

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 302
3140041

BETWEEN	KARA CHASE Applicant
AND	THE BARKERY DOG DAYCARE KERIKERI LIMITED Respondent

Member of Authority: Rachel Larmer

Representatives: Mike Harrison, advocate for the Applicant
Alexandra Parker for the Respondent

Investigation Meeting: 29 April 2022 by Zoom

Date of Determination: 7 July 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 1 April 2022 “*The Barkery Dog Daycare Limited*” changed its name to “*Beyond the Leash Northland Limited*” (referred to as “*the respondent*”).

[2] The applicant, Kara Chase, began working for the respondent on a casual basis on 27 January 2021. There is a dispute between the parties about whether she was a casual employee or an independent contractor.

[3] There is no dispute that on 27 March 2021 the parties agreed Ms Chase would be employed by the respondent as a permanent part time employee for 30 hours per week.

[4] Ms Chase’s employment ended by text message on 13 May 2021. Ms Chase claimed she was unjustifiably dismissed. The respondent claimed her employment ended “*by mutual agreement.*”

[5] The respondent gave conflicting accounts about why Ms Chase's employment ended. It also pursued the obviously contradictory position that although Ms Chase was not dismissed her dismissal was justified.

[6] Ms Chase informed the Authority at the investigation meeting she was not pursuing her breach of good faith and penalty claims as stand-alone claims because the same facts were relied on for her dismissal grievance, so she wanted to focus on that claim only.

[7] The respondent denied it employed Ms Chase from 27 January 2021 to 27 March 2021 ("*the first period*") because it claimed that during this time she worked as an independent contractor.

[8] Ms Alexander Parker told the Authority she paid Ms Chase \$600 cash per week for "*less than 28 hours work*" during the first period, because Ms Chase received \$600 regardless of the actual hours she worked.¹

[9] Ms Chase denied that. Ms Chase said she was only paid for the hours she actually worked. Ms Chase said her hours varied each week during the first period she worked for the respondent.

[10] The respondent in its statement in reply said it paid Ms Chase \$20 an hour cash during the first period she worked. The respondent did not say it paid Ms Chase \$600 a week regardless of how many hours she worked, or that it paid her \$600 a week when she worked less than 28 hours a week.

[11] The Authority preferred Ms Chase's evidence that she was paid \$20 cash for each hour she worked but that she was not paid for any hours she did not work.

[12] The unsigned employment agreement produced to the Authority, and the version Ms Chase signed on 27 April 2021 which the respondent had not signed, said Ms Chase would work for 31 hours a week on Tuesday, Wednesday and Thursday from 7.30am to 5.45pm for \$23 per hour.

[13] The Authority noted that the employment agreements it was given had different terms regarding the days and hours of work and the rates of pay compared to what had occurred

¹ The Authority noted that 28 hours x \$20 per hour was \$560 not \$600.

during the relationship.² It also differed from what had been agreed in the text message exchanges about the permanent job.

[14] The employment agreements said Ms Chase would be paid \$23 per hour. The KiwiSaver clause in Ms Chase's employment agreement said she would be paid the respondent's Compulsory Employer Contributions (CECs) to KiwiSaver "*at the rate of 3% on top of their salary or wage*".

Authority's investigation

[15] The Authority conducted a Zoom investigation meeting. Ms Chase is living overseas and Ms Parker said she could not attend an in person investigation due to health reasons.

[16] Ms Chase and Ms Parker both filed affidavits and relevant documents in advance of the investigation meeting. The parties were questioned about their evidence by the Authority. Mr Harrison questioned Ms Parker about her evidence and Ms Parker questioned Ms Chase about her evidence.

Background facts

[17] At the material time the respondent operated a 'dog day care' business. Michael Burns is the respondent's sole director and shareholder. His girlfriend Alexandra (Alex) Parker was running the respondent's business when Ms Chase worked for it. Ms Parker had a broken foot in January 2021 so needed help looking after the dogs that used the respondent's 'dog day care' services.

[18] Ms Parker knew and was friendly with Ms Chase's parents, so it was through that connection she arranged for Ms Chase to help her (Ms Parker) out with the dogs for the respondent. Ms Parker and Ms Chase did not meet in person until 27 January 2021, which was the first day Ms Chase worked for the respondent.

[19] Ms Chase was receiving a WINZ benefit while undertaking casual work for the respondent during the first period of work. Ms Chase said WINZ knew about her casual work because it was continuing to assist her to obtain a job with more permanent hours of work.

² By agreement, Ms Chase actually worked 30 hours a week at the rate of \$23 per hour.

[20] Ms Chase said that after she and Ms Parker agreed on 27 March 2021 that she (Ms Chase) would be employed by the respondent for 20 hours a week, then Ms Chase informed WINZ of that.

[21] Ms Parker told the Authority that Ms Chase had asked to be an independent contractor when she started working for the respondent. Ms Chase denied. Ms Chase said she assumed she had been employed as a casual employee, because she had been employed to do casual work and the parties had not discussed her employment status.

[22] Up until the end of March 2021 the parties would agree each day on what if any days and hours Ms Chase would work the following day. During the first period Ms Chase worked there were times when she was not available to work for the respondent due to other commitments she had. The casual arrangement therefore suited both parties at that time.

[23] Neither party could produce records of the cash payments that were made/received or of the days and hours that Ms Chase actually worked during the first period of work. Ms Chase told the Authority she recorded the days and hours she worked in a book that was kept on the respondent's business premises but, because Ms Parker had spilled red wine on it, those details were no longer available.

[24] Ms Parker provided Ms Chase with a written employment agreement around 14 April 2021. That first written employment agreement contained incorrect KiwiSaver information, so Ms Parker advised Ms Chase on 19 April 2021 that needed to be corrected.

[25] On 27 April 2021 Ms Parker issued Ms Chase with a corrected individual employment agreement. Ms Chase signed the employment agreement that day but it is unclear whether it was signed by the respondent because the Authority was not given a copy that had been signed by both parties.

Issues

[26] The following issues are to be determined:

- (a) What was the status of the parties' relationship from 27 January 2021 to 27 March 2021?
- (b) Was Ms Chase dismissed?
- (c) If so, was Ms Chase's dismissal justified?

- (d) If not, what if any remedies should she be awarded?
- (e) Should any remedies Ms Chase may be awarded be reduced on the grounds of contribution?
- (f) What if any costs should the successful party be awarded?

What was the status of the parties' relationship from 27 January to 27 March 2021?

[27] Ms Parker told the Authority she had one very brief phone call with Ms Chase in late January 2021 during which they agreed to meet at the respondent's business premises on 27 January 2021. Ms Chase denied that and said they did not speak until they met for the first time at the business on Ms Chase's first day of work.

[28] Ms Parker told the Authority Ms Chase said she wanted to be an independent contractor and not an employee. Ms Chase denied that. Ms Chase's version of their first interaction was that it occurred on Facebook and the topic was that she would be employed as a casual employee, to work on a flexible basis to provide help to Ms Parker as and when she needed it. The days and hours of work would therefore be variable.

[29] The parties agreed that Ms Chase had worked on the first day she met Ms Parker at the respondent's business premises. Ms Parker said she worked for four hours while Ms Chase said she worked the full day.

[30] Whether Ms Chase was an employee from 27 January – 27 March 2021 depended on whether she met the definition of “*employee*” in s 6 of the Employment Relations Act 2000 (the Act).

[31] Section 6(2) of the Act required the Authority to determine “*the real nature of the relationship*” between the parties. Under s 6(3) of the Act the Authority had to consider all relevant matters, including the parties' intention, but that was not determinative of the status of the parties' relationship.

[32] *Intention* – there was no mutual intention. Ms Parker claimed Ms Chase wanted to be an independent contractor but Ms Chase denied that. Ms Chase said she thought she was a casual employee.

[33] *Control* – the respondent exercised control over Ms Chase and how she undertook the work related activities. Ms Parker told Ms Chase what had to be done and how and when it was to be done, and Ms Chase had to meet those expectations.

[34] *Independence* – Ms Chase was not acting independently and she did the work on/from the respondent's premises.

[35] *Tools of trade* – the respondent supplied Ms Chase with the tools that she needed to perform the work that she did for it.

[36] *Documents* – the Authority was not provided with any documents that recorded the arrangement that had been agreed for the first period Ms Chase worked.

[37] *Payment* – Ms Parker paid Ms Chase in cash. No records of the cash payments were kept by the parties. Ms Parker said Ms Chase was paid weekly although the actual date she was paid could vary from week to week. Ms Chase was just handed cash each week, she did not invoice the respondent for her services.

[38] *Taxation* – Ms Parker said tax was not deducted from the cash payments because Ms Chase was responsible for paying her own tax. Ms Chase said she assumed the respondent had deducted PAYE from the cash payments before they were passed on to her.

[39] *GST* – Ms Chase was not GST registered in New Zealand and she was not operating her own business regarding the work she did for the respondent.

[40] *Public perception* – customers of the respondent's business would not have known that Ms Chase was an independent contractor and not an employee.

[41] *Separate business* – Ms Chase did not wear a branded uniform. She did not have business cards and there was no other information indicating that although Ms Chase was on the respondent's premise, she was operating independently in business on her own account.

[42] *Supervision/direction* – Ms Parker exercised supervision over Ms Chase who was expected to comply with Ms Parker's direction regarding the work that Ms Chase did for the respondent.

[43] *Ability to work for others* – it was a casual role so Ms Chase was able to work for others, although she did not do so, but she did continue to see more permanent work.

[44] *Substitution* – Ms Chase could not substitute another person to do the work she had been engaged to do for the respondent. She had to personally perform the work she had been hired to do.

[45] *Ability to profit* – Ms Chase was employed on an hourly rate for the hours she worked. She had no ability to profit from her endeavours because her earnings were limited to the number of hours she worked.

