

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 59/08
5098470

BETWEEN	KIM MACDONALD Applicant
AND	TRACY GIFKINS t/a GREY LYNN VETERINARY CLINIC First Respondent
AND	GREY LYNN VETERINARY CLINIC LIMITED Second Respondent

Member of Authority: Robin Arthur

Representatives: Glenn Finnigan, Counsel for Applicant
No appearance for Respondents

Investigation Meeting: 8 February 2008 at Auckland

Determination: 22 February 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, a veterinary nurse, says she was unjustifiably dismissed – either directly or constructively – in early August 2007. She seeks lost wages from 6 August 2007 until the date of the investigation meeting and for an unspecified period beyond; an order for payment of holiday pay and return of personal property; distress compensation of \$15,000; and compensation for loss of benefit of attending a professional conference in Australia. She also seeks penalties against her former employer for contractual and statutory breaches and her legal costs.

[2] The respondents, through a statement of reply lodged in September 2007 by solicitors then acting for them, deny the Applicant was dismissed in any sense.

Rather they say the Applicant resigned and was, in any event, employed only by the Second Respondent and not the first.

[3] The respondents later ceased to instruct representatives in this matter and did not comply with a direction to mediation made in November 2007. I have had inquiries made through a support officer of the Authority and am advised that the First Respondent told the Mediation Service that she was not willing to discuss a date for mediation. I was advised in November 2007 by a solicitor then acting for the respondents that the First Respondent had matters in the District Court and the Family Court to attend to but, despite my requests, no further information was provided on why the respondents could not attend to mediation and investigation of the present employment relationship problem.

[4] I am aware from a report in the *New Zealand Herald* that the First Respondent appeared in the District Court at North Shore in late November 2007 to plead not guilty to charges of theft of an animal.

[5] The online register of the Veterinary Council of New Zealand shows the First Respondent's current registration status as "*suspended*".

The investigation

[6] A notice of investigation meeting for this matter was issued on 29 November 2007 along with a Minute setting out the timetable for lodging witness statements in advance of the investigation meeting scheduled for 8 February 2007.

[7] At the same time, the parties were also directed to mediation but as noted above the respondents did not attend mediation and would not agree to a date to do so. Neither did they lodge any witness statements or attend the notified investigation meeting.

[8] I am satisfied that the respondents have had adequate notice of the investigation and opportunity to participate in it. Notice of the investigation meeting was sent to solicitors then acting for the respondents. While that firm of solicitors has since ceased to act for the respondents, I have no reason to doubt that the respondents were aware of the notice at the time it was issued. Copies of documents subsequently lodged by the Applicant in the Authority have been sent to the respondents. The most recent correspondence was a Minute of the Authority dated 29 January 2008

confirming, amongst other things, that the investigation meeting scheduled for 8 February would proceed. A copy of that Minute was sent addressed to the First and Second Respondents at an address in Westmere, Auckland. That address is the physical address at which the Applicant worked in the veterinary clinic and is the registered office address and address for service given for the Second Respondent in a current Companies Office records. Those records also give that location as the address of its sole director, the First Respondent. Courier records confirm that this Minute was received at that address.

[9] No one appeared for the respondents at the appointed time on the day of the investigation meeting. At my request, a support officer of the Authority attempted to contact the First Respondent on both a mobile number and an office number for her that had been provided to the Authority by her former solicitors. The officer was not able to contact her and left messages at both numbers. Having waited 30 minutes, I proceeded with the investigation meeting. The notice of investigation meeting advises in a note that if a respondent does not attend the investigation meeting the Authority may, without hearing evidence from the respondent, issue a determination in favour of the Applicant. Clause 12 of Schedule 2 of the Employment Relations Act 2000 (“the Act”) provides that the Authority may act fully on a matter where, without showing good cause, any party fails to attend or be represented. The respondents have not shown any good cause for the Authority not to investigate and determine the Applicant’s claim which I now proceed to determine.

[10] Information available for my investigation included the statements of problem and reply, a witness statement from the Applicant, relevant background documents provided by the parties, and the Applicant’s answers to questions in the investigation meeting. The Applicant had also lodged an affidavit from a friend and neighbour but I have not had to rely on its contents in preparing this determination. The Applicant’s counsel also provided brief written and oral submissions on the issue of the identity of the employer and whether penalties should be awarded against the two respondents.

