

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 206  
3071933

BETWEEN                      DARLENE SHEREE MYLES  
Applicant

AND                              LEARNING CURVES  
MONTESSORI LIMITED  
Respondent

Member of Authority:      Helen Doyle

Representatives:            Edward Loughnan, counsel for the Applicant  
No appearance for the Respondent

Investigation Meeting:     14 May 2020 by telephone

Submissions Received:     On the day

Date of Determination:     21 May 2020

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**DETERMINATION OF THE AUTHORITY**

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- A      Darlene Myles was unjustifiably dismissed from her employment with Learning Curves Montessori Limited (Learning Curves).**
- B      Learning Curves is ordered to pay to Darlene Myles the following sums:**
- (a) \$1,365 gross for lost wages under s123(1)(b) of the Employment Relations Act 2000 (the Act).**
  - (b) \$7000 without deduction for compensation under s123(1)(c)(i).**
  - (c) \$1059 for reimbursement of the employer contribution for KiwiSaver.**
  - (d) \$720 for reimbursement of the non-taxable allowance for petrol.**
  - (e) \$1,125 for costs and \$71.56 for reimbursement of the filing fee.**

**C Learning Curves has 10 working days to respond to a late claim for unpaid wages in the sum of \$432 gross during the notice period. Failure to do so will result in an order that this sum is also payable to Ms Myles.**

### **Employment Relationship Problem**

[1] Darlene Myles has a number of employment relationship problems that she wishes the Authority to resolve.

[2] She says that she was unjustifiably dismissed from her employment as a part-time cleaner with Learning Curves Montessori Limited (Learning Curves) and seeks reimbursement of three months lost wages and compensation for hurt and humiliation.

[3] Ms Myles says that she is owed money for holiday pay, unpaid employer KiwiSaver contributions, and unpaid travel allowance.

[4] Further that she was not paid for six days that she worked at Learning Curves and provided a final pay slip to support this.

[5] Learning Curves has not taken steps with respect to this proceeding. No statement in reply has been lodged; there has been no attendance on its behalf on case management conferences and there has been no compliance with directions made to provide wage and holiday records, a statement of evidence and relevant documents.

[6] Ms Robyn Toms is the managing director of Learning Curves. On 1 October 2019 she sent an email to the Senior Authority Officer in response to a request for a statement in reply. She stated in her email response that she is on holiday in Australia and required a further fourteen days within which to reply. No statement in reply was ever received.

[7] I am satisfied that Learning Curves was served with the statement of problem and received notice of the steps throughout the process and the investigation meetings. An investigation meeting on 22 April 2020 had to be rescheduled to a telephone investigation on 14 May 2020 because of the Covid-19 Pandemic.

[8] The Authority directed the matter to mediation however Ms Myles says that mediation did not take place although it was her preferred method of attempting to resolve the process.

[9] There was no reason provided as to why there was no appearance on behalf of Learning Curves at the telephone investigation. In the circumstances the Authority elected to proceed under clause 12 of the second schedule to the Employment Relations Act 2000 (the Act) to hear evidence from Ms Myles.

[10] Ms Myles made an affirmation and confirmed her statement of evidence was true and correct.

### **The Issues**

[11] The Authority needs to determine the following issues in this case:

- (a) How did the employment relationship end?
- (b) If Ms Myles was dismissed, then was that dismissal justified?
- (c) If the dismissal was unjustified what remedies should be awarded and are there issues of mitigation and/or contribution?
- (d) Has there been a default in payment of wages to Ms Myles?
- (e) Is there unpaid holiday pay?
- (f) Are there unpaid KiwiSaver employer contributions and if so in what amount?
- (g) Were payments made appropriately for travel allowances?

### **How did the employment relationship end?**

[12] Ms Myles commenced her employment with Learning Curves in 2015 as a cleaner. Initially she cleaned four of the Montessori centres around Christchurch however in or about 2018 this reduced to three centres. There was a corresponding reduction to her hours of work. Ms Myles also worked as a teacher aide at a primary school. Her family relied on the income from both of her jobs.

[13] On 10 June 2019 Ms Myles received the following text message from Ms Toms:

Dear Darlene

As per your individual employment agreement, I am, as your employer, giving you 2 weeks written notice that your individual employment agreement will come to an end.

Your last day of work is/will be Monday 24 June 2019.

I want to thank you for your dedication and professionalism during your time with Learning Curves Montessori Ltd and I wish you all the very best for your future.

[14] Ms Myles said in her evidence that there was nothing prior to this text to suggest continued employment was at risk and that she was shocked to receive the message.

[15] The only contact after the text message was a message in which Ms Toms asked Ms Myles to contact her. Ms Myles responded and advised Ms Toms that she did not feel comfortable speaking over the phone and suggested a meeting in person. Ms Myles then took some legal advice and it was decided that there should be communication on a more formal basis.

[16] An application was then lodged with the Authority.

[17] I am satisfied that Ms Myles was dismissed from her employment with Learning Curves by text message with her final day of employment being 24 June 2019 .