[46] *Rewards* – Unlike the respondent, Ms Chase did not have the ability to obtain any of the financial rewards associated with running a successful business. Ms Chase had no opportunity to be rewarded for her services other than by payment of the hourly rate for each hour she worked. She had no ability to increase her earnings, other than by working more hours.

[47] *Risks* – Ms Chase did not take on any business risk. All risks associated with the dog day care business were held by the respondent.

[48] *Work expenses* – Ms Chase performed the work for the respondent at its premises using its equipment. There was no evidence regarding reimbursement for work expenses. However, all of the costs associated with Ms Chase's role were covered by the respondent.

[49] *Integration test* – Ms Chase was fully integrated into the respondent's business. The clients using the respondent's services would likely have expected Ms Chase was the respondent's employee because of the extent of that level of integration.

[50] *Record keeping* – neither party kept records recording Ms Chase's hours of work and pay.

[51] *Autonomy* – Ms Chase was not autonomous in terms of arranging her own work, remuneration or holidays because she was working under the control of the respondent. Ms Parker set the hours and days of work based on the respondent's needs. Ms Chase needed Ms Parker's approval for time off. An example of that was the permission Ms Chase sought from Ms Parker to take time off work to attend a WINZ interview on or around 24 March 2021.

[52] *Running a business* – Ms Chase was not running her own independent business regarding the work she did for the respondent.

[53] *Payslips* – Ms Chase did not receive payslips.

[54] *Employment records* – the respondent did not keep wage and time records or holiday and leave records for Ms Chase during any of the time that she worked for the respondent.

[55] *Holiday Act 2003 entitlements* – Ms Chase did not receive any holiday pay when her work for the respondent ended. She did not take any paid leave while employed.

[56] *Control test* – the respondent exercised a high level of control over Ms Chase that was consistent with an employment relationship.

[57] *Economic reality/fundamental test* – The economic reality was that Ms Chase worked as the respondent's employee.

Real nature of the relationship

[58] Considering all of the relevant factors the Authority considered it more likely than not that the real nature of the parties' relationship for the first period Ms Chase worked for the respondent was an employment relationship.³

[59] The Authority considered Ms Chase was a more reliable and therefore believable witness than Ms Parker, because Ms Chase's story did not keep changing.

[60] It was unlikely Ms Chase had asked to be an independent contractor because she was not set up to benefit from such an arrangement and she continued to seek more permanent work. If the respondent had intended for Ms Chase to be an independent contractor then it needed to have made that clear to her before she started work on 27 January 2021.

[61] The evidence did not establish that Ms Chase was in business on her own account. She worked at Ms Parker's direction. Ms Chase had not set up her own business, she was not GST registered, she did not invoice the respondent, she did not provide her services to others. Ms Chase was not set up to take the advantages associated with self-employment and she did not take on the risks/rewards associated with being a business owner.

[62] The features that the Authority would have expected to have seen in order to establish that Ms Chase had been engaged as an independent contractor and was in business on her own account were lacking in this case.

³ 27 January to 27 March 2021.

[63] While it was open to Ms Parker to have provided Ms Chase with documentation regarding an independent contracting arrangement, if that was the basis on which she was to have been engaged, that did not occur.

[64] The respondent's failure to do so, the lack of common intention, and the way the relationship operated in practice indicated the real nature of their relationship was more likely than not to have been an employment relationship, because Ms Chase established she had met the definition of "*employee*" in s 6 of the Act.

[65] The Authority therefore concluded Ms Chase was employed by the respondent for the entire period from 27 January – 13 May 2021.

PAYE liability

[66] That finding that the parties were in an employment relationship during the first period of work means the respondent is now ordered to calculate and remit to the Inland Revenue Department (IRD) the correct PAYE and ACC levies that it should have paid, but failed to pay, on Ms Chase's earnings from 27 January to 27 March 2021, being the first period of employment.

[67] Because there are no records of what Ms Chase earned over the first period, her PAYE and ACC levies needed to be calculated based on Ms Parker's evidence that Ms Chase was paid \$600 per week cash during the first period she worked regardless of how many hours she worked. That had to be the basis of the PAYE calculation because there is no other records or evidence of the actual days and hours Ms Chase worked.

[68] The Authority was not told whether the respondent correctly paid Ms Chase's PAYE and ACC levies to IRD for the period 29 March to 13 May 2021. If that has not occurred, then the respondent must remit any shortfall to IRD.

Was Ms Chase dismissed?

Ms Parker's evidence

[69] Ms Parker's unsworn affidavit dated 9 December 2021 said "*Ending her [Ms Chase's] employment was mutual. After Kara refused to agree with less hours or a week off [...] Kara agreed to be paid out 2 weeks' pay, cut her ties and move on.*"

Reasons given in Statement in Reply

[70] The statement in reply lodged on 31 May 2021, that was prepared by Ms Parker, stated:

The business has not been making enough money in order to accommodate employing Kara on the hourly rate and hours that she wanted.

