

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 25/09
5119018

BETWEEN ADRIENNE McWHINNIE
 Applicant

AND AVONDALE GOLF CLUB
 INCORPORATED
 Respondent

Member of Authority: James Crichton

Representatives: Susie Tait, Counsel for Applicant
 Desmond Wood, Counsel for Respondent

Investigation Meeting: 11 July 2008 at Christchurch

Submissions received: 10 November 2008 from Applicant
 13 January 2009 from Respondent

Determination: 3 March 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms McWhinnie) alleges that she was unjustifiably dismissed and subject to a succession of unjustified actions causing her disadvantage and, in addition, is owed wages and holiday pay by the respondent employer (the Golf Club). The Golf Club resists Ms McWhinnie's various allegations and says that subsequent to Ms McWhinnie's departure, various significant irregularities were discovered.

[2] Ms McWhinnie was employed by the Golf Club as *office administrator*. When she commenced her employment, she was subject to an individual employment agreement dated 25 May 2005. For reasons which will become apparent shortly, I will refer to this agreement throughout the determination as the *first employment agreement*.

[3] The first employment agreement provided for an ordinary hourly rate of \$18 gross, set out the hours of work and then concluded the substantive part of the remuneration provisions with the following provision:

Any other time authorised by Management Committee will be paid at a rate time and one half for first three hours thence at double time.

[4] The Golf Club says that Ms McWhinnie took longer to complete her allotted tasks than it expected and that she interfered in tasks that were nothing to do with her and, as a consequence, the Golf Club was confronted with requests for overtime from Ms McWhinnie.

[5] It was for this reason, according to the Golf Club, that a second employment agreement dated 11 June 2006 was entered into, the principal effect of which was to reduce the penal element of any overtime authorised from either time and a half or double time (as the case may be) back to a flat rate of \$18 per hour for each overtime hour worked.

[6] Contrary to the view advanced by the Golf Club, Ms McWhinnie's evidence was that she was required to work many more hours than the Golf Club expected to pay for and when her claim was filed in the Authority, Ms McWhinnie identified the hours worked each week (the majority of which disclose significant overtime) and the result of this calculation was a claim by Ms McWhinnie that she was owed the sum of \$17,305.65 gross as unpaid overtime for essentially the period covered by the first employment agreement.

[7] In early June 2006, there was a meeting between the then president of the Golf Club and Ms McWhinnie, at which the Golf Club undertook to pay to Ms McWhinnie the sum of \$1,500 as a contribution to the overtime that she had worked. There is dispute about the extent of this discussion and the nature of the understandings reached and I will revert to a consideration of that issue later. Following on from that meeting, the parties entered into the second employment agreement dated 11 June 2006.

[8] That second employment agreement contained a fundamental change to pay all overtime hours at the ordinary hourly rate rather than on a penal time basis, but still required the approval of the Golf Club's Management Committee before overtime was paid.

[9] Ms McWhinnie had an accident at home on 4 May 2007. Ms McWhinnie attended at the doctor and, on her evidence, was allowed to continue work. However, the Golf Club's view was that she was unable to fulfil her usual duties because she had part of an arm in plaster and accordingly the Golf Club asked Ms McWhinnie to leave the workplace, take sick leave and return when she was able to fulfil her duties. The evidence is that Ms McWhinnie was reluctant to leave the workplace because she was *saving up* her sick leave for an upcoming leg operation.

[10] Ms McWhinnie's contention that her doctor had allowed her to continue working is, according to the Golf Club, false because it discovered a medical certificate from Ms McWhinnie's doctor which required her to take two weeks away from work to enable her injury to heal.

[11] While Ms McWhinnie was away from the workplace, the Golf Club sought to obtain from her the passwords to enable the Golf Club to access its own computer system. Ms McWhinnie declined to reveal her password to the Golf Club, believing it was personal to her, and requested that the Golf Club contact the programme owners to seek access to the system.

