IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 44/10
File Number: 5272554

	BETWEEN	Megan McLeay Applicant
	AND	Radius Residential Care Limited Respondent
Member of Authority:	Denis Asher	
Representatives:	Alan Millar for Ms McLeay Eleanor Robinson for the Company	
Investigation Meeting	Palmerston North, 16 February 2010	
Submissions Received	By 26 February 2010	
Determination:	2 March 2010	

DETERMINATION OF THE AUTHORITY

The Problem

[1] At issue is whether the respondent ("the Company") justifiably dismissed Ms McLeay.

The Investigation

[2] During a telephone conference on 17 August 2009 the parties agreed to an investigation in Palmerston North on 10 November 2009 and a timetable for filing witness statements and documentary evidence.

[3] Later, by email dated 28 September Ms McLeay's advocate, Mr Alan Millar, advised – through a fault on his part – that his client was overseas on the scheduled investigation date and sought an adjournment. The parties subsequently agreed on another investigation date, of 16 February 2010.

[4] At the investigation itself, and other than in respect of a small disagreement in respect of page 5 of doc 6 (Ms McLeay's position description), the parties agreed to treating the bundle of documents supplied by the respondent in its statement in reply as an agreed bundle while adding to it other documents produced on the day. All references in this determination are to document numbers set out in that agreed bundle.

Background

[5] The Company operates an agency providing casual and temporary labour to the care industry. The Palmerston North branch was closed at the beginning of 2009.

[6] Ms McLeay was employed by the Company as a co-ordinator in June 2006. In December 2006 she took up the position of local manager on an interim basis; it was her first experience of employment in a management capacity. In March 2007 she was permanently appointed to the position.

[7] Ms McLeay worked without any immediate local supervision but was visited on a monthly basis by the national operations manager, Ms Ann Bedford, who had appointed her to the position.

[8] During late 2007 Ms McLeay was subjected to a disciplinary process and issued a final warning. In a determination dated 28 October 2008 (WA 144/08) I found that, while the Company had legitimate reason to communicate its concerns to the applicant so that over time she would address and meet them, Ms McLeay had nonetheless been unjustifiably disadvantaged. I found that the Company had not met its statutory obligation to be active and constructive, responsive and communicative per s. 4(1A) of the Employment Relations Act 2000 (the Act). In particular the Company had moved beyond the process it set for itself in its employee handbook; it had failed to communicate its concerns before issuing a final warning, and that the

action plan prescribed by the national operations manager should have preceded the warning and not – as happened – have been put in place after the warning. The Company's concerns about the seriousness of the applicant's performance were also not borne out by review timelines provided for in the national operations manager's performance plan.

[9] I awarded Ms McLeay $4,000 compensation for humiliation reduced by 25% contributory fault for her failure – in breach of her obligation to be responsive and communicative – to respond to her employer's concerns other than by in writing.

[10] During that earlier investigation, and after it was confirmed that the applicant's employment had been terminated by the Company in early 2008, Ms McLeay advised that she was awaiting the outcome of her first grievance before determining if she would proceed with this, her second, grievance.

[11] I now revert back to the events leading up to this determination:

[12] In a letter dated 5 December 2007 (doc 15) the national operations manager advised of serious concerns with regard to Ms McLeay's performance and conduct that could result in disciplinary action.

[13] Ms McLeay replied by letter dated 12 December (doc 17).

[14] Other matters came to light: they were particularised in another letter from the respondent dated 27 December (doc 21).

[15] A disciplinary meeting followed on 7 January 2008 shortly after which, but from that date, the Company stood down Ms McLeay on full pay.

[16] Another written response dated 8 January was provided by the applicant (doc 26, second page). On the following day Mr Millar filed advice of an unjustified action grievance on his client's behalf: he advised that the time granted the applicant to respond was too short, and sought her reinstatement. By letter dated 10 January the Company rejected the alleged unjustified disadvantage (doc 29).

[17] The claim of too short a time to respond and disadvantage arising out of suspension were subsequently abandoned: while referred to, they form no part of this investigation.

[18] By way of a letter dated 10 January the Company summarily dismissed Ms McLeay (doc 30). The decision was based on findings that the applicant's actions constituted serious misconduct which could have caused financial loss to the Company; that Ms McLeay failed to follow proper, reasonable and lawful instructions with regard to the recording of client contacts, employment, orientation and suspension of staff and that she gave guarantees of work on behalf of work-permit applicants to the immigration authorities without authorisation despite being fully aware that she was not authorised to do so *"or following procedural requirements in this respect"* (above). The respondent described Ms McLeay's actions as causing *"a serious breach of trust and confidence"* (above).

[19] Notice of Ms McLeay's personal grievance was communicated to the Company in a letter dated 3 April 2008.

Discussion and Findings

[20] It is not disputed that the Company dismissed Ms McLeay.

[21] Seven concerns in total were raised with the applicant, to which she responded. Through her advocate, Ms McLeay also made it clear to her employer she would not be discussing its concerns or responding to them other than in writing.

[22] Ms McLeay's explanations in respect of two of the allegations she faced were accepted by the Company, however she was dismissed in respect of the remaining 5 matters of concern.

[23] Those five matters, set out in the 10 January 2010 letter (doc 30) were:

a. Complaint from X;

b. Failing to document visits/contacts in client files at the time of contact;

c. The employment and subsequent unauthorised and improper suspension of Y;

d. Supplying guarantees of employment to three work permit applicants and failing to notify or obtain authorisation to do so; and

e. Failure to issue the Handbook to all new employees and ensure official orientation is carried out.

The Law

[24] The parties agree that, per s. 103A of the Employment Relations Act 2000, the relevant question of whether the dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[25] In *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, the full Employment Court, at para [37], observed that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[26] In *Trotter* v *Telecom Corporation of New Zealand Ltd*, 2 ERNZ 659, Goddard C J found that, amongst other things, in the case of dismissal for misconduct, fairness and reasonableness require that the employee be given an intelligible statement of the allegations of misconduct with sufficient particulars and a real opportunity to refute or mitigate the allegations (page 679).

[27] *Pacific Forum Line Ltd* v *Merchant Service Guild* ([1991] 3 ERNZ 1035) was quoted with approval in *Trotter* (above), wherein (at 1046), the then Colgan J said:

> *It is only fair that where an employee is so criticised for poor performance that termination of the employment is contemplated, clear advice to this effect should be*

given and an opportunity to improve or so disagree with the assessment given, if this is to be the justification for dismissal.

[28] And,

What this passage says is that where there is unsatisfactory performance, warnings should precede action. … The purpose of warnings is to give the employee an opportunity to improve or otherwise allay concerns, not to create a pretext for a dismissal for which no independent reason exists. A warning is not a magic wand creating a ground for dismissal. It is rather a step fairly taken to enable a dismissal to be averted. It follows that a warning to be fair must be explicit. … This process may be more difficult for management positions whose output is often somewhat broadly comprehended. Clarity and objectivity are all the more necessary.

(*Trotter*, 680)

[29] In *Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union* [1990] 3 NZILR 23 ; [1991] 1 NZLR 392 ; (1990) 3 NZELC 98,130 ; (1990) ERNZ Sel Cas 855 the Court of Appeal upheld, amongst other things, the Labour Court's earlier finding on the application of an appropriate standard of proof: namely, if a serious charge provided justification for a dismissal, the evidence in support of it needed to be as convincing in its nature as the charge was grave.

[30] I now apply the tests set out above to the matters relied on by the Company to sustain Ms McLeay' dismissal:

Complaint from X

[31] The original complaint is set out in a letter from X dated 27 November 2007 (doc 9). It traverses several matters including being threatened with a negative credit rating in respect of a bill the writer had never been previously invoiced for and had no knowledge of, as well as the (poor) quality of the Company's care giving staff, the cost of that staff, and resulting problems with his own employees threatening not to work with the respondent's care givers or resign if required to.

[32] The complaint does not identify Ms McLeay. It is not clear from it, nor indeed from the Company's subsequent investigation, if Ms McLeay was directly or indirectly responsible for any of the matters complained of. The applicant denied that she was. There is no evidence resulting from the employer's investigation of Ms McLeay being managerially responsible for not invoicing the complainant, or threatening him with an (underserved) negative credit rating, or of providing over-priced, sub-standard care givers.

[33] A plain reading makes clear that the complaint itself is of the Company's practices.

[34] It is not clear what if any part of Ms McLeay's response (doc 17) was not acceptable to the Company. The applicant advised she had spoken previously to the complainant, understood his concerns to have been resolved amicably and was not responsible for any financial issues.