[...]

Kara accepted a termination payment of \$1380 on 13/05/2021 without having to work those two weeks.

[...]

I have/had substantial reasons for terminating Kara's recent contract [...], due to Kara's serious misconduct.

[...].

Text messages

[71] On 12 May 2021 around 8.32 pm Ms Parker texted Ms Chase asking "*Is it okay for you to take off work for Monday and Tuesday next week?*" Ms Chase did not reply to that message.

[72] Ms Parker followed that with a further message at 8.17 am on Thursday 13 May 2021 that said:

Or just take off next week if that's okay? Mike and I need to build up funds. We might have to decrease your hours to two days until work picks up as I need to be making an income myself in order to support our house build etc. Is this okay with you?

[73] Ms Chase replied by text at 9.07 am the same day:

Hey, sorry that doesn't work for me. I thought this was a secure, long term job.

[74] Ms Parker replied at 9.10 am the same day:

I might need to give you two weeks' notice then. Sorry I have to do this.

[75] That was followed with another text message from Ms Parker to Ms Chase at 9.15 am that day that said:

Over the last six weeks – we've had to use Mike's wage to cover your salary as the income from work has not covered the rent, your wage and power. It is not working for us financially. Two days would be better otherwise I'm happy to go back to working full time.

[76] That was followed with a further text from Ms Parker to Ms Chase at 10.39 am that stated:

If you are unhappy with that – I’ll pay you out two weeks of work without you having to be here etc and we’ll just cut ties.

It is important for Mike and I not to run ourselves in the ground financially.

You’ve been great and I’ve appreciated your work here.

Sorry it had to be this way.

[77] Ms Parker sent Ms Chase a message at 11.42 on 13 May 2021 that said:

Through text message I’ve asked you if you would be comfortable with taking next week off and if you were okay with a temporary decrease in ours (sic) of 20 hours per week – to give the business a chance to get build (sic) funds. You’ve replied “Hey sorry that doesn’t work for me. I thought this was a secure, long term job.”

[...]

Due to your response, I’m assuming that you’re not comfortable with having your hours decreased. Because of this, I think the best way forward is to cut ties.

Please consider this your two weeks (sic) notice. I am happy to pay you two weeks of pay \$1380 – without you having to work.

[78] Ms Chase replied to Ms Parker at 11.54 am that day:

Thanks deposit that when you can.

[79] Ms Chase was paid two weeks’ notice but she was not paid any holiday pay in her final pay. Ms Chase did not receive any KiwiSaver contributions from the respondent, either while employed or on termination of her employment.

Finding

[80] The Authority finds that Ms Chase’s employment ended because she was dismissed by text message. The initiative for the ending of the employment came from Ms Parker, who was acting on behalf of the respondent.

[81] Under the terms of her employment agreement Ms Chase was employed for set hours of work, so she was entitled to work and be paid for those hours. While it was open to the respondent to ask Ms Chase to take time off without pay and/or to reduce her hours, she was not required to agree to that. Ms Chase’s refusal to agree a variation of her hours of work or to take unpaid time off work was not a dismissible offence.

[82] In this case, when Ms Chase did not agree to take unpaid time off work, the respondent initiated the text messages sent on 13 May 2021 about ending her employment and then did in fact end the employment. That clearly involved a unilateral dismissal, as is evident from the content of the messages Ms Parker sent Ms Chase.

Was Ms Chase's dismissal justified?

[83] Justification is to be assessed in accordance with the justification test in s 103A of the Act. This required the Authority to objectively determine whether the respondent's actions, and how the respondent acted, were what a fair and reasonable employer could have done in all the circumstances at the time it dismissed Ms Chase.⁴

[84] A fair and reasonable employer is expected to comply with its contractual and statutory obligations. These included the s 4(1A) good faith obligations and each of the four procedural fairness tests set out in s 103A(3) of the Act. Failure by an employer to do so may fundamentally undermine its ability to justify a dismissal or other action.

Good faith

[85] Section 4(1A) of the Act requires an employer that is proposing to make a decision that may adversely impact on an employee's ongoing employment to provide the employee with information relevant to that decision and an opportunity to comment on that information before a final decision is made.

[86] That did not occur in this case.

[87] The only information that Ms Chase received were the messages that have been quoted in this determination. There was no financial information or restructuring proposal provided to Ms Chase and there was no good faith consultation with her.

[88] The respondent therefore failed to comply with its good faith requirements in s 4(1A) of the Act.

⁴ Section 103A(2) of the Act.

Procedural fairness requirements

[89] The respondent also failed to comply with any of the four minimum procedural fairness requirements set out in s 103A(3) of the Act.

[90] The respondent did not sufficiently investigate its concerns before it dismissed Ms Chase, in breach of s 103A(3)(a) of the Act.

[91] The respondent did not raise its concerns with Ms Chase before she was dismissed, in breach of s 103A(3)(b) of the Act.

[92] Ms Chase was not given a reasonable opportunity to respond to the respondent's concerns before she was dismissed, in breach of s 103A(c) of the Act.

