

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 30  
5337087

BETWEEN            TINA TUPE  
                                 Applicant  
  
AND                    PETER CUNNINGHAM  
                                 Respondent

Member of Authority:    Michele Ryan  
  
Representatives:        Rachael Webb Counsel for Applicant  
                                 Respondent in person  
  
Investigation Meeting:    8 March 2012 in New Plymouth  
  
Submissions received:    On the day of the investigation meeting  
  
Determination:            2 April 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Ms Tina Tupe (“Ms Tupe”), was employed by the respondent, Mr Peter Cunningham, (“Mr Cunningham) to provide care to Mr Cunningham’s wife who had suffered a stroke. Ms Tupe was employed for approximately a year and nine months prior to her dismissal. Ms Tupe says she was unjustifiably dismissed. She seeks reimbursement of lost wages, compensation of \$10,000 and costs.

[2]     In contrast Mr Cunningham says he was justified in dismissing Ms Tupe and says he should not be liable for any of the remedies claimed by Ms Tupe.

**The Investigation Meeting.**

[3]     The parties did not attend mediation prior to the Employment Relations Authority investigation meeting. Mr Cunningham says the Mediation Service had

phoned him to make arrangements for mediation but it had called at a time when he was not able to speak and he had requested that it call him the following day. He says the Mediation Service did not contact him again. He made no attempt to contact the Mediation Service himself.

[4] Mr Cunningham did not communicate or respond to any of the correspondence or directions of the Authority until the day of the investigation meeting. By way of explanation Mr Cunningham advised that he had moved house three times following Ms Tupe's dismissal and mail had not been forwarded to him. He says he was unaware that Ms Tupe had lodged proceedings until he was served with all the relevant documents relating to the investigation. In contrast however there was some unchallenged evidence that Mr Cunningham was aware a personal grievance had been raised by Ms Tupe relatively soon after she was dismissed. Mr Cunningham did not file a Statement in Reply or a Statement of Evidence with the Authority.

[5] Both Mr Cunningham and Ms Tupe attended the investigation meeting. I had a brief discussion with the parties to ascertain if mediation would be a more suitable mechanism to resolve the employment relationship problem between them. Neither Ms Tupe nor Mr Cunningham considered the issues between them could be progressed by mediation.

[6] By the time the Authority's investigation meeting was scheduled to commence, it had been over 14 months since the situation giving rise to the employment relationship problem had occurred. I decided to continue with the investigation meeting rather than direct the parties to mediation as I considered mediation would not contribute constructively to resolving the matter, and in order to prevent further delay to the disposal of the employment relationship problem.

[7] Mr Cunningham gave his evidence orally on the day of the investigation. His wife was unable to attend the investigation meeting due to her disability. Ms Tupe was legally aided and represented by a solicitor. Mr Cunningham told the Authority he was unable to receive legal aid and was self-represented. No other person attended the meeting to provide additional information or evidence to the Authority.

[8] Most of the evidence relevant to the claim of unjustified dismissal was not challenged by either Ms Tupe or Mr Cunningham. Where relevant evidence was challenged I have recorded the competing views but have not included evidence that is irrelevant to determining the employment relationship problem. During the investigation meeting Ms Tupe and Mr Cunningham each made allegations of wrongdoing against the other about matters of a possible criminal nature. Neither was able to provide any evidence to support the allegations made.

[9] The Authority's findings have been made on the civil standard of the balance of probabilities, having assessed the evidence to determine what was more likely than not to have occurred.

### **Background Information and Facts**

[10] In 2008 Mr Cunningham's wife suffered a stroke and required significant assistance and care. Mr Cunningham's wife is reported to be wheel chair bound and has the use of her left arm only. Evidently her speech has been affected by the stroke but she is able to communicate albeit with some difficulty.

[11] In the aftermath of Mrs Cunningham's stroke, Mr Cunningham left his job to provide full-time care at home for his wife. From time to time Mr Cunningham's wife also received respite care at a retirement home in the region. Following an assessment by a Needs Assessment and Service Coordination agency, Mr and Mrs Cunningham became eligible to receive Ministry of Health funding to purchase support services to assist them in Mrs Cunningham's care. Mr Cunningham sought to employ a care-giver to assist him with household management and with Mrs Cunningham's personal care. Mr Cunningham told the Authority he employed a care-giver for several months in 2008 but that this employment relationship ended before Christmas 2008.

[12] Ms Tupe worked at the retirement home where Mrs Cunningham received respite care and through this connection Ms Tupe met Mr and Mrs Cunningham. In March 2009 Mr and Mrs Cunningham and Ms Tupe discussed having Ms Tupe provide care at home for Mrs Cunningham. No written employment agreement was entered into but Ms Tupe's hours of work, rate of pay and duties were agreed.

[13] Ms Tupe commenced employment on 1 April 2009. She worked 56 hours per fortnight and was responsible for general domestic household duties such as dishes, washing and meal preparation as well as assisting with Mrs Cunningham's personal hygiene, social activities and shopping.

[14] Ms Tupe attested that for the first year the employment relationship worked well, but said the relationship between herself and Mr Cunningham began to deteriorate in or about mid-2010 and onwards. Ms Tupe pointed to a number of incidents as the cause of the unease between her and Mr Cunningham but said that while it was an "*uneasy working relationship, it was functional*".

[15] In particular Ms Tupe says there were ongoing disagreements between her and Mr Cunningham as to how personal hygiene care for Mrs Cunningham should be administered. Mr Cunningham did not agree with Ms Tupe's approach and instructed Ms Tupe as to how he wanted Mrs Cunningham's cares to be undertaken. Ms Tupe advised that after receiving Mr Cunningham's instructions, she continued to undertake Mrs Cunningham's care as she (Ms Tupe) thought best and in contradiction to Mr Cunningham's instructions. She says Mrs Cunningham consented to Ms Tupe's approach to care.

[16] Mr Cunningham agreed that from early-mid 2010 onwards he regarded the employment relationship between himself and Ms Tupe as becoming progressively unpleasant. He said that over the course of the six months prior to Ms Tupe's dismissal he had warned Ms Tupe "*four or five times*" about a number of problems he perceived with her performance. He says these included, amongst other things, lateness in attending work, her behaviour towards him and Ms Tupe's work ethic generally.

[17] Ms Tupe refutes that Mr Cunningham ever warned her that her behaviour was unacceptable or that she could be disciplined in an employment relations context. On questioning Mr Cunningham was unable to recall exactly when he raised his concerns with Ms Tupe or to provide any detail as to what was said. He agreed that in hindsight he may not have been clear with Ms Tupe as to the extent of his concerns. He told the Authority this was because he did not wish to antagonise Ms Tupe. He said he was "*trying to be nice about [the warnings]*" because he did not want to dismiss Ms Tupe and knew she relied on the pay. In evidence he accepted the

Authority's proposition that although he considered he had warned Ms Tupe her of his concerns, he had not warned Ms Tupe in such a way that she was fully cognisant of his concerns, so that she could expect to be dismissed if she continued to perform her role as she had been.

[18] Ms Tupe told the Authority that the differences in opinion between her and Mr Cunningham as to how to provide appropriate care culminated in a heated argument on Friday 5 November 2012. She admits to yelling and swearing at Mr Cunningham in the very strongest of language and to refusing to carry out his instructions. Mr Cunningham agreed that the difficulties between him and Ms Tupe reached a crescendo on 5 November 2010. He says the Ms Tupe's attitude and use of language during the argument between them on that day was "*unacceptable and abusive*". Mr Cunningham told the Authority that from his point of view "*things could not go on like that*". The argument was not settled and Ms Tupe went home at the end of the shift.

[19] On the morning of Monday 8 November 2010 Mr Cunningham visited Ms Tupe at her home before she was due to commence work. He told the Authority that he advised Ms Tupe that he was "*sorry that things weren't working out*" between them and suggested Ms Tupe take the rest of the week off on pay, to consider whether she wanted to continue working for Mr Cunningham.

[20] Both Mr Cunningham and Ms Tupe reported that the meeting was brief but amicable. Ms Tupe says she happily agreed to a week's holiday. She advised the Authority that in or about this time Mr Cunningham's wife warned her that Mr Cunningham was intending to "*get rid of*" Ms Tupe although Ms Tupe was unable to provide any exact details as to when this statement was relayed to her.

[21] During the week commencing 8 November 2010 Mr Cunningham sought assistance from an organisation called Manawanui who managed the processing of Ms Tupe's fortnightly wage payments. He says he sought their advice because he did not want Ms Tupe to continue working within his home in the way that she had been. It needs to be noted that Manawanui does not provide professional HR or employment relations advice in the usual course of its business. Mr Cunningham says he knew he needed to have a written employment agreement and he wanted to set out and record

his expectations as to Ms Tupe's style of work. He said he thought if he formalised the employment arrangement with a written employment agreement both he and Ms Tupe "*would both know where we both stood*". A written employment agreement and a position description were drafted.

