

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 40
5377503

BETWEEN MARIA GUTHRIE
 Applicant

A N D RACHEL MCNABB
 First Respondent

A N D KIDS DOMAIN LIMITED
 Second Respondent

Member of Authority: G J Wood

Representatives: Steve Hurring for Applicant
 Barbara Buckett for Respondent

Investigation Meeting: 11 December 2012 and 5 February 2013 at Wellington

Submissions Received: 26 March 2013

Date of Determination: 2 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The first respondent, Ms Rachel McNabb, established a childcare business known as Kids Domain, which later became run as a limited liability company, Kids Domain Limited (the second respondent). It operated in Lower Hutt and Stokes Valley. The applicant, Ms Guthrie, was originally employed by Ms McNabb and disputes that she was ever employed by the company. Ms McNabb claims that she sold the Stokes Valley branch of the business where Ms Guthrie worked to a Ms Carol Nohinohi, and that Ms Guthrie was to transfer to the employment of Ms Nohinohi as required in the employment agreement between the parties. As a result Ms McNabb claims Ms Guthrie was of necessity made redundant.

[2] When informed of the sale Ms Guthrie went on sick leave and elected not to take up employment with Ms Nohinohi, because amongst other things she doubted the

genuineness of the sale and had been offended by comments about her that Ms McNabb had made during the sale process.

[3] A week after purportedly taking over the business and paying a significant deposit, Ms Nohinohi pulled out of the sale (or alternatively effectively sold the business back to Ms McNabb). Ms Guthrie was then not offered employment with either of the respondents - instead Ms Nohinohi remained as manager of Kids Domain Stokes Valley, employed by the company.

[4] Ms Guthrie makes a number of claims about her dismissal, which she believes was not a genuine redundancy or transfer, but constituted either an unjustifiable actual or constructive dismissal, and involved breaches of good faith. All of Ms Guthrie's claims are denied by the respondents.

[5] The respondents have counterclaimed, alleging that Ms Guthrie wrongly used the work van for personal use, did not pay for repairs for damage to the vehicle when she was using it for personal reasons, and that she over claimed her working hours.

[6] The issues for determination are:

- a. Who was Ms Guthrie's employer;
- b. Whether the sale of the business was a genuine transaction;
- c. What the terms of the parties' written employment agreement were (as more than one version has been provided to the Authority);
- d. Whether Ms Guthrie was properly consulted over the sale of the business;
- e. Whether the employer met its contractual obligations in a transfer situation, including whether Ms Guthrie was given a proper notice period;
- f. Whether Ms McNabb's behaviour over the transfer was misleading;
- g. Whether (in the alternative), if Ms Guthrie is found to have resigned, and having not taken up a new position with Ms Nohinohi, the circumstances constituted a constructive dismissal;

- h. What remedies, if any should be awarded to Ms Guthrie?
- i. What remedies, if any, should be awarded under the counter-claims?

Factual discussion

[7] Ms McNabb established and ran an after school care facility for primary school children in Stokes Valley and Lower Hutt (trading as Kids Domain), from 2002 onwards. In 2008 Ms Guthrie was employed at the Stokes Valley Centre branch as a supervisor/coordinator. Ms Guthrie was one of three staff employed at the Stokes Valley Centre.

[8] The parties to the written employment agreement were Kids Domain and Ms Guthrie, but in legal terms her employer was Ms McNabb. Ms Guthrie was employed to do 20 hours per week in childcare and 3.75 hours per week for administrative work. However during school holidays, when more care was provided, she worked 50 hours per week. By the end of her employment she was earning \$19.00 gross.

[9] In 2009 Ms McNabb established a limited liability company, Kids Domain Limited, to operate the business. Ms McNabb gave advice to the staff that the company was now running the business, but that everything would be staying the same except for accounting, payroll and GST issues. Staff were informed that they would in future be being paid by Kids Domain Limited, but that their entitlements such as annual leave and sick leave would be transferred. While Ms Guthrie claims that she was not aware of these changes, she was definitely aware that the name on her payslips was changed and she made no objection to this change at any time before her employment ended.

[10] There are no significant employment issues that were ever raised with Ms Guthrie during the course of her employment. However, the same did not apply with respect to at least one other former employee at Kids Domain. The evidence clearly established that in 2009 Ms McNabb used underhand methods to dismiss a former employee for redundancy, when no redundancy actually took place. This was a key reason why Ms Guthrie has consistently questioned the genuineness of her own subsequent dismissal for redundancy.

[11] I accept Ms Guthrie's evidence that she was entitled to limited personal use of the work van and that she did not breach the agreement she had with Ms McNabb about that. I am also satisfied that she never claimed excess hours above what she worked, because she was required to do administrative work outside of core hours. Finally, I accept Ms Guthrie's evidence that she was never provided with any evidence (and neither was the Authority) that the respondents suffered any costs to repair to the van for which Ms Guthrie was responsible.

[12] In early 2012 Ms McNabb was seriously concerned about her own and her partner's health. In particular, on 16 February her partner was diagnosed with a serious illness. Ms McNabb decided that she would try and sell the Stokes Valley Centre, in order to be able to have more time to be with her partner.

[13] On Friday 17 February she texted her staff (her normal method of communication) telling them that the centre would be up for sale in the next few weeks and that she would have a meeting with the staff about that next week. Ms Guthrie responded by questioning whether she was serious. In an answer that emphasises the danger of communicating by text, and especially late on a Friday evening, Ms Smith made the following response (corrected for text speak), which, understandably, she now regrets:

Yes I've had enough. Too much bullshit with funding and I now have trust issues with you all.

[14] Ms Guthrie asked what were the trust issues and the response was that:

It's not cool being backstabbed when all I've done is work hard to keep you all happy. Talk to your dad. He has a lot to say about you guys and what you say about me and Wayne. There is no point in making things worse than they are. It is best for everybody that we all go our separate ways.

[15] Ms Guthrie responded rudely and negatively. She also asked when the meeting was and was told that it would be sorted out later.

[16] Ms Guthrie then approached her friend, Ms Carol Nohinohi, who had previously sold a childcare centre, for advice about how to go about selling a centre. Instead, Ms Nohinohi expressed an interest in buying the centre. I accept that Ms Nohinohi discussed the issues with her husband and decided, following

discussions with Ms McNabb, that she was prepared to buy the business and operate it effectively as a franchise of Kids Domain. The core of the deal was agreed between Ms McNabb and Ms Nohinohi on Monday, 20 February. The basic heads of agreement between Kids Domain and Ms Nohinohi was put into writing on 21 February.

[17] I accept from the records of Kids Domain that Ms McNabb sent out a letter to Ms Guthrie dated 17 February that was wrongly dated and should have been dated 20 February. That letter states that an offer had been made to purchase the Stokes Valley Centre as a franchise of Kids Domain. It was also stated:

Once the sales agreement has been signed you will be advised accordingly and you will meet the new owner(s).

The new owner(s) will be introduced to you and I will be working closely with them to make the transition as smooth as possible.

The new owner(s) have not decided at this stage whether to renew contracts. This will be decided once they have come in to make their assessment, but have said they will be trying to keep things as much the same as possible and I will put through recommendations and will be working with you and them through this process.

Attached is an information sheet they have requested to be completed should you wish to stay on with them. This will give them an idea of what experiences you have before they come in to meet you personally.

Please complete by Friday 24 February 2012 and put in the envelope provided for collection.

[18] Ms Guthrie never completed the information sheet sought by Ms Nohinohi.

[19] It is clear that at this point that little thought, if any, had been given to the employment agreement between the parties, which provides as follows, on the basis of Ms Guthrie's copy:

11.1 Employer to provide information and consider comments in restructuring situations

In the event that all or part of the work undertaken by the employee will be affected by the employer entering into an arrangement whereby a new employer will undertake the work currently undertaken by the employee, the employer will meet with the employee, providing information about the proposed arrangements and an opportunity for the employee to comment on the proposal, consider and respond to their comments.

11.2 Employer to require offer of similar position in restructuring situations

The employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions, and will include in the agreement reached with the new employer a requirement that the employee be offered a position with the new employer at the same or similar terms of employment.

Where the employee either chooses not to transfer to the new employer, or is not offered employment by the new employer, the employer will activate the redundancy provisions of this agreement.

Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the employer's business.

[20] There is no specific notice for redundancy, but the general notice of termination is four weeks, which may at the employer's discretion be paid in part or in full.

[21] Rather than organise a meeting, Ms McNabb provided staff members with a letter dated 21 February terminating their employment on notice for redundancy, although the letter refers to another meeting about the sale of Kids Domain. The employees were told that as of Monday 27 February the new franchise operator would be Ms Nohinohi, and that she would meet them all on Friday 24 February and collect the forms. The letter also stated:

Your contract with Kids Domain Limited will cease on Friday 9 March 2012 5.30pm (2 weeks notice as per redundancy clause in your contract) and final pay paid to you.

During the period 27 February and 9 March, Carol and myself will be working with you through the transition period and I will be there to help with any contract negotiations etc with her.

[22] In fact the notice period should have been four weeks as per the contract that I have concluded operated between the parties.