[93] The respondent did not genuinely consider Ms Chase's explanation to its concerns, because its concerns were never put to her so she never had an opportunity to respond, in breach of s 103A(3)(d) of the Act.

[94] As a matter of logic, an employer that denied dismissing an employee is unlikely to be able to establish justification of its dismissal, because it would not have taken any steps to have complied with any of the procedural fairness tests of the justification test in s 103A(3) in the Act. That was the case here.

Section 103A(5) of the Act

[95] Section 103A(5) of the Act did not preclude the Authority from finding that the respondent's dismissal of Ms Chase was unjustified solely because of minor process defects that did not result in her being treated unfairly. There was no process at all. The process defects that occurred in this case were serious, fundamental and resulted in substantial unfairness to Ms Chase.

Substantive justification

[96] Having established that the way in which Ms Chase's dismissal occurred was procedurally unjustified, the Authority now turns to consider whether the respondent had good reasons, based on reasonable grounds, for dismissing Ms Chase.

[97] Based on the reason the respondent gave Ms Chase for her dismissal at the time it occurred, the Authority has concluded that it did not.

[98] The texts on 13 May 2021 showed Ms Parker ended Ms Chase's employment for financial reasons, as per Ms Parker's text that day that said "*It is important for Mike and I not to run ourselves in (sic) the ground financially.*" However, a number of different reasons have been put forward since then by Ms Parker, that were never put to Ms Chase at the time.

[99] The Authority has assessed Ms Parker's evidence about those other reasons to determine whether Ms Chase engaged in blameworthy conduct that cause or contributed to her dismissal.

Redundancy?

[100] There was no good faith restructure process, even though the employment agreements provided to the Authority contained a redundancy clause that stated:

Redundancy is when an employee's role is no longer needed.

If after following a good faith restructuring process the employee is made redundant, they will be given notice as set out in ending employment. They will not receive redundancy compensation entitlements.

[101] In an email to the Authority on 22 June 2021 Ms Parker said:

At the point of hiring Kara as an employee (for less than 4 weeks) the business wasn't making enough income to sustain paying the increased income.

[...]

The Barkery's income had dropped substantially over the last 6 weeks of Kara working and it didn't look promising to keep her on board with the hours and rate that she wanted; which is why I asked Kara if she could take a week off and reduce her hours temporarily to 20 hours per week.

[102] In a text exchange on 27 March 2021 Ms Parker, in a discussion about engaging another new employee, said to Ms Chase "*I eventually need another part time staff member for my business to be operating well.*" That undermined the suggestion there was an operational need to make Ms Chase's position redundant.

[103] The respondent's claim that Ms Chase was dismissed on the grounds of redundancy was also undermined by its advertisement only two days after Ms Chase was dismissed, for a 'dog day care' teacher at a pay rate of \$35 to \$50 an hour. That was considerably more than the \$23 per hour Ms Chase was being paid.

[104] Ms Parker explained to the Authority that this was a maximum of four hours, to be worked two hours a day, on two days of the week, would be less than the respondent had been paying Ms Chase on a weekly basis, even though it was to be paid at a higher hourly rate than Ms Chase had been paid Ms Parker said the higher hourly rate was to reflect the ‘specialist dog pack walking skills’ that she was seeking in the advertisement.

[105] Although the respondent did not employ someone into that position until September 2021, if there had been a genuine redundancy situation then this new role should have been offered to Ms Chase as a redeployment opportunity. The fact that it was not undermined the respondent’s ability to claim that Ms Chase was genuinely redundant.

[106] The redundancy lacked any fair or proper process in which the ‘financial circumstances’ raised in the messages Ms Parker sent to Ms Chase were appropriately raised with Ms Chase.

[107] The text messages Ms Parker sent to Ms Chase were insufficient to have constituted a genuine restructuring proposal or consultation. The good faith requirements in the employment agreement and in the Act were therefore not met.

[108] The timing of a ‘redundancy’ also undermined its genuineness. Ms Parker proposed Ms Chase’s change from casual work to 30 or 31 hours a week permanent employment on 27 March 2021. The dismissal by text occurred less than seven weeks later on 13 May 2021.

[109] Ms Parker did not share with Ms Chase or the Authority what exactly had changed over that period to make Ms Chase’s role no longer viable. The only information about that was in the quoted messages in this determination.

Serious misconduct?

[110] The statement in reply claimed Ms Chase was dismissed for “*serious misconduct*”. However, the text messages ending the employment on 13 May 2021 did not refer to serious misconduct at all.

[111] Ms Parker’s final text message to Ms Chase ended by saying “*You’ve been great and I’ve appreciated your work here*”. That was inconsistent with the claim Ms Chase had been dismissed for serious misconduct.

[112] The respondent in its statement in reply said that on 24 April 2021 Ms Parker “*noticed dog products (in the office) were missing and that the accounting side of things was starting to look suspicious. I did not address Kara about these concerns, especially not in an accusing way [...]. It was clear she stole the product. I did not make a fuss about it, to avoid conflict with her.*”

[113] The evidence did not support such serious allegations being made against Ms Chase.

