

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 365
5560765

BETWEEN	MICHELLE McGREGOR Applicant
A N D	AUCKLAND CITY SECURITY LIMITED, previously NZ TACTICAL CANINES LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Thuzar Win, Advocate for the Applicant No appearance by or for the Respondent
Investigation Meeting:	9 November 2015
Date of Oral Determination:	9 November 2015
Date of Written Record:	25 November 2015

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Non-appearance of the respondent

[1] NZ Tactical Canines Limited has failed to file a Statement in Reply or to attend the investigation meeting. Mr Kevin Robertson is recorded as having received a copy of the Statement of Problem on 24 July 2015. Until 16 July 2015, Mr Robertson was the sole shareholder and director of NZ Tactical Canines Limited.

[2] On 16 July 2015 Ms Donna Ayris became the sole director and shareholder of the company which then changed its name on 27 July 2015 to Auckland City Security Limited. The Statement of Problem was then served on the new address for service as listed on the Companies Register on 2 September 2015. The Authority received a response from Ms Ayris on 2 September 2015 by way of telephone call, during which

Ms Ayris advised that the respondent would not be responding to the Statement of Problem.

[3] On 7 September 2015 the Notice of Investigation Meeting was served on the registered office of NZ Tactical Canines Ltd (now Auckland City Security Ltd). The Notice of Investigation Meeting was also sent to Mr Robertson at NZ Tactical Canines Ltd's previous registered office address.

[4] The Authority Officer has attempted to contact Ms Ayris this morning by telephone to ascertain the company's whereabouts. A message was left, but no reply was received.

[5] I am satisfied that the respondent was properly served with the Statement of Problem together with a notice of this investigation meeting. No good cause has been shown for the respondent's absence. In these circumstances, I proceed to investigate the matter in the absence of the respondent.

The employment relationship problem

[6] The applicant, Ms Michelle McGregor, alleges that she was unjustifiably dismissed and is owed arrears of wages and holiday pay by the respondent. Ms McGregor was employed by NZ Tactical Canines Limited from 12 March 2015. This was her first employment as a dog trainer. She was not provided with a written employment agreement before or when she started work. However, she was later provided with a written agreement but did not sign it. She did verbally agree with Mr Robertson that she would work some of her hours as a dog trainer, running puppy classes, and some hours doing office duties.

[7] Ms McGregor worked from Monday to Friday from 9am to 4pm, although this varied in practice, and was to be paid \$18 gross per hour for office work and \$25 gross per hour for training dogs.

Issues

[8] There are four issues for the Authority to determine:

- (a) Was Ms McGregor dismissed by the respondent?;
- (b) If so, was that dismissal unjustified?;

- (c) If so, what remedies should the applicant receive?; and
- (d) What, if any, arrears of wages and holiday pay are owing from the respondent to Ms McGregor?

Evidence

[9] At the investigation meeting the applicant advised that the telephone on which she had made and received various text messages with Mr Robertson and his wife, Cassie Robertson, was broken. She had contacted Vodafone in an attempt to retrieve text messages, but this was not possible.

[10] Ms McGregor was the sole witness in support of her case. She provided payslips from the respondent and her bank statements for the period from March to October 2015. She also provided some email correspondence with Cassie Robertson and also material regarding her attempts to find work after finishing with the respondent.

[11] Under s.174A of the Employment Relations Act 2000 (the Act) I will not be referring to all of the evidence which I have heard. I will be making findings in order to dispose of this matter as efficiently as possible.

Dismissal

[12] Ms McGregor says that she worked for NZ Tactical Canines Ltd from 12 March until May 2015. Her office work included the development of class content ideas for puppy training and marketing. She was based at the rental property of Mr and Mrs Robertson in Kumeu.

[13] Ms McGregor was aware that another business owned by Mr Robertson in the security field seemed to be struggling as their security guards would arrive at the Robertsons' property saying they had not been paid.

[14] On or about Sunday, 10 May 2015, Ms McGregor received a text message from Mr Robertson advising her not to go into work the next day as he would be busy with meetings.

[15] On Tuesday, 12 May 2015, Ms McGregor went into work as usual. Mr and Mrs Robertson met with Ms McGregor and another staff member, Michelle Wright,

and told them that they (the Robertsons) had to move. They said that the puppy classes would have to stop until they could find an appropriate place to hold them. Ms McGregor was told to take a work laptop home and to work on office work from there. The Robertsons indicated that they had to move in the next week or two and were looking for new premises. Mr Robertson said he would keep in contact with the applicant through weekly meetings at Michelle Wright's house. Ms Wright had a pre-existing connection with Mrs Robertson.

[16] Ms McGregor says that she did not work for the period from 13 to 15 May but that she worked for six hours per day on 18, 19 and 20 May 2015. She was not advised of any meetings at Ms Wright's house.

[17] On 19 May 2015, Ms McGregor went into her workplace to ask about her pay and to find out what was happening. She assisted with the packing up of the office. During this time, she overheard Mr Robertson say that they were moving into his little sister's house. He referred to Royal Road in Massey, but not to a house number. Ms McGregor received the impression that this was just a temporary move because the Robertsons had had to move out of the Kumeu property quickly. Nothing specific was said to indicate to Ms McGregor that her employment had finished.

[18] From 20 May onwards, Ms McGregor attempted herself to contact both Mr and Mrs Robertson by text and voicemail message on many occasions, asking them to contact her. Her text messages included asking what was happening about her pay and her job. Mr Robertson did not return Ms McGregor's messages and until 8 June 2015 did not text her. Ms McGregor attempted to ring from other phone numbers. Ms McGregor's partner phoned Mrs Robertson on Ms McGregor's behalf from his phone. Mrs Robertson answered, but denied responsibility saying that it was Mr Robertson's business.

[19] Ms McGregor also contacted Ms Wright to see if she knew more about what was happening with their jobs, but Ms Wright said she did not.

[20] On or before 25 May, Ms McGregor was able to contact Mrs Robertson on one occasion and request money to be paid as she needed to buy food. As a result, she was paid \$400 by the respondent on 25 May.

[21] On or about 8 June, Ms McGregor received a text from Mr Robertson stating that he was waiting for a client to pay them and then he would pay her. Ms McGregor texted back asking if she still had a job, but received no reply.

[22] Ms McGregor received no further communication from Mr Robertson.

[23] Ms McGregor gave evidence that she did not resign from her position with the respondent nor did she agree to her employment finishing.

[24] The respondent did not attempt to recover its laptop from Ms McGregor. After some time, Ms McGregor texted Mrs Robertson about the laptop and Mrs Robertson replied that Ms McGregor should go ahead and sell it. That occurred and \$270 was received by Ms McGregor.

[25] I find that Ms McGregor attempted on a number of occasions in May and June to contact the respondent's director, but received no response other than one text on 8 June from Mr Robertson.

[26] Ms McGregor considered that her employment was terminated by the respondent effective on 21 May 2015.

[27] A dismissal is the termination of the employment relationship at the employer's initiative (*Wellington Taranaki and Marlborough Clerical etc IUOW v. Greenwich (t/a Greenwich & Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95).

[28] So was this termination at the employer's initiative? Ms McGregor made extensive efforts to contact Mr Robertson including many voice messages and texts. If she had misunderstood what was going on, then the duty of good faith under s.4 of the Act required the employer to get in contact with her to clarify the situation: *New Zealand Cards v. Ramsay* [2012] NZEmpC 51.

[29] The respondent's director appears to have moved himself and the business to other premises, but did not inform the applicant of the exact address. He did not ask her to attend the previously referred to weekly meetings or for her to work at any new business premises. This amounted to a breach by the respondent of its contractual obligations to Ms McGregor.

[30] I find that this amounted to a sending away by the respondent and thus a dismissal effective 21 May 2015.

Was the dismissal unjustified?

[31] The applicant alleges that her dismissal was unjustified because it was without proper procedure and without sound justifiable reason. Under s.103A of the Act, the question of whether a dismissal is justified is an objective one based on whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time.

[32] Section 103A(3) lists four factors which the Authority must consider, which are essentially whether there has been a sufficient investigation, whether the concerns have been raised with the employee, whether the employee has had a reasonable opportunity to respond and whether the employer genuinely considered any explanations.

[33] The onus is on the employer to show that the dismissal was both substantively and procedurally justified: *Wellington Road Transport etc IUOW v. Fletcher Construction Company Ltd* (1982) ERNZ Sel Cas 10.

[34] In the present case, there has been no evidence provided by the respondent of any substantive reason for the dismissal. In terms of the procedure, there is no evidence that the respondent investigated any allegations against the applicant, put any concerns to her, thus the applicant had no opportunity to respond to any allegations and the respondent did not consider any response which the applicant may have had.

[35] I find that the applicant's dismissal was unjustified as the actions were not ones which a fair and reasonable employer could have taken in all the circumstances. I accept Ms McGregor's claim that she was dismissed without proper procedure and without sound justifiable reason. She was also dismissed without notice.

Remedies

[36] In terms of remedies, I look firstly at the issue of arrears of wages and holiday pay. Ms McGregor is claiming payment for two things here:

- (a) Three weekly pays specified on payslips dated 26 April 2015, 3 May 2015 and 10 May 2015. Although the payslips were provided to Ms McGregor, she did not receive payment. These amounts total \$1,420 gross; and
- (b) Twenty one hours of work, being seven hours on each of 18, 19 and 20 May 2015. At the \$18 rate for office duties, this amounts to \$378 gross (this amount is different to that specified orally, as there was a miscalculation, and this difference flows through to the corrected figures below).

[37] I find that both these amounts were owed to the applicant, amounting to \$1,798 gross. However, the applicant has received payment of \$400 on 25 May 2015 and \$270 being the proceeds of the laptop which Mrs Robertson authorised the sale of. Therefore, deducting \$670 there are outstanding wages of \$1,128 gross.

[38] In terms of holiday, Ms McGregor is owed holiday pay of 12.04 hours (according to the payslip of 10 May 2015) amounting to \$216.72. She is also entitled to 8% of the outstanding pay for 18, 19 and 20 May 2015 which is \$30.24. I therefore find that Ms McGregor is entitled to \$246.96 gross of holiday pay.

[39] As the respondent has had the benefit of this money and the applicant has not been paid when she should have been, I award interest on the wage arrears and holiday pay outstanding at the prescribed rate under the Judicature Act 1908 calculated from 21 May 2015.

Lost wages

[40] The applicant claims lost wages at an average rate of \$455.40 gross per week. She claims that for the period from 21 May to 16 October 2015, when she was able to obtain permanent employment. However, the applicant was overseas for a holiday for a month in August and I therefore deduct four weeks from the amount claimed.

[41] I find the applicant is entitled to the sum of \$7,741.80 gross (being 17 weeks' pay at \$455.40 per week) less \$2,685.50 earned through casual childminding work and one other short job during the period. She is thus awarded \$5,056.30.

Compensation under s.123(1)(c)(i) of the Act

[42] The applicant claims compensation for distress of \$7,000 under s.123(1)(c)(i) of the Act. Ms McGregor says that she has suffered immense emotional and financial distress as a result of her dismissal.

[43] I accept that Ms McGregor was upset and distressed as a result of her dismissal and has lost trust in the reliability of future employers. Her relationship was put under pressure and she had to divert money from a home renovation project in order to support herself.

[44] I award Ms McGregor the sum of \$4,000 as compensation under s.123(1)(c)(i) of the Act.

[45] I find there was no contribution on Ms McGregor's part for the purposes of s.124 of the Act.

Costs

[46] The applicant has sought costs for her representation and I award those on the basis of a half day of hearing time at the standard Authority tariff rate. The applicant is therefore awarded \$1,750 in costs.

Nicola Craig
Member of the Employment Relations Authority