

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Amy Jilaine McKay (Applicant)

AND Woodend Preschool & Nursery Limited trading as Minnies Preschool
(Respondent)

REPRESENTATIVES David Beck, Counsel for Applicant
Kelvin Reid and Christina Glubb, Counsel for Respondent

MEMBER OF AUTHORITY Paul Montgomery

INVESTIGATION MEETING Christchurch 28 July 2006

SUBMISSIONS RECEIVED 14 August 2006
30 August 2006

DATE OF DETERMINATION 30 November 2006

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant, Miss Amy McKay, alleges she was unjustifiably dismissed from her employment as an early childhood educator with the respondent. Ms McKay was employed under an individual employment agreement for a fixed term to work while a permanent employee was on parental leave. She says the respondent terminated her employment early on 23 December 2004, without justification or notice. The applicant claims unpaid wages in the sum of \$1,560.00 gross, \$5,000 compensation for hurt and humiliation and costs.

[2] The respondent denies the applicant was dismissed and that the termination of their relationship came about by the applicant tendering a verbal resignation which was accepted. It denies it has any outstanding obligations to the applicant and declines to meet the remedies sought by Ms McKay.

The facts

[3] It is common ground that Ms McKay was employed on a written fixed term agreement to fill a parental leave vacancy of Ms Kayleen Richards. The agreement was that Ms McKay would be employed from 1 March 2004 until 28 February 2005. The document was signed by the applicant and Mrs Sally Moffatt, a director of the respondent on 20 December 2003.

[4] Under a section entitled "Terms of Employment", the document states:

- (e) *I month's notice of termination must be given by either the employer or employee unless a different period is mutually agreed by them. This will not affect the employer's right to instantly dismiss the employee for serious misconduct.*

[5] On 15 November 2004 a staff meeting was held to discuss, among other things, the staffing for the coming year. Attending that meeting were the supervisor, the head teacher/assistant supervisor and two teachers, one of which was Ms McKay. Neither of the respondent's directors was present. At the point where each person present was asked to comment on the issues under discussion, Ms McKay gave the clear impression that she would not be involved in the coming year. Her evidence was *I recall taking no part in this discussion and saying something like, it's pointless, as I wouldn't be there.* The head teacher, Heather Sullivan's evidence was; *When it was Amy's turn to comment she stated that: It doesn't matter, I'm not here, I'm gone.*

[6] On 22 November 2005 a discussion took place at the pre school between Ms McKay and Mrs Moffatt. The latter's evidence was

During the discussion she verbally told me that she was leaving. It was a short conversation in which she advised that she would be leaving at the end of the year. The purpose of this conversation was for Amy McKay to resign on that date. I commented that I would get in touch with Kayleen Richards (who had been on maternity leave) to advise her that she could start early. ...Therefore it was this day, then 22 November 2004, about half an hour after Amy McKay told me that she was leaving, that I called Kayleen Richards.

[7] Mrs Moffatt in her evidence says

On 7 December 2004, Amy McKay approached Heather to say that she had changed her mind regarding her decision to leave and that she needed to talk to me. On 10 December 2004, I spoke with Amy McKay as a result on [sic] the request on 7 December to talk to me regarding her decision to leave. During this conversation I queried what was happening as she had told me that she was leaving. Amy McKay told me she had changed her mind. I told her that she had put me in an awkward position as I had already notified Kayleen Richards she would be able to start and she had organised child care.

[8] Mrs Moffatt then goes on in her evidence to say

Amy McKay was non-specific about changing her decision to leave. She made references to her circumstances changing. It was at this point that she raised the pre school paying her out a month's wages in lieu of one month's notice. Amy McKay indicated that if she was paid out a month's wages she would go. My response to this was that the agreement had been terminated on 22 November 2004 when she told me she was leaving. I further reinforced that it was not our practice to pay out wages. I was happy for Amy McKay to work out her one month's notice period to 23 December 2004.

Later on in her evidence Mrs Moffatt says

From my point of view, Amy McKay's resignation was absolutely unequivocal and there is no way I could have misinterpreted her. I do not know what happened between 22 November 2004, when Amy McKay resigned, and 7 December 2004 when she approached Heather Sullivan saying she wanted to speak to me regarding changing her decision to leave, but I can only speculate that the employment position she had secured

in that time had fallen through, and she therefore wanted to continue at Minnie's pre school until 28 February 2005. If Amy McKay had not resigned, I would have been perfectly happy for her to work out the rest of her contract period. The difficulty was that by the time Amy McKay raised the issue about saying [sic] on, we had already committed to alternative arrangements with Kayleen Richards.

The issues

[9] To determine this matter the Authority needs to decide the following questions:

- Was the termination of the employment instigated by the respondent or by the applicant; and
- Was the respondent obliged to allow the applicant to withdraw her resignation; and
- In the event the applicant has a personal grievance, what remedies are to be awarded; and
- Did the applicant contribute to the grievance?

The investigation meeting

[10] At the investigation meeting the Authority was assisted with evidence from the applicant herself and on behalf of the respondent, evidence from Sally and Ross Moffatt and also from Heather Sullivan.

[11] The significant matters to emerge at the investigation meeting were firstly, relating to a communication between Mr Moffatt and the applicant over the issue of payment of wages in lieu. In her evidence to the Authority the applicant stated that she was asked to speak to Ross Moffatt after she had spoken with Sally Moffatt on 10 December 2004. She says

I advised him that I wanted to continue with my employment contract as agreed at the time. Ross then became very angry on the phone saying that my employment was terminated and I would no longer have any hours of employment after Christmas. Intimidating me personally with profanity and threatening me, Ross said that he would destroy my career with children in Christchurch and I wouldn't be able to work with kids again. Further adding to this, he claimed that I was a gold digger and wanted a golden watch before leaving. I then reminded him of my contractual right to one month's notice of termination from either party unless mutually agreed.

[12] Mr Moffatt's evidence is that he received a phone call from his wife on 14 December 2004

who advised that Amy McKay had changed her mind about leaving and was requesting payment of a month's wages from 23 December 2004 in lieu of notice. From our point of view, Amy McKay's employment was terminated by her verbally on 22 November 2004. During that conversation with Sally Moffatt, I reinforced that we would not be paying Amy McKay any money as she had terminated the agreement on 22 November 2004 when she advised that she was leaving on 23 December 2004. The only time I spoke with Amy McKay during December was on 20 December 2004. Amy McKay had again approached Sally Moffatt in relation to being paid out a month's wages, and Sally Moffatt telephoned me. I spoke to Amy McKay and advised her that I would not be paying her any wages in lieu of notice, as she had advised that she was leaving at the

end of the year, which was now. At no time during that conversation did I make any personal comments. I ended the conversation and hung up.

[13] The other matter was in the evidence of the applicant when she said

Minnie's pre school was closed on 23 December 2004 for the Christmas break. Holiday pay was distributed by management. When I was asked into the office by Ross Moffatt, Sally had already left the centre so I asked Heather Sullivan, the over 2 supervisor, to be present as I felt unsafe to be alone with Ross. Again termination was discussed and I very clearly stated that I either wanted the one month's notice as the agreement stated, or I wanted the option of employment until the contract termination date 28 February 05.

[14] Later on in closing her evidence Ms McKay says

Overall, I cannot understand how they got things so wrong. I never put anything in writing which I would have once I got a firm job offer. At best, it could be said Sally misunderstood my comment at the 15 November staff meeting which she did not then clarify with me personally and then she contacted Kayleen to get her back early or at worst my employers simply decided not to honour their contractual obligation as they found it more convenient to terminate my employment at the end of the year.

[15] The other significant issue is that the applicant says she does not recall the meeting with Sally Moffatt on 22 November 2004. Curiously when she was asked as to whether any informal discussions took place between her and Sally, the applicant said that *if there was a meeting* with Sally Moffatt the conversation would have related to negotiating the terms of her departure.

[16] Specifically in relation to 22 November meeting when questioned by Mr Reeve, the applicant said *I don't remember the meeting. I don't recall having meetings before this and I have no memory of any meetings.* She then went on to say *I may have said I would renegotiate to Sally if I had a meeting with her.*

[17] While I found all the witnesses who appeared at the investigation meeting to be open and honest, I found Amy McKay had a poor recall of significant events at the heart of this matter. Where conflicts of evidence have arisen on major points at issue in this case, I have tended to prefer that of Mr and Mrs Moffatt whose evidence whether written or oral tended to be precise and clearly put.

Analysis and Discussion

[18] In considering the evidence and submissions put by counsel for each party, I am of the view that the comments made by the applicant at the staff meeting on 15 November 2004 could not, in itself, be regarded as a resignation. This is because they were ambiguous in the sense that Ms McKay may have been stating she was in her position only until the end of the following February and to explain her lack of any substantial comment on the issues under discussion. There was no evidence that the applicant referred to her leaving at the end of the year or the end of the term. It is also significant that neither Director was present at the staff meeting.

[19] The key event is what Mr Beck described as a brief (head around the door) exchange between the applicant and Mrs Moffat on 22 November 2004. Mrs Moffat's evidence was

On 22 November 2004, Amy McKay had a discussion with me at Minnies Preschool. During that discussion she verbally told me she was leaving. It was a short conversation in which she advised that she would be leaving at the end of the year.

