

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Irene Marian Callen (Applicant)

AND Marie Sanderson t/a Marie's Early Childhood Learning Centre
(Respondent)

REPRESENTATIVES Richard Mark for applicant.
Marie Sanderson in person.

MEMBER OF AUTHORITY Ken Raureti

INVESTIGATION MEETING 27 February 2007
3 May 2007

DATE OF DETERMINATION 24 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem.

[1] Ms Callen commenced employment at Marie's Early Childhood Learning Centre in Kaikohe as a Team Leader on 23 January 2006. Three weeks later, her employment was terminated. Ms Callen says the dismissal was unjustified. Ms Callen also claims she is owed arrears of wages for the period she was employed. She says that she was paid at the salary rate of \$55,000.00 per annum, whereas she was supposed to be paid a salary of \$65,000.00 per annum.

Identity of respondent.

[2] Ms Callen says that Marie Sanderson, trading as Marie's Early Childhood Learning Centre was her employer. She says that the employment agreement she signed names the employer as "Marie's Early Childhood Learning Centre (Employer)". The page that the parties signed is set out as follows:

Employer: Marie Sanderson Date Signature

The date is handwritten and records 23.1.06, and the signature is that of Marie Sanderson.

[3] Messers Callen and Sanderson negotiated comprehensive terms and conditions of employment which included a Job Description, Team Leader, Licensee & Owner responsibilities and a policy for staff misconduct. The total number of pages of their agreement was eleven. Whilst both Ms Callen and Marie Sanderson signed or initialled each page, Ms Callen specifically refers to Ms Sanderson as having signed pages 7, 8 & 10 as "Owner", evidencing in her view that Ms Sanderson was her employer.

[4] Ms Sanderson says that Ms Callen was at all times an employee of Marie's Early Childhood Learning Centre Limited, a company which was incorporated in May 2004 under the Companies Act 1993. Ms Sanderson is a Director and Shareholder of that company. Ms Sanderson refers to a raft of business transactions and documents, including a company cheque book and bank account used to pay the operational and sundry costs of running the Centre, various business

transactions including invoices and payments for services, and IRD PAYE records as evidence that all business activities including the employment of Ms Callen, were conducted by the company.

Discussion and finding.

[5] Ms Sanderson is a Director of more than one company and it is apparent she has had, run, or been involved with several businesses over a long period of time. The document entered into by the parties was not a cursory agreement, it was afforded the importance and significance that such an agreement warrants. It contained a comprehensive list of entitlements, responsibilities and obligations of each of them.

[6] The eleven page document including the employment agreement was one that was subject to quite extensive negotiations over a 2 ½ month period resulting in numerous amendments to the original documentation. The document was visited, revisited and amended before they finally concluded the terms of employment. Ms Callen took responsibility for the final re-typing of the document and re-presented it to Ms Sanderson with a covering letter identifying and pointing out all of the changes, amendments and re-groupings of various terms.

[7] The Companies Act 1993 sets out the law in respect of duties, responsibilities and obligations of a company. Section 25 (1) of that Act provides that a company must ensure that its name is clearly stated on every communication sent on or behalf of the company, and on every document signed by or on behalf of the company that creates a legal obligation. It was incumbent on Marie Sanderson as a Director, shareholder and signatory on behalf of the company to correctly name Marie's Early Childhood Learning Centre Limited as the employer, or to satisfy the Authority that Ms Callen was aware that the employment agreement they signed was an obligation being incurred by the company.

[8] Section 25 (2) provides that where the name of the company is incorrectly stated the person who signed the document is liable to the same extent as the company if the company fails to discharge the obligation, unless the Court is satisfied it would not be just and equitable for that person to be so liable.

[9] I find that in all likelihood and probability, Marie's Early Childhood Learning Centre Limited was the respondent employer. Ms Sanderson was remiss in not correctly stating the identity of the employer in the employment agreement, or in any of the other documentation. While it is not absolutely clear that she made Ms Callen aware that the employment agreement they signed was an obligation being incurred by the company, there is no evidence indicating that Ms Callen was misled or deceived in respect of the respondent's identity. **I find the correct identity of Ms Callen's employer is Marie's Early Childhood Learning Centre Limited.**

[10] In the circumstances, I am satisfied that notwithstanding Ms Sanderson was remiss in not correctly stating the name of the respondent employer, it would not be just and equitable for her to be held personally liable.

Background of employment.

