

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 316
5555074

BETWEEN	MICHELE CHRISTOFFERSEN Applicant
A N D	LINDA TOKANA First Respondent
A N D	MAMAKU EARLY LEARNING CENTRE LIMITED Second Respondent

Member of Authority: Rachel Larmer

Representatives: Warwick Reid, Advocate for the Applicant
Harry Edward, Advocate for the Respondent

Investigation Meeting: 07 October 2015 at Rotorua

Date of Determination: 09 October 2015

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Ms Michele Christoffersen is an experienced and registered Early Childcare Teacher. Ms Christoffersen says she was employed by Ms Linda Tokana to work at the Mamaku Early Learning and Childcare Centre (Mamaku) in Rotorua in August of 2013. The employment agreement signed by Ms Christoffersen and Ms Tokana records the employer as “*Mamaku Early Learning.*”

[2] Ms Tokana is the owner and operator of Mamaku. She ran the Childcare Centre and (among other things) she was the person who rostered, hired, fired and disciplined staff. Ms Tokana was the person who offered Ms Christoffersen employment and who subsequently dismissed her.

[3] Ms Tokana says she did not personally employ Ms Christoffersen. Ms Tokana therefore believes she is not Ms Christoffersen's employer. Ms Tokana says Ms Christoffersen was employed by Mamaku. However Mamaku is not a legal entity, it is a trading name only so it cannot legally have employed Ms Christoffersen. The identity of Ms Christoffersen's employer therefore needs to be determined by the Authority.

[4] Ms Christoffersen was dismissed on 28 January 2015 after she left work before her shift had finished. Ms Christoffersen says she left work early because she was unhappy about a number of different things. This included comments Ms Tokana had made to Ms Christoffersen earlier that day so she left in order to take time to consider whether she could continue working at Mamaku.

[5] Ms Tokana told Ms Christoffersen that she was not to leave work early and that if she did it would be treated as serious misconduct as per the Mamaku Disciplinary Code and would result in her "*instant dismissal*." Ms Christoffersen left work anyway at 1.40pm instead of at 6pm when her rostered shift ended.

[6] Ms Tokana's response to Ms Christoffersen leaving work early was for Ms Tokana to text Ms Christoffersen asking for her keys and uniform back. Ms Tokana confirmed that she sent that text because she (Ms Tokana) had decided to dismiss Ms Christoffersen for serious misconduct because she had decided to "*walk out*".

[7] Ms Christoffersen says she did not "*walk out*" of her job, she just left work early on 28 January to consider her situation because she was upset. Ms Christoffersen says she made that clear to Ms Tokana in a letter she (Ms Christoffersen) handed to Ms Tokana before she left saying:

I am so upset and angry about the comment that was made I cannot seem to concentrate on the story that I've been trying to write. I intend to go home and think seriously about my position here and if I can continue working at the Mamaku Early Learning Centre or not.

...

I am not in a very good frame of mind to be at work.

[8] The catalyst for Ms Christoffersen leaving work at 1.40pm was an exchange that occurred around 11.30am that day when Ms Tokana overheard Ms Christoffersen using "*an extremely loud and angry voice*" to children she was looking after at the lunch table during their lunchtime.

[9] At the time that occurred Ms Tokana was close by speaking to a parent who happened to be complaining about teacher/child ratios¹ and about the way Ms Christoffersen spoke to the children. Ms Tokana says the parent heard Ms Christoffersen's raised voice and subsequent response to Ms Tokana who went over to see what was happening.

[10] Ms Christoffersen denies using a loud or angry voice but she does admit using a "*firm*" voice because she was telling off three children who had got up and looked like they were going to leave the table.

[11] I have resolved this conflict in favour of Ms Tokana's version of events. It would not make sense for Ms Tokana to have left the complaining parent and gone inside to speak to Ms Christoffersen if she had not been concerned about what she heard. The use of a firm voice would not have raised concern but the use of a loud angry voice and/or a teacher yelling at children would have.