[12] That discussion, in relation to the giving up of the password, took place in a telephone call between Mr Haggerty of the Golf Club and Ms McWhinnie on 10 May 2007. Ms McWhinnie says that Mr Haggerty was rude and unpleasant and Mr Haggerty says that Ms McWhinnie was rude and unpleasant.

[13] Ms McWhinnie got a clearance to return to work with effect from Monday, 21 May 2007 and she took that clearance document into the workplace on Friday, 18 May 2007. She gave the clearance form to Mr Haggerty, the Club president, and her evidence is that Mr Haggerty told her that he wished to meet with her that afternoon. There was discussion about the nature of that meeting and in the result the proposed meeting time was changed to 10.30am on Saturday, 19 May 2007.

[14] There is some dispute about the circumstances surrounding that meeting. However, I am satisfied that the evidence confirms that Ms McWhinnie was told in advance that the purpose of the meeting was sufficiently serious to justify her bringing a support person. At the meeting, I am satisfied that Ms McWhinnie was told that the Golf Club had passed a motion of no confidence in her and that she would be paid two weeks' notice. The severance of the employment was for gross insubordination in

respect of the way in which Ms McWhinnie had treated the Golf Club president, Mr Haggerty, in the telephone discussion the pair of them had on 10 May 2007 concerning the computer passwords.

[15] I am satisfied also that Ms McWhinnie was told at the disciplinary meeting on 19 May 2007 that the Golf Club would need to undertake an audit of its financial records because of *the extraordinary reaction* of Ms McWhinnie to the Golf Club's requests for information in respect of its own computer system. In conveying this information to Ms McWhinnie, the Golf Club was acting on its own legal advice.

[16] That audit was to produce significant material which the Golf Club subsequently relied upon to support its decision to dismiss.

[17] In the result, having been dismissed from her employment, Ms McWhinnie proceeded to raise her personal grievance.

Issues

[18] It will be convenient to consider the following issues:

- (a) The overtime issue;
- (b) The 10 May 2007 telephone call;
- (c) The disciplinary meeting on 19 May 2007;
- (d) The financial audit.

The overtime issue

[19] As I made clear above, Ms McWhinnie was employed under two individual employment agreements with different provisions in respect of the payment of overtime. The first employment agreement provides that overtime will be paid for on a penal rate basis and the second one provides that overtime will be paid at the flat hourly rate of \$18 per hour which was, throughout the term of her employment, Ms McWhinnie's hourly rate.

[20] Importantly, both agreements required that any overtime be authorised by the Management Committee of the Golf Club. Further, the second employment agreement increases the ordinary hours to be worked by Ms McWhinnie from the 20

hours provided for in the first employment agreement to 25 hours per week in the second.

[21] Ms McWhinnie's evidence is that, when she commenced her employment, the Golf Club was commencing the operation of a new accounting system and that the 20 hours per week provided in the first employment agreement was simply insufficient to cope with the volume of work required. For instance, in her brief of evidence, Ms McWhinnie refers to this early period in the following terms:

During this time I would spend many a late night to sort out the various matters – up to 50 hours per week sometimes. The club was aware that I was doing the overtime and was grateful that I was that dedicated. At the time I told the club president ... Mr Tony Burling-Claridge and Mr Noel Hobson that because the club could not afford it I would not pay myself the overtime I was working until we got out of the red.

[22] There is dispute from the Golf Club about the contention that it knew about the overtime being worked and about the *arrangement* to pay that overtime after the Golf Club *got out of the red*.

[23] What is clear is that in June 2006 there was a meeting between Mr Burling-Claridge, the Golf Club President, and Ms McWhinnie, the principal purpose of which was to negotiate and agree the new employment agreement which became the second employment agreement. Ms McWhinnie's evidence is that she used that meeting to raise with Mr Burling-Claridge her entitlement to receive \$17,305.65 gross by way of unpaid overtime for work done during the period of the first employment agreement.