[35] Because of the Company's failure to provide an intelligible statement of the allegations of misconduct (*Trotter*), or to challenge what presumably was unacceptable in the applicant's response, and by way of an objective review (*Air New Zealand*, above) I am satisfied a fair and reasonable employer, in all the circumstances at the time, would not have found serious misconduct on the applicant's part in respect of X's complaint. While Ms McLeay was the manager at the time, and therefore the 'face' of the Company in respect of the complainant's concerns, it is not clear from the respondent's subsequent inquiry that the applicant has acted in breach of its policies or procedures or instructions such as to generate the writer's concerns. No connection has been demonstrated by the Company of (in)actions by Ms McLeay resulting in the complaint.

Failing to document visits/contacts in client files at the time of contact

[36] This allegation arose out of Ms McLeay's response to the complaint from X. The applicant's manager, Ms Ann Bedford, noted that integrated progress notes provided by Ms McLeay were not present when they jointly reviewed client notes some months earlier. Ms Bedford emailed the applicant asking for clarification (doc 12).

[37] In reply Ms McLeay said that her response *"was written today from notes in my calendar on Outlook, my personal diary and notes written on the Referral for Healthcare Workers Sheets. The dates are the dates they were noted – therefore giving you a timeline. … If you wish to see all these documents, please let me know and I will copy them so they can be faxed to you"* (doc 12). Ms Bedford replied wondering *"why you did not write these up at the time given that they are important and should have been written at the time of the events"* (above)

[38] The matter was then reiterated by Ms Bedford in her letter of 5 December 2007 (doc 15). Ms McLeay's response was that she had not failed as alleged, but had acted in the manner as was the practice at the time and had received no instructions to conduct herself differently.

[39] The Authority's investigation resulted in a good deal of evidence from Ms McLeay's manager that she believed the applicant had in effect manufactured documentation of client visits after the event, and not at the time of contact. That, of course, was not the original allegation against Ms McLeay.

[40] As is made clear at paras 15-17 of Ms Bedford's witness statement (doc 3), on receipt of the applicant's response to her letter of 5 December she began to check the Integrated Progress Notes against the calendar and staff placement list and noted that several did not correspond, and (despite her offer) Ms McLeay had not sent through any evidence supporting her claim the notes were written elsewhere. During my investigation I asked Ms Bedford, did her concerns about this discrepancy, which she described as trust and confidence matters, contribute to her decision to dismiss the applicant? She confirmed it did.

[41] Ms Bedford also emphasised Ms McLeay's legal obligations, as a registered nurse, to prepare notes at the time of an event.

[42] Applying again the objective review required, I am satisfied a fair and reasonable employer, objectively measured, would have put particularised complaints to Ms McLeay, sought her response in respect of specified discrepancies, assessed her response that *"she acted in the manner as was the practice at the time"* (doc 17) and allowed the employee to address any concerns it had as to trust and confidence: none

of these steps were taken. In particular, despite their longstanding professional relationship and knowing of her location, Ms Bedford did not talk to the previous Palmerston North manager in respect of 'practices at the time'. Nor did Ms Bedford accept Ms McLeay's offer to provide copies of contemporaneous records (doc 12).

[43] I am satisfied a fair and reasonable employer, in coming to a decision to dismiss, would also put to an employee its concern that person had falsified documentation in a subsequent attempt to cover up (par 4, v., of the respondent's submissions received 24 February 2010).

[44] I am therefore satisfied the Company has not justified its finding of serious misconduct in respect of failing to document visits/contacts in client files at the time of contact.

The employment and subsequent unauthorised and improper suspension of Y

[45] The thrust of this allegation was that Ms McLeay, without authorisation, employed someone on the Company's behalf, and similarly and improperly suspended her (doc 21).

[46] The applicant's response was that she employed the person concerned *"as part of my normal duties"* and, in respect of allegations about the employee's background and departure from her previous employment, that *"I had suitable delegated authority to deal with such matters"* (doc 26).

[47] As with the previous and following allegations, Ms McLeay's response was that *"It …* (had) *been part of my duties to make offers of employment"* (above). The Company did and does not accept that claim.

[48] Again, no inquiry was made of Ms McLeay's predecessor, to clarify her practice and what if any instruction on this matter had been passed to the applicant when she assumed managerial responsibilities.

[49] Amongst other things, Ms McLeay's position description specifically provides she was to *"recruit and select staff to ensure quality care of clients and efficient running of*

the homecare operation" (page 1, doc 6 in the bundle). Page 4 of the same document required Ms McLeay *"To recruit new staff with appropriate management team … and ensure appropriate staff selection and orientation takes place"*. Other than in respect of a disputed manager's file, no communications preceding the complaint have been produced by the Company stating it was not part of the applicant's duties to recruit and discipline staff.

[50] The position description also defined one of Ms McLeay's key activities as *"To ensure that industrial procedures and policies are adhered to within the Company guidelines"* (page 2, above). Company procedure and policies are set out in various documents including a Facility Manager's Manual (doc 7). That document makes it clear that managers, including Ms McLeay, were required to request a new position in writing to her managers.

[51] Ms McLeay's explanation of her actions is that she acted *"firstly on the requirement to protect the company, and secondly to protect its clients. I acted in accord with my duties and delegated authority as manager"* (doc 26). The applicant says she became aware the employee had probably falsified information given at the job interview and on her application form, and because a Police investigation into that person was underway. The employee confirmed to Ms McLeay she had misled her and the Company. Ms McLeay said her actions resulted in no financial implications for the respondent.

[52] Ms McLeay advised the Authority that she had first seen the Facility Manager's Manual after her dismissal, as a result of filing a grievance. The Company produced an email to the applicant, dated 27 December 2006 from her predecessor, advising how she could access it and other manuals (doc 33). Ms McLeay said she did not recall seeing the email and her efforts to access these documents had never been successful; she never downloaded anything from the electronic server and relied instead on existing documents (including photocopying them when necessary).

[53] Again, the Company made no direct inquiry of the applicant's predecessor in respect of previous practice and the applicant's induction.

[54] The respondent cannot establish, on a balance of probabilities basis, that Ms McLeay deliberately ignored the requirements set out in the Facilities Manager Handbook.

[55] I am satisfied a fair and reasonable employer, objectively measured and in all the circumstances at the time, would not have dismissed the applicant. All of the circumstances are characterized by Ms McLeay acting in all sincerity, albeit with managerial naivety, in reliance on a belief (untested by the respondent) that she was behaving no differently from her predecessor, on whose example she relied (*"delegated authority"*).

Supplying guarantees of employment to three work permit applicants and failing to notify or obtain authorisation to do so

[56] Ms McLeay's position is the same in respect of this allegation as the preceding matters, that it was *"… part of my duties to make offers of employment"*, and that she did not have to seek authority to do so (doc 26). Ms McLeay expressly referred to the practice of her predecessor and advised, *"A reference to Radius' records will confirm this to be so"* (above). One of the workers concerned was already an existing employee.

[57] For the reasons set out above in respect of the preceding allegation, I reach the same conclusion in respect of this matter.

Failure to issue the Handbook to all new employees and ensure official orientation is carried out

[58] Ms McLeay set out in some detail her response to this allegation (see page 4, doc 26). Again, it essentially advised that she did what her predecessor did and what she had been trained to repeat. It is not clear, in terms of the claimed extensive orientation activities performed by the applicant, why the orientations she performed were not acceptable to the respondent, other than that they were different from what it wanted Ms McLeay to do.

[59] As Ms McLeay's defence of repeating what her predecessor had shown her to do was not tested by the Company, and in the absence of express directions to conduct

herself differently, and in the face of the applicant acting on behalf of the respondent with the best of intentions, I am not persuaded a fair and reasonable employer would have found her actions in this instance amounted to serious misconduct warranting summary dismissal.

[60] In summary, the Company has failed to demonstrate Ms McLeay breached *"proper, reasonable and lawful instructions and processes"* that she knew or should have known of, and that she wilfully acted *"without authorisation, despite being fully aware"* of the Company's procedural requirements (doc 30).

Observation

[61] The Company's complaints against Ms McLeay should properly have been seen, and handled, as performance issues. Such an approach would have facilitated the shifting focus of the employer's concerns.

[62] Where there is unsatisfactory performance, warnings should precede action (*Pacific Forum*/*Trotter*).