[23] Ms Guthrie was very upset about the redundancies and the speed with which they were taking place. She and another employee engaged Mr Hurring separately to represent them. He contacted Ms Guthrie about their concerns on 22 February.

[24] A meeting was held on 23 February with Mr Hurring, Ms Guthrie and Ms McNabb. It was a very short meeting, during which Ms McNabb declined to provide additional information about the sale of the business, and in particular declined to provide Mr Hurring with a copy of the sale and purchase agreement. The parties had a major disagreement over which version of the employment agreement was correct. As a result of all these interactions Ms Guthrie came to the firm belief that the sale was not genuine and was part of a pattern of deceptive conduct by Ms McNabb, which had in the past seen another employee dismissed ostensibly for redundancy where in fact there was no redundancy situation.

[25] Ms Guthrie felt so upset that she could not return to work. Later that day Mr Hurring raised a personal grievance on Ms Guthrie's behalf. He also indicated that Ms Guthrie was unwell and was unsure as to when she would be able to return to work. He confirmed that all relevant information regarding the sale of the business and arrangements made for the transfer of staff had arranged to be provided, and that any allegations concerning Ms Guthrie were to be put in writing. He also suggested mediation. He later informed Ms McNabb that Ms Guthrie's medical certificate indicated that she should be off work for two weeks.

[26] Ms McNabb responded the next day, 24 February, stating that she had not been given prior notice of Ms Guthrie's absence and seeking a copy of the medical certificate. She again declined to provide a copy of the sale and purchase agreement and stated:

It was never said they weren't going to be working for Carol. I'm just wondering if my letter on 17 February has been misinterpreted (new owners haven't signed at this stage to renew contracts). What I mean by this is that their contracts with Carol may differ to the ones they currently have with me – for example, Carol questioned why the girls were paid an extra half an hour every morning for not working ...

[27] Ms McNabb also responded to Mr Hurring's request with a number of allegations about Ms Guthrie's behaviour, which need not be traversed here.

[28] On 28 February Mr Hurring sought a response on the status of the arrangements for the transfer of Ms Guthrie's job to Ms Nohinohi. Ms McNabb was involved in the negotiations for new employment with Ms Nohinohi because Ms Nohinohi did not have a computer. Ms Nohinohi was by this time working in the business, although she was not officially to take over until 9 March, and didn't

operate it until 12 March. This is consistent with her paying a substantial deposit on 8 March.

[29] There were a number of legitimate concerns with the draft employment agreements provided by Ms Nohinohi. The first was that the employer was said to be Kids Domain Stokes Valley, which is not a legal entity, although it does also state that Ms Guthrie was to *report to Carol Nohinohi (employer)*. That issue was remedied, but reference to Kids Domain Limited as the franchisor was sought. There was also the issue of Ms Guthrie's start time, as she felt she needed to start work at 7.15, not 7.30. There were a number of other issues raised by Mr Hurring on Ms Guthrie's behalf of a more technical nature, together with a claim for payment for time and a half on public holidays and any additional time worked.

[30] In any event, Ms Guthrie felt that she could not work with Ms Nohinohi as the new employer because she still had no trust that this was a genuine sale, and as Ms McNabb would still be involved as the owner of Kids Domain, yet she had stated that she had no trust in Ms Guthrie. She therefore decided not to take up employment with Ms Nohinohi. Mr Hurring informed Ms McNabb accordingly on 8 March stating:

I write to advise that Maria will not be returning to work for the new employer at the end of her sick leave period.

[31] Ms McNabb was also told that the personal grievance raised with her was to continue.

[32] Ms Nohinohi had had an urgent specialist appointment set down for 14 March. At that appointment she was told that she was suffering from a more serious health problem than she had thought. Ms Nohinohi, in consultation with her husband, took the view that their limited funds were needed to deal with Ms Nohinohi's health problems, rather than the purchase of a new business. She therefore sought Ms McNabb's approval to pull out of the sale, which was granted. Subsequently Ms Nohinohi's deposit was returned, less expenses incurred, such as accountancy charges etc. There was no accounting for income to Ms Nohinohi for the week she ran Kids Domain Stokes Valley, but she was paid by Kids Domain Limited for the week that she actually operated the centre.

[33] After the sale was cancelled Ms McNabb gave no consideration to rehiring Ms Guthrie, as she had lost trust in her and she had already left her employment with Kids Domain. Ms Guthrie now considers that she may have been able to be re-employed with Kids Domain, despite the trust issues between the parties. However, while she may have considered returning to work at Kids Domain she took no initiatives in this regard, and has not at any stage sought reinstatement.

[34] Ms Nohinohi subsequently continued in the employment of Kids Domain, effectively running the Stokes Valley Centre.

[35] The parties have attended mediation but have been unable to resolve matters and it therefore falls to the Authority to determine them.

The law

[36] This case is to be decided under the new s.103A. In *Angus & McKean v. Ports of Auckland* [2011] NZEMPC 160 the Full Court dealt with the issue of the application of this section in practice. It held at para.[57]ff:

[57] *The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer's dismissal or disadvantaging of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.*

[58] *Next, relying on evidence, relevant legal provisions, relevant documents or instruments and upon the specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections 3, 4 and 5 must be applied to this exercise.*

[59] *Finally, in determining justification under the new s103A, the Authority or the Court must determine whether what the employer did and how the employer*

did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or the Authority must do so objectively, that is ensuring that they do not substitute their own decisions for those of the fair and reasonable employer in all the circumstances.

[37] Those subsections 3, 4 and 5 referred to above state as follows:

3. *In applying the test in subsection (2) the Authority or the court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
4. *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
5. *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because defects in the process followed by the employer if the defects were –*
 - (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

Determination

[38] It is clear from the evidence that Ms Guthrie was at best indifferent as to whom her employer was. There is no doubt that her employer changed in March 2009 to Kids Domain Limited, even though Ms McNabb did not properly organise the transfer, such as by providing new employment agreements for Kids Domain staff. I

conclude therefore that from that date Kids Domain Limited did become Ms Guthrie's employer, on an effectively uncontested basis.

[39] I have closely considered the claim that the sale was not a genuine one and that Ms McNabb's real intention was to replace Ms Guthrie with Ms Nohinohi, a friend of hers. Certainly there is sufficient evidence to make this an arguable proposition. First, the sale took place without a standard legal form sale and purchase agreement. Second, the sale price of \$25,000 appeared unable to be immediately met by Ms Nohinohi, as she had to borrow from family (in \$20 and \$50 notes) the \$5,000 deposit paid. Third, no written application for transfer of ownership (for subsidy purposes for example) had been registered with the Ministry of Social Development (MSD) as could be expected, and at least one letter to do with the transaction was wrongly dated. Fourth, Ms Nohinohi backed out of the sale one week after taking over the running of the Centre. Fifth, Ms Nohinohi became the employee manager of the Stokes Valley centre with immediate effect, reducing the pressure on Ms McNabb.

[40] However, the Authority must determine matters on the balance of probabilities, i.e. what is more likely than not, taking into account that the more serious the nature of the allegation, the more convincing the evidence in support of it must be.

[41] I conclude that the sale was a genuine attempt by Ms McNabb to sell the Stokes Valley arm of the business to Ms Nohinohi because:

- otherwise Ms Nohinohi would have committed perjury for no direct benefit to herself, except perhaps for a job;
- Ms Nohinohi did have a genuine health scare at the time she was taking over the business;
- MSD was refunded subsidies for the week in question;
- the accountants of Kids Domain would have been misled had the sale process not been genuine;
- Ms Nohinohi was invoiced for costs associated with the cancelled sale and purchase of the centre;

- under the parties' employment agreement Ms Guthrie had the right of transfer and therefore a non-genuine sale of the business would not necessarily mean that Ms Guthrie would no longer be working at the centre. Indeed Ms Nohinohi had never met Ms Guthrie before and therefore had no particular reason not to offer her a genuine position, and there were serious negotiations about such a position; and
- Ms Guthrie was not the only one affected by the sale of the business. Another employee affected still remains in employment at Kids Domain Stokes Valley.

[42] On the balance of probabilities therefore, I conclude that what happened was a genuine attempt at a sale that fell through, with unfortunate consequences for Ms Guthrie.

[43] Serious allegations were made against Ms McNabb for allegedly tampering with the parties' employment agreement so as to deny Ms Guthrie proper notice. I note that the separate versions of the employment agreement proffered by the parties are not compatible. The main change affecting the parties relates to restructuring and redundancy.

[44] I accept, on the balance of probabilities, that the version provided by Ms Guthrie is the correct version that applied between the parties. I do so because Ms Guthrie's version has handwritten amendments made on it, including initialling by Ms McNabb, which are not contained in full in other versions. This implies that Ms McNabb has only been able to access an earlier version of the employment agreement. Furthermore, I accept that it is more likely that an employment agreement would not contain a shorter period for notice of termination due to redundancy than for general notice.