[24] Mr Burling-Claridge denied absolutely in his evidence that he knew about the \$17,305.65 and his recollection of events is that Ms McWhinnie asked for \$1,000 and, in the result, there was agreement that \$1,500 be paid by the Golf Club to Ms McWhinnie on account of the alleged unpaid overtime.

[25] On this clear difference of recollection, I have reached the conclusion that I prefer Mr Burling-Claridge's recollection of events rather than Ms McWhinnie's. Mr Burling-Claridge is very clear that he never saw the schedules detailing the \$17,000 odd allegedly owed to Ms McWhinnie and that she never asked for that sum. His clear recollection is that there was a request for a global sum which she had suggested at \$1,000 and which Mr Burling-Claridge finally agreed to at \$1,500.

[26] In the course of this meeting, Ms McWhinnie contends that Mr Burling-Claridge made the curious comment that Ms McWhinnie could have the job as long as she wanted it and that she subsequently confirmed this undertaking with Mr Burling-Claridge in a telephone conversation with him following her dismissal.

[27] However, Mr Burling-Claridge absolutely denies making any such commitment, either in the meeting or in the much later telephone conversation. Indeed, there was no independent evidence of this alleged commitment save for Ms McWhinnie's email confirmation to her lawyer about the thrust of the confirming telephone conversation with Mr Burling-Claridge.

[28] Nothing turns on the fact of whether the position was secure or not, but for the sake of completeness, I note that I prefer Mr Burling-Claridge's recollection of these events to Ms McWhinnie's.

[29] The real issue in this matter is the question of the authorising of overtime by the Golf Club.

[30] As I have just noted, Ms McWhinnie alleged that she was owed over \$17,000 in overtime payments for the term of the first employment agreement and the total amount allegedly owed over the whole employment would be greater again. However, while Ms McWhinnie contends that the Golf Club knew and understood that this large accumulating sum was due and owing as a contingent liability, the Golf Club was equally adamant that no such understanding existed for the very straightforward reason that no such overtime had ever been authorised. This is a matter that I return to later in the determination.

The 10 May 2007 telephone call

[31] On 10 May 2007, there was a telephone discussion between Mr Haggerty of the Golf Club and Ms McWhinnie which was the proximate cause of Ms McWhinnie's dismissal. Ms McWhinnie was at home on sick leave after an injury. The Golf Club had engaged a temporary person to fill in for Ms McWhinnie while she was away from work. The Golf Club needed to access its computer and Mr Haggerty rang Ms McWhinnie at home to obtain the passwords.

[32] While Ms McWhinnie gave Mr Haggerty one generic password, she refused to give up the password that was, in her terms, *personal to her* as a consequence of

which, the Golf Club was unable to access all of its own computer equipment and programmes.

[33] Ms McWhinnie's view, which she expressed during the telephone discussion with Mr Haggerty, was that Mr Haggerty ought to contact the system manager to *arrange a new password for the next office person*.

[34] I am satisfied that this telephone discussion was, at best, intemperate. Even on Ms McWhinnie's recollection of it, she acknowledges that she hung up the phone in her employer's ear.

[35] There are two versions of who was most to blame in this conversation. Ms McWhinnie alleges that Mr Haggerty, the Golf Club president, was intemperate and rude although that is not confirmed by the temporary Golf Club employee, Ms Birdling, who was in the Golf Club office when Mr Haggerty rang Ms McWhinnie. Ms Birdling's evidence is that Mr Haggerty was firm and direct but polite.

[36] It is common ground that Ms McWhinnie hung up on Mr Haggerty. Her evidence is that she had always been trained not to give up what she understood was her personal password. Conversely, the Golf Club's view was that her personal password was a password derived exclusively for the Golf Club's work and for the Golf Club's purposes and as a consequence it could only be *personal* in a very limited sense of that word.