[11] As I have indicated in paragraph [3], Ms Callen's terms of employment were contained in a written employment agreement with very detailed attachments. She commenced employment at the Centre as a Team Leader on 23 January 2006. She was responsible to Marie Sanderson with the primary objective of the position to ensure the delivery of high quality early childhood education. Ms Callen was being familiarised and trained in the total operation, administration and management of the Centre, because she was to take up the position of Licensee, some 7 weeks later on the 10th March 2006.

[12] At the end of Ms Callen's first week of employment (Friday 27 January), she wrote a weekly management report to Marie Sanderson in which the first sentence of the report says, *"I did not give this report to you on Friday as I knew it would contain comments you didn't like and I wanted to be*

here when you read it” The report was very critical of the Centre’s equipment, materials and resources, and was judgmental of Marie Sanderson’s running of the Centre. Ms Callen indicated that the staff *“appear to be rather battle weary and I find you have a very regimented approach that is not helpful. It is not conducive to emergent curriculum. I do not like the signs you feel necessary to have around the centre that are very negative.”*

[13] Ms Callen goes on to express her concerns about the behaviour of the children being socially immature and unable to cope with simple life skills, through to a further criticism of Marie Sanderson’s unprofessional behaviour in reprimanding a staff member in front of another employee. There were many parts of the report that had the appearance of advocating for the staff at the Centre.

[14] Ms Sanderson responded in writing to Ms Callen’s report. The tone and content of Ms Sanderson’s response was a problem solving/conciliatory approach. She includes statements of *“I appreciate you doing the induction paper.....Over the next few weeks I will be doing some policies.....and would appreciate your input. I would like us to look at the Policy on.....Next Tuesday may be a good time to go through and familiarise yourself with.....If you have any queries about any of these things please let me know.....Please trial the system and routines for 2 months, give it time please. If you feel you can’t wait that long, please speak to me about it.....I am hoping to change the filing cabinets, please feel free to reorganise these to suit yourself”*

Ms Callen’s resignation.

[15] During the weekend, Ms Callen says she talked at length with her partner about her employment at the Centre, and they decided that she should resign which is what she did. When she returned to work after the weekend, she told her colleagues/staff that she was going to hand in her notice/written resignation. During the course of the morning after various conversations amongst the staff, all of the staff wrote individual letters of resignation. Ms Callen handed the letters of resignation to Marie Sanderson along with her own written notice.

[16] Understandably, after having received written notice of resignations from all of her employees, Ms Sanderson engaged in various strategies to protect her business, from talking individually with the staff about their resignations and trying to change or influence their decisions, to altering or removing some of Ms Callen’s responsibilities and duties.

[17] The first change that Ms Sanderson implemented in respect of Ms Callen’s resignation was confirmed in her letter to Ms Callen of 1 February advising her that her *“resignation is accepted..... As you have only been here for just over 1 week I will not be giving you further training in the basic admin work. Nor will I be giving you purchasing rights.”*

[18] Ms Callen says that Marie removed her authority relating to financial matters like writing out cheques to pay bills or purchasing items. She says she agreed to that change. On 3 February, Ms Sanderson wrote another note to Ms Callen saying, *“You resigned after working less than 6 days. Because you are leaving without having rec’vd any training in the running of my Centre most of the admin work will continue to be done by me. I cannot justify allowing you to spend 20 hrs p.w. on admin when I am doing most of it myself. Therefore I suggest that we can adjust the staff roster so you are working with the chn for a minimum of 32 hours p.w. until you leave. I trust this will not be an issue for you.”*

[19] On the 7th of February, Ms Sanderson wrote to Ms Callen asserting her contractual rights as she understood them, advising her of her responsibilities as Team Leader to ensure that the staff/children ratios were maintained and that she has an obligation to work with the children on the floor for up to 40 hours per week to maintain those ratios. Ms Sanderson told her that it was inappropriate of her to think she could do 20 hours admin and 20 hours on the floor in light of the fact that she was leaving, and that she (Ms Sanderson) was doing the admin work. Ms Callen was of the view that she only had to do 20 hours admin, and 20 hours teaching per week.

Disciplinary process and dismissal.

[20] By the end of the week, Friday 10 February, a dispute between them arose over Ms Callen’s work on the floor versus administration. Ms Callen says at 11.30am, she walked off the floor as this was her official administration time. This culminated in a short but heated exchange between them which Ms Callen says she was instantly dismissed for inflexibility. Ms

Sanderson says she did not instantly dismiss her, she said she was upset with Ms Callen's refusal to work as requested and went away to think about things. When she returned (approximately 20 minutes later), she gave Ms Callen a letter which suspended her on pay while she conducted an investigation into various allegations about her. When she gave her the letter, she requested that Ms Callen leave immediately.

[21] On Monday 13 February, Ms Sanderson initiated disciplinary action against Ms Callen advising her that she was to attend a meeting on the 14th to respond to specific concerns which she outlined in a letter. There were a total of thirteen specific concerns that Ms Callen had to respond to;

- 1) Wilful damage to Childcare property. – Cutting tree.
- 2) Refusal to work as per instructions with chn and/or admin.
- 3) Giving 10 minutes notice re not coming to work instead of 1 hr resulting in a deliberate act adversely affecting the safety of chn. Matty was alone with 9 chn up to 8.30am.
- 4) Falsifying time sheets.
- 5) Leaving an assigned place of work without authority, eg leaving Matty on her own with chn at 2.10pm on 9/2/06 to talk with MOE. Also leaving at 2.40pm to supposedly go to WINZ till 4.30pm and not being able to tell me who you spoke to and not signing yourself out.
- 6) Telling staff members the Centre was closing and inciting them to hand in their notice along with yours on 1/2/06.
- 7) Having extended morning tea and lunch breaks.
- 8) Failure to complete the stipulated hours of work.
- 9) Failure to observe safety rules, eg walking away from staff and children and refusing to work with them.
- 10) Failure to report a work related accident.
- 11) Refusal to sign WINZ subsidy forms.
- 12) Use of work phone for personal gain/negative calls to MOE/personal use.
- 13) Refusal to turn off personal mobile phone during work hours.

[22] Ms Sanderson told Ms Callen that the matters were very serious and if she did not provide satisfactory responses her employment may be terminated.

[23] Ms Callen attended the disciplinary meeting and had a representative with her, a person called April. Ms Callen had prepared a written response to each of the concerns. The written response was handed Ms Sanderson at the meeting. Ms Sanderson wanted Ms Callen to read it out but Ms Callen would not engage, instead, April read the response. In respect of items 2, 4, 8 and 12, Ms Callen requested that Ms Sanderson be more specific and provide more detail in order that she can respond.

[24] Ms Sanderson did not ask any questions of Ms Callen other than was there anything further that she may want to add. April asked if Ms Sanderson would get back to them on the points that Ms Callen sought clarification or more specifics on and Ms Sanderson indicated she would. Ms Sanderson also said she would get back to her that day when she decided what action she would take.

[25] That afternoon, Ms Sanderson wrote a four page letter responding to each of the thirteen points. Extracts from that letter include; *"Throughout your letter you state you need more detail. As this is a relatively small business it is not at all difficult to know to what I am referring.....2) You have refused to follow 99% of my instructions. You have done this by a) walking away when I speak to you. b) telling me you've heard enough. c) breaking rules & regulations-mainly health and safety, but many others..... 4) I have had complaints from 2 staff and myself who are responsible for checking time sheets. I don't need to be specific you know what you have/have not done.....8) You are well aware of the hrs you have refused to work....."*

The letter goes on to say *"I don't accept your explanations as outlined above. In addition I am concerned you are being dishonest and your intentions concerning working at my Centre were, and are not honourable. This is a small workplace and in view of your behaviour I have lost trust and confidence in you to perform your obligations to my employee. I believe I have no option but to immediately terminate your employment."*

Legal Considerations

[26] The legal considerations for this matter arise out of s.103A of the Employment Relations

Act 2000 Test of justification

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[27] The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[28] At paragraph 144 the Court said in respect of the case before it:

"The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her".

[29] Of importance to a consideration of any personal grievance claim are the minimum requirements for a fair procedure to be followed by an employer in cases of dismissal. These have been concisely stated by the Labour Court in *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35, to be the following;

1. *Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct;*
3. *An unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*

[30] The Court also observed in *Unilever* that in examining the procedure followed by an employer, what is looked for is ... *substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.*

Discussion and findings.

[31] The relationship between Ms Sanderson and Ms Callen was punctuated with tensions and difficulties from the beginning. Ms Sanderson indicates that during the employment agreement negotiations which dragged out for 2½ months, Ms Callen took full advantage of her vulnerability and successfully manipulated her into agreeing to some terms that she would not normally have agreed to. By the end of Ms Callen's first week, Ms Callen wrote a critical report of the Centre, and by the end of the weekend she had made her mind up that she was going to

hand in her notice. On the 1st of February, Ms Callen handed in written resignations from all of the staff along with her own.

[32] The acuteness of the tension between them escalated with each day from the time Ms Callen resigned. Ms Sanderson put in strategies to manage the risk to her business, some of which impacted on and needed Ms Callen's support, however, rather than being supportive, I would describe Ms Callen's behaviour as not being as helpful as one could have been.

[33] A key point of difference between them centred on the split of *administration hours* versus the *on the floor hours*. Ms Callen relied on the T1 Team Leader's responsibilities which says "*Work 20 hours administration etc, and 20 hours teaching.*" Ms Sanderson also relies on the T1 responsibility which goes on to say "*However, there may be some flexibility to ensure the appropriate running of the programme and availability of staff.*" Everything came to a head on the 10th, when Ms Callen walked off the floor asserting that it was her *official administration time*.

[34] It is very clear that Ms Sanderson sent Ms Callen away after a heated exchange (para[20]). If Ms Callen was relying on the circumstances surrounding the 10th as being the time when she was actually dismissed, then it would require a more careful and thorough examination of Ms Sanderson's clear instruction of sending Ms Callen away as to whether or not it amounts to a dismissal, or a suspension. However, in light of the events that followed I need not make a finding on that matter, as Ms Callen was actually dismissed four days later, and I have factored it into my consideration of the remedies.

[35] After sending Ms Callen home, Ms Sanderson embarked on a disciplinary process within a very tight timeframe that she set. She wrote to Ms Callen on the 13th setting out a large number of concerns that she sought a response to by 12.00pm noon the following day. The disciplinary meeting occurred at the arranged time. Ms Callen addressed each of the concerns and at the same time sought more specifics on some of the concerns. Later that day, without further enquiry or providing more information to Ms Callen, Ms Sanderson wrote to Ms Callen and dismissed her.

[36] It is apparent that Ms Sanderson did not carry out a full and fair investigation into all of the concerns she had. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her.

[37] Such an opportunity has been categorised in *Unilever* above as the elements of procedural fairness being a real opportunity as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct, and an unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.

[38] Standing back and objectively considering all of the evidence available to me, Marie's Early Childhood Learning Centre Limited's actions are not what a fair and reasonable employer would have done in all the circumstances. **Ms Callen was unjustifiably dismissed; she has a personal grievance and is entitled to remedies in settlement of that personal grievance.**

Arrears of wages claim.

[39] Ms Callen has raised an arrears of wages claim because she says that she was paid at the salary rate of \$55,000.00 per annum, whereas she was supposed to be paid a salary of \$65,000.00 per annum. Ms Sanderson says that the \$65,000.00 salary was to be effective from the 10th of March 2006 which was the date when Ms Callen was to assume full licensee responsibilities.

[40] On the evidence provided to me, it is clear that Ms Callen was employed as a Team Leader and that she would become the Licensee on the 10th of March, being the date when Ms Sanderson was going to leave Kaikohe and relocate to the Waikato so that she could be closer to her family and grandchildren. The 10th of March was not just an arbitrary date; the

documentation supports and spells out the changing responsibilities becoming effective from that date. There is also sufficient evidence (including Ms Callen's letter of 17 January 2006) to show that an additional \$10k was negotiated by Ms Callen to take on the Licensee responsibilities. The full Licensee responsibilities were to be effective from 10 March 2006, up until that date the salary for the position she was employed in was \$55,000.00.

[41] I find that the salary of \$55,000.00 was what Ms Callen should have been paid up until 10 March 2006. She was paid at that rate; **therefore Ms Callen's arrears of wages claim based on the \$65k salary is dismissed.**

[42] Ms Callen has a second strand to her arrears of wages claim which she alleges that there are some days, and hours on other days that she has not been paid for which she is entitled to be paid. To assist Ms Callen in respect of the part of her claim which relate to the 10th, 13th & 14th of February 2006. Her absences on those days were due to Ms Sanderson sending her away and were related to the disciplinary process. I confirm that **Ms Callen is entitled to be paid for a full day in respect of each of those three working days.**

[43] In respect of Ms Callen's claim for deductions made for 7th & 8th of February, Ms Callen was not at work on those days due to an accident. It is not clear if the accident was work related or not. **In the absence of any documentation clarifying the accident and where it happened, if it was not a workplace accident, the respondent has no obligation to pay for Ms Callen's absences. In respect of the 9th of February, it is apparent that Ms Callen left the Centre at 2.10pm to go for some physio treatment; she is not entitled to be paid for that absence.**

Remedies.

