IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 165
5515268

	BETWEEN	NATALIA BAKER Applicant
	A N D	MARY McLEOD t/a KIDS COUNT EARLY CHILDHOOD EDUCATION CENTRES Respondent

Member of Authority:	James Crichton
Representatives:	Rowland Ingram, Advocate for the Applicant Respondent in person
Investigation Meeting:	16 April 2015 at Manukau
Date of Determination:	10 June 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Baker) alleges that she was unjustifiably dismissed by the respondent (Ms McLeod) and also contends that she was improperly subjected to a disciplinary warning by Ms McLeod. Both contentions are denied.

[2] Ms Baker was employed at one of Ms McLeod's early childhood education centres as a Van Driver. As such, her duties were principally to do with the collecting of the children who attended the centres and delivering them home again. The employment was subject to a written individual employment agreement. The employment commenced in 2012 when the employment agreement between the parties was also executed.

[3] Ms Baker was issued with a disciplinary warning on 23 July 2014 because of a failure to attend a professional development session organised by the employer on

23 June 2014. Ms Baker complains that the disciplinary warning does not comply with the employer's own policy nor indeed with the terms of the employment agreement; that allegation is denied by Ms McLeod.

[4] Then on 28 July 2014, Ms Baker attended at the workplace for the final time. She says that she was dismissed on that date; Ms McLeod says, to the contrary, Ms Baker finished her shift after an altercation with the Centre Manager but then subsequently abandoned her employment.

[5] The bulk of the factual matrix around the end of the employment is not in dispute. Ms Baker returned from her morning van run to the centre at around 8.45am. She was standing waiting outside the women's toilet when she was approached by Luke Loxton, the Centre Manager.

[6] Mr Loxton sought to engage Ms Baker in respect to a document called a sign in sheet. This document was supposed to be executed by parents when their child was put into the van to be taken to the Centre each morning; the parent initials that the child has been collected and the time that that happens is then recorded.

[7] It is common ground that there were some incomplete aspects of the form and Mr Loxton was seeking Ms Baker's assistance; put shortly, Ms Baker refused to assist him. She said first it was not her job and second she was waiting to use the toilet because she thought she might have diarrhoea.

[8] Shortly thereafter, Ms Baker moved to the Centre kitchen and Mr Loxton reappeared with another form, this document being the *"Centre Base sign in sheet"* on which one or other of the staff members in the Centre van signed the children into the Centre, that is, signed to indicate that the child had arrived at the Centre. Ms Baker accepted this form could be her responsibility and she made the alteration requested by Mr Loxton.

[9] However, it seems that that alteration was made with poor grace (the evidence is that Ms Baker flicked Mr Loxton's pen back at him rather than handing it to him), and Mr Loxton says that as it was near the end of her shift, he directed Ms Baker to *"just leave"* or words to that effect.

[10] Then it seems that Mr Loxton sought to engage with Ms Baker again to address her manner but it seems common ground that she carried on exiting the

premises and at the point at which she got to the gate, Mr Loxton said something to the effect *"if you leave then don't bother coming back"* and according to Ms Baker only, he then added *"that's it you're fired don't ever come back"*.

[11] Ms Baker, at the time, lived directly opposite the centre that she worked at and immediately that she got home after this altercation with Mr Loxton, she realised that she still had the vehicle keys in her pocket. She accordingly rang the Centre and asked for instructions to return them. She says this tends to support her contention that at the time she believed that her position had been brought to an end by the action of the employer.

[12] She also rang Work and Income New Zealand (WINZ) and sought its advice about how to obtain the benefit again given her belief that she had just been dismissed. Ms Baker's evidence to me was that WINZ told her it thought the dismissal sounded unfair and that she should get advice.

[13] Accordingly, Ms Baker promptly contacted her advocate and within a matter of hours of the events just described, her advocate, Mr Ingram, provided the employer with a personal grievance letter alleging the employer had unjustifiably dismissed Ms Baker. There was no immediate response from the employer to that personal grievance letter. In particular, there was no immediate denial of the alleged circumstances of the dismissal. Again, Ms Baker relies on that fact as evidence for the view that the allegation she abandoned her employment is a post-dismissal rationalisation.

[14] I have to remark that the parties' engagement with each other post the termination of the employment seems to have been characterised by an unhelpful enthusiasm to score points rather than a collaborative approach to try to seek a resolution of the matter by agreement. Accordingly, the matter proceeded to the Authority after an unsuccessful mediation and it now falls for me to determine the matter.

Issues

[15] There are only two issues in contention. The first is whether the disciplinary warning was properly administered or not and the second is whether Ms Baker was unjustifiably dismissed or abandoned her employment.

Was the disciplinary warning correctly administered?

[16] Ms Baker's objection to the disciplinary warning is based first on its justification and second on the procedure the employer adopted. Dealing first with the question of justification, Ms Baker says that what she did could not constitute serious misconduct although it is apparent from the letter prepared by Mr Loxton confirming the warning that the employer considered the matter was serious misconduct.

[17] The Authority has been provided with a schedule to the employment agreement entitled *"Schedule 2 – Misconduct and serious misconduct"*. That document identifies failure to follow a lawful and reasonable instruction of the employer as an example of serious misconduct. Ms Baker protests that she has never seen this document before, at least until these proceedings were on foot.

[18] That may be right, but there is little doubt that she saw her own employment agreement and it contains an absolutely explicit provision which the employer relies upon requiring the employee to attend professional development sessions, whether they are held within work time or not. It was this very issue that resulted in Ms Baker receiving a warning.

[19] The evidence is that Ms Baker gave Ms McLeod's agent a series of excuses for not being able to attend the professional development session in question and she rehearsed the same excuses in evidence before me.

[20] Those excuses or explanations do not avail her; the clause in question in the employment agreement requires that she attend whether in her time or in the employer's time. The fact that she refused to attend entitled the employer to give her a warning.

[21] I agree with Ms Baker to this extent that the warning itself is not perhaps as artfully worded as it might be. First, it refers to the wrong operative clause in the employment agreement so it would not be apparent to a reader of the letter without further inquiry, just what clause the employer was relying upon.

[22] Second, while the warning is a verbal warning and therefore the first warning that would be required in terms of the disciplinary trail contemplated by the relevant clause in the employment agreement, the document does rather read as if it were a

written warning and in my view, it would be better for such a document to be clearly identified as *"written confirmation of a verbal warning"* or words to that effect.

[23] Moreover, and perhaps most importantly, I do not consider that a good and fair employer could reasonably conclude that a failure to attend professional development sessions by an employee constituted serious misconduct: s.103A of the Employment Relations Act 2000 (the Act) applied. I think the most that could be concluded from the factual matrix of the present case is that a warning for ordinary misconduct could be issued.

[24] Ms Baker seeks no relief in relation to this issue, that is, there is no claim in the Statement of Problem concerning this warning and therefore it would be inappropriate of me to take this issue any further, but I would observe that if I was asked to, I doubt that the infelicities I have identified in the warning are sufficiently grave as to justify a conclusion that Ms Baker has a personal grievance for disadvantage because of unjustifiable actions of the employer and moreover, even if I were to conclude that there was a personal grievance, I would then have to consider whether Ms Baker's behaviour had contributed in any way to the circumstances giving rise to the personal grievance and on the face of it, it is hard to reach any other conclusion than that her determined stance was to place other priorities ahead of the obligations that she had committed herself to when she executed the employment agreement.

[25] As I say, even if I had been asked to consider whether the warning constituted a personal grievance or not, it would be difficult to conclude that Ms Baker had suffered any disadvantage from the warning and it would be equally difficult to conclude that the employer had committed an unjustified action or series of action when what Ms Baker was disciplined for was failing to fulfil an express term of her employment agreement.

Was Ms Baker unjustifiably dismissed?

[26] As I have already noted, there is a great deal of common cause on the facts in this matter. Mr Loxton agrees that he said to Ms Baker at the end of the altercation with her on 28 July 2014, words to the effect *"if you walk away then don't come back"*.

[27] However, there is no corroboration of Ms Baker's allegation that Mr Loxton also said something to the effect about her being *"fired"*.

[28] I hasten to add the fact that nobody else heard the use of the word "fired" does not mean, of course, that Mr Loxton did not use that word, only that the only evidence I have of its use is from Ms Baker herself.

[29] I note that I have a very full brief of evidence from Mr Loxton who, in all other material respects agrees with the evidence provided to me by Ms Baker, and another full brief from Ms Maureen Wiperi whose office was reasonably close to the area where the disputation between Ms Baker and Mr Loxton took place. Ms Wiperi certainly heard the remark *"if you're not going to come back then don't bother coming back"* or words to that effect, but she did not hear the use of the word "fired".

[30] On the basis of the evidence before me then, I conclude that Mr Loxton did not use the word "fired" and that conclusion, based on the weight of evidence, is consistent with Mr Loxton's explanation to me of why he said what he acknowledges saying. He admitted to being frustrated with Ms Baker's confrontational behaviour and he wanted to try to confront her by pointing up the seriousness of her situation.

[31] However, he was adamant that he did not seek to end her employment by that remark and that he had no authority to end her employment in any event.

[32] But even if the word "fired" was not used, as I have decided on the evidence I heard, there is still a live issue because it is clear to me that the words used by Mr Loxton, the words he acknowledges using, that Ms Baker acknowledges hearing and that Ms Wiperi overheard, could themselves be construed as a "sending away".

[33] After all, what the law requires in evaluating whether there has been a dismissal in these circumstances is whether the language used by the employer is such that a reasonable bystander hearing those words could conclude that there had been a "sending away", that is that the employment relationship had been brought to an end at the behest of the employer, by the employer directing the employee in clear enough terms that the employee's services were no longer wanted or required.

[34] I have reached the conclusion that the words used by Mr Loxton could properly be construed by a reasonable, impartial third party as constituting a "sending away" and that therefore it was not unreasonable of Ms Baker to conclude that the

remarks she heard Mr Loxton make, that were overheard by Ms Wiperi and that he himself acknowledges making, constitute at law a "sending away".

