

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 297  
5404907

BETWEEN

FIFITA TUI  
Applicant

A N D

KIDS CARE CHILDHOOD  
CENTRE LIMITED  
Respondent

Member of Authority: James Crichton  
Representatives: Applicant in person  
Corry Watson, for Respondent  
Investigation Meeting: 20 May 2013 at Auckland  
Date of Determination: 11 July 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Ms Tui) alleges that she was unjustifiably constructively dismissed from her employment with the respondent (Kids Care). Kids Care resists that claim.

[2] Ms Tui commenced employment on 20 May 2012 to work in the childcare centre operated by Kids Care in Henderson, Auckland. The business effectively provided recreational opportunities for small children and operated primarily by providing facilities for children to have parties including birthday parties.

[3] Ms Tui's evidence (which is disputed) is that she was promised two days work a week and that the nature of her employment was permanent part time. Kids Care says that Ms Tui's employment was casual, that like all other staff she was offered work as and when required, and that no promise would have been made to her about a

minimum number of hours to be offered per week. However, Kids Care acknowledges that the manager who hired Ms Tui is no longer working in the business and cannot be contacted.

[4] No employment agreement was provided to Ms Tui at the commencement of the relationship, notwithstanding her regular requests for one.

[5] Ms Tui told the Authority that she ceased to be offered work by Kids Care in the context of her persistent demands for a written employment agreement and her complaints to the then Department of Labour about employment matters. Conversely, Kids Care maintained that it had issues it wished to discuss with Ms Tui, including some of a disciplinary nature, which it wished to deal with before offering her further work. One of those issues in particular concerned anxieties that some of Ms Tui's co-workers had about working with her. Kids Care took the view, not unnaturally, that that issue needed to be resolved before Ms Tui could return to duty.

[6] Kids Care says that Ms Tui refused to engage with it in respect of those matters until she had been provided with further work and a written employment agreement.

[7] A written employment agreement was first provided to Ms Tui under cover of a letter from Kids Care dated 21 November 2012, which letter also sought to progress the employer's issues with Ms Tui.

[8] Both parties complain about the difficulty of getting hold of the other and each gave evidence to the Authority about that being the other's fault.

[9] Mediation was sought by Ms Tui but refused by Kids Care on the footing that it still had an open disciplinary investigation which Ms Tui failed to engage with and until that was resolved and it was clear what it was Ms Tui wanted to mediate about, it thought the request for mediation was premature.

[10] At the beginning of calendar 2013, Kids Care commenced a restructuring of its Henderson business. By this stage, Ms Tui had not been called in to work for fully three months and the issues between the parties remained unresolved. Notwithstanding that, Kids Care sought to engage with Ms Tui as part of the restructuring process.

[11] Two letters, the first dated 21 January 2013 and the second dated 1 February 2013, were generated and sent to all staff including Ms Tui. The Authority has seen the copies of the letters addressed to Ms Tui and is satisfied that they were sent. For whatever reason, Ms Tui never received them. The Authority noted there was a small error in the address recorded for Ms Tui on the letters.

[12] In any event, as a consequence of not receiving the letters, Ms Tui did not participate in the employer's consultation process, much to the surprise of Kids Care. The evidence from Kids Care was that Ms Tui was the only employee who did not participate.

[13] A restructuring proposal was developed and ultimately implemented which had the effect of disestablishing Ms Tui's position, amongst others. However, like other staff, had she received the second letter from the employer, she would have had the opportunity to apply for new positions in the restructured organisation.

[14] Kids Care, having heard nothing from Ms Tui in respect of the restructure (and indeed nothing at all from her for some time), calculated Ms Tui's final pay and paid that into her bank account.

[15] Moreover, the whole business has now been sold by Kids Care. These latest developments were unknown to Ms Tui at the point at which the Authority convened its investigation meeting. The investigation meeting proceeded at the appointed time with only Ms Tui present. Kids Care had indicated at the last minute that it was not able to attend at the appointed time but proposed to attend on the Authority later on the same day. In the circumstances, that was consented to.

[16] The effect of that process was that the Authority took Ms Tui's evidence first then the evidence for Kids Care and to ensure that both parties had access to the evidence the Authority heard, the Authority generated a Minute dated 22 May 2013 in which it set out the evidence that it heard from each of the parties and sought further submissions and/or evidence from each of the parties to assist it in its investigation.

[17] That further evidence and/or submission has now come to hand and this determination is able to be completed as a consequence.

## **Issues**

[18] The Authority will need to consider the following questions:

- (a) What was the nature of the employment relationship between the parties;
- (b) How was the relationship brought to an end?

### **What was the nature of the employment relationship between the parties?**

[19] The Authority is satisfied on the evidence it heard that Ms Tui was employed on a casual basis and was not employed on a permanent part time basis as she contended. The Authority has now been provided with all the appropriate operational and time sheet data from Kids Care relating to Ms Tui's employment. While it is clear that Ms Tui's employment becomes a little more regular in terms of its pattern as the employment wears on, it is still plain that this was a casual relationship where employment was provided as and when there was work to be done.

