

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 223  
5613544

BETWEEN RACHAEL TEKA  
Applicant  
AND MEIRIKI WALKER  
Respondent

Member of Authority: Vicki Campbell  
Representatives: Applicant in person  
Respondent in person  
Investigation Meeting: 3 June 2016  
Further information received: 15 and 21 June 2016  
Determination: 04 July 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Ms Teka was justifiably dismissed.**
- B. There will be no order for costs.**

**Employment relationship problem**

[1] Ms Rachael Teka claims she was unjustifiably dismissed from her employment as a support worker with Mrs Meiriki Walker. Mrs Walker denies the claims.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence received from Ms Teka and Mrs Walker but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

## **Background**

[3] Ms Rachael Teka was employed under the terms of a written employment agreement dated 19 October 2015 to provide support for Mrs Walker's dependent son Mr Rick Walker (Rick). Mrs Walker personally is named as the employer in the employment agreement.

[4] Rick is the 30 year old son of Mrs Walker and her husband Mr Bryan Walker. Rick is autistic and has special needs for his daily care. Due to his disability Rick's behaviour can be more challenging when he is in a stressful situation or is anxious. Mrs Walker's uncontested evidence is that Rick will react negatively to people who show their own negative emotional responses and behaviour toward him. Rick needs constant reminders about his behaviour including that he must be gentle with people because he does not have the capacity to remember being told not to act in a particular way.

[5] Other aspects of his disability mean that Rick is not able to communicate verbally and often uses physical cues to inform those around him of his needs. By way of example if Rick does not want to go inside, he will not walk up the ramp which provides access to his house. Rick does use a plastic board to communicate with his care givers and his parents, but he has never used this device to communicate with Ms Teka.

[6] During her employment Mr Walker had had to speak with Ms Teka about her conduct towards his son. Mr Walker was a passenger in a car driven by Ms Teka when she stopped the car abruptly and yelled at Rick. Mr Walker reported the incident to Mrs Walker and spoke to Ms Teka about her conduct explaining to her that it was not acceptable.

[7] On 29 November 2015 two incidents occurred. Mrs Walker heard Ms Teka yelling at her son and later that day Ms Teka was heard yelling at and seen physically pushing Rick. The incident was reported to Mrs Walker which resulted in Ms Teka being dismissed from her employment.

## **Issues**

[8] The issue for determination is whether Ms Teka's dismissal was unjustified and if so what, if any remedies should be awarded.

## **Determination**

[9] There is no dispute that Ms Teka was dismissed as a result of information Mrs Walker had that Ms Teka had been seen yelling and physically pushing her intellectually disabled son and that this followed an earlier incident where Mrs Walker herself had observed Ms Teka yelling at her son.

[10] Given that there is no dispute about the fact of dismissal, the question is whether the dismissal was justified. The statutory test of justification is contained in section 103A of the Act. The section provides for the question of whether an action was justifiable to be determined on an objective basis, having regard to whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[11] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[12] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.<sup>1</sup>

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<sup>1</sup> Employment Relations Act 2000, section 103A(5).

[13] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[14] As a full Court observed in *Angus v Ports of Auckland Ltd*<sup>2</sup>

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[15] Mr and Mrs Walker had left the house to attend church on 29 November 2015. Mrs Walker realised she had forgotten to take her grandson's bag with her and returned home to retrieve it. As she arrived back at home she heard Ms Teka yelling at Rick.

[16] Mrs Walker asked Ms Teka what had happened. Ms Teka told her Rick had touched her breast and she demonstrated how that had happened by placing her hand at the top of her breast which was visible due to the low cut singlet top Ms Teka was wearing. Mrs Walker says she told Rick that behaviour was not acceptable and asked him why he was doing this. Mrs Walker says Rick told her he was testing Ms Teka to see if she would do what a previous worker had done to him.

[17] Ms Teka then informed Mrs Walker of another incident where Rick had touched her bottom. When Mrs Walker asked her son why he had done that he denied doing that and told Mrs Walker that Ms Teka was lying. Mrs Walker says Ms Teka then started yelling again and told Mrs Walker that she could not do the job any more and that she would not do it.

[18] Ms Teka left the house briefly to calm down and when she returned she told Mrs Walker she was fine. Rick apologised to Ms Teka for his behaviour and Mrs Walker, satisfied that all matters had been resolved, left the house to return to church.

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<sup>2</sup> [2011] NZEmpC 160, (2011) 9 NZLR 40 at [26].

[19] When Mrs Walker returned home that evening Ms Pauline Wallace, Mrs Walker's sister-in-law who was staying at the house with the family, advised Mrs Walker that she had seen Ms Teka pushing Rick roughly up the ramp to the house and had overheard Ms Teka yelling at Rick. Ms Teka acknowledges that she assisted Rick up the ramp but denies pushing him and says she had her hand on his back and was guiding him.

[20] The following morning, on 30 November 2015, Mrs Walker discussed with her son the events of the previous day. Rick told his mother that he didn't think Ms Teka could cope with him and he did not feel safe with her. Rick informed his mother that when he and Ms Teka were out in the car she would sometimes stop the car and yell at him. This information was consistent with Mr Walker's observations which he had reported to Mrs Walker.