[114] The Authority was concerned that Ms Parker appeared to have adopted a scattergun approach to maligning Ms Chase, by throwing up multiple unsubstantiated reasons for her dismissal after the fact.⁵

[115] The “*Ending employment: Serious misconduct*” clause in Ms Chase’s employment agreement stated:

If, after following a fair process, the employer concludes that the employee has engaged in serious misconduct, the employee may be dismissed without notice. Serious misconduct is behaviour that fundamentally compromises the employer’s trust and confidence in the employee. Serious misconduct includes, but is not limited to:

- Theft [...].

[116] No serious misconduct investigation was conducted before Ms Chase was dismissed, in breach of these requirements in the employment agreement and in breach of the good faith and procedural fairness requirements in the Act.

Accounting issues?

[117] The reference in the statement in reply to the accounting side of things “*looking suspicious*” was never explained to Ms Chase or the Authority and there was no evidence provided to support such allegations.

Missing stock?

[118] Ms Parker sought to rely on missing product to justify Ms Chase’s dismissal. The evidence the Authority heard established that other people had come in and out of the respondent’s premises during the time period when the stock went missing.

⁵ The serious misconduct allegations were an example of the ‘badmouthing’ by Ms Parker that Ms Chase gave evidence about when addressing her remedies claim.

[119] Ms Parker did not raise any concerns about theft, dishonesty or serious misconduct with Ms Chase while she was employed. The missing stock issue was only raised as a concern after Ms Chase raised her unjustified dismissal grievance claim.

[120] The Authority was provided with text messages between Ms Parker and Ms Chase on 28 April 2021 in which Ms Parker asked about a missing jar of dog food. Ms Parker asked Ms Chase if she had sold one that day and Ms Chase said she had not.

[121] Ms Parker's response was "*No worries xx*". She followed that with a text that said "*After 10.30 am keep the front door locked. The likes of [dog owner's name redacted] Mum etc will just help themselves.*" Ms Parker then sent a third text that said "*F**ks me off. Out of all of my clients I bet you it was her*".

[122] That text exchange showed Ms Parker did not believe Ms Chase had stolen the missing stock but instead considered it more likely one of the customers (a specific customer the Authority has not named) had removed the missing stock.

[123] The Authority considered it unlikely Ms Parker would not have raised concerns with Ms Chase if she believed Ms Chase had stolen from the respondent.

[124] It was also unlikely that Ms Parker would have told Ms Chase how great she had been or thank her for her work, as Ms Parker did in the dismissal message she sent to Ms Chase, if she (Ms Parker) believed Ms Chase had stolen stock. It was far more likely that Ms Parker would have immediately confronted Ms Chase about any supposed theft Ms Parker believed had occurred.

[125] The Authority therefore considered Ms Parker's text messages to Ms Chase at the time of her dismissal likely reflected the true position, namely that Ms Parker was happy with her and grateful for the work Ms Chase had done.

[126] The Authority concluded that the missing stock Ms Parker referred to in the text message on 28 April 2021 was not the reason for Ms Chase's dismissal. Even if it had been, concern about missing stock was never raised with Ms Chase, the concern was not properly investigated, and there was insufficient credible evidence for Ms Parker to have concluded that Ms Chase was responsible for it.

[127] A fair and reasonable employer could not have concluded that Ms Chase had engaged in serious misconduct regarding the missing stock issue.

Allegations of WINZ fraud?

[128] Ms Parker told the Authority Ms Chase had engaged in WINZ fraud, which is why she (Ms Parker) ended her (Ms Chase's) employment. In an email to the Authority dated 22 June 2021 Ms Parker said "*Finding out about Kara's fraud broke my trust and confidence completely with her.*"

[129] That evidence fundamentally contradicted Ms Parker's evidence that Ms Chase had not been dismissed and that the employment ended by mutual agreement. However, leaving that aside, Ms Parker's evidence of fraud was lacking.

[130] Ms Parker's belief about benefit fraud was based solely on a text Ms Chase sent Ms Parker on 24 March 2021 that said she (Ms Chase) needed to be relieved for an hour because she had an unexpected appointment with WINZ at 2pm. Ms Parker claimed that text was proof "*Ms Chase had engaged in the WINZ fraud*".

[131] When pressed by Mr Harrison and the Authority to provide evidence of WINZ fraud, Ms Parker relied solely on the text. Ms Parker failed to provide any other evidence other than the text to support the benefit fraud claim. Ms Parker's benefit fraud allegations were based on assumptions she had made that were unsupported by evidence.

[132] Ms Chase's evidence to the Authority was that she had been open and honest with WINZ about her employment situation. She said her WINZ case manager knew she had initially been employed by the respondent on a casual basis and that had turned into permanent employment at the end of March 2021.

[133] Ms Chase provided the Authority with a text she sent Ms Parker on 24 March 2021 that said "*I'll let them [WINZ] know that I've applied for a job at the day care [respondent's business].*" Ms Chase confirmed she had then advised WINZ of the change in her employment status from casual to permanent.

[134] While she was working on a casual basis for the respondent Ms Chase said she had still been in contact with WINZ about job opportunities. WINZ had also helped her look for work again after she was dismissed.

[135] There was no evidence presented by Ms Parker on behalf of the respondent to the Authority to establish WINZ fraud. Even if there had been, Ms Parker agreed that she had not raised that with Ms Chase while Ms Chase was employed.

[136] Ms Parker made a formal complaint of fraud to WINZ. The Authority was informed that WINZ has not substantiated that allegation. The WINZ fraud allegations were not raised during the employment or investigated by the respondent.

[137] There was no reliable evidence presented to the Authority from which a fair and reasonable employer could have reasonably concluded that WINZ fraud had occurred. It was a new matter raised after Ms Chase had raised her dismissal grievance claim.

Findings

[138] The Authority finds that a fair and reasonable employer could not have concluded that Ms Chase had engaged in serious misconduct or that dismissal was the appropriate response to that regarding the 'suspicious accounting', the WINZ fraud and the missing stock allegations.

[139] Nor could a fair and reasonable employer have disestablished Ms Chase's position without first putting a restructuring proposal to her and giving her an opportunity to apply for any alternative roles such as the opportunity that was advertised on Facebook jobs two days after Ms Chase's dismissal.

[140] The respondent was therefore unable to justify Ms Chase's dismissal. The respondent's actions and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time it dismissed Ms Chase.

[141] Ms Chase's dismissal was substantively and procedurally unjustified so she is entitled to remedies.

What remedies should Ms Chase be awarded?

Mitigation

[142] The Authority was satisfied that Ms Chase appropriately mitigated her loss. She applied for alternative positions and had a number of interviews. She was assisted by her WINZ case manager who helped find employment opportunities for her. Ms Chase obtained alternative employment within seven weeks of her dismissal.

Lost remuneration

[143] Ms Chase claimed seven weeks' lost remuneration. However she was paid two weeks' pay in lieu of notice of \$1,380. That left five weeks' lost remuneration that Ms Chase was entitled to recover.

[144] The notice the respondent paid Ms Chase was based on \$690 a week consisting of \$23 an hour for 30 hours. Ms Chase's award of lost remuneration should be based on those same figures.

[145] The respondent is ordered to pay Ms Chase \$3,450, being five weeks' lost remuneration at \$690 per week, based on a 30 hour work week multiplied by \$23 per hour.

Distress compensation

[146] Ms Chase said she was shocked and distressed by her dismissal. She said she had only received the highest praise from Ms Parker regarding her work ethic, immaculate cleaning and how great she was with the dogs and customers. Ms Chase said Ms Parker had told her before her dismissal that she (Ms Chase) had "*revived her business from the dead*".

[147] Ms Chase said that in response to Ms Parker's suggestion in a text message that they "*will just cut ties*", she deleted Ms Parker from her Facebook friends. Ms Chase's mother also later blocked Ms Parker on Facebook after Ms Chase told her mother about the abusive messages Ms Parker had sent her.

[148] Ms Chase's deletion of Ms Parker from Facebook precipitated a number of abusive text and Facebook messages from Ms Parker to Ms Chase and her family.

[149] Ms Chase recounted abuse and harassment she said she had received from Ms Parker, who had also apparently harassed Ms Chase's parents. Ms Chase described how Ms Parker had badmouthed her around town, which Ms Chase said she found very challenging because they lived in such a small community that everyone seemed to know that there had been a problem with her employment.

[150] Ms Chase said a number of the respondent's clients informed her that Ms Parker had been spreading lies around town about her. Ms Chase said the lies were hard to hear and were very difficult to manage in a small community.

[151] Ms Chase further said she was distressed and humiliated as a result of Ms Parker's placement of an advertisement on Facebook jobs for employment with the respondent for four hours twice a week at a pay rate of \$35 to \$50 an hour, which was more than Ms Chase had been paid.

[152] Ms Chase said she had suffered a huge amount of stress due to the widespread abuse Ms Parker had engaged against Ms Chase, and her family, as a result of her dismissal. Ms Chase described how she and her family had suffered from more stress as a result of Ms Parker's actions towards them arising from the dismissal than they had ever been exposed to by one individual before.

[153] The Authority was satisfied that Ms Chase has suffered humiliation, injury to feelings and loss of dignity as a result of her unjustified dismissal, so it was appropriate to compensate her for that.

[154] The respondent is therefore ordered to pay Ms Chase \$12,000 distress compensation under s 123(1)(c)(i) of the Act for the humiliation, loss of dignity and injury to feelings Ms Chase suffered as a result of her unjustified dismissal.

Annual holiday entitlement arrears

[155] Ms Chase was entitled to eight per cent of her total gross earnings over the period 27 January – 13 May 2021 as annual holiday entitlements that should have been paid to her when her employment ended, but that has still not been paid.

[156] Because it was unclear how much Ms Chase actually earned during her employment, the Authority had to rely on Ms Parker's evidence about that. Ms Parker told the Authority that regardless of how many hours Ms Chase worked during the first period of employment she was paid \$600 net per week. The award of annual holiday entitlements arrears therefore had to be based on the grossed up figure that related to that evidence.

[157] The \$600 cash per week payment divided by 28 hours work amounted to \$21.43 net per hour or approximately \$26.40 gross per hour.

[158] The Authority has therefore calculated Ms Chase's likely total gross earnings from 27 January – 27 March 2021 as \$739.20 per week gross (being \$26.40 per hour x 28 hours per week).

[159] There are 8.5 weeks between 27 January and 29 March 2021, meaning Ms Chase's total gross earnings over that period would have likely been \$6,283.20 gross.

[160] Under the terms of the agreement the parties reached about Ms Chase's permanent employment on 29 March 2021, she was to be paid \$23 an hour for 31 hours a week plus Compulsory Employer Contribution of three percent. Her income was therefore \$713 gross per week for the 8.2 week period between 30 March and 27 May 2021.

[161] The date of 27 May was used by the Authority instead of 13 May as that was 14 days after the dismissal that occurred on 13 May, to reflect that Ms Parker paid Ms Chase two weeks' pay in lieu of notice. The notice pay is subject to the annual holiday entitlements so it has been included within the time period used to calculate Ms Chase's total gross earnings.

[162] Based on the evidence available, the Authority therefore finds that Ms Chase should have received \$6,283.20 gross for the period 27 January - 29 March 2021 and \$5,846.60 gross for the period 29 March - 27 May 2021.

[163] Ms Chase's total earnings while employed would therefore have been \$12,129.80 gross for the duration of her employment over the period 27 January – 27 May 2021 (inclusive of the two weeks' pay in lieu of notice she received). Eight per cent of her total gross earnings of \$12,129.80 was \$970.38.

[164] The respondent is ordered to pay Ms Chase annual holiday pay arrears of \$970.38 within 28 days of the date of this determination.

Compulsory Employer Contribution KiwiSaver arrears

[165] There was no evidence the respondent had paid any of its KiwiSaver Compulsory Employer Contribution (CEC) on Ms Chase's wages. Ms Chase is therefore entitled to be paid three per cent of her total gross earnings as the respondent's CEC to KiwiSaver.

[166] Within 28 days of the date of this determination the respondent is ordered to remit its CEC of \$363.89 to the IRD for the benefit of Ms Chase's KiwiSaver account.

Should remedies be reduced on the grounds of contribution?

[167] Contribution denotes blameworthy conduct that has been proven on the balance of probabilities. The evidence failed to establish to the required standard of proof that Ms Chase

had engaged in blameworthy conduct. Her remedies are therefore not required to be reduced under s 124 of the Act.

What costs should be awarded?

[168] Ms Chase as the successful party is entitled to a contribution towards her actual legal costs. The Authority has adopted its usual notional daily tariff based approach to costs.

[169] This matter involved an investigation meeting that lasted just over three hours. The notional pro-rated starting point for assessing costs in this matter was therefore \$2,250. There are no reasons that warrant a reduction being made to the notional starting tariff.

[170] The Authority finds that the manner in which Ms Parker, on behalf of the respondent, elected to conduct these proceedings unnecessarily and unreasonably increased Ms Chase's legal costs. It is therefore appropriate to increase the notional starting tariff by \$750 to reflect that conduct.

[171] The respondent is ordered to pay Ms Chase \$3,000 towards her actual legal costs plus \$71.56 to reimburse her filing fee.

Outcome

[172] The Authority makes the following findings and orders:

- (a) Ms Chase was employed by the respondent between 27 January and 13 May 2021;
- (b) Ms Chase's employment ended as a result of her unjustified dismissal;
- (c) Within 28 days of the date of this determination, the respondent is ordered to pay directly to the IRD:
 - (i) The correct amount of PAYE and ACC levies that should have been but was not paid on Ms Chase's total gross earnings (based on \$600 net a week) for the period 27 January to 27 March 2021; and
 - (ii) Any PAYE and/or ACC levy arrears on her total gross earnings over the period 29 March to 13 May 2021; and
 - (iii) \$363.89 CEC for the benefit of Ms Chase's KiwiSaver account;

- (d) Within 28 days of the date of this determination, the respondent is ordered to pay Ms Chase \$19,491.94 consisting of:
- (i) \$3,450 lost remuneration under s 128(2) of the Act;
 - (ii) \$12,000 distress compensation under s 123(1)(c)(i) of the Act;
 - (iii) \$970.38 annual holiday entitlements arrears;
 - (iv) \$3,000 towards her actual legal costs; and
 - (v) \$71.56 to reimburse her filing fee.

Rachel Larmer
Member of the Employment Relations Authority