[45] If this had been a deliberate change of terms by Ms McNabb then I consider that it would have been more to the employer's advantage than the version provided by Ms Guthrie. I do not accept, however, that this was a deliberate action by Ms McNabb. Rather it is more likely to have been reliance on an earlier form of the contract, or some other form of genuine mix-up. To conclude that this change was done deliberately would involve a greater level of proof than a genuine mistake, which is not present here, particularly as differing forms of the contract did exist before the sale process was ever contemplated.

[46] While I do not accept that the sale process was a sham, there is no doubt that Ms Guthrie's dismissal was unjustified and that she was unjustifiably disadvantaged in her employment. Ms Guthrie was entitled to four weeks notice but was given only two. Had she been given the four weeks notice required under the agreement, her employment would have been due to end for redundancy at the end of her notice period, namely the end of business on Friday 23 March.

[47] By 19 March Kids Domain had decided to take back the employment of staff at the Stokes Valley Centre, and indeed did so with effect from that date. This meant that Ms McNabb was under an obligation to retain Ms Guthrie in employment, but she failed to even consider this prospect. A fair and reasonable employer could not have continued with Ms Guthrie's redundancy when during the notice period it became clear that her redundancy was no longer required.

[48] The other major failing by Kids Domain was that Ms McNabb did not properly consult with Ms Guthrie before giving Ms Guthrie notice of termination of her employment. Under s.4(1)(A) of the Act an employer who is proposing to make a decision that will have an adverse effect on the continuation of employment of an employee access to information relevant to the continuation of the employee's employment about the decision, and an opportunity to comment on the information to their employer before the decision is made (*Simpsons Farms v Aberhart* [2006] ERNZ 8255). That obligation is strengthened here by clause 11.1 of the employment agreement. However, it was clearly envisaged as part of the sale and purchase agreement that all staff would transfer, as the agreement *includes all staff*, so some consideration of the employer's obligations under Ms Guthrie's employment agreement occurred, but this was not done consistently or properly. Furthermore, rather than ensuring from the outset that Ms Guthrie obtained the benefit, set out in clause 11.2, of employment with a new owner on similar terms, Ms McNabb, at first at least, merely told Ms Guthrie that she would recommend to the new employer that things should remain as much the same as possible.

[49] Thus what Kids Domain did and how it acted were not how a fair and reasonable employer could have acted in all the circumstances at the time

Remedies

[50] It is clear that the Centre has always required a minimum of three staff and Ms Guthrie should have been one throughout. Ms Guthrie is therefore entitled to be paid a minimum of three months lost remuneration, as Kids Domain did not need to employ Ms Nohinohi or any other staff in place of Ms Guthrie.

[51] Because Ms Guthrie was entitled to employment throughout with Kids Domain, and Ms McNabb never approached her once there was a change in circumstances during the course of Ms Guthrie's notice period, there has been no failure to mitigate by Ms Guthrie. I also accept that Ms Guthrie has sought other employment, as evidenced by her written job applications and her oral and written evidence.

[52] I accept that as a result of the grievance Ms Guthrie lost six months pay. It would be unreasonable to extend this period to the full period of loss of 29 weeks as there can be no certainty the employment would have lasted the full period. I assess six months compensation as amounting to \$13,727.50 gross (comprising 26 weeks normal pay, being one-half of a year, and extra hours for two holiday programmes of a fortnight).

[53] Ms Guthrie is also entitled to compensation under s.123(1)(c)(i). Her evidence was clear that she was very upset about losing her job unjustly. Kids Domain and Ms McNabb have further upset Ms Guthrie through comments about a lack of trust in her (which did not need to be aired given Kids Domain was implementing a redundancy) and its failure to contact her once the sale had fallen through. In the absence of any supportive evidence such as from medical sources, I conclude that compensation of \$5,000 is appropriate.

[54] Ms Guthrie did not contribute to the situation that gave rise to her grievance(s). These were errors made by Kids Domain in the way that it implemented Ms Guthrie's planned redundancy, which did not in fact need to take place. There was thus no blameworthy behaviour by Ms Guthrie.

[55] Any remedies for breaches of good faith by Kids Domain are already covered by the above orders, as to do otherwise would effectively penalise Kids Domain twice for the same behaviour.

[56] I therefore order the second respondent, Kids Domain Limited, to pay to the applicant, Marie Guthrie, \$5,000 in compensation under section 123(1)(c)(i) and \$13,727.50 gross in lost remuneration.

[57] The claims against the first respondent, Ms Rachel McNabb, are dismissed, as she was not Ms Guthrie's employer at any relevant time.

[58] The counter-claims against Ms Guthrie, are, on the basis of the facts as found, dismissed.

Costs

[59] Costs are reserved.

G J Wood

Member of the Employment Relations Authority