[37] As a consequence of the discussion on 10 May 2007, there was a meeting of the Golf Club on Wednesday, 16 May 2007 at which a motion of no confidence was passed in Ms McWhinnie. She had no input into the discussion and was completely unaware that that meeting had taken place until the disciplinary meeting of 19 May 2007 at which she was told about the earlier committee decision. It follows that Ms McWhinnie had no input whatever into the decision of the committee to move and pass a vote of no confidence in her.

The disciplinary meeting on 19 May 2007

[38] Ms McWhinnie attended this meeting with a support person (her step-daughter), having been told enough before the meeting to encourage her to involve a support person. The Golf Club was represented by Mr Haggerty and Mr Jones.

[39] It seems to be common ground that Mr Haggerty advised Ms McWhinnie that at the Golf Club's management meeting the previous Wednesday, 16 May, the committee had moved and passed a no confidence motion in Ms McWhinnie's continued employment on the footing that she had refused to hand over passwords when asked and hung up in the Golf Club President's ear. The committee allegedly reasoned that this behaviour was grossly insubordinate and that in consequence, Ms McWhinnie could be dismissed with immediate effect and that, based on legal advice, the Golf Club ought to conduct an audit of its system.

[40] In elaborating on this, Mr Haggerty told Ms McWhinnie that she must either resign or be immediately dismissed. Both Mr Haggerty and Mr Jones expressed a preference for Ms McWhinnie resigning rather than being dismissed.

[41] Ms McWhinnie pointed out that she had had no opportunity to respond in any way to the allegations made against her and that she was presented with a fait accompli and that she had no intention of resigning and would be attending at work on the following Monday. Mr Haggerty said that she would not be allowed to enter the premises and there was agreement that a mediation take place in an attempt to resolve matters. This took place on 23 May 2007 and resulted in an agreement that Ms McWhinnie would be suspended on full pay for a period but there is dispute about how long that was to be for. In the result, Ms McWhinnie received only two further weeks' pay.

The financial audit

[42] The justification for the financial audit was the Golf Club's conviction that Ms McWhinnie's behaviour in relation to the withholding of the password was potentially evidence of wrongdoing by her in respect of the Golf Club's financial system.

[43] The summary position as a consequence of that audit was that Ms McWhinnie received overpaid and unauthorised payments totalling \$32,338.14.

[44] These payments were taken by three means:

- (a) By completing and then countersigning blank cheques already pre-signed by the then president of the Golf Club Mr Burling-Claridge and then crediting those to her bank account;

- (b) By taking a grant of \$5,000 obtained by the Golf Club and crediting that to her own bank account; and
- (c) By increasing her direct deductions for wages such that an irregular amount was paid over part of the period of the employment.

[45] The Golf Club's position is that none of these payments were authorised by the Golf Club expressly, and that in addition, there was no implicit or implied consent to these payments being made.

[46] The evidence of Ms McWhinnie, on the other hand, is that Mr Burling-Claridge knew that she was using some of the cheques he pre-signed to pay her additional moneys (which Mr Burling-Claridge denied vehemently), and that Mr Burling-Claridge and/or Mr Noel Hobson (originally the Golf Club's treasurer) impliedly agreed to these additional payments being made.

[47] I found Ms McWhinnie's evidence on the financial matters unconvincing. She did herself little service by stoutly maintaining that she had never signed any cheques for her own wages (she was a signatory) when the Golf Club were able to produce a whole sequence of cheques for her wages signed by Ms McWhinnie.

[48] Even more importantly though, no evidence was led to prove that the Golf Club's Management Committee had approved any payment of overtime made to Ms McWhinnie. She claims that the evidence shows that she did in fact work overtime, that the Golf Club knew she worked overtime and that they approved some payments of overtime and condoned others.