[44] Having concluded that Ms Callen was unjustifiably dismissed, it follows that consideration must be given to the remedies available to her under sections 123, and 128 of the Employment Relations Act 2000. I am bound by s.124 of the Act to consider the extent to which Ms Callen's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies accordingly.

[45] Ms Callen had handed in her notice, she wasn't going to be there beyond 1 March, and therefore Ms Sanderson could reasonably conclude that it was not in the Centre's best interests to familiarise and train Ms Callen in the administration and management of the Centre when she would not get a return on such an investment. In the circumstances, Ms Sanderson's requests for Ms Callen to spend more time on the floor and less time on administration were reasonable.

[46] I find that Ms Sanderson could reasonably have required Ms Callen to vary the make up of the hours she worked on the floor to ensure the appropriate running of the business. One of Ms Callen's letters (20 January 2006) specifically refers to there being *three additions of my own, and one reworded, shown in italics; these are T1) flexibility of hours, T29) showing an allowance of.....and at the end (no number correlation) that duties may be delegated appropriately if and when required.* The parties envisaged that flexibility of hours was necessary from both parties. The 20/20 administration and teaching hours split was indicative only.

[47] I would categorise Ms Callen's behaviour of opposition to most of Ms Sanderson's suggestions, her steadfast and inflexible approach to Ms Sanderson's request, then instruction to spend more time on the floor, and her walking off the floor on the 10th as a deliberate defiance of Ms Sanderson's authority. This, in my view is blameworthy conduct to such an extent that the financial remedies available to her be reduced by 20%.

[48] Ms Callen had handed in her notice which was to come in to effect on 1 March 2006. Any lost remuneration beyond that date cannot be attributed to her dismissal. **Ms Callen is entitled to 80% of the wages she would have earned from the date of her dismissal, 14 February 2006 to the 1st day of March 2006.**

[49] I am satisfied that Ms Callen suffered some hurt and humiliation surrounding the events of 10 February and her ultimate dismissal on 14 February 2006. **Ms Callen is to be paid \$1000.00 pursuant to s.123 (1) (c) (i) of the Employment Relations Act 2000. That amount is to be reduced by 20%.**

Summary of findings and orders.

- i) **I find that Marie's Early Childhood Learning Centre Limited is the correct identity of Ms Callen's employer.**
- ii) **Ms Callen was unjustifiably dismissed; she has a personal grievance and is entitled to remedies in settlement of that personal grievance.**
- iii) **Ms Callen's arrears of wages claim based on the \$65k salary is dismissed.**
- iv) **Ms Callen is entitled to be paid for a full day in respect of the three working days of the 10th, 13th & 14th of February.**
- v) **Ms Callen was not at work on the 7th and 8th of February, and she left early on the 9th, she is not entitled to be paid for those days.**
- vi) **Ms Callen is entitled to 80% of the wages she would have earned from the date of her dismissal, 14 February 2006 to the 1st day of March 2006.**
- vii) **Ms Callen is to be paid \$1000.00 pursuant to s.123 (1) (c) (i) of the Employment Relations Act 2000. That amount is to be reduced by 20%.**

Costs.

[50] Costs are reserved. The parties are requested to attempt to resolve that matter themselves. In the event that costs are not resolved, Mr Mark is invited to file submissions with the Authority and copy to Ms Sanderson within 28 days of this determination. Ms Sanderson will have a further 14 days to respond and copy to the Authority and Mr Mark.

Counterclaim.

[51] In an amended statement in reply, Ms Sanderson made a counterclaim against Ms Callen. The counterclaim was global and stated large amounts of dollars that were being claimed for damages, loss of business, personal stress, and the difference between the amount Ms Sanderson sold her business for as opposed to what she says it was really worth and should have sold for. The claim was not particularised, nor was it laid out fully enough or with sufficient detail to enable a thorough investigation.

[52] At the Investigation meeting held in Whangarei, I advised Ms Sanderson that she can pursue the counterclaim with more and much needed detail at another, separate investigation meeting. I have since set a meeting date and timetable for the counterclaim investigation, however Ms Sanderson advises that she is currently not well and due to her health she will not be able to meet the timetable, or attend the meeting and has requested an adjournment.

[53] Ms Sanderson's counterclaim against Ms Callen is adjourned sine die.

Ken Raureti
Member of Employment Relations Authority