



# New Zealand Employment Relations Authority Decisions

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## **Kernahan v Review Publishing Co Limited (Auckland) [2007] NZERA 158 (17 May 2007)**

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 152/07 5042702

BETWEEN KATY KERNAHAN Applicant

AND REVIEW PUBLISHING CO LIMITED

Respondent

Member of Authority: Leon Robinson

Representatives: Claudia Elliott for Applicant

Paul Tremewan for Respondent

Determination: 17 May 2007

### **DETERMINATION OF THE AUTHORITY**

[1] Ms Katy Kernahan ("Ms Kernahan") asks the Authority to investigate her claim that she was unjustifiably dismissed from her employment as an account manager with Review Publishing Co Limited ("Review Publishing"). She asks the Authority to resolve the problem by making formal orders in her favour for reimbursement and compensation.

[2] Review Publishing says Ms Kernahan's employment was terminated during her probationary period of employment after Ms Kernahan threatened violence against another employee. It further says the dismissal was substantively justifiable and procedurally fair.

[3] The parties were unable to resolve the problem between them by the use of mediation.

**The facts**

[4] Ms Kernahan was summarily dismissed on 28 April 2006. She was paid two weeks wages in lieu of notice.

[5] Ms Kernahan was offered employment in a letter dated 22 March 2006 from Review Publishing Director Ms Tania Walters ("Ms Walters). That letter advised:-

*I am pleased to offer you the position of account manager on Apparel magazine.*

*This offer is subject to your written acceptance of the terms and conditions of employment that were discussed at your interview. **This offer is for a contract period of 12 weeks** and it is important to note that this position is totally performance based and your remuneration is based on a consistent level of achievement.*

(Emphasis added)

[6] Ms Kernahan commenced employment on 3 April 2006 and agrees she accepted these terms of employment:-

### *1. Terms of Agreement*

#### *1.1*

*This agreement shall come into effect on 3/4/06 and shall remain in force for a period of twelve weeks. During this time performance reviews will take place and this contract will then be renegotiated or terminated pursuant to any provision of this agreement.*

### *5. Probationary/Trial Periods*

#### *5.1*

*Employment is subject to a trial period of three months (dates advised in letter of appointment) during which time the Employee's performance will be reviewed in weeks 3, 7 and 9 of trial period. The Employee will be entitled to whatever training, supervision, support and resources during this period as may be deemed necessary by the Employer, and will be advised at the performance review meetings of their work performance in relation to the standards required of them. The Employer will clarify the standards required with reference to the Employee's position description. (Refer Schedule 1).*

[7] On the morning of 27 April 2006 Ms Kernahan was told by team leader Ms Paolo Ghirelli ("Ms Ghirelli") to attend a meeting in the boardroom. Present was Mr Mitchell, Ms Kernahan, account manager Ms Tania Flynn ("Ms Flynn") and Ms Ghirelli. The meeting was a discussion about client databases. The Authority finds it descended to a point where Ms Kernahan became agitated and made threat type statements in a raised voice. Ms Ghirelli says Ms Kernahan exploded and said "F... help anyone that stole my clients". Mr Mitchell says Ms Kernahan shouted "God help anyone who touches my database because they will be terribly sorry." Mr Mitchell slammed his fist on the table and demanded she cease.

[8] The following morning on 28 April 2006, Ms Kernahan after being requested by the administration person Kelly to do so, signed an employment agreement and dated her execution as 3 April 2006. Ms Kernahan had earlier discussed a previous version of the employment agreement but had requested amendments.

[9] Later that same morning, Ms Flynn advised Mr Mitchell she wished to lay a formal complaint that she had been threatened by Ms Kernahan on two previous occasions in the preceding three weeks. The Authority finds that Ms Flynn was asked by Mr Mitchell to record her complaint in writing. She duly did so and provided that written complaint to Mr Mitchell at some stage during that same day.