[20] This has to be considered in the context of Mrs Moffat's earlier statement in evidence:

During the early part of November 2004, I was involved in a conversation with Amy McKay where she advised that she was looking for other employment as she knew that her employment agreement was to terminate in a few months time, being February 2005. I advised Amy McKay that it was fine to look for other employment and that I had no issue with her either leaving early or staying to the end of February. ... From my point of view, it made no difference to me when Amy McKay decided to leave.

During this conversation, Amy McKay stated that if she could find a job she would leave at the end of the year, otherwise she would leave at the end of February 2005 as she would need the money. The end of the year for Minnies Preschool was 23 December 2004.

[21] So, in the early part of November 2004 the applicant had signalled to Mrs Moffat that in the event that she found another position she would exercise her right to leave early. Further, the applicant had the assurance from Mrs Moffat that her leaving early would not cause any difficulty for the employer.

[22] It seems to me that in the light of this earlier discussion, the transmission of the applicant's decision to leave at the end of the year need not have been a particularly long or complicated matter. I accept that a brief transmission of the information in an around the door conversation, would be quite adequate in the circumstances. I also note that the individual employment agreement does not require the giving of notice by either party to be in written form. I think it also likely that given Ms McKay's statement to Mrs Moffat in the earlier meeting, it was unsurprising that Mrs Moffat, on being given the information by the applicant, was of the view that the applicant had secured alternative employment. I also think it likely that given the date on which the interchange occurred, Mrs Moffat was entitled to conclude that it fitted neatly with the finish of the term on 23 December 2004.

[23] In considering counsel for the applicant's submissions, and in particular his references to *Boobyer v. Good Health Wanganui* WEC3/94, Goddard CJ, I have come to the view that none of the circumstances set out in that case are applicable in the present matter. On the evidence before the Authority I simply do not see the communication by Ms McKay to be ambiguous, nor, again on the basis of the evidence, do I accept that Mrs Moffat seized upon unintended words capable of amounting to a resignation.

[24] I do not think that there was any onus on the employer to determine whether an employee resigning has or has not found alternative employment. It was also open to the respondent, having been advised of Ms McKay's departure, to contact Kaylene Richards to determine whether she was able to return for the onset of the coming year. Once Ms Richards had agreed to return at the onset of the new year, the balance of the original agreement between the applicant and the respondent became unavailable to Ms McKay.

[25] Her attempt to retract her resignation is somewhat curious in the sense that the applicant advised Heather Sullivan on 7 December 2004 that she had changed her mind and would not be leaving. On 10 December 2004 Mrs Moffat spoke with the applicant who told her that she had changed her mind. In effect the applicant did not request that she be able to withdraw her resignation, but appeared to think, perhaps somewhat naively, that all she had to do was notify her

employer of her intention to stay on. It is trite to say that the withdrawal of a resignation cannot be made unilaterally. This is particularly so when the balance of the fixed term arrangement under which the applicant was employed, has been uplifted by an employee returning from parental leave. On this issue the evidence of Mrs Moffat was quite clear *if Amy McKay had not resigned, I would have been perfectly happy for her to work out the rest of her contract period.*

[26] Mr Moffat's evidence supports that contention when he says *Had Amy McKay not resigned on 22 November 2004, there would have been absolutely no reason for us to terminate Amy McKay's employment in December 2004, as claimed by her.* While one can surmise why the applicant sought to withdraw her resignation, such musings are not particularly useful. However, perhaps it was seeing the December newsletter which recorded her departure and the employer's thanks for her work, which galvanised her decision making.

The Determination

[27] Returning to the issues as set out earlier in this determination, I find that the termination of the employment was instigated by the applicant. I find the respondent was not obliged to allow the applicant to withdraw her resignation and observe that on the basis of the evidence in front of the Authority, it would have been prepared to do so had it not been for the fact that it had already confirmed Ms Richards' return for the beginning of the coming new year.

[28] I find that the respondent paid the applicant all money due to her at the time of her departure on 23 December 2004 and has no outstanding obligations in respect of wages and holiday pay.

[29] I find that the applicant does not have a personal grievance and while she feels aggrieved at what has occurred, the Authority is unable to assist her further. As there is no personal grievance, Ms McKay cannot have contributed to a grievance.

Costs

[30] Costs are reserved. I urge the parties to attempt to resolve this matter between themselves, but if that is not possible Mr Reid is to file his memorandum on this matter within 30 days of the issue of this determination. Mr Beck is to have a further 14 days within which to lodge and serve his memorandum in reply.

Paul Montgomery
Member of Employment Relations Authority