[11] Findings of fact in this determination are based on the unchallenged affirmed evidence of the witness corroborated where possible by reference to the relevant documents.

The issues

[12] The issues arising for resolution in this determination include:

- (i) Was the Applicant employed by the First Respondent or the Second Respondent?
- (ii) Was the Applicant unjustifiably dismissed, directly or constructively, on 3 or 6 August 2007?
- (iii) If the Applicant was unjustifiably dismissed, what remedies are due to her?
- (iv) Are penalties required for the respondents' failure to provide wage time and leave records and not returning personal property of the Applicant?

The Applicant's employer

[13] In June 2006 the Applicant was employed on a part time basis to work at a veterinary clinic at 153 Garnet Road, Westmere ("the clinic"). In October 2006, she accepted an offer of a full time job at the clinic. She had no written employment agreement. At the Applicant's instigation, she and the First Respondent discussed a written agreement based on a form available to members of the New Zealand Veterinary Nurses' Association. The terms of this agreement were finalised and signed on 14 June 2007. A First Schedule detailed the hourly rate, hours of work, sick leave and a remuneration review date.

[14] The description of the employer is given as: *Grey Lynn Vet Clinic/Tracy Gifkins*. This was handwritten onto the agreement form by the Applicant but each page of the agreement was later initialled by the First Respondent who also signed the First Schedule.

[15] By its statement in reply, the respondents assert there is no employment relationship between the Applicant and First Respondent. Rather they say the Applicant was employed solely by the Second Respondent. I do not accept that assertion. There is no reference to a limited liability company on the employment agreement.

[16] Companies Office records show the First Respondent was the sole director of the Second Respondent from at least 2002. If the First Respondent, in discussing an employment agreement with the Applicant in June 2007 had intended the employer to be the Second Respondent, she would most likely have discussed it at that time. She did not.

[17] I accept the Applicant's evidence that she had not seen or heard any reference to such a company during the period of her employment and that it was not referred to on invoices given to clients or business cards. Every indication available to the Applicant was that her employment was directly with the First Respondent who operated the clinic under the trading name Grey Lynn Veterinary Clinic and without reference to a limited liability company.

[18] Inland Revenue Department records, obtained by the Applicant and setting out her income and deductions made for PAYE, give the "*employer or payer*" as "*Trustees in the Van Der Oest Trading*". However there is no information from the Applicant or suggestion from the respondents that the Applicant was employed by a trust.

[19] On the balance of probabilities, I am satisfied that the Applicant's employer was the First Respondent and not the Second Respondent. Even if it had been the intent of the respondents that the Applicant be employed by the Second Respondent, it is more likely than not, on the information available to me, that the identity of that legal entity was never disclosed to the Applicant. If the Second Respondent was the undisclosed principal, the First Respondent was its agent and never made the identity of the Second Respondent plain to the Applicant. Not having discharged that onus, personal liability rests on the First Respondent. If an election is required in such circumstances, Mr Finnigan advised that the Applicant chose to pursue the First Respondent: *Cuttance v Perkis* [1994] 2 ERNZ 321, 333 applies. See also

How the employment ended

[20] On 2 August 2007, the Applicant talked with the First Respondent about a number of concerns. She told the First Respondent that she was unhappy about additional hours of work required of her on evenings and Saturdays and the stress of dealing with clients who were dissatisfied when the First Respondent cancelled appointments, was late for consultations or was not able to be contacted by telephone

while away from the clinic, which the Applicant said was a regular occurrence. The Applicant asked the First Respondent to consider giving her a pay rise to recognise the high work load and level of responsibility.

[21] The First Respondent told the Applicant she should “*hang on*” until a new nurse started work in the next few weeks. She also told the Applicant that her pay would be reviewed in a formal salary review. Although the date for that review was not mentioned, the Applicant’s employment agreement shows the review was due on 29 August. The First Respondent also told the Applicant that arrangements already made to pay her airfares and expenses to attend an international veterinary conference in Sydney from 19 to 23 August were to be treated as recompense for extra hours and working alone in the clinic.

[22] The Applicant was dissatisfied with the First Respondent’s response but returned to work and remained at the clinic until around 7pm.

[23] After arriving home that evening the Applicant sent the First Respondent a text message saying that she was not up to coming into work the next day, a Friday. She had contracted the flu some days earlier but remained at work. Her aunt had died earlier in the week and the Applicant’s father had recently been in hospital.

[24] Around 9.30am the next morning the First Respondent rang the Applicant at home. The First Respondent asked if the Applicant was coming in to work. The Applicant replied that she “*wasn’t up to going into work*” and had sent a text the previous evening. The two women then briefly discussed the issues about hours and working alone at the clinic that they had talked about the previous afternoon. The First Respondent then said: “*So we have hit a wall then*”. After saying that she wanted to stay friends with the Applicant, the First Respondent then said: “*We need to part ways*”. The conversation ended with the First Respondent saying that she had a client and hanging up the phone.

[25] From that conversation the Applicant says she thought she had been dismissed but was not completely certain of this. She then sent the First Respondent an email asking her to “*clarify in writing*” what the words “*we need to part ways*” meant for her “*employment status*”.

[26] By the morning of Monday, 6 August the Applicant has received no reply to that email. Although she says that she was “*reasonably certain*” that the First

Respondent had meant to dismiss her, she decided to go to work that morning “*just in case*”.

[27] On arrival at the clinic at around 7.30am she found a client waiting outside with a cat needing to be euthanized. However when the Applicant tried to open the clinic doors she found that her keys did not work and quickly realised that the locks had been changed.

[28] She then sent this text to two mobile numbers used by the First Respondent: “*I am at clinic to open up it seems u have changed the locks? Have a client here are u opening the clinic today and what is my employment situation?*”

[29] Around ten minutes later she tried to phone the First Respondent on both mobile numbers. The First Respondent answered one call but cut off the call after the Applicant identified herself.

[30] The Applicant says that “*it was at this point that I realised that [the First Respondent] really had intended to end my employment*”.

[31] Later that day the Applicant sent the First Respondent a further email setting out the events of the morning and stating: “*taking all this into account, I have take it (sic) that you have terminated my employment and therefore I am seeking legal advice*”.

[32] Two days later the Applicant received a telephone call from a man identifying himself as Scott Leith. She says that Mr Leith told her that he was authorised by the First Respondent to resolve matters with her. He asked the Applicant what she wanted to settle the matter. She asked Mr Leith to contact her lawyer to discuss that but made an appointment with him to pick up personal property from the clinic. The next day she sent Mr Leith a text with her lawyer’s contact details.

[33] Mr Leith later rang to cancel the appointment for collection of personal property. Some of her property was later returned through her lawyer’s office but the Applicant says a number of items have still not been returned to her.

[34] Several weeks later the Applicant rang the Police to ask if they would help get her property back. She understands that a Police officer did attend the clinic and

speak to the First Respondent. The Applicant was later visited by a Community Constable who served her with a trespass notice at the First Respondent's request.

Determination

[35] I am satisfied that the termination of the Applicant's employment occurred in an unequivocal fashion on Monday, 6 August 2007 when she arrived at the clinic to find the locks of her workplace had been changed without notice to her. It is also more likely than not that the words of the First Respondent about parting ways spoken on 3 August were words of dismissal. If they were not, she would have advised the Applicant of the change of locks and made arrangements for the Applicant to get into the clinic on the Monday.

[36] The actions of the First Respondent on both days, taken together, were clearly intended to 'send away' the Applicant and amount to a dismissal. I find that this dismissal was unjustified because it was not what a fair and reasonable employer would do in all the circumstances at the time.

[37] The Applicant had earlier expressed a number of complaints about her work and conditions but the First Respondent has responded in an unfair and unreasonable manner by dismissing the Applicant rather than meeting her obligations to address those concerns in a manner consistent with her good faith obligations to be constructive and responsive: s4(1A) of the Act.

[38] The Applicant has a personal grievance for unjustified dismissal and I must consider what remedies are required to settle the grievance.

Remedies

Lost wages

[39] The Applicant is entitled to reimbursement under s123(1)(b) and 128 of the Act for wages lost as a result of the grievance.

[40] The shock and distress of the sudden manner of her dismissal affected the Applicant's health and confidence in seeking alternative full-time employment. She has been on a sickness benefit from 11 August 2007 until recently but was also able to secure a part-time job at an after-hours veterinary clinic where she earned \$2150 gross between late August and early December 2007.

[41] An assessment of lost wages includes an allowance for the contingencies of life, considers the efforts of the Applicant to mitigate her loss by steps such as finding another job, and deducts earnings made in the period for which lost wages are granted.

[42] In the circumstances of this case I consider an award of lost wages for the period from 6 August to 23 November 2007, that is 16 weeks, is the appropriate measure of loss.

[43] I do not consider a longer period is warranted for these reasons. While the Applicant has remained without full-time work from the time of her dismissal until the date of the investigation meeting, it was clear from her evidence that she has not pursued some employment opportunities in other veterinary clinics because of her personal or moral views about how they practice. While she says that her job search is hampered by not having a reference from her most recent full-time employer, the First Respondent, and the dismissal has damaged her reputation in the very small veterinary industry, she also has very positive references from other practising veterinarians with whom she has worked previously and at her present part-time job. She also has other skills from previous work experience with which she could have sought alternative or additional work. Prior to the investigation meeting the Applicant also had a month's "time out" in Australia and that cannot be fairly included in the lost wages period.

[44] Although the Applicant says she loved her job at the First Respondent's clinic and would have stayed there, I have also allowed for the contingency that she may well have continued to find the situation unsatisfactory and sought a job elsewhere.

[45] The First Respondent has not provided wage and time records properly requested by both the Applicant's lawyer and a Labour Inspector. In the absence of those records I have relied on the Applicant's best assessment of her average wages, based on her usual hourly rate and the amount of overtime for which she was paid and IRD records of her gross earnings for the first three months of the tax year in 2007. Accordingly I assess the Applicant's gross weekly wage to be \$790 which for the 16 weeks lost wages awarded totals \$12,640. From that amount must be deducted the Applicant's earnings in her part-time job in the period for which lost wages are awarded, which I assess as \$2000. The gross award for lost wages is \$10,640.

[46] Once she has received payment of this award from the First Respondent, the Applicant may need to account to Work and Income New Zealand for the amount of sickness benefit received in the period for which lost wages has been awarded. That is left as a matter for her to discuss with WINZ in due course.

Holiday pay

[47] The Applicant has claimed an additional amount for holiday leave owed to her for the entire period of her employment. Because the First Respondent has not provided wages, time and leave records against which this claim might be checked, I have relied on the Applicant's evidence in assessing the holiday pay owed to her.

[48] She has a notebook recording leave days taken among personal property not returned to her from the clinic.

[49] The Applicant recalls taking "*only one or two days of annual leave*" and any other days off being, by agreement with her employer, time in lieu for unpaid overtime worked.

[50] Based on IRD records and her own information the Applicant says her gross income was \$28,862 from June 2006 to the end of July 2007. To that must be added the amount of lost wages awarded of \$10,640 for the period to the end of November 2007. From the total sum of \$39,502 I deduct two days ordinary pay totalling \$288, leaving \$39,214 and calculate holiday pay owed on that total, at 8 per cent, as being \$3137.

[51] This amount is awarded in part under s123(1)(b) of the Act as other money lost and in part under s123(c)(ii) of the Act as loss of a benefit expected.

Compensation

[52] The Applicant suffered humiliation, loss of dignity and injury to feelings as a result of her abrupt unjustified dismissal. On 6 August she was humiliated by standing with a client and being unable to open the door of her workplace because her employer had changed the locks without telling her. She has felt humiliated that some people among the relatively small veterinary industry believed the termination of her employment was due misconduct by the Applicant. The humiliation was compounded by petty behaviour of the First Respondent in not properly providing for

the return of all the Applicant's personal property at the clinic and arranging for what appears to have been unnecessary steps to have a trespass order served on the Applicant. Information from her doctor confirms that from August last year the Applicant suffered panic attacks, insomnia and depressive symptoms that she had not suffered previously and which appear connected to the circumstances of her dismissal.

[53] In all the circumstances of her dismissal, the Applicant is entitled to an award of compensation under s123(1)(c)(i) of the Act which I set at \$8000.

Return of property

[54] It is inconsistent with the mutual obligation of trust, confidence and fair dealing implied into every employment agreement for the employer to refuse to make reasonable arrangements for the return of all of the Applicant's personal property.

[55] Correspondence from the Applicant's lawyers to solicitors acting at the time for the respondents identify the following property as not having been returned: Unitec course notes (other than a particular named text book), Vet nurse course notes, NZ Veterinary Nurses Association magazines, NZVNA membership card and work book, her timesheets and a particular cat poster.

[56] The Applicant's evidence was that she has been and continues to be deprived of the benefit of consulting her course notes and other material about veterinary issues as they arise in her present part-time job and may arise in any future veterinary jobs. Without return of that property she faces considerable time and expense attempting to recreate that personal reference resource.

[57] The First Respondent is directed to make arrangements for return of the identified property to the Applicant's lawyer's office within 14 days of the date of this determination. If this is not done within 14 days, the compensation awarded by this determination is increased by \$2000, being compensation for loss of a benefit, whether or not of a monetary kind, which the Applicant might have reasonably obtained if the grievance had not arisen under s123(1)(c)(ii) of the Act.

Loss of other benefits

[58] As a result of her abrupt dismissal the Applicant also lost the benefit of attending a useful and prestigious international industry conference. Attending the

conference would have enabled her to meet the ongoing professional development programme requirements of the Veterinary Nurses Association for at least one year, possibly longer.

[59] While she was offered the airline tickets after her grievance was raised, the First Respondent had cancelled the Applicant's conference booking. Recently dismissed, without income, the Applicant could not afford to attend the conference under her own steam.

[60] I accept that missing the opportunity to attend that conference amounts to a loss of a benefit that would not have occurred but for the grievance. While no precise monetary amount can be set for that loss, the sum of an additional \$1000 is awarded under s123(1)(c)(ii) of the Act to mark that loss.

Contribution

[61] I have considered whether any reduction of the remedies awarded to the Applicant is required under s124 of the Act.

[62] The Applicant had raised certain concerns with her employer and after an unsatisfactory conversation decided not to attend work the next day. While that action may have precipitated the employer's words and actions of dismissal, it does not amount to conduct sufficiently blameworthy to require reduction of remedies. The Applicant clearly remained open to addressing issues with her employer in good faith, and took steps to do so by attending work on 6 August where she, I accept, hoped to talk with the First Respondent and resolve issues about work in the clinic in the hope of continuing to work there.

Penalties

[63] The Applicant seeks penalties against the First Respondent for failing to return her personal property, breaching her contractual and statutory obligation to pay holiday pay, and for failing to provide wage, time and holiday records properly requested by the Applicant's lawyer under s130 of the Act.

[64] I consider that the remedies already awarded satisfactorily deal with the issues of personal property and holiday pay.

[65] The First Respondent has breached obligations to provide records under s130 and has shown no good reason for that failure. The Act provides for the Authority to impose a penalty in such circumstances and I accept it is appropriate to do so, but with the penalty to go to the Crown and not the Applicant as sought by her.

[66] The First Respondent is to pay a penalty of \$500 to the Authority, for transfer to the Crown Account, for her breach of s130(2) of the Act.

Summary of determination and remedies.

[67] I have found the Applicant was employed by the First Respondent.

[68] I have found the Applicant was unjustifiably dismissed by the First Respondent and has a personal grievance.

[69] The grievance is to be settled by the following remedies. The First Respondent is to pay to the Applicant the following sums:

- (i) \$10,640 in lost wages for the period from 6 August to 23 November 2007, under s123(1)(b) and s128 of the Act; and
- (ii) \$3137 in holiday pay owing for the period from 6 June 2006 to 23 November 2007, under s123(1)(b) and s123(c)(ii) of the Act; and
- (iii) \$8000 as compensation for humiliation, loss of dignity and injury to feelings, under s123(1)(c) of the Act; and
- (iv) \$1000 as compensation for loss of benefit of attending the Australian conference, under s123(c)(ii) of the Act.

[70] The First Respondent is also directed to return identified personal property of the Applicant through her lawyer within 14 days of the date of this direction. In the event of failing to do so, the First Respondent is to pay to the Applicant an additional \$2000 as compensation for loss of benefit of use of those materials, under s123(c)(ii) of the Act.

[71] The First Respondent is to pay to the Employment Relations Authority for transfer to the Crown Account the further sum of \$500 for breach of s130 of the Act.

Costs

[72] The Applicant is entitled to a reasonable contribution to her costs in bringing this application. If the parties are unable to agree costs and the Applicant wishes the Authority to determine costs, the Applicant may lodge and serve, within 28 days of this determination, a memorandum on costs. The First Respondent will have 14 days from the date that memorandum is served on her to lodge a reply before the Authority determines the matter.

Robin Arthur
Member of the Employment Relations Authority