[49] It does seem more rather than less likely that Ms McWhinnie worked some overtime but I am not satisfied that if the Golf Club knew that, they turned their mind to that fact and reflected on the consequences of it. Critically though, I am absolutely clear that there was no approval of the overtime by the Golf Club. There was simply no evidence before me that the Management Committee had considered it and approved it.

[50] Indeed, the evidence suggests quite the reverse. Ms McWhinnie claimed that she presented evidence of her wages and overtime payments as part of the financial reports tabled at Monthly Management Committee meetings. But no member of the Management Committee who gave evidence at the investigation meeting recalled

seeing that information and there was no resolution of the Management Committee at any point which authorised overtime payments. What one would have expected to authorise overtime payments was not approval of the monthly financial reports after the event, for that would have been an entirely routine and machinery process. One would have expected in advance specific resolutions referring to the requirement for overtime and approving of it; no such resolution or series of resolutions has been identified.

Has there been an unjustified dismissal?

[51] There can be no question that Ms McWhinnie has been unjustifiably dismissed. Even if she was grossly insubordinate in the telephone discussion on 10 May 2007, she was entitled to be heard before the decision was taken to dismiss and she was not. The decision to dismiss was made by the Management Committee on Wednesday, 16 May 2007 without Ms McWhinnie even being present. Indeed, she had no idea that that decision had even been made until some days after the event.

[52] The Golf Club say that the Management Committee passed a motion of no confidence in Ms McWhinnie on 16 May 2007 and then sought to negotiate her departure afterwards at the disciplinary meeting on 19 May 2007. But I am clear that the decision had already been taken at the earlier meeting and by offering Mrs McWhinnie the choice of resigning or being dismissed (which happened at the 19 May meeting) the Golf Club were constructively dismissing Mrs McWhinnie anyway.

[53] It would be difficult to find a more unsatisfactory process if one tried. Here was an employer faced no doubt with a serious situation which simply made the decision to dismiss the employee without even bothering to talk to the employee and get her side of the story. Even if this was a situation where summary dismissal might have been in prospect, fairness and reasonable dealing require that the parties deal with each other on a good faith basis and this is simply not the action of a good and fair employer.

[54] I am absolutely satisfied that Ms McWhinnie's dismissal was unjustified and I base that conclusion exclusively on the total absence of a fair process in effecting the dismissal. In particular, I am concerned that the actual decision to dismiss was made without Ms McWhinnie even being aware that such a decision was in contemplation,

and certainly without any possibility of her having any chance to have her views aired before the decision-maker.

[55] Ms McWhinnie also contends that she has suffered unjustified actions of the Golf Club which have caused her disadvantage. I am satisfied this claim is made out at least in respect to the suspension process and the confused and unsatisfactory arrangements to prevent Ms McWhinnie from returning to the workplace.

Is Ms McWhinnie entitled to remedies?

[56] Having reached the conclusion that Ms McWhinnie has personal grievances, she is therefore entitled to have the Authority consider whether remedies should be applied to correct the employer's default.

[57] That raises the issue of contribution, whether Ms McWhinnie's actions contributed in any way to the circumstances giving rise to the personal grievances. It is important to note that Ms McWhinnie was dismissed for gross insubordination, in effect for her behaviour in the 10 May 2007 telephone discussion with Mr Haggerty of the Golf Club. Specifically, in failing to give up the passwords for the Golf Club's computers and in hanging up on Mr Haggerty, Ms McWhinnie was found to have been grossly insubordinate. The difficulties with the suspension process follow on from that point.

[58] Despite the want of process, it is difficult to see how Ms McWhinnie could justify her behaviour. The passwords in question were passwords which I hold the Golf Club had a proprietary right to. They were not personal passwords in the sense that one might have a personal password for one's own computer. These were access codes which Ms McWhinnie developed exclusively for the purpose of the employer's business, and as a consequence, the employer (the Golf Club) had a proprietary right to those passwords and was absolutely entitled to have them.

