Extensions to Life Limited.
- I have found that Ms McKenzie was unjustifiably dismissed.
- I have assessed contribution at 10%.
- I have ordered that Extensions to Life Limited pay to Ms McKenzie the sum of \$4,801.43 gross being reimbursement for lost wages under s.123 (1)(b) of the Employment Relations Act 2000.
- I have ordered that Extensions to Life Limited pay to Ms McKenzie the sum of \$6,300 being compensation for humiliation, loss of dignity and injury to feelings under s.123 (1)(c)(i) of the Employment Relations Act 2000.
- I have ordered Extensions to Life Limited to pay to Ms McKenzie a penalty of \$300 for failing to provide Ms McKenzie with an individual employment agreement.

- I have reserved the issue of costs.

Helen Doyle
Member of the Employment Relations Authority