[63] There is no evidence of Ms McLeay's performance being so defective, and so injurious of the Company's interests, as to justify her summary dismissal (*Honda* and *Click Clack International Ltd v James* [1994] 1 ERNZ 15).

[64] There is no evidence of her performance resulting in unnecessary cost to the Company.

[65] There is no evidence of an active malcontent, but instead all the measures are of someone genuinely committed to her employer's interests.

[66] There was every reason, however, to make clear to, and remind the applicant of, the extent of her responsibilities, and her obligations, in key areas, to refer those matters to her manager.

[67] The practices required of Ms McLeay by the Company were entirely fair and reasonable, and would properly have been put by way of clear instructions and performance management.

[68] As is clear from the above, Ms McLeay's general defence is that she did what she had been instructed by her predecessor to do, consistent with what she had seen in her time as a coordinator, prior to being appointed acting and then actual manager, for Palmerston North. The Company took no steps – other than checking some records it held, but not reporting the results back to the applicant – to look at that claim, and it therefore had no basis to set it aside.

[69] A performance-based approach from the Company was all the more appropriate in that it was already undertaking a management or action plan in respect of other, similar performance concerns (see WA 144/08).

[70] The applicant's conduct, objectively reviewed by the standards of a fair and reasonable employer, cannot be said to have been,

> *…serious misconduct warranting the termination of employment, such misconduct as goes to the root of the employment contract so as to destroy it altogether and render it impossible for it to continue.*

(*Northern Distribution Union* v *Newman's Coach Lines Ltd* [1980] 2 NZILR, 677, 682, Goddard CJ)

[71] Bearing the above in mind and in all the circumstances at the time, a fair and reasonable employer, objectively measured, would not have dismissed the applicant.

Remedies

[72] Ms McLeay seeks three months lost earnings, less $1,000 earned through casual work. She also claims $10,000 compensation for hurt and humiliation, and costs of $1,500.

[73] The applicant's evidence is that, following and because of the impact of her summary dismissal (effective 10 January 2008), she was not up to working more than the 1-day a week position she found within a week of her termination; and that following the approach of a friend she has been managing that person's company since 1 April of that year. No evidence, medical or otherwise in support of the claim the effect of the dismissal limited Ms McLeay's ability to find fresh employment was put to the Authority. However, in the circumstances, and in particular having regard to Ms McLeay's demeanour and evident stress arising out of her dismissal as relived during the investigation process, I am satisfied wages compensation equivalent to the intervening period of limited employment (10 January – 31 March), should be paid, less income derived during that period. Leave is reserved to the parties to submit the calculation to the Authority if agreement is not forthcoming on the same.

[74] Ms McLeay's evidence of the effect of the dismissal on her is not extensive. However, for the reasons made clear in par 73 above, I am satisfied from my investigation that the effects were significant and worsened by the effects of responding at speed to the (unjustified) disciplinary process on her return from holiday: Ms McLeay's claim for $10,000 is therefore barely but adequately made out.

Contributory Fault

[75] As was the case in events culminating in Ms McLeay's first employment relationship problem (WA 144/08), the applicant followed the advice of her advocate to communicate with the Company's representatives in writing only.

[76] In my previous determination I was satisfied this approach was in breach of Ms McLeay's obligation to be communicative and responsive, and warranted a contributory fault finding, and reduction of remedy, of 25%.

[77] I remain of the same view in this instance: acting under advisement Ms McLeay elected to speak to her employer only by way of correspondence. I am satisfied this method contributed to her grievance to the extent it frustrated the Company's ability to get clear, prompt answers to its concerns and unfortunately contributed to a failure to properly weigh the evidence in its possession.

Determination

[78] The Company is to compensate Ms McLeay for remuneration lost from 10 January 2009 until 31 March of the same year, less income derived by her from part time work.

[79] The Company is also to pay Ms McLeay compensation for humiliation and hurt of $10,000.

[80] Both figures are to be reduced by 25% contributory fault.

[81] Leave is reserved to the parties to return these calculations to the Authority if agreement between them is not forthcoming.

[82] Costs are reserved. Subject to submissions from the Company including – should one exist – advice of a calderbank offer, I note the costs claimed already on Ms McLeay's behalf of $1,500, in the circumstances of what proved to be a half-day investigation, are likely to prove fair and reasonable.

Denis Asher
Member of the Employment Relations Authority