[59] Furthermore, in hanging up on the President of the Golf Club, Ms McWhinnie behaved in an extraordinarily cavalier fashion which did her no credit. Mr Haggerty was, at the relevant time, the titular head of the employer and was entitled to be treated with courtesy and respect.

[60] Ms McWhinnie's allegation that Mr Haggerty was rude and aggressive in the telephone discussion is not borne out by a person who overheard Mr Haggerty's end of

that conversation and I prefer Mr Haggerty and Ms Birling's recollection of the conversation to Ms McWhinnie's whose evidence on this, and other points, did not impress me.

[61] Before leaving the issue of contribution, I must consider and deal with the out turn from the financial audit. In doing so, I note again that Ms McWhinnie was not dismissed for financial irregularity; indeed, at the point at which the decision was taken to dismiss, there was no knowledge of the Golf Club about any financial irregularity. It was only because of Ms McWhinnie's thoroughly inappropriate behaviour in relation to the passwords that a financial audit was undertaken.

[62] That financial audit, as I have made clear, disclosed significant irregularities which, on the basis of the evidence of the Golf Club, disclose a large amount of money which Ms McWhinnie had paid to herself entirely without her employer's authority.

[63] Clearly, if the employer had known about that financial irregularity while Ms McWhinnie was still in employment, then that would undoubtedly have been a further ground on which her dismissal might conceivably have been justified. However, the short point is that the employer had no knowledge of the financial irregularities at the time of the employment, and so it cannot form part of the decision to dismiss: *Salt v Fell*, Court of Appeal [2008] ERNZ 155 applied.

[64] In any event, I am satisfied that Ms McWhinnie contributed to her dismissal to the greatest extent possible and I consider her contribution to the dismissal was 100%. That being my considered view, no remedies are warranted.

[65] Even if that conclusion is seen as unduly harsh, the legal position is clear. I am satisfied on the evidence before me that the Golf Club never approved, either explicitly or implicitly, the additional payments Ms McWhinnie made to herself allegedly for overtime hours she worked. There is no minute or written record of any description that authorises such payment and both employment agreements require authorisation of "Management Committee" of the Golf Club.

[66] That provision must be seen for what it is, a requirement for the committee to authorise, not an officer of the Golf Club acting alone. At best all Ms McWhinnie can allege is that she had "understandings" with Golf Club officers but even those are denied in the Golf Club's evidence. Furthermore, if individual officers had been given

the power to make those authorisations (and that is denied by the Golf Club) there would surely be formal delegations in place conferring that authority. On the face of it, no such delegations exist.

[67] It is a clear law that a wrong-doer cannot benefit from their wrong. My conclusion is that Ms McWhinnie contributed completely to the circumstances leading to her dismissal and thus is entitled to no remedies. That conclusion is reinforced by the Golf Club's subsequent discovery of Ms McWhinnie paying herself for unauthorised overtime. That subsequent discovery may be considered by the Authority in considering remedies because otherwise, Ms McWhinnie would be seen to have benefitted from her wrong. That clear precept reinforces me in my conclusion that, notwithstanding the finding of a personal grievance, no remedies ought to be contemplated: *Salt v Fell* supra, applied.

[68] The same logic informs my decision not to entertain Ms McWhinnie's claim for unpaid wages but in respect to holiday pay, I hold that Ms McWhinnie is entitled to that payment in terms of the Holidays Act 2003.

Determination

[69] Ms McWhinnie has been unjustifiably dismissed by her employer, the Avondale Golf Club, but because I have found that her behaviour contributed completely to the circumstances leading to her personal grievance, I have declined to award any remedies.

[70] Because of my finding that Ms McWhinnie is entitled to payment of her holiday pay as of right, I direct that the Golf Club is to pay her the sum of \$2095.89 net being their calculation of her holiday pay due and owing. In view of my other findings, it is not appropriate to award interest.

Costs

[71] Costs are reserved.

James Crichton
Member of the Employment Relations Authority