[35] I observe that employers do themselves a disservice by using language of the kind at issue here because even if their intention is not to bring the relationship to an end, language expressing a suggestion, as in this case, that the employee ought not to come back is redolent of finality and it is difficult to see how any reasonable person would not think that a person in authority in the employer's business making an observation such as that was effectively seeking to bring the relationship to an end.

[36] I accept without reservation that Mr Loxton may not have intended that consequence; that is his evidence and I do not think that he is a dishonest man, but the effect of what he said was reasonably capable of being interpreted by Ms Baker as a wish to conclude the employment. The fact that Mr Loxton had no power to bring the employment to an end is neither here nor there; Ms Baker did not know that and she is entitled to take Mr Loxton's words at face value.

[37] I agree with Ms Baker also that her behaviour immediately after the departure from the workplace is relevant. She immediately rang the workplace to say that she had the van keys; Mr Loxton could have taken the opportunity in responding to clarify his position. He did not.

[38] Moreover, when Ms Baker contacted Mr Ingram and asked him to act, Mr Ingram was very prompt and got a personal grievance letter to the employer within four hours of the events complained of. That letter makes it absolutely clear what the basis of the personal grievance claim is and I accept Ms Baker's claim that it is significant that no immediate response from the employer denied the basis of the personal grievance.

[39] The importance of these last two aspects cannot be underestimated. The law is clear that even where an employer makes a mistake of the sort that I am satisfied Mr Loxton made on behalf of his employer Ms McLeod, if that mistake is remedied urgently by clarifying the position, then the ability of the aggrieved party to rely on the original mistake falls away.

[40] Accordingly, if the employer had immediately denied Ms Baker's version of events (not as to detail but as to the nature of the end of the relationship) or if Mr Loxton had gone back to Ms Baker immediately after she left and made it clear

that she was not dismissed, then the employer could have relied on those factors to defend any subsequent grievance proceedings that were brought.

[41] That neither of those courses of action were taken by the employer seems to me to add further weight to Ms Baker's contention that she was entitled to treat her employment as having been brought to an end by Mr Loxton's observations.

[42] But that is not the end of the matter either because while I am satisfied on the basis of the analysis I have just worked through that Ms Baker has a personal grievance for unjustified dismissal, I am obligated by the effect of s.124 of the Act to consider whether Ms Baker has contributed in any way to the circumstances giving rise to that grievance.

[43] I conclude that Ms Baker has, by her inappropriate behaviour and her apparent refusal to work collaboratively with colleagues and her employer, contributed to the circumstances giving rise to her personal grievance. If Ms Baker had responded appropriately to the reasonable and legitimate requests from Mr Loxton to address very straightforward and uncontroversial aspects of her undoubted obligations to act in good faith towards her employer, then this personal grievance proceeding may have been unnecessary in whole or in part.

[44] All that Ms Baker needed to do was to engage collaboratively with Mr Loxton in respect to two sheets of paper. The contention that she makes in relation to the first of the forms that she was asked to assist with is that it was not her responsibility. I am satisfied on the evidence that I heard that that is not correct at all and that both the staff in the van have an obligation to ensure that children are correctly signed in. Even if strictly speaking Ms Baker is correct on that point, she has an obligation to act in good faith toward her employer and being dismissive and unhelpful does not meet that test.

[45] In relation to the second document that Ms Baker was asked to address, even she acknowledges that it was her responsibility to deal with, but by the time Mr Loxton had confronted her about this second document, it seems common ground that she was in a poor humour and the evidence is consistent that rather than hand his pen back to him, she flicked it at him and then stumped off.

[46] Again, that is not good faith behaviour; parties must learn to treat each other respectfully and to act collaboratively so that matters of small significance like these executed forms can be dealt with without drama.

[47] I am satisfied that Ms Baker's contribution to the circumstances giving rise to her personal grievance is 50%, that is, that half the personal grievance for unjustified dismissal can properly be attributed to her active contribution.

[48] It follows from that conclusion that the remedies I would otherwise have awarded Ms Baker need to be rebated by 50%. I conclude that a 50% contribution is appropriate because I judge Ms Baker's behaviour towards the employer to be deliberately provocative and entirely devoid of the good faith that must inform the employment relationship, and to be causative of the eventual termination by a factor of 50%.

Determination

[49] I have found that Ms Baker has a personal grievance for unjustified dismissal because she was entitled to conclude that Mr Loxton's words did constitute a "sending away", but that she contributed to the circumstances giving rise to the personal grievance by a factor of half.

[50] I direct that Ms McLeod is to pay to Ms Baker the following sums to remedy the personal grievance (taking into account contribution):

(a) Compensation under s. 123 (1) (c) (i) of the Act in the sum of $1250;

(b) A contribution to wages lost (ample evidence being provided of Ms Baker's attempts to obtain new work) in the sum of $4680 gross;

(c) Reimbursement of the Authority filing fee in the sum of $71.56.

Costs

[51] Costs are reserved.

James Crichton
Member of the Employment Relations Authority