### **Was the dismissal justified?**

[18] The individual employment agreement provides that either party may terminate the agreement by giving a period of notice of two weeks.

[19] There needs to be a justifiable basis for the employer to dismiss an employee. The dismissal also needs to be carried out in a procedurally fair manner if a dismissal is to be justifiable.

[20] In assessing justification the Authority is required to apply the test of justification in s 103A of the Act. In applying the test the Authority considers on an objective basis whether the actions of Learning Curves and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. The Authority must consider four procedural fairness factors set out in s 103A (3) of the Act and other factors as appropriate. Minor defects in the process that do not result in an employee being treated unfairly will not result in a dismissal being unjustified – s 103A (5) of the Act.

[21] There was no evidence before the Authority for it to conclude there was any justifiable ground for termination of Ms Myles employment. Ms Myles said that she cannot understand why her employment was terminated and she did not receive any explanation

from Ms Toms. She understood another cleaner had been employed to replace her. There was an absence of any procedural fairness.

[22] I find that the dismissal was substantively and procedurally unjustified.

[23] Ms Myles was unjustifiably dismissed from her employment with Learning Curves. As the personal grievance of unjustified dismissal has been made out she is entitled to consideration of remedies.

## **Remedies**

### *Reimbursement of wages*

[24] Ms Myles worked 4.30pm to 7.30pm Monday to Friday at the material time for Learning Curves. This fitted in with her other role in which she worked from 8.30am to 2.30pm. The hours in each role enabled her to look after her grandchildren after school and in the school holidays.

[25] Shortly after her dismissal she was able to increase her hours in her other role however said that she still received about \$200 per week less than she had whilst employed by Learning Curves. This forms the basis of the claim for reimbursement of lost wages of \$2,400 net.

[26] I am satisfied that Ms Myles attempted to mitigate her loss by increasing her hours in her other role and looking for other roles.

[27] In order to verify the claim that following dismissal there was ongoing loss of income for three months I have considered the Inland Revenue (IRD) income breakdown for the period from 24 June 2019 to 23 September 2019.

[28] Ms Myles' ordinary hours of work at Learning Curves before her dismissal were 15 per week. The IRD income breakdown shows that Ms Myles received \$1440 gross for each of the months of March and April 2019. I have not taken May into account because it shows income as half of that amount in the sum of \$720.

[29] In her other role Ms Myles received for each of the months of March, April and May a gross monthly income of \$1486. This increased to \$2,181 in June 2019, \$3,177 in July, \$2118 for August and \$2118 for September when her hours increased.

[30] Before dismissal Ms Myles usually received income in the combined total from her two roles of \$2,926 gross per month. Following dismissal for July, August and September her average gross monthly earnings were \$2471. There is a corresponding loss in earnings of \$455 per month or \$113.75 gross each week for that period. I could not be satisfied that there was a loss of income sustained by Ms Myles for June from the IRD breakdown of income. I have therefore assessed loss over 12 rather than 13 weeks.

[31] Subject to any issues about contribution Ms Myles is to be reimbursed the sum of \$1,365 gross calculated on the basis of \$113.75 multiplied by 12 weeks for lost wages.

### *Compensation*

[32] Ms Myles claimed compensation however did not provide a figure that she claimed for compensation. I accept from the evidence that the dismissal came as a shock. Ms Myles considered she was a good worker and she supplied a lot of her own cleaning equipment when she undertook her role. The job was important to her as she could fit the hours worked around her family requirements. Ms Myles said that stress arose from the fact that another family member continued to work for Learning Curves after her dismissal. She heard second hand about some gossip about her departure. I was not able to place weight on that as there was no direct evidence to support that. I do however accept that Ms Myles was left to speculate about why she was dismissed. She had concerns about her income for the future. I do weigh that she was able to within a short period of time increase her hours and reduce her financial loss somewhat in her other role.

[33] Ms Myles wanted some engagement from Learning Curves and the opportunity to resolve her issues at an early time. She did not receive that and has no understanding as to why she was dismissed. That caused her humiliation and loss of dignity.

[34] In all the circumstances subject to any issue of contribution the sum of \$7000 is an appropriate award for compensation.

### *Contribution*

[35] There is no evidence to support Ms Myles contributed to her dismissal and accordingly the amounts set out above are not reduced.

**Unpaid wages for work undertaken in final two weeks**

[36] Unpaid wages were not claimed in the statement of problem.

[37] Learning Curves needs an opportunity to provide its view as to whether there is money owed to Ms Myles for work undertaken in the two week notice period.

[38] The Authority has viewed the final payslip. It shows wages were paid for 3 hours in the sum of \$72. Ms Myles says that she is owed payment for six further days worked in that period in the sum of \$432 gross or \$396 net.

[39] Learning Curves have 10 working days from the date of this determination to respond to this claim. If it fails to do so there will be an order that the sum of \$432 gross is due and owing to Ms Myles for unpaid wages.

**Holiday Pay**

[40] Ms Myles' final payslip showed an amount for holiday pay in the sum of \$3,020.06 gross. Ms Myles was unclear how that figure was made up and believes she is owed two further weeks for holiday pay.