[22] On 15 November 2010 Ms Tupe says on her arrival at work Mr Cunningham presented her with a written employment agreement and told her she could not start work until she signed the document. Ms Tupe wanted to receive advice on the matter and they agreed to meet at 1pm although this meeting was later scheduled for 5pm that day. Ms Tupe says the rate of pay and the amount of hours recorded in the written employment agreement remained the same, but the hours in which the work was to be performed had changed from her previous routine, and she was unhappy about these changes.

[23] Ms Tupe, Mr Cunningham and an employee from Manawanui met at 5pm at Mr Cunningham's home. Mr Cunningham says he set out in detail his specific expectations within the employment agreement and position description and that these were discussed between them for approximately an hour and a half. He says he told Ms Tupe that he wanted her to start work on time, comply with his instructions, behave in a professional manner and be less involved in personal matters between him and his wife. He also advised the Authority that he told Ms Tupe that he disliked having her children in his home, which he says had increased over time. He recorded in the position description that the children should not be at work. Mr Cunningham reported that the meeting was "*full and frank, we knew where we stood, on time, on working hours and no kids*".

[24] Ms Tupe reported that she was unhappy with the attitude of the employee from Manawanui who accompanied Mr Cunningham however she agreed that a compromise over the hours of work was reached, and that the meeting concluded with Mr Cunningham and Ms Tupe having agreed to new terms and conditions of employment. I was not provided with a copy of the employment agreement or position description. The representative from Manawanui was to make the amendments to the draft documents and return these to Mr Cunningham.

[25] Mr Cunningham attested that when he arrived home in the afternoon of the following day, 16 November 2010, he found Ms Tupe's children and her mother at

the house. He said the “*place was in a mess, no dishes done, no clothes put away from the laundry*”. Mr Cunningham says in addition to his unhappiness at finding the expectations agreed between them the day before had not been adhered to, his wife relayed to him that Ms Tupe had spoken in a derogatory manner to members of the local community when accompanying her on a shopping trip earlier that day. Mr Cunningham did not raise his concerns with Ms Tupe at that time and instead discussed these with his wife after Ms Tupe and her family had left the house. On the basis of Ms Tupe’s conduct during that day Mr Cunningham resolved to dismiss Ms Tupe.

[26] In the morning of 17 November 2010 Mr Cunningham prepared a letter of dismissal. When Ms Tupe arrived at work Mr Cunningham met Ms Tupe outside the house. He refused her access to the house or to speak with his wife, instead Mr Cunningham read out the contents of the prepared letter of dismissal. Ms Tupe was advised that her services as a support carer were no longer required, and that she was no longer able to work at the house. He advised her that her usual hours would be continued to be paid up to and including 2 December 2010 and she would be paid out all outstanding annual leave and lieu day entitlements. The letter concluded by thanking Ms Tupe for her efforts and wishing her well in the future. Ms Tupe says that Mr Cunningham had told her she had “*become too close*”. A brief argument ensued between the two and Ms Tupe left the premises soon after.

[27] Soon after Mr Cunningham employed a friend of Ms Tupe’s who she had introduced to Mr Cunningham with a view to having her friend perform her work duties while she intended to take a fortnights holiday from 22 November.

[28] Ms Tupe and Mr Cunningham each provided further background information to the Authority.

[29] Ms Tupe stated that she although she was always mindful of working in the privacy of Mr and Mrs Cunningham’s home , she regarded herself as becoming less of an employee and more as a friend to Mr Cunningham’s wife.

[30] Mr Cunningham described his wife as good natured and eager to please those around her. He says he was becoming increasingly unhappy with the influence Ms

Tupe had on his wife and considered Ms Tupe was having a negative effect on his relationship with his wife.

### **Issues**

[31] The particular issues which need to be determined in this matter are:

- a. Was Ms Tupe dismissed unjustifiably?
- b. If Ms Tupe was dismissed unjustifiably, did her actions contribute to the situation which gave rise to her personal grievance?
- c. What remedies should be awarded?

### **Discussion and Determination**

[32] Mr Cunningham does not dispute he dismissed Ms Tupe. As I understand Mr Cunningham's evidence, he dismissed Ms Tupe because of her conduct on 16 November 2010. He says Ms Tupe had not completed her daily domestic duties, she had spoken badly to members of the community about him and her children were at his home when he had specifically instructed that they should not be.