[21] Later that morning Ms Teka rang Mrs Walker's home and spoke to Mr Walker. Ms Teka told Mr Walker she would not be at work that day but agreed to come into work at 2.00pm to discuss the incidents from the previous day.

[22] By 2.00pm when Ms Teka had not arrived, Mrs Walker contacted her at home by telephone. Ms Teka told Mrs Walker she could not meet that day but following discussion it was agreed that Ms Teka would come in after she had showered. Ms Teka arrived at the house at 3.00pm.

[23] Mrs Walker met with Ms Teka when she arrived at the house and enquired as to how she was feeling about the job. Ms Teka told Mrs Walker that she still wanted to do the job and that she loved the job and loved working with Rick.

[24] Mrs Walker raised her concerns about the events from the previous day and discussed with Ms Teka the information she had received from Ms Wallace. Ms Teka did not deny that she had yelled and pushed Rick roughly. Mrs Walker told Ms Teka that physical or verbal abuse of Rick would not be tolerated as she could not take the risk that Rick would be hurt.

[25] Mrs Walker told Ms Teka that she had spoken to her son about the allegations raised by Ms Teka the previous day that Rick had touched her bottom which he had denied. Ms Teka told Mrs Walker that Rick did not do that and she denied saying he had.

[26] Mrs Walker told Ms Teka that she spoke very harshly to Rick and reminded her that she had been spoken to previously about the way she speaks to Rick. Mrs Walker raised her concerns about Ms Teka being physical with her son and blaming him for her emotional state. Mrs Walker advised Ms Teka that because of these issues together with Rick's advice to his mother that he felt unsafe with Ms Teka she was considering ending the care arrangement. Mrs Walker advised Ms Teka that she would be paid two weeks' notice but she was not required to work the notice as Mrs Walker considered Ms Teka's behaviour toward her son was escalating and she was concerned about his safety.

[27] Ms Teka responded by reminding Mrs Walker that her son had touched the top of her breast, had on occasion bent her fingers back and had pulled her hair. These behaviours are not unusual behaviours for Rick.

[28] The role of caring for an intellectually disabled adult male in his own home in the absence of any supervision is an important task and requires a high level of trust between the care workers and the family employing them.

[29] Mrs Walker dismissed Ms Teka as she did not believe her son was safe in her care. When Mrs Walker told Ms Teka she would give her two weeks' notice Ms Teka thanked her and told her she was glad it was all over.

[30] The circumstances of this dismissal are different to those normally determined in the Authority. This was a very personal employment relationship where Ms Teka was employed by a mother to care for a significantly intellectually impaired son. The resources available to Mrs Walker to assist her in dealing with employment relationship problems are not the same as those available to corporations or even small businesses.

[31] During the investigation meeting Ms Teka told me that Rick was fully able to discern between right and wrong and understood that some of his behaviours toward her were wrong. I have accepted Mrs Walker's evidence that her son's behaviour was compulsive and even if he did know that it was wrong (which she denied) he could not help himself.

[32] Rick's competence to understand right from wrong is not as certain as Ms Teka would like me to believe. I have had the benefit of reading a letter addressed to Ms Teka from the NZ Police dated 8 June 2016 where Ms Teka is advised that Rick is to be formally assessed in relation to his ability to be aware of any offending on or by him. For the sake of completeness I record here that this assessment is in relation to offending against Rick and is not related to Ms Teka's employment or this employment relationship problem.

[33] Ms Teka struggled in her care giving role with Rick because of his behaviours. In answer to questions at the investigation meeting Ms Teka acknowledged that she should have been calmer when dealing with Rick's behaviour but she became frustrated with him. I am satisfied Ms Teka allowed this frustration to show through her behaviours toward him which resulted in him reacting badly. Ms Teka told me that on 29 November 2015 she had become frustrated with Rick as it was a very hot day and she was laden down with bags.

[34] This evidence is consistent with Mrs Walker's evidence that Ms Teka had told her on more than one occasion that she was struggling to work with Rick and that she could not do it. This is also consistent with the evidence Ms Teka gave at the investigation meeting when she acknowledged that things were difficult between her and Rick and the relationship could not go on the way it was.

[35] I am satisfied Mrs Walker had as much information available to her as she needed in order to set up a disciplinary process and no further enquiry was necessary. I am also satisfied that Ms Teka was provided with a full opportunity to respond to Mrs Walker's concerns and took those responses into consideration before making the decision to dismiss.

[36] Ms Teka was not put on notice that the meeting could result in the termination of her employment and neither was she provided with the opportunity to seek advice or have representation with her at the meeting. However, in the overall scheme of this particular employment relationship these procedural defects while not minor did not result in Ms Teka being treated unfairly.

[37] I find Ms Teka was justifiably dismissed. On an objective basis the action of Mrs Walker dismissing Ms Teka was an action an employer acting fairly and reasonably in all of the circumstances of this matter could take.

**Costs**

[38] Neither party has been represented throughout the Authority's investigation process and there will be no order for costs.

Vicki Campbell

Member of the Employment Relations Authority