[41] The Authority had directed Learning Curves to provide wage and time records and holiday and leave records for the entire period of employment by 29 November 2019. It failed to do so.<sup>1</sup>

[42] Ms Myles provided handwritten notes about what days she recalled taking for annual leave. In 2017 she calculated that she took 15 days leave. In 2018 she had 25 days leave available. She took 10 days and then in her final year she calculated she had 30 days or six weeks owing as at the date her employment ended. For completeness because there was reference to sick leave in the handwritten notes there was nothing in Ms Myles employment agreement to suggest that untaken sick leave would be paid out on termination.

[43] Ms Myles holiday pay was required to be calculated in accordance with ss. 24 and 25 of the Holidays Act 2003 and she should have received payment in her final pay for the portion of her annual holidays not taken. This should be calculated under s24 at the rate based

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<sup>1</sup> Notice of Direction dated 29 October 2019

on the greater of her ordinary weekly pay at the date of the end of her employment or her average weekly earnings over the 12 months immediately prior to that last pay period.

[44] I assess that the rate that is greater is the ordinary weekly earnings of \$360 per week at the end of her employment. That would mean the portion of annual holiday entitlement not taken should be calculated at \$360 multiplied by 6 weeks which is \$2160.

[45] Additionally Ms Myles was entitled to 8% of gross earnings since she last became entitled to holiday pay under s 25(1) of the Holidays Act. The anniversary date for assessment is recorded in the employment agreement as 30 November 2015. From 30 November 2018 Ms Myles gross earnings as reflected on the IRD income breakdown were \$10,080 although that includes the amount paid for holiday pay. Payments under s 24(2) are gross earnings for the purposes of an assessment under s25 (2) of the Holidays Act. 8% of gross earnings once calculated should not then be considered in any further calculation of 8% of gross earnings.

[46] For present purposes I am not too concerned about that because I am assessing whether the holiday pay paid to Ms Myles in her final pay reflects broadly what was owed. 8% of \$10,080 is \$806.40 and \$2,160 added to that as the portion of unpaid annual leave is \$2,966.40. The amount paid for holiday pay was \$3,020.06. I am not able to conclude to the standard required that Learning Curves owes Ms Myles further payment for holiday pay.

[47] In those circumstances I make no award for holiday pay.

### **Employer KiwiSaver contributions**

[48] Ms Myles says that she was owed unpaid KiwiSaver contributions of \$1,059 from her employer. The Authority was provided with an email from her provider and a transaction list with employer contributions for the material period.

[49] There are periods showing where there are no employer contributions shown as having been made. For 11 months between October 2017 and September 2018 there are no employer contributions shown. There is also a period between November 2016 and January 2017 where no contributions were made. That is over a year's worth of employer contributions at 3%. Up until August 2018 Ms Myles was paid a higher rate because she was cleaning four centres although I do not have the full wage and time records.

[50] It is difficult to work out what is owed exactly with any degree of accuracy. I accept there was a sustained period when no contributions were made and no acceptable reason advanced for that. I do not conclude that Ms Myles claim of \$1,059 is unreasonable.

### **Travel allowance**

[51] Ms Myles was entitled in schedule A of her employment agreement to a non-taxable allowance of \$30 per week for petrol. She has highlighted on her Westpac transaction list fortnightly payments made to her from Learning Curves where the travel allowance was not paid starting from late 2015. She said that she had raised these non-payments with her employer as they arose to the extent she was aware of them but they were not all remedied as required.

[52] There are 12 fortnightly pays reflecting payments for 24 weeks in which the non-taxable allowance for petrol was not paid.

[53] I accept the claim for reimbursement for the non-taxable allowance for petrol of \$720 being \$30 per week x 24 weeks.

### **Costs**

[54] Ms Myles said that she has likely incurred costs of approximately \$3,500 together with GST and disbursements in pursuing this matter. Costs in the Authority are usually assessed on the basis of a daily tariff which is set at \$4,500 for the first day of an investigation meeting. This matter occupied a little over one hour and an appropriate award for costs would be the sum of \$1125 together with reimbursement of the filing fee of \$71.56.

### **Orders Made**

[55] I order that Learning Curves Montessori Limited pay to Darlene Sheree Myles the following sums:

- (a) The sum of \$1,365 gross being reimbursement of wages lost as a result of the unjustified dismissal grievance under s 123 (1)(b) of the Act.
- (b) The sum of \$7000 without deduction being payment of compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

- (c) The sum of \$1,059 being unpaid KiwiSaver employer contributions.
- (d) The sum of \$720 without deduction being reimbursement of the non-taxable travel allowance.
- (e) The sum of \$1125 together with reimbursement the filing fee of \$71.56.

[56] Learning Curves Montessori has 10 working days from the date of this determination to provide its view as to whether Ms Myles was paid correctly for all work undertaken in her notice period. A failure to respond within that timeframe will result in an order that the sum of \$432 gross be paid to Ms Myles for unpaid wages.

Helen Doyle  
Member of the Employment Relations Authority