[33] Mr Cunningham is required to justify his decision to dismiss Ms Tupe according to the recent amendments<sup>1</sup> to s103A of the Employment Relations Act 2000 ("the Act").

[34] Pursuant to the new amendments the Authority must consider and determine, objectively, whether Mr Cunningham's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[35] The Employment Court in its recent decision *Angus and McLean v Ports of Auckland Limited*<sup>2</sup> made it clear that procedural fairness remains an important feature of an employer's (in this case Mr Cunningham's) process when contemplating a decision to dismiss or disadvantage an employee. Not only must Mr Cunningham's decision to dismiss Ms Tupe be based on reasonable grounds but the way Mr Cunningham dismissed Ms Tupe must be fair.

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<sup>1</sup> Section 15 Employment Relations Amendment Act 2010

<sup>2</sup> [2011] NZEmpC 160

[36] When determining whether a dismissal is justified the Authority must consider the following<sup>3</sup>:

- a. Having regard to the resources available to the employer, whether the employer sufficiently investigated the allegations;
- b. Did the employer raise its concerns with the employee prior to dismissing or taking action against the employee;
- c. Whether the employer gave the employee a reasonable opportunity to respond to the concerns before dismissing or taking action;
- d. Did the employer genuinely consider the employee's explanation before dismissing or taking action;
- e. Any other factors which may be appropriate;
- f. If there were minor defects in the process taken by the employer which did not result in the employee being treated unfairly, these cannot be treated by the Authority or the Court as the basis for a determination that the dismissal was unjustified.

[37] Mr Cunningham told the Authority that when he was in the process of dismissing Ms Tupe he wanted to "do things the right way" and had accessed the Department of Labour's web-site to find out what notice he was required to give Ms Tupe.

[38] In this regard it appears Mr Cunningham sought to find out what a fair and reasonable employer could do after deciding to dismiss, but not regarding what was required before a decision to dismiss is made.

[39] I accept that Mr Cunningham's resources as an employer were meagre. However even as an inexperienced small employer Mr Cunningham's process fell below the basic minimum requirements of a fair and reasonable employer. Mr Cunningham did not advise Ms Tupe of his concerns as to her conduct before dismissing her. No discussion between Mr Cunningham and Ms Tupe took place between the time the actions that gave rise to the dismissal occurred on 16 November, and Mr Cunningham's notification to Ms Tupe that she was dismissed on the morning

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<sup>3</sup> As stipulated at s103A(3) Employment Relations Act 2000

of 17 November. In this regard Mr Cunningham prevented Ms Tupe of any opportunity to explain herself and precluded himself an opportunity to give genuine consideration to her explanations before making a decision. I consider the defects in the process undertaken by Mr Cunningham were not so minor that they did not affect Ms Tupe unfairly. As a consequence I find the way Mr Cunningham dismissed Ms Tupe was unfair and not actions a fair employer could reasonably take in all the circumstances at the time. Ms Tupe was unjustifiably dismissed and has a personal grievance.

### **Remedies**

[40] Having found that Ms Tupe's dismissal was unjustified I turn to remedies. Ms Tupe seeks compensation for hurt and humiliation, reimbursement for lost wages, and costs.

[41] There was no claim by Ms Tupe for a penalty in response to Mr Cunningham's failure to provide a written agreement when she was employed in 2009. Mr Cunningham advised that he knew he should have a written employment agreement and it is clear from his evidence that this requirement became increasingly apparent as the employment relationship between him and Ms Tupe deteriorated. It was equally clear however that Mr Cunningham was naïve and inexperienced as an employer and I do not think his failure to ensure an employment agreement was given to Ms Tupe in 2009 was deliberate. In these particular circumstances I do not think a penalty is appropriate.

### *Contribution*

[42] In considering Ms Tupe's entitlement to remedies the Authority must apply s124 of the Act, which provides that where an employee's actions contributed to the situation which gave rise to the personal grievance remedies are to be withheld or reduced.

Both Ms Tupe and Mr Cunningham acknowledged that there were problems in the employment relationship. I accept Ms Tupe's evidence that it was difficult at times to know who to take her work instructions from, "*with Mr Cunningham telling me how to do things one way and [his wife] telling me to do things in another way*".

[43] An inference from Ms Tupe's evidence was that Mr Cunningham had made a decision to dismiss Ms Tupe prior to the events of 16 November 2010. I do not accept that suggestion. It is clear that on 15 November 2010 Mr Cunningham sought to clarify the terms of the employment relationship by introducing a written employment agreement and position description which detailed his expectations. I do not consider Mr Cunningham would have gone to the effort of having both an employment agreement and detailed position description prepared had he already decided to dismiss Ms Tupe. In this regard I accept Mr Cunningham's evidence that he was hopeful to get the employment relationship "*back on track*". I find that by the end of the evening of 15 November 2010 new terms of employment had been negotiated and agreed between Ms Tupe and Mr Cunningham. I also find that Ms Tupe was in no doubt as to Mr Cunningham's expectations of her as an employee from that point onwards.

[44] On the following day Mr Cunningham found Ms Tupe had not adhered to the express terms and conditions as to how and what duties were required. On questioning by the Authority Ms Tupe conceded that some of her daily duties had not been finished. Ms Tupe was unable to explain, despite her agreement to new terms and conditions of employment the previous day, why she had not complied with those terms other than to say, in response to why the children were in the house that by that time she was "*off the clock and had finished work*".

[45] I find there is a significant causal connection between Ms Tupe's conduct on 16 November 2010 and Mr Cunningham's decision to dismiss. Ms Tupe reluctantly acknowledged during the investigation meeting that she may have contributed to the situation. Ms Tupe conceded that she "*may have become too comfortable*" in her position within Mr Cunningham's home, and agreed that she was not reluctant to challenge Mr Cunningham over matters in which she held a different point of view. I find that although there were substantial procedural flaws to the way in which Ms Tupe was dismissed, Ms Tupe significantly contributed to the situation which gave rise to her personal grievance. Given that Ms Tupe admitted during the Authority's investigation that she had previously ignored Mr Cunningham's instructions and she was unable to explain why her conduct on 16 November 2011 was in direct contradiction to the contents of the position description she had ostensibly agreed to

the day before, I find Mr Cunningham was able to reasonably conclude that Ms Tupe did not intend to adhere to the new employment arrangements or take instructions from him. I assess Ms Tupe's contribution to the situation that gave rise to his personal grievance as being 70 percent.

#### *Reimbursement for lost wages*

[46] Section 128(2) of the Act stipulates that the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months' ordinary time remuneration. However where an employee claims he or she has been unjustifiably dismissed the employee should make attempts to reduce any losses as a result of the dismissal<sup>4</sup>. In practical terms this means an employee should attempt to find alternative employment to mitigate the loss of wages or salary.

[47] When Ms Tupe was initially questioned by the Authority as to her attempts to mitigate her loss she said she did not bring any evidence of that description to the Authority and was unaware she was required to.

[48] However on further questioning as to the type of work she had applied for, Ms Tupe stated "*I never went looking for a job. I truly feel I was unjustifiably dismissed and I am owed three months wages*". She admits that after being dismissed she made little or no effort to look for alternative work, and instead applied for a work and income benefit which she began receiving on 25 January 2011.

[49] On the evidence I find that Ms Tupe relied on Mr Cunningham's breach of process in dismissing her as reason to consider herself entitled to three months wages, and based on that expectation she made no attempt to mitigate her losses. I find Ms Tupe's failure to make an effort to mitigate her losses disentitles her from receiving the benefit of reimbursement and I decline to award her reimbursement of lost wages pursuant to s 128(b).

#### *Compensation*

[50] Ms Tupe gave limited evidence of the effect the dismissal had on her. She said looking after Mr Cunningham's wife had been the best job she had ever had and it had fitted in with her lifestyle and child care responsibilities. She says she was

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<sup>4</sup> Argosy Imports Ltd v Lineham [1998] 3 ERNZ 976

shocked by Mr Cunningham's actions on 17 November 2010 in dismissing her, and was humiliated by Mr Cunningham's subsequent employment of her friend to take her place.

[51] On the basis of the evidence available I award \$2000 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000. However this sum is reduced by 70% to \$600, to reflect Ms Tupe's contribution to the situation that gave rise to her personal grievance.

**Costs**

[52] Costs are reserved.

**Summary of Orders**

- A. Mr Cunningham is ordered to pay Ms Tupe \$600 - as compensation pursuant to s123(1)(c)(i) of the Employment Relations Act 2000.
- B. No order for reimbursement of lost wages is made.
- C. Costs are reserved.

**Michele Ryan**  
**Member of the Employment Relations Authority**