[10] Later that day, Ms Kernahan was summarily dismissed in a meeting held with her at about midday. Present at that meeting were Ms Kernahan, Mr Mitchell and Mr John Winters ("Mr Winters"). I find that Mr Mitchell told Ms Kernahan he

had received a complaint that Ms Kernahan had threatened someone. Mr Mitchell refused to reveal the identity of the complainant. Ms Kernahan told Mr Mitchell she had wanted to make her own complaint of personal grievance in relation to Mr Mitchell's behaviour the previous day in the meeting where he had banged his fist on the table.

[11] I find that Mr Mitchell referred to Ms Kernahan's own behaviour in the meeting the previous day where she had exploded and made threatening type statements about anyone who interfered with her client base. I find that Ms Kernahan appeared to have no recall of those statements or the meeting itself.

[12] Eventually Mr Mitchell disclosed it was Ms Flynn who had complained. I find that Ms Kernahan requested details of the complaint but Mr Mitchell told her he did not have to provide any details. He told Ms Kernahan he had taken advice and was within his rights not to provide her details of the complaint. Ms Kernahan said there was no point continuing in those circumstances. Mr Mitchell then advised that Ms Kernahan was dismissed for "gross misconduct" and he referred particularly to clause 37.7 of the employment agreement. He said he would pay her two weeks notice and said he did not have to. He told Ms Kernahan she would be driven home. Ms Kernahan denied threatening anybody and told Mr Mitchell he was in breach of her employment contract. She told him she would even take a lie detector test.

[13] Ms Kernahan told Mr Mitchell she had things to finish off and that she was going to send him an email. Mr Mitchell told her "No". Ms Kernahan said she would and that it was her right to reply. Ms Kernahan went back to her desk to finish her work. After about an hour, Ms Kernahan gathered her personal items together and was then driven home.

[14] After she was dismissed, Ms Kernahan wrote by email that same day to Mr Mitchell and Ms Walters as follows:-

*Peter/Tania*

*In relation to the meeting Peter and I have just held and the meeting that was called yesterday and discussions held.*

*Please note that I categorically deny I have threatened Tania Flynn and am not happy about the way this matter has been raised nor the way it has been handled. As advised just now Peter I have a personal grievance which you seem unhappy or unwilling to listen to.*

*You are now formally advising me that you are dismissing me based on the allegation made by Tania Flynn, without any written advice of the grievance nor any right of reply by myself.*

*This is not in the true spirit of good faith discussions and I believe you are breaching the employment relations act, and our contract by unfair dismissal and discrimination. You have not discussed any of this in a fair or rational manner, nor given me a right of reply, in fact I was so disturbed by your behaviour at yesterdays meeting I sought advice on the issue yesterday. As such I will be exploring my options in relation to this matter.*

[15] In a letter dated 15 May 2006 Review Publishing's representatives confirmed the reasons for dismissal as follows:-

*Your employment was terminated due to your misconduct, in particular in regards to the threats of violence made by you to another employee. The termination of the employment was carried out in a procedurally fair manner.*

*Given the above, and in light of your continued denial of the facts which led to the dismissal, the company does not believe that mediation will resolve this matter.*

### **The merits**

[16] I now determine the resolution of this employment relationship problem by making an assessment of which of the parties' respective positions is the more meritorious.

[17] Ms Kernahan's employment was not fixed term. The employment agreement completely fails to meet the requirements of [section 66](#) of the *Employment Relations Act 2000* ("the Act"). At Ms Kernahan's election, the employment was indefinite. As well, fixed-term employments are prohibited for the purposes of assessing the suitability of an employee.

[18] As for the probationary period, [section 67](#) of the Act makes it clear that the law relating to unjustifiable dismissal is not changed by such arrangements.

[19] Ms Kernahan says her dismissal is unjustifiable. The test of justification is that set out under [section 103A](#) of the Act.