[20] The very nature of the business dictated that work was driven by the number of parties being held for children in the business at any one time. Demand fluctuated dramatically with the weekends busier than the week days and school holidays being busier than school term periods. The fact that Ms Tui worked more regularly during the weekend than during the week days is hardly a surprise given the business fundamentals. There is, in the Authority's opinion, simply no evidence to support her contention that she was a permanent part time employee.

[21] Of course, Ms Tui maintains that she was told when she was employed that she would work two days a week minimum but Kids Care denies that any employee would have been told that and even if there was some observation to that effect, it can only have been an intimation of the likely requirement for work. It cannot, in the Authority's opinion, be construed as definitive proof that a permanent part time role was in contemplation.

[22] Another aspect of this question is whether Ms Tui was summoned to work by telephone message or text message or whether she simply turned up on a regular roster. While Ms Tui maintained the latter was the position, Kids Care was very clear that there was always a roster drawn up based on demand and that staff were

invariably summoned to work by a message from the employer. The message from the employer was not necessarily from the same person each time, but Kids Care was adamant that it never had sufficient security of work to enable any staff member to simply turn up on particular days in the expectation that they would be required. The Authority accepts Kids Care's evidence on this point and insofar as it differs from Ms Tui's, prefers Kids Care's evidence.

[23] Those being the Authority's conclusions then, Ms Tui was a casual employee employed to work on an as and when required basis.

[24] The employment agreement eventually provided by Kids Care to Ms Tui (and never signed), while it does not refer to the proposed employment as casual, does contain a very explicit provision relating to the proposed arrangements:

6.2 *Unless otherwise prescribed in Schedule A attached, NO minimum number of hours of work shall apply and the employee accepts there is no guarantee that work will be available in any particular week. To avoid doubt there may be weeks where no work hours are offered or available.*

[25] Although that agreement was never executed by either party and did not form the bargain between them, it is nonetheless persuasive evidence of the nature of the employer's business and the reality that there was no guarantee of work being provided.

[26] Conversely, all the documentation relating to the employment as worked, refers to Ms Tui's position as being casual. That word is used in the pay advice slips for instance. The rosters which the Authority has studied are frequently annotated by staff indicating which days they are available and which days they are not. Such an arrangement would be inconsistent with a permanent part time role but absolutely consistent with a casual role where employees can make themselves available, or not, for work on particular days. Further and finally, even where Ms Tui worked similar days (particularly Sundays), the hours are often different with variable start times and variable finish times. It seems to the Authority just inconceivable that that sort of arrangement could have been effected automatically, that is without some notice from the employer.

[27] In summary then, the Authority is not persuaded that Ms Tui's position is a permanent part time role at all and that she was indeed employed by Kids Care for the whole of the employment as a casual employee.

[28] Notwithstanding that finding, it will be apparent from the foregoing section of this determination that Ms Tui was not provided with a written employment agreement in a timely fashion. It is true that one was provided eventually but as the Authority has just noted, that would effectively have changed the nature of the relationship between the parties because it clearly contemplates a permanent part time role albeit on a no fixed hours basis whereas the Authority is satisfied that the role which Ms Tui actually performed was a casual employment position.

[29] In the present case, both parties accept that if there had been a written employment agreement between them from the beginning of the employment, some anyway of the disputes they now have would have been resolved.

[30] One final aspect of this matter that the Authority desires to comment on is the incidents and payment for holidays. While not conclusive, the payment of holiday pay in the hourly rate is often said to be indicative of a casual employment relationship.

[31] Here, holiday pay was paid in the hourly rate for some of the employment but not all of it. That being the position, the Authority is not able to take that aspect any further. The evidence for Kids Care is that any holiday pay owed to Ms Tui at the end of the relationship, because of her purported redundancy, was paid out to her, or is about to be..

### **How did the employment relationship come to an end?**

[32] Ms Tui maintains of course that she was constructively dismissed when she raised concerns with Ms Watson of Kids Care about the absence of an employment agreement and subsequently complained to the then Department of Labour about Kids Care. She says that in not offering her continued employment, she was in effect constructively dismissed. But the difficulty with that argument, looked at in isolation, is that the employer is not under any duty to provide continuing work if this is, as the Authority has found, a casual employment arrangement.

[33] But the Authority supports that conclusion with further findings about the reason that Kids Care failed to continue to offer Ms Tui work. The Authority is not persuaded by Ms Tui's evidence that the issues that concerned the employer (including issues of a disciplinary nature) were resolved, as she maintains. Indeed, the weight of evidence suggests that they were still of concern to the employer and that it was because the employer could not get Ms Tui to engage on those matters that the employer felt constrained to stop offering Ms Tui work. Were that not the position, the Authority is satisfied that Ms Tui would still have been offered continuing work as she was regarded as a good employee. But the difficulty about getting her to address these issues forced the employer's hand.

[34] The factual position is that the last day Ms Tui worked was 17 November 2012. On 21 November 2012, the employer wrote to Ms Tui and raised issues with her that, on the evidence the Authority heard, the employer had been endeavouring to get Ms Tui to address for at least the previous month.

[35] But even if the Authority's conclusion about the employer's attempts to get Ms Tui to address matters in the previous month is mistaken, it will be apparent that Ms Tui was working up until 17 November 2012 and on 21 November 2012 the employer wrote a letter which set out certain concerns. The letter could not be described as an unpleasant one; it is written in reasonably friendly terms making clear that the concerns the employer has are just allegations at this stage and seeking to meet with Ms Tui to resolve them. The letter proposes two different ways of addressing the issue, either a formal meeting or the employer indicates it is prepared to meet informally to address the issues.

[36] The issues of concern were threefold. First, Ms Tui is alleged to have interacted inappropriately with a customer, second Ms Tui is alleged to have threatened and/or been rude to colleagues, and third Ms Tui had provided sketchy information about another staff member accessing the till in the business without authority and the employer sought to get further and better particulars about that.

[37] The employer's evidence (which the Authority accepts), is that it had been trying to get Ms Tui to address those issues and that that process had been going on for several weeks before the letter was written. That oral evidence, given to the Authority in its investigation, is consistent with the terms of the letter of 21 November 2012 which refers to the fact that the employer had "... *been seeking to meet with you*

*informally to discuss concerns that have come to my attention regarding your employment”.*

[38] The letter goes on to make clear that the employer’s conclusion is that it would be:

*... inappropriate to roster you back on until we have discussed the allegations. ... One of the concerns relates to an allegation of intimidation and bullying behaviour towards other staff members. The staff members involved are fearful of retaliation and further behaviours of a similar nature by you. ...*

[39] It seems to the Authority absolutely appropriate and sensible for Kids Care to try to resolve this issue first, before returning Ms Tui to the roster. While the other two issues may not be of such moment as to prevent the continuation of Ms Tui’s work, the suggestion that she threatened or bullied staff had to be resolved smartly. Ms Watson for Kids Care told the Authority that other staff members were fearful of working with Ms Tui until the issue had been resolved.

[40] Ms Tui told the Authority that she understood that these issues had been resolved in two separate discussions that she had with Ms Watson, but both of those discussions predate the 21 November 2012 letter and so, given that Ms Tui received the letter (she put the letter into evidence so she must have received it), it is difficult to understand how she could conclude that the matters were resolved from the employer’s standpoint when the letter clearly sets out that the employer still wants to talk to her about those matters.

[41] The employer does not deny that the earlier discussions Ms Tui refers to, took place, but does refute absolutely the suggestion that either of those discussions resolved the employer’s concerns about the three issues referred to in the 21 November 2012 letter.

[42] The Authority has no hesitation in concluding that the reason that Ms Tui was not offered work beyond 17 November 2012 was because she had failed to engage with her employer in good faith to resolve these three issues. Her failure to accept her obligations to deal with those matters was the reason that she was not getting further work; it had nothing to do with her raising other issues with the employer.

[43] But Ms Tui protests that Ms Watson would not talk with her face-to-face and/or that Ms Watson was difficult to get hold of. As the Authority has already noted, Ms Watson makes exactly the same allegations about Ms Tui.

[44] Whatever the practical difficulties, the short point is that unless and until Ms Tui had made it possible to engage with Ms Watson so that the latter could be satisfied about the issues in the 21 November 2012 letter, Ms Tui was not going to be offered any further work. As there was never such a meeting, 17 November 2012 was the last day that Ms Tui worked.

[45] It is true that Ms Tui tried to get Ms Watson to go to mediation and was cross with Ms Watson that that did not happen, but Ms Watson was entitled to maintain the position, in the Authority's view, that she had a disciplinary process under way which she needed to conclude and that might either deal with all of Ms Tui's concerns or at least crystallise just exactly what the problem was. The Authority is not minded to be critical of Kids Care for refusing mediation at that point; it had an ongoing disciplinary issue which it was entitled to have addressed by Ms Tui.

[46] It follows from the foregoing analysis that the Authority is not persuaded that the relationship of employment between these parties came to an end by Ms Tui being constructively dismissed from her employment when she raised issues that the employer was unhappy about. In fact, the Authority is satisfied that the work relationship came to an end because Ms Tui would not engage with the employer to resolve an allegation of bullying which was troubling other staff members.

[47] But Ms Tui remained an employee of Kids Care even although she was not offered work and that position remained until the redundancy earlier this year when a restructuring was undertaken, various positions (including Ms Tui's) disestablished and final payments made and accounted for.

[48] Accordingly, to answer the Authority's question, Ms Tui's employment came to an end when her position was disestablished.

### **Determination**

[49] The Authority is not persuaded that Ms Tui has any personal grievance against Kids Care or indeed any other employment related claim against Kids Care in terms

of the present proceedings. That being the Authority's conclusion, the claim brought by Ms Tui fails in its entirety.

### **Costs**

[50] In the particular circumstances of this case, as both parties represented themselves in effect, costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority