

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 86/08
5096007

BETWEEN KAYLENE BICKLEY
 Applicant

AND HALIFAX VET LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Graeme Downing, Counsel for Applicant
 Maree Kirk, Counsel for Respondent

Investigation Meeting: 18 and 19 March 2008 at Nelson

Determination: 26 June 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Halifax Vet Limited owns and operates a business in Nelson called Halifax Veterinary Centre. Kaylene Bickley was employed by Halifax from about 2000 until June 2007 when she was summarily dismissed for serious misconduct following an investigation into invoicing and reconciliation irregularities.

[2] Mrs Bickley says that she was unjustifiably dismissed and seeks compensation for the lack of notice of dismissal, reimbursement of lost wages and compensation for distress. In essence, Mrs Bickley denies any improper conduct and is critical of several aspects of Halifax's investigation. Halifax says that it conducted a full and fair investigation which established that Mrs Bickley took money from the business by manipulating its invoicing and reconciliation systems, these actions amounting to serious misconduct.

[3] In response to Mrs Bickley's statement of problem, Halifax lodged its own claim by which it seeks to recover its losses arising from Mrs Bickley's alleged defalcations and the imposition of a penalty on her for breaching the statutory duty of good faith. In response Mrs Bickley denies any breach of her contractual and statutory obligations and says that Halifax did not suffer any loss attributable to her actions.

[4] To resolve these issues I need to explain Halifax's accounting system and Mrs Bickley's role in this before setting out how Halifax's concerns arose, what it did to investigate those concerns, and why it reached its decision to dismiss Mrs Bickley. Having done that I will assess whether Halifax's decision was justified before turning to the company's claims against Mrs Bickley.

Halifax's systems

[5] Halifax is a large veterinary practice employing about 15 staff. Hans Andersen is one of the company principals and a vet. Clare Maisey is the senior vet nurse. Prior to her dismissal, Mrs Bickley had been employed for a number of years full time as a vet nurse.

[6] Entering the practice there is a reception and waiting area. Behind the reception desk are located two computer terminals. There is also a cash drawer that was (at the relevant time) easily accessible and eftpos payment facilities. Vet nurses generally staff the reception desk and handle payments and invoicing as well as their nursing duties. Clients are encouraged to pay for their services at the time or interest charges are added to unpaid accounts. The invoicing, payment by cash, cheque or electronic transactions and receipting are dealt with there and then by whoever is available at reception. The principal business is the veterinary work, but Halifax also sells some related products as counter sales. Part of dealing with the transaction is for the staff member to record in the computer whether the payment is received by cash, cheque or eftpos. The cash, cheque or eftpos transaction slip is then put away for later reconciliation and banking.

[7] Halifax has a computerised accounting system used to generate invoices, receipts and statements for clients. Generally, statements are sent only to the clients recorded on the system as owing money to Halifax. The system apparently generates statements for every account so it is necessary each month to sift out the statements

that need not be sent to clients. There are also processes about following up overdue accounts and rebating interest charges. In about December 2005 Mrs Bickley took over responsibility for debtors which involved sifting out the statements that were not posted, adjusting interest charges in accordance with standard practices, following up outstanding accounts, initiating debt recovery processes and writing off bad debts.

[8] There are about 10 networked computers in the practice. As mentioned, there are two computers at reception. Each of the three treatment rooms has a computer, there are two in the office, two in the treatment area and one in the staffroom that is also used as a work area. While each user has a unique password, the computers can be (and often were) left logged on and could be used by other users. No one staff member is the sole user of any particular computer. Mrs Bickley's evidence is that each staff member was also aware of the passwords of a number of other staff members. I accept that others may have known her password but there is no evidence that Mr Andersen's password was known by others.

[9] One task is to reconcile the day's transactions and prepare the banking. A payment details list is printed from the computer and the cash, cheque and eftpos totals should match the cash, cheques and eftpos slips present. If not, an attempt is made to find out why. For example, a payment actually made by cheque but recorded as cash would not affect the grand total but would cause a difference under each sub-total. Once that error was identified the coding could be changed so that the correct type of payment was recorded on the computer. In early January 2007 there was a change to the reconciliation procedure to ensure that documentation of any errors was kept. Mrs Bickley confirmed in her evidence that she knew about this requirement. It is common ground that Mrs Bickley generally prepared the reconciliations on Thursdays and Saturdays and other staff generally did them on other days.

How the concerns arose

[10] Because Mrs Bickley was responsible for debtors, client inquiries about accounts were generally directed to her to deal with. By chance, Ms Maisey received four calls from clients on Thursday 3 May 2007. The clients had just received statements for the previous month showing they owed money to Halifax. They all said they had already paid their accounts. Ms Maisey attended a course away from the practice between 2pm and 4pm that day so she investigated the clients' questions on her return. She was doing this in the staff room from about 4.15pm.

[11] Mrs Bickley's evidence which I accept is that, on the same day that Ms Maisey had been to the course, she had a brief discussion with Ms Maisey about these accounting mistakes. Ms Maisey's evidence, which there is no reason to doubt, is that Mrs Bickley came into the staff room. While Ms Maisey's evidence is that she did not mention the account names to Mrs Bickley, Mrs Bickley says that she was told the names of one of the accounts (*Account F*) but also saw the names on the papers Ms Maisey was working with. *Account F* was not one of the client inquiries but Ms Maisey had noticed as part of her investigations a reconciliation error affecting *Account F*, so she was investigating it as well. It is common ground that Ms Maisey told Mrs Bickley that her investigations involved one of Mrs Bickley's banking reconciliations, that mistakes happened, and that she would sort it out. Mrs Bickley left the staff room. Ms Maisey's evidence which there is no reason to doubt is that she continued her investigation and Mrs Bickley came back to the staff room at about 4.55pm.

[12] In about February 2007 a computer change was made so that only users logged on with Mr Andersen's and Ms Maisey's passwords could delete certain records. Consulting Room 3 is just along a corridor from the staff room. During the afternoon of 3 May the computer in Consulting Room 3 was logged on by Mr Andersen using his password as he was working in there. Some time after Ms Maisey's course ended, Mr Andersen left the consulting room to talk with some visitors to the practice. The visitors had been presenters at Ms Maisey's course. Mr Andersen did not log off the computer and no one else was using Consulting Room 3 over this period.

[13] At 4.27pm on 3 May 2007 someone used the computer in Consulting Room 3 to change the computer records for *Account F*. On 5 April 2007 that account had been credited with a payment of \$100 by Eftpos. By the time of her first conversation shortly after 4pm on 3 May 2007 with Mrs Bickley, Ms Maisey had identified that there was no Eftpos slip for this transaction, an error that had not been identified by Mrs Bickley who did the reconciliation in April.

[14] As noted, Mrs Bickley went back into the staff room at about 4.55pm and had a second discussion with Ms Maisey about the account errors. Mrs Bickley asked how Ms Maisey was getting on. Ms Maisey said that she had checked three client complaints but had not been able to resolve them because the records did not show any cash missing on the relevant days. Mrs Bickley asked if they related to her

reconciliations and Ms Maisey said they did. Mrs Bickley then burst into tears saying *see, all the nurses are talking about me* and left abruptly.

[15] Ms Maisey continued her investigations in conjunction with Mr Andersen over some days. They discovered later that someone had deleted the 5 April 2007 record of a \$100 Eftpos payment on *Account F* and changed a 17 February 2007 cash payment of \$140 to a cash payment of \$240.

The disciplinary investigation

[16] Kay Chapman is a senior consultant with EMA. Halifax engaged her to assist with its investigation into whether any funds were missing and who might be responsible. Her evidence, which I accept, is that Mr Andersen told her initially that he did not believe that any of his staff were stealing money. As part of her investigations, Ms Chapman cross referenced suspicious transactions from the accounting records with when staff were working. This showed that Mrs Bickley worked on most of those occasions and no other staff member's work patterns coincided so closely. Next, a letter and some documents were prepared to initiate a disciplinary investigation involving Mrs Bickley.

[17] The letter and other documents were given to Mrs Bickley on 31 May 2007. The letter cautions Mrs Bickley that the allegation of her dishonestly failing to follow correct accounting procedures is serious and could result in her dismissal. It requires Mrs Bickley to attend a meeting on 5 June 2007 and encourages her to bring a representative. Relevant accounting documents were provided. There is also a summary explaining how the concerns implicating Mrs Bickley had arisen. Mr Andersen's evidence is that the summary was included with the 31 May 2007 letter while Mrs Bickley says that she did not receive it until the beginning of the meeting on 5 June 2007. I will assume Mrs Bickley's evidence is correct on this point but it makes no difference as will become apparent.

[18] Mrs Bickley was legally represented at the meeting. Eventually Mrs Bickley's explanation was a complete denial of improper or dishonest conduct. Mrs Bickley's lawyer sought and received an explanation of why it was thought that any money was missing and why Mrs Bickley was suspected. Mr Andersen explained by reference to a particular incident. He also said that Mrs Bickley was the only employee at work on each occasion and that no combination of any two employees could have made the

suspicious changes. It was also significant that Mrs Bickley had recorded reconciliations as correct when in fact they were incorrect.

[19] There was discussion about *Account F*. Mrs Bickley said that she printed the reconciliation report for 5 April 2007 that day, successfully did the reconciliation the next morning, then printed out a new reconciliation report at 2pm on 6 April 2007. That is the print date on the paper copy held in Halifax's records. Mrs Bickley could not explain why she printed the reconciliation report twice or what had happened to the first print out. She confirmed that she knew that she was not supposed to print a second reconciliation report. Ms Chapman gave evidence about this exchange which I accept as an accurate description of what was said. The question and answer about the print outs refers to a policy introduced in January 2007 about keeping the paper record of reconciliation errors and corrections. In evidence, Mrs Bickley says that she reprinted the reconciliation report because the first one was covered in writing and was a mess. I accept Ms Chapman's evidence that this explanation was not given to Halifax at the time during its disciplinary process. If the explanation was true it would have been given during the employer's investigation so I do not accept Mrs Bickley's evidence.

[20] Near the end of the meeting Mrs Bickley's solicitors requested a further meeting for Mr Andersen to show them the relevant parts of the computer system. 12 June 2007 was agreed for this purpose. The meeting then adjourned with the solicitors saying they would review the documents with Mrs Bickley.

[21] On 12 June 2007 Halifax received a letter dated 8 June 2007 from Mrs Bickley's solicitors. It says that Mrs Bickley is fully apprised of the allegations and denies them in their totality. It also says that nothing further would be gained by meeting again as the evidence available is insufficient to warrant dismissal for misconduct, for which a criminal conviction would be required to establish misconduct with any degree of certainty. The letter ends by inviting Halifax to reach its own decision about whether there is sufficient evidence to establish serious misconduct and to direct all future correspondence to the solicitors. Needless to say, there was no meeting on 12 June 2007.

[22] Ms Chapman wrote to the solicitor on 18 June 2007. The letter points out that there has been very little response to enable the employer to conclude that there is a favourable explanation for the alleged irregularities. Further information was attached

to the letter and Mrs Bickley was given the opportunity to respond in writing. The letter says that Halifax will proceed to make a decision even without Mrs Bickley's further participation. It also takes issue with the proposition that a criminal conviction is required to establish serious misconduct.

[23] The information attached to the letter included an explanation of concerns about transactions for *Account EH* and Mrs Bickley's link to those concerns, a similar explanation regarding *Account F* and information on staff working patterns for all the concerning transactions supporting the contention that Mrs Bickley was the only staff member at work on all the occasions.

[24] On 20 June 2007, Mrs Bickley's solicitors responded by repeating her denial and her unwillingness to attend any further meeting. The next day, in answer to Halifax's question, the solicitors confirmed that Mrs Bickley did not want to provide any written response. On 22 June 2007 Halifax wrote to the solicitors saying that there would be meeting at 4pm on 29 June 2007 to tell Mrs Bickley the outcome of the investigation and if Mrs Bickley did not attend, she would be given a letter with a copy faxed to the solicitor. An offer was made to consider any alternative suggestion about how to communicate the outcome. The solicitors responded on 27 June 2007. That facsimile says that Mrs Bickley will attend the meeting to hear the outcome of the investigation and asks for findings to be put in writing for Mrs Bickley to seek advice after the meeting before any final decision is made.

[25] On 29 June 2007, Ms Chapman sent a facsimile to Mrs Bickley's solicitors setting out the investigation findings as follows:

Investigation Findings

1. *The allegation that Kaylene failed to follow correct cash handling procedures is substantiated.*
2. *The allegation that Kaylene failed to follow correct invoicing procedures is substantiated.*
3. *The allegation that Kaylene failed to follow correct accounts reconciliation procedures is substantiated.*
4. *The allegation that Kaylene carried out her duties in a dishonest manner is substantiated.*
5. *The allegation that Kaylene misappropriated funds is substantiated.*

[26] The letter goes on to foreshadow the dismissal for established serious misconduct and says that the meeting later that day is Mrs Bickley's opportunity to make any submissions about that proposed outcome.

[27] Later, at about 4pm, when Mrs Bickley did not arrive for the meeting, Mr Andersen went out to get her from her duties. Mrs Bickley explained to Mr Andersen and his representative (Evan Price) that neither she nor her solicitors would be attending the meeting. Mr Price read out to her the relevant passage from Halifax's 29 June 2007 letter and then rang Mrs Bickley's solicitor who later returned the call. The solicitor confirmed that Mrs Bickley would not be attending the meeting. Mr Price referred to the earlier correspondence which said a decision would be made nonetheless, but the solicitor again said that Mrs Bickley would not be attending a meeting. The call ended and Mrs Bickley returned to her duties.

[28] Mr Andersen and Mr Price canvassed the situation and Mr Andersen decided to proceed with the foreshadowed dismissal. Mr Price then prepared a dismissal letter which was given to Mrs Bickley by Mr Andersen. She left the premises soon after.

[29] In her evidence Mrs Bickley says that the letter is oddly worded, raising the suggestion that it was prepared prior to the sequence of events on 29 June 2007. However, there is no reason to doubt the evidence given by Mr Price which forms the basis of the outline of events given above.

The grievance is raised

[30] On 11 July 2007, Mrs Bickley's solicitors wrote to Halifax raising her grievance. To summarise:

- it is suggested that the dismissal letter was pre-prepared;
- Mr Andersen is alleged to have made inappropriate and inaccurate comments to others about Mrs Bickley taking thousands of dollars;
- the accounting procedures are described as *poor if not chaotic* and various examples are given; *Account F* issue is portrayed as a response to the client's belief of having paid more than the computer records showed;

- it is asserted that there are no grounds to support a finding that Mrs Bickley took any money;
- complaint is made about the principal investigator being another employee; and
- complaint is also made that other employees were not subject to the same scrutiny as Mrs Bickley.

[31] Despite mediation the parties have not been able to resolve this problem.

Justification?

[32] Whether the dismissal of Mrs Bickley is justified must be determined objectively by considering whether Halifax's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[33] Halifax cannot be criticised for initiating its investigation or for its focus on Mrs Bickley. Any employer faced with four clients ringing at the same time to dispute their accounts would want to get to the bottom of the apparent discrepancies. The choice of person to undertake the work was entirely a matter for the employer and no valid criticism can be levelled at Halifax for delegating the work to Ms Maisey. She is a senior and trusted employee with relevant skills who had no reason to be partial towards Mrs Bickley.