[20] I find that it was Ms Flynn's complaint on the morning of 28 April 2006 that forced Ms Kernahan's termination. That finding is corroborated by the representative's advice specifying threats of violence to another employee in explanation for the dismissal.

[21] That being so, I find that Ms Kernahan was given no prior notice of the matters to be discussed in the meeting where she was dismissed. She was given no opportunity to take advice or invited to have a support person with her. Nor was Ms Kernahan told the matter was serious and that it could lead to her dismissal. A fair and reasonable employer would have accorded her these minimum requirements.

[22] I find that Mr Mitchell gave conflicting evidence as to whether he had Ms Flynn's written complaint when he met with Ms Kernahan. At the first day of investigation meeting he said *"I had a complaint from Tania Flynn. I didn't show the written complaint to Katy. She didn't ask for it. It was on Tania Flynn's file."* But on the second day of investigation meeting, he said there was no written complaint before the meeting with Ms Kernahan.

[23] Whether he had the written complaint or not, Ms Kernahan was not given any particulars of Ms Flynn's complaint. She was not therefore in a position to know the precise allegations against her. That was unfair because she was denied an opportunity to defend herself. As a matter of natural justice, a person at peril of suffering penalty is entitled to be heard in their defence. A fair and reasonable employer will always extend this opportunity. This employer did not.

[24] I note that I have seen Mr Mitchell's file note of the meeting held with Ms Kernahan when she was dismissed. That note suggests to me Mr Mitchell had predetermined the matter by deciding to dismiss Ms Kernahan before he had heard from her. The note further corroborates Ms Kernahan's evidence that she did not have time to object because Mr Mitchell was in a hurry to catch a plane.

### **Determination**

[25] I determine that on an objective basis, Review Publishing Co Limited's actions and how it acted, were not what a fair and reasonable employer would have done in all the circumstances at the time. **I find the dismissal on 28 April 2006 was unjustifiable.**

### **Resolution**

[26] Ms Kernahan has a personal grievance and she is entitled to remedies in settlement of that grievance.

[27] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by [section 124](#) of the Act to consider the extent to which Ms Kernahan's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[28] I accept Ms Ghirelli's evidence of the way in which Ms Kernahan behaved and conducted herself in relation to Ms Flynn.

I find that Ms Kernahan behaved unprofessionally, aggressively and was hostile towards Ms Flynn. This conduct I find is blameworthy conduct, and further, that this hostile behaviour was the situation that led to the personal grievance. I assess Ms Kernahan's contribution to the situation that led to the personal grievance as 25%. The remedies to be awarded to her shall be reduced by that proportion accordingly.

### **Reimbursement**

[29] Ms Kernahan seeks three months wages as reimbursement. She received income support from Work and Income New Zealand for the twelve weeks following her dismissal. She says she did not feel able to look for another job for six months because she was depressed and stressed.

[30] The period of alleged loss is not restricted by any fixed term period of employment because I have found this was not a fixed term employment. The probationary period has no relevance to the question of reimbursement.

[31] But Ms Kernahan has failed to mitigate or lessen her losses. She gives evidence she did not look for work because she was depressed and stressed. But she offers no evidence of a level of stress and depression over and above that of any other applicant dismissed unjustifiably and as would be sufficient to render her incapacitated for further employment.

[32] Because she has failed to take any steps to mitigate her losses and because I have found she contributed to the situation, I decline to award her reimbursement.

### **Compensation**

[33] This was an employment which lasted only twenty days, with the Easter vacation intervening.

[34] Having regard to her evidence, her length of service and her level of contribution, I award her compensation of \$3,000.00 but reduced by 25% in the sum of \$2,250.00. **I order Review Publishing Limited to pay to Katy Kernahan the sum of \$2,250.00 as compensation.**

### **Costs**

[35] I record that the Authority was advised on 21 March 2007 that Ms Kernahan is in receipt of a grant of legal aid.

[36] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Elliott is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Tremewan is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson

**Member of Employment Relations Authority**