[12] When Ms Tokana went to investigate the commotion she reminded Ms Christoffersen that there was a parent in the Centre to which Ms Christoffersen replied that she was "*working on her own with all the children*". Ms Tokana was unhappy at this response which was also overheard by the parent who had just been complaining about teacher/child ratios.

[13] Ms Tokana says she was surprised by Ms Christoffersen's response given she could have asked the other adults who were close by for assistance if she felt unable to look after the ten children who were at the lunch table by herself. Ms Tokana considered someone with Ms Christoffersen's experience and expertise could and should have been able to handle the children without raising her voice to them.

[14] Ms Tokana also said that even if Ms Christoffersen had felt unable to cope she could and should have asked for assistance from the other adults in the area – she should not have raised her voice to the children. Ms Tokana's view is that Ms Christoffersen lost her temper so quickly that the other adults in the area were not aware that she wanted or needed assistance. Ms Christoffersen's view is that she should have had help looking after the children at the lunch table.

¹ Ms Tokana says she always rostered an extra teacher over and above minimum requirements.

[15] There were ten children sitting at the lunch table with Ms Christoffersen and five other adults within a few metres of her. One adult was on a break, Ms Tokana was dealing with the parent query, one adult was in the children's sleep room leaving two other adults available in the immediate area.

[16] Ms Tokana did not see any need for Ms Christoffersen to have raised her voice at the children she was looking after. Ms Tokana says that caused her to ask Ms Christoffersen whether she thought she had the skills to do the job she was being paid to do, namely looking after young children. It was this comment that Ms Christoffersen took offense to and which caused her to decide to leave work early.

[17] Ms Christoffersen's version of events is that Ms Tokana came up and stood beside her very close, leaned into her ear and said through clinched teeth "*I do not appreciate my staff yelling at the children, especially when I'm dealing with a parent complaint*". After Ms Tokana had finished her discussion with the parent, she went over to Ms Christoffersen and asked to talk about what had occurred.

[18] Ms Christoffersen says that Ms Tokana told her that she needed teachers with enough experience to be able to cope with large numbers of children and that if she could not cope with being a teacher after all her training, then there were plenty of others who could.

[19] Ms Tokana says she made the comment because Ms Christoffersen was a fully registered teacher who appeared to be saying that she could not be left alone with ten children while they were sitting at the lunch table together while there were also other adults in the immediate vicinity.

[20] Ms Tokana says that she had previously received feedback from other staff that Ms Christoffersen had been raising her voice inappropriately to children and that the parent present that day had also complained about the way Ms Christoffersen had spoken to the children.

[21] Ms Christoffersen took exception to Ms Tokana's comment because she felt it undermined her. Ms Tokana says that Ms Christoffersen has the same training and qualifications as she does so she should be well able to cope with normal child related issues that may arise.

[22] Ms Tokana told Ms Christoffersen that if she felt she had needed help then she could and should have called on the other staff instead of raising her voice at the children. Ms Tokana expressed concern that two of the children Ms Christoffersen had yelled at were particularly vulnerable because they had recently been removed from their family due to care and protection concerns so it was particularly important that the Centre felt like a safe place for them.

[23] Ms Tokana says her comments to Ms Christoffersen were made out of frustration because of Ms Christoffersen's apparent inability to cope without yelling with what Ms Tokana believed was a basic and normal teacher/child incident.

[24] Ms Tokana's view is that Ms Christoffersen's response to the children she had yelled at was extreme, unprofessional and demonstrated a lack of teaching competence. Ms Tokana said that was why she raised this with Ms Christoffersen to see if she felt able to do the role she had been employed to do.

[25] Ms Christoffersen went to lunch at 11.30am for half an hour. When she returned from lunch Ms Tokana suggested Ms Christoffersen had some non-contact away from the children time which occurred. At 1.30pm Ms Christoffersen handed Ms Tokana the letter (referred to above) which said she was going home.

[26] When Ms Christoffersen presented Ms Tokana with the letter, Ms Tokana asked Ms Christoffersen "*are you walking off the job?*." Ms Christoffersen says she told Ms Tokana she was not walking off the job, she was going home. Ms Tokana told Ms Christoffersen that if she walked out the door it would mean instant dismissal because it would mean she was walking off the job.

[27] Ms Christoffersen believes her letter of 28 January explained she was going home because she was upset about the comment that Ms Tokana had made to her and wanted to consider her position.

[28] Ms Christoffersen agrees that Ms Tokana showed her the Disciplinary Code and pointed out that it referred to "*Insubordination, Refusing to obey a lawful order, or walking off the job*" as constituting serious misconduct which would attract the penalty of "*instant dismissal*." Ms Tokana also told Ms Christoffersen that if she left work she would be dismissed.

[29] In her witness statement Ms Christoffersen says that at the time of the incident she was not in a healthy state both physically and mentally and with the benefit of hindsight she realised she had over-reacted to what she had perceived to be Ms Tokana slighting her professional ability, which Ms Christoffersen said struck at the core of her self-esteem.

[30] Ms Christoffersen says that after leaving work on 28 she received a text message from Ms Tokana saying: *“Hiya. Can you return our Centre key and uniforms please.”*

[31] Ms Christoffersen texted back to say she had not quit or walked out, she left because she was not in a good space due to Ms Tokana’s comment *“so unless you have fired me I will be back at work tomorrow as usual”*. Ms Tokana texted a reply that says: *“you walked when you were told not to. That constitutes instant dismissal according to our lawyer. Keys and uniform back please.”*

[32] Ms Christoffersen says that two days later she received a hand delivered letter from Ms Tokana dated 28 January dismissing her.

[33] Ms Christoffersen says her dismissal was substantively and procedurally unjustified. Ms Tokana denies that. She says Ms Christoffersen’s actions amounted to serious misconduct so her summary dismissal was justified.

Issues

[34] The issues for the Authority to determine are:

- (a) Who employed Ms Christoffersen?
- (b) Was Ms Christoffersen’s dismissal justified?
- (c) If not, what if any remedies should be awarded?
- (d) What if any costs should be awarded?

Who employed Ms Christoffersen?

[35] Ms Christoffersen’s Inland Revenue Department’s (IRD’s) earnings record identifies *“Mamuka Early Learning Limited”* as her employer. Although that is the name that was on the Employer Monthly Schedule submitted to IRD that is not a legal

entity as such a company does not exist. It is also not the name of the employer which was recorded in the employment agreement.

[36] There were apparently no payslips issued to staff who were paid directly into their bank account. Ms Christoffersen was not aware that IRD had Mamuka recorded as a limited company in its records before she retrieved this information for the Authority's investigation.

[37] Ms Christoffersen says she was never told by Ms Tokana that she (Ms Christoffersen) was being employed by a limited liability entity. Ms Tokana accepts that.

[38] I consider that the doctrine of the undisclosed principle applies. If Ms Tokana was contracting with Ms Christoffersen on behalf of a limited liability entity then she had to make that clear to Ms Christoffersen. The facts establish that did not occur. Ms Tokana is therefore liable as Ms Christoffersen's employer in accordance with the doctrine of the undisclosed principle.

[39] I accept Ms Tokana never intended to personally employ Ms Christoffersen but the issue with that is that Ms Tokana never communicated that intention to Ms Christoffersen. Ms Tokana just assumed that Ms Christoffersen knew Ms Tokana was not her employer. In the absence of clear communication regarding the identify of the employer Ms Christoffersen assumed she was employed by Ms Tokana personally which is why Ms Tokana has been held liable as the employer.

Was Ms Christoffersen's dismissal justified?

[40] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether how the employer acted, and its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.²

[41] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith obligation in s.4(1A) of the Act which requires an employer who is proposing to make a decision which may adversely

² Section 103A(2) of the Act

impact on an employee's ongoing employment to provide that employee with relevant information and an opportunity to comment on it before a final decision is made.

[42] Section 103A(3) of the Act sets out four procedural fairness tests which identify minimum standards of fairness which must be met by an employer.

[43] I find that Ms Christoffersen was dismissed without a fair or proper disciplinary process being undertaken. Ms Tokana simply sent Ms Christoffersen a text ending her employment. The absence of a fair or proper disciplinary process meant Ms Christoffersen was not fully or properly put on notice about Ms Tokana's specific disciplinary concerns. Nor was Ms Christoffersen given an opportunity to take legal advice or to respond to the disciplinary concerns before she was dismissed.

[44] The dismissal also occurred without Ms Tokana giving Ms Christoffersen all relevant information. Ms Tokana's statement to Ms Christoffersen that if she left she would be instantly dismissed in accordance with the Disciplinary Code was insufficient to meet an employer's good faith obligations to provide relevant information and an opportunity to comment on it as required by s.4(1A) of the Act because it was not part of a formal disciplinary process.

[45] Because Ms Tokana proceeded immediately to dismiss Ms Christoffersen by text message instead of going through a fair or proper disciplinary process, she is unable to satisfy the Authority that she complied with any of the four procedural fairness tests set out in s.103A(3) of the Act.

[46] I do not accept Ms Tokana's evidence that her advice to Ms Christoffersen that if she left she would be dismissed was sufficient to meet the requirement under s.103A(3)(a) of the Act to "*sufficiently investigate*" the disciplinary concerns.

[47] Ms Tokana's failure to meet with Ms Christoffersen to discuss the disciplinary concerns breached the s.103A(3)(a) obligation because Ms Tokana had drawn conclusions based on the information she had obtained without input from Ms Christoffersen. The lack of a fair or proper disciplinary investigation means Ms Tokana is unable to establish compliance with s.103A(3)(a) of the Act.

[48] The decision to dismiss Ms Christoffersen by text message without informing her of specific disciplinary concerns also breached an employer's obligations under

s.103A(3)(b) of the Act because it meant that Ms Tokana's specific concerns were not fully or properly raised with Ms Christoffersen before she was dismissed.

[49] The timing and manner of Ms Christoffersen's dismissal meant that Ms Tokana failed to give Ms Christoffersen a reasonable opportunity to respond to Ms Tokana's concerns before Ms Christoffersen was dismissed, contrary to the requirements of s.103A(3)(c) of the Act. There were medical issues that could have been raised by Ms Christoffersen within the context of a disciplinary meeting but which did not come to light until the Authority's investigation.

[50] I further find that Ms Tokana is unable to meet the requirements of s.103A(3)(d) of the Act because Ms Christoffersen did not have an opportunity to provide an explanation which meant that her explanation to Ms Tokana's specific concerns was not considered before Ms Christoffersen was dismissed.

[51] Ms Tokana told the Authority she thought that the reference to "instant dismissal" in the Disciplinary Code and employment agreement meant she could just dismiss Ms Christoffersen after telling her that if she left she would be dismissed. That is not the case. The law requires the good faith requirements and procedural fairness tests in s.103A(3) of the Act to be met.

[52] Failure to do so fundamentally undermines Ms Tokana's ability to establish to the required standard that Ms Christoffersen's dismissal was justified.

[53] I find that these procedural defects cannot be described as minor and they did result in unfairness to Ms Christoffersen. Accordingly s.103A(5) of the Act does not preclude the Authority from determining that Ms Christoffersen's dismissal was unjustified.

What if any remedies should be awarded?

Mitigation

[54] Ms Christoffersen was under a legal obligation to mitigate her loss. However Ms Christoffersen says she did not seek alternative work because she went onto a sickness benefit from 03 February 2015.

Lost remuneration

[55] I am not satisfied to the required standard that Ms Christoffersen actually lost any remuneration as a result of her unjustified dismissal because she was certified as being medically unfit to work.

[56] Because Ms Christoffersen was unfit to work she received a sickness benefit following her dismissal. I consider Ms Christoffersen's lost remuneration is therefore more likely than not due to her ill health and inability to work rather than her unjustified dismissal.

[57] Ms Christoffersen obviously does not agree with the assessment I have made. Ms Christoffersen attributes her ill health and associated inability to work is from the effects of her dismissal. However I am not satisfied Ms Christoffersen has proven such a causal connection to the required standard which is why I do not accept her submission on that issue.

[58] It is clear from the medical evidence produced to the Authority that Ms Christoffersen had a number of serious personal and health issues that were already significantly adversely affecting her at the material time. Ms Christoffersen admits that she left work in the circumstances she did due to such issues. I therefore consider these to be the substantial causative factors for her ill health and inability to work.

[59] For these reasons I decline to award lost remuneration.

Distress compensation

[60] Ms Christoffersen gave evidence about the distress she suffered. She told the Authority that the loss of her job had a seriously adverse effect on her health and wellbeing. She says that she required medical attention and counselling and was unable to work for a period of time.

[61] Balanced against that evidence is the view that Ms Christoffersen expressed in her letter of 28 January that she was considering whether she wanted to continue working at Mamaku. She also expressed dissatisfaction to the Authority about a number of aspects of her work and that she was unhappy with aspects of Ms Tokana's management.

[62] I consider there is therefore a real risk Ms Christoffersen may have decided to end her employment anyway due to these issues or based on the other (non-work related) issues she was experiencing at the time.

[63] It is clear Ms Christoffersen was suffering from multiple health and personal issues at the time of her dismissal which I consider were likely to have adversely affected her. The medical information Ms Christoffersen produced recognises other issues that appeared to have been impacting her at the material time.

[64] Distress compensation must be limited to compensating Ms Christoffersen for the actual effects of the unjustified dismissal on her and not for any other non-dismissal related matters that were impacting her.

[65] Ms Tokana is ordered to pay Ms Christoffersen \$3,000 distress compensation under s.123(1)(c)(i) of the Act to compensate her for the humiliation and injury to feelings she suffered as a result of her unjustified dismissal.

Contribution

[66] Having determined that Ms Christoffersen has a dismissal grievance, s.124 of the Act requires the Authority to assess the extent to which Ms Christoffersen's actions contributed to the situation which gave rise to her grievance. Contribution denotes blameworthy conduct which is established on the balance of probabilities.

[67] I consider that Ms Christoffersen should bear 40% responsibility for what occurred. She inappropriately raised her voice to children and did so in front of a parent who was in the process of making a complaint about the way Ms Christoffersen had been speaking to children previously.

[68] Ms Christoffersen became unduly offended when Ms Tokana understandably attempted to manage the sensitivities of the situation. Ms Christoffersen made the decision to leave work notwithstanding it put her colleagues under extra pressure because they would be one early childcare teacher short for the remainder of the day.

[69] Ms Christoffersen also left the Centre without its minimum number of registered teachers which could have potentially adversely affected its registration. Ms Christoffersen made no attempts to set up a meeting with Ms Tokana to discuss the issues that had caused her to decide to leave work early.

[70] Ms Tokana had also made it clear to Ms Christoffersen that there would be consequences if she left her job and instead of resolving the issue despite that advice Ms Christoffersen decided to leave work anyway. These are all blameworthy actions that have been proven on the balance of probabilities. It is therefore appropriate under s.124 of the Act to reduce remedies to reflect this contribution.

[71] Accordingly I find that Ms Christoffersen's distress compensation should be reduced to \$1,800 to reflect her contribution.

Costs

[72] The parties asked costs be reserved as there had been without prejudice except as to costs communications.

[73] Ms Christoffersen as the successful party is entitled to a contribution towards her actual costs. This matter involved a 3.5 hour investigation meeting so the notional starting point for assessing costs is \$1,750 (based on pro-rated current notional daily tariff of \$3,500).

[74] The parties are encouraged to resolve costs by agreement. If that is not possible Ms Christoffersen has 14 days within which to file costs submission, Ms Tokana has 14 days within which to respond. This timetable will be strictly enforced so any departure from it requires the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority