IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 20
5359297

	BETWEEN	KATE MARY LOUISSON FISHER Applicant
	A N D	CARRIE O'BRIEN Respondent

Member of Authority:	M B Loftus
Representatives:	Andrew Marsh, Counsel for Applicant Carrie O'Brien on her own behalf
Investigation meeting:	11 December 2012 at Wanaka
Submissions Received:	At the investigation
Date of Determination:	25 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Kate Fisher, claims she was unjustifiably dismissed from her employment with the respondent, Carrie O'Brien, on 23 June 2011.

[2] Ms O'Brien contends Ms Fisher could not have been dismissed given her status as a casual employee. As such she was engaged on an *as-and-when-required* basis and her cessation was the natural conclusion of one such engagement.

Background

[3] Ms Fisher and Ms O'Brien were introduced by a mutual friend. Ms Fisher was relatively new to Wanaka, having gone there to join friends but without employment. She was seeking work and had experience as a nanny/au pair. Ms O'Brien, with five children, was open to the suggestion she may appreciate assistance though not, at the time, actively seeking it.

[4] The two had an informal discussion, though recollections about what was said differ. Ms Fisher claims the arrangement into which they entered was one under which she would work part-time, albeit with flexible hours. She says she was required to work three afternoons a week, with a fourth possible depending on Ms O'Brien's commitments. There was an expectation she start at approximately quarter to three when the first of the children had to be picked up from preschool. She says she was to finish around 5pm to 6pm, depending on both the children's and Ms O'Brien's activities. She is adamant she and Ms O'Brien intended an ongoing relationship.

[5] Ms O'Brien is of the view the arrangement was loose and flexible. She saw it a case of *let's enter into a casual engagement and see how it goes*. Her view is the discussion was so casual it was really a case of *did I need any help and my answer was well, how about trying to pick up the kids after school*.

[6] Ms O'Brien claims that about a week later Ms Fisher approached and advised she needed more money. Accordingly she sought more work. Ms O'Brien says she responded by suggesting the possibility of cleaning as she had a regular cleaner but was aware that individual had plenty of engagements. As a result, and Ms Fisher's acceptance, Ms O'Brien gave her then present cleaner two weeks' notice. Ms Fisher then took over the cleaning duties, which were performed on a Monday morning.

[7] While it would appear Ms Fisher's relationship with the children was initially cordial, tensions soon arose with the children complaining to their mother about the way Ms Fisher drove and alleging she swore in their presence. There was also an incident where a piece of firewood dislodged from a fireplace which led to a terse conversation between Ms Fisher and one of the children.

[8] Notwithstanding that, it would appear little formal action occurred as a result. Ms O'Brien says she asked Ms Fisher whether or not she was swearing in front of the children. The accusation was denied and the issue taken no further. There was also a telephone conversation concerning the speed at which Ms Fisher came up the O'Brien's driveway on one occasion.

[9] Notwithstanding that, the children continued to make comments to their mother which led to what Ms O'Brien describes as a family meeting. The children were present, as was Ms Fisher. Ms O'Brien says she called the meeting as it was

obvious things were not going well. She claims everyone knew why they were there and she opened by telling the children it was not alright to ignore Ms Fisher. She said she then admonished Ms Fisher along the lines of *its scary to speed*. She says it was *just that kind of stuff*. The discussion was low key ended with a comment along the lines of *we're all okay, let's just carry on*.

[10] The final incident occurred on 22 June 2011. That evening Ms Fisher was caring for Ms O'Brien's children along with three others while the O'Briens and some friends went to dinner. There was some discord which led to both Ms Fisher and one of the children telephoning Ms O'Brien during dinner expressing their discontent.

[11] Ms O'Brien says that led her to conclude the arrangement was not working. Given it was, in her view, casual she felt she could, and should, bring it to an end.

[12] The following morning Ms O'Brien sent a text to Ms Fisher which, according to her, expressed the view the arrangement could not continue as it was too hard. She says the text went on to ask *can we talk about this later*. Ms Fisher accepts the first comment was there but has no recollection of a suggestion the two talk.

[13] Notwithstanding that, Ms O'Brien said the two did have a discussion later in the day. She says Ms Fisher was extremely upset and asking why the arrangement had been brought to an end. She says she replied she was of the view Ms Fisher knew and it was continuous disharmony with the children. Ms O'Brien was finding it too hard to continue. Ms Fisher has no recollection of the discussion, but does not deny it occurred.

Determination

[14] There are, potentially, two issues to be determined. The first relates to the nature of the relationship between Mesdames O'Brien and Fisher – was it on-going as Ms Fisher contends or casual as Ms O'Brien believes? The second depends on the answer to the first. Assuming the relationship was on-going, the question becomes can Ms O'Brien justify her decision to bring it to an end?

[15] Underpinning Ms O'Brien's defence is her belief the arrangement was casual. She understood it could therefore be brought to a conclusion at will. Given the evidence I conclude that was, initially, the case. The arrangement in respect to childcare was clearly flexible. Despite Ms Fisher's assertion there were core hours,

the evidence shows little certainty in respect to either the days of work or the hours that would be required when Ms Fisher attended. It also shows engagements and start times were organised at short notice and depended on the O'Brien's activities. There is also evidence Ms Fisher could respond to a request she work by advising she was unavailable and she availed herself of that opportunity on a couple of occasions.

[16] That said, the conclusion the arrangement was initially casual fails to overcome the fact the nature of an arrangement can change (see, for example, *Barnes (formally Kissell) v Whangarei RSA (Inc.)* [1997] ERNZ 626).

[17] To ascertain whether or not the arrangement had changed requires an examination of issues such as intent, work patterns and the obligations imposed on the parties (*Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225).

[18] Here a significant change occurred after some three weeks with Ms Fisher assuming the duties of the previous cleaner.

[19] The new arrangement saw an agreement Ms Fisher would clean each Monday. That was a regular engagement and there is no evidence it was intended to be finite. In other words an element of ongoing regularly scheduled work was introduced and from that point the arrangement ceased to be casual, at least in respect to that portion of the work.

[20] I therefore conclude Ms Fisher had an on-going relationship with Ms O'Brien which means the decision to terminate (which Ms O'Brien accepts she made) was a dismissal. Ms O'Brien is therefore required to justify her decision.

[21] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

> *… must be determined, on an objective basis,* [by considering] *whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal … occurred.*

[22] In applying that test the Authority must consider whether:

a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;

b. The employer raised its concerns with the employee prior to taking action;

c. The employer gave a reasonable opportunity for response;

d. The employer genuinely considered the explanation before taking action; and

e. Any other appropriate factors.

[23] I have considered the issue of resources. Ms O'Brien is an individual with no knowledge of employment law yet this does not, I conclude, excuse significant deficiencies which ignore the principles of natural justice, especially as she is of means and could have obtained professional assistance.

[24] In essence the points in 22 (b) to (d) above summarise that which has long been required – an employer is required to put issues in its mind, allow an explanation and consider them.

[25] There was no compliance with these requirements in respect to the decision to conclude the arrangement. There was no raising of concerns, no discussion and no attempt to ascertain what happened or why when the decision to dismiss was made. Ms O'Brien's evidence, reiterated during both the investigation meeting and a telephone conference which preceded it, was the interests of her children came first and nothing was going to supersede that consideration. The evidence shows she acted accordingly, concluded the arrangement was not working and its maintenance *too tough* and, as a result, arbitrarily brought it to an end.

[26] Her actions must, given the evidence and the failure to comply with the requirements of s.103A, be unjustified.

[27] The conclusion the dismissal is unjustified raises the question of remedies. Ms Fisher seeks wages lost as a result of the dismissal and compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act. In the statement of claim she also asked that I order the provision of a reference but this claim was not mentioned during the investigation meeting. Given the lack of evidence or submission I will consider it no further.

[28] Ms Fisher says she was unable to find further work in Wanaka and forced to return to Christchurch. She obtained one short term engagement before obtaining regular work on 23 August 2011. She bases her loss for the period between dismissal and 23 August 2011 on the basis of average earnings with the O'Brien's minus the income she got from the short term job. She quantifies the loss at $1,779.

[29] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. The period covered by the above claim is less than three months. The evidence is the loss was incurred and putting aside qualms I may have about whether an average is the best basis of calculation (see 30 below) it is the only one I have. I therefore conclude, contribution aside, there is no reason why the amount claimed should not be awarded in full.

[30] Ms Fisher also claims her new job pays $14 per week less than she averaged with the O'Briens and seeks ongoing recompense of that loss. That I am not willing to order that given the flexibility in respect to the O'Briens childcare needs and the fact this means there is no guarantee Ms Fisher would have continued to earn at the rate she had prior to dismissal. There can be no certainty this is a real loss.

[31] Ms Fisher seeks $15,000 as compensation for hurt and humiliation. Ms Fisher submits this is the more significant of her claims and that the impact of dismissal was of more concern than the loss of income. Mr Marsh submits a normal award would be in the order of $4,000 to $6,000 but submits this should be increased due to the hurt evidenced and the fact it had been accentuated by the actions of the respondent since dismissal.

[32] The claim for an increased award is, however, undermined by two points. First Ms Fisher attributes a degree of angst to the fact she felt compelled to return to Christchurch. She had a fear of doing so given the earthquakes. The consequences of earthquakes can not, I conclude, be visited upon the O'Briens. Second there is the no evidence supporting the claim subsequent actions by the O'Briens contributed to Ms Fisher's hurt.

[33] Having considered her evidence, I conclude it appropriate to award $4,000.

[34] Finally I note a claim, tendered in submission, that Ms Fisher did not receive any holiday pay. There was no evidence tendered in support so all I can say is that if true, Ms O'Brien should address this failure.

[35] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Fisher contributed to her dismissal in any significant way. While Ms O'Brien clearly contends she did, there is no solid evidence upon which I can base a finding of contribution, let alone quantify it if indeed there was.

Conclusion and Orders

[36] For the above reasons I conclude Ms Fisher has a personal grievance in that she was unjustifiably dismissed.

[37] As a result the respondent, Ms Carrie O'Brien, is ordered to pay the applicant, Ms Kate Fisher, the following:

i. $1,779.00 (one thousand, seven hundred and seventy nine dollars) gross as recompense for wages lost as a result of the dismissal; and
ii. A further $4,000.00 (four thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[38] Costs are reserved.

M B Loftus.
Member of the Employment Relations Authority