[34] The focus on Mrs Bickley arose for two main reasons. Halifax's professional adviser mapped staff working patterns with the dates of irregular transactions using information supplied by Ms Maisey. That showed that Mrs Bickley was the only staff member who was or might have been present on all the identified dates. The second factor was the apparent likelihood that Mrs Bickley had changed *Account F* on the computer on 3 May 2007. As a result it was reasonable for suspicion to focus on Mrs Bickley rather than other staff and Halifax was entitled to initiate a disciplinary investigation seeking her response, as it did.

[35] There can be no valid criticism about how Halifax conducted its investigation. Mrs Bickley was appropriately cautioned about what was at stake. She was provided with relevant documents and information and given a full opportunity to understand the allegations and provide a response.

[36] Some confusion arose on the last day of Mrs Bickley's employment but that is not attributable to Halifax. The commitment given by Halifax was to provide a further opportunity for Mrs Bickley to respond before finalising its decision. That was done but Mrs Bickley on advice rejected the opportunity. Mrs Bickley probably thought she could rely on the sequence proposed by her solicitors but this was the employer's disciplinary investigation and there is nothing improper with the employer's process.

[37] There was no predetermination by Halifax. I accept Ms Chapman's evidence about Mr Andersen's initial disbelief that a staff member would be stealing. Even as the picture unfolded, Mr Andersen held off reaching a conclusion. As indicated above, Mr Price prepared the dismissal letter after Mr Andersen finally decided to proceed with dismissal on 29 July 2007. The letter was then given to Mrs Bickley. Nothing more was required of a fair and reasonable employer.

[38] That leaves the question of whether there was sufficient information for a fair and reasonable employer to reach the conclusions set out in the 29 June 2007 letter.

[39] In evidence Mrs Bickley said that there could be no innocent explanation for a person changing the *Account F* information on the computer on 3 May 2007 and she vehemently denied making the change. That reflects her denials during Halifax's investigation. However, a fair and reasonable employer would have concluded that Mrs Bickley did actually change the *Account F* computer record. I accept Mr Andersen's evidence that the financial audit trail report establishes that an alteration was made to *Account F* at 4.27pm on 3 May 2007. The record of a \$100 Eftpos payment on 5 April 2007 was deleted. At the same time the record of a \$140 cash payment on 17 February was altered to show a \$240 cash payment at the same time. At a superficial level this action left the *Account F* balance unchanged and resolved the absence of the Eftpos transaction slip for the 5 April 2007 transaction. The banking for 17 February 2007 had not reconciled at the time and the changes made on 3 May 2007 simply increased the cash deficit but that was not apparent without further investigation.

[40] Halifax's inquiries placed four employees at work at 4.27pm on 3 May 2007. Ms Maisey was with another employee in the staff room. Neither of them made the changes using Mr Andersen's log-on. A third employee was serving clients at reception as shown by the reception computer operating under her log-on with

transactions at 4.25pm, 4.26pm and 4.32pm. Only Mrs Bickley's whereabouts at the time of the change to *Account F* were not otherwise established. That together with Mrs Bickley's knowledge that an irregularity with *Account F* was being investigated and her familiarity with the accounting software was sufficient information for a reasonable employer to conclude that Mrs Bickley made the changes to *Account F*. The other point that should be mentioned is that Halifax checked with the bank to confirm that there had been no eftpos transaction for \$100.00 for the client on 5 April 2007 so the computer record of it was false from the outset. The false record was part of someone taking cash. Because Mrs Bickley changed *Account F* on 3 May she must have been involved in taking the money earlier. That is a conclusion that a fair and reasonable employer would have reached in these circumstances. It was Halifax's conclusion at the time.

[41] Halifax's conclusions about Mrs Bickley taking money extended well beyond *Account F*. In light of the conclusion fairly reached about Mrs Bickley taking money in connection with the *Account F* transaction I find that the same fair and reasonable employer would also have concluded that there were probably other defalcations by Mrs Bickley associated with irregular reconciliations and account changes.

[42] It follows that Mrs Bickley was justifiably dismissed and that she does not have a personal grievance.

Counterclaim

[43] Halifax says that Mrs Bickley breached implied terms of her employment agreement by taking money and manipulating the accounting records to try and cover up her defalcations. This is quantified in two ways. First, there are accounting records from January 2007 to May 2007 supporting a claim of \$2,118.25. For example, in January there are 2 deleted invoices relating to cash payments. On each of those occasions cash reconciled with the payments list but there should have been a cash surplus equalling the deleted invoices since those invoices were not included in the payments list. Other examples show that invoices from months before were altered to create credits on client accounts presumably to offset current invoices and permit money to be taken without creating a debit account the client would notice. The second method of quantification relies solely on banking discrepancies for 2006 amounting to \$640.08. The accounting software apparently does not permit a better forensic analysis for this earlier period.

[44] In respect of the claim based on the 2006 banking records, the evidence does not establish to a level of probability even that money was misappropriated. There could be a number of other equally plausible innocent explanations for the banking anomalies and there is nothing of any substance to implicate Mrs Bickley even if money was taken by someone.

[45] More must be said about the 2007 claims. It seems unlikely that there would be an innocent explanation for all the manipulation of client accounts involving the creation of credits up to a year earlier but it seems to be accepted by Halifax that some innocent changes were made by staff at different times or at least accounting changes were made and no money was taken on many occasions. Against that background what cannot be established to a level of probability is that Mrs Bickley was the one who made any particular changes to the accounting records and actually took money on any particular occasion. The sole exception to this finding relates to *Account F* where there is convincing evidence that Mrs Bickley changed the records which could only have been an attempt to cover up taking \$100.00 at an earlier point in time in connection with the false eftpos transaction. Halifax is entitled to an order requiring Mrs Bickley to repay that sum.

[46] It may seem anomalous that Halifax can justifiably dismiss Mrs Bickley for dishonesty but falls short of proving on the balance of probabilities that Mrs Bickley took money which she should be ordered to repay. However, different considerations arise. The Authority's role in respect of the personal grievance is to objectively scrutinise the reasonableness of the employer's decision. Here, there was nothing unreasonable about Halifax's actions and how it acted. That is different from proving that Mrs Bickley took any particular amount on any particular occasion in breach of her contract, which would need to be established as fact before there could be any order against her.

Penalty

[47] A penalty is sought against Mrs Bickley for an alleged breach of the duty of good faith. It is said that Mrs Bickley was not responsive and communicative during the disciplinary process, that she misled and deceived Halifax during her employment and that she did the same through counsel during the disciplinary process.

[48] Because the imposition of a penalty is a quasi-criminal sanction, proof to the criminal standard has always been required in proceedings such as this. The only improper conduct proven to that standard is that Mrs Bickley changed *Account F* on 3 May 2007. There is not proof to that standard even that Mrs Bickley had taken money which she intended to cover up by this change.

[49] It is also the case that only certain breaches of good faith render a person liable to a penalty. Here, there is no evidence that Mrs Bickley intended to undermine her employment relationship. Nor is there evidence to the required standard of a sustained breach of the duty of good faith.

[50] Accordingly the penalty claim is dismissed.

Summary

[51] Mrs Bickley does not have a personal grievance and her claims are dismissed.

[52] It is proven on the balance of probabilities that Mrs Bickley took \$100.00 from Halifax in breach of her implied obligations and she is ordered to pay that amount to Halifax.

[53] The claim for a penalty against Mrs Bickley for breach of good faith is dismissed.

[54] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority