

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 216
3134900
3135723

BETWEEN KELLY LEOTA LU
Applicant and Respondent

AND CHOICEKIDS CHILDCARE
LIMITED
Respondent and Applicant

Member of Authority: Eleanor Robinson

Representatives: Dave Cain, advocate for Ms Leota Lu
Daniel Church, counsel for ChoiceKids Childcare Limited

Investigation Meeting: 19 and 20 April 2022

Submissions and/or
further evidence 20 April 2022 from the Applicant and
from the Respondent

Determination: 26 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Kelly Leota Lu, claims that she was unjustifiably dismissed by ChoiceKids Childcare Limited (ChoiceKids). Ms Leota Lu also claims that she was unjustifiably dismissed as a result of being suspended by ChoiceKids.

[2] Ms Leota Lu further claims that ChoiceKids breached the duty of good faith it owed to her.

[3] ChoiceKids denies that Ms Leota Lu was unjustifiably dismissed or unjustifiably disadvantaged because she was not suspended from her employment, and counter claims that she breached her contract of employment with ChoiceKids by misrepresentation and by breaching her duty of good faith to ChoiceKids by failing to be “responsive and communicative” during her employment.

The Authority's investigation

[4] During the investigation I interviewed witnesses for the Applicant and Respondent and received submissions from both parties.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[6] The issues requiring investigation are whether or not:

- Ms Leota Lu was unjustifiably disadvantaged by being suspended by ChoiceKids?
- Ms Leota Lu was unjustifiably dismissed by ChoiceKids?
- ChoiceKids breached the duty of good faith it owed to Ms Leota Lu?
- Ms Leota Lu breached her contract of employment with ChoiceKids?
- Ms Leota Lu breached the duty of good faith she owed to ChoiceKids?

Background

[7] ChoiceKids was an early childhood education centre provider which ceased trading on 30 April 2021. At the time Ms Leota Lu was employed, ChoiceKids owned and operated 8 early childhood education centres in the Auckland region.

[8] Ms Leota Lu said that she responded to an advertisement, placed by Madison Recruitment Limited (Madison) on behalf of ChoiceKids, for an Executive Assistant. Prior to the application to ChoiceKids Ms Leota Lu said she had been employed by another company as an Executive Assistant.

[9] Ms Leota Lu applied for the position at ChoiceKids and was interviewed on 3 February 2020 by Ms Jenn Park, at that time the Business Manager.

[10] Both Ms Leota Lu and Ms Park agree that the interview was informal in nature. Ms Leota Lu said that Ms Park did not take any notes during the interview. Ms Park said that she took notes during the interview making a written record as the interview progressed which was provided in evidence.

[11] The written notes of the interview are in the form of a template document which Ms Park said was her usual practice and records Ms Leota Lu stating in response to the question about the reason for leaving her previous role: “there were issues in the team culture and she wanted a new challenge”.

[12] Ms Leota Lu said that at the time of the interview with Ms Park there were issues in her employment relationship with her previous employer which were still ongoing. She had been worried about what she could refer to in an interview and discussed that with Ms Caitlin Chatterley of Madison.

[13] Ms Leota Lu said she had been completely transparent with Ms Chatterley with her reasons for seeking employment.

[14] Ms Chatterley confirmed that she had advised Ms Leota Lu to say that she had ‘made a decision to leave’ if questioned about why she had left her previous employment, but this was because she had understood from what Ms Leota Lu told her that she had resigned from her previous employment.

[15] Ms Chatterley said that she had advised Ms Leota Lu to be honest if asked about her previous employment and how it ended.

[16] Ms Chatterley said she had taken a reference from a Senior Estimator with the previous employer with whom Ms Leota Lu told her she had worked closely, but with whom she had not reported directly. He had responded that stating that he did not know the reason for Ms Leota Lu leaving. Ms Chatterley said there had been nothing in that reference that had raised any concern. She had communicated this to Ms Park and to Mr Paul Davys, sole Director of ChoiceKids.

[17] Ms Parks said she considered that Ms Leota Lu had interviewed well and offered her the role of Executive Assistant after consultation with Mr Davys. She sent Ms Leota Lu an employment agreement to review on 12 February 2020 (the Employment Agreement).

[18] The Employment Agreement contained the following clauses:

17.5 Employee Acknowledgement

The Employee acknowledges that:

- (i) They have not misled or supplied false information to the Employer in any respect, including in relation to their qualifications, experience or ability to perform any duties under this agreement;
- (ii) They have not deliberately failed to disclose any matter that could have materially influenced the Employer’s decision on whether to employ the employee;
- (iii) They have been advised of their right to take independent advice on the terms of this Agreement;

- (iv) That they have been provided with a reasonable opportunity to take that advice;
- (v) ...
- (vi) ...
- (vii) The Employer has relied on the above acknowledgements in offering employment to the Employee, and this if any of the information referred to above is incorrect or misleading in any material respect, the employer may terminate the Employee's employment without notice.

[19] Ms Leota Lu said that she had 'skipped through' the Employment Agreement, but not fully read it. She had signed the Employment Agreement on 13 February 2020. She had also initialled each page.

[20] Ms Leota Lu commenced her employment at ChoiceKids on 27 February 2020, reporting to Ms Park. She enjoyed the work at ChoiceKids and had a good relationship with Ms Park.

Fuel Card Issue

[21] On 23 March 2020 New Zealand had gone into a Covid-19 lock down and Ms Leota Lu said she had been asked by Ms Park to collect the company fuel cards from the staff and to keep them secure during the lockdown. Before she had completed the task, she had been informed that they had already been collected and would be put in her office.

[22] When the employees returned to the ChoiceKids office after the lockdown, Ms Leota Lu said she was asked to reissue all the fuel cards and was told they were in Ms Park's office desk drawer. One fuel card appeared to be missing. Later she was asked to telephone to all the ChoiceKids call centres to obtain the number of the cards issued.

[23] Ms Leota Lu said a fuel card had been used to purchase petrol at three different petrol stations, but she could not account for it and it did not turn up during her search. Later she discovered that an employee had used it. The following day the employee had brought the fuel card to her and it was identified. Ms Leota Lu said she had telephoned Ms Park and informed her. She had then placed the fuel card on one of her document trays whilst awaiting further instructions from Ms Park.

[24] Ms Leota Lu said she believed the matter had been resolved.

[25] During the lockdown period Ms Leota Lu said she had been informed of a significant overpayment in her salary. She repaid what she could afford but there remained an amount outstanding, and it was arranged that it would be deducted in instalments from her fortnightly salary.

[26] From that point forward Ms Leota Lu said Mr Davys, who had been friendly towards her, barely acknowledged her presence.

[27] Mr Davys said he had been made aware of the overpayment totalling in excess of \$60,000.00 by the ChoiceKids payroll provider. He said it was not a unique incidence and he had asked the payroll provider to deal directly with Ms Leota Lu to arrange repaying the excess payment.

[28] Mr Davys said he did not believe that his manner towards Ms Leota Lu had changed following the payroll overpayment. Whilst he did not have much day-to-day contact with Ms Leota Lu, he was always polite when he saw her.

Events 25 June 2020

[29] Mr Davys said that on 25 June 2020 ChoiceKids had been carrying out an audit required in accordance with the Children's Act 2014. ChoiceKids was required under the Children's Act 2014 to complete safety checking of staff prior to them working with children.

[30] The Ministry of Education had found some issues with non-compliance with the staff files which had been submitted to it. As a result Mr Davys said ChoiceKids was given a short window of time to provide the required documentation. A failure to do so could result in some ChoiceKids centres being placed on suspended licences, or the ChoiceKids licence being cancelled.

[31] Mr Davys explained that the usual process for filing compliance documents was to have the documents filed online. Ms Park had completed a full audit of all online files and made a list of instances of non-compliance. He said that Ms Leota Lu and other employees were assisting Ms Park to find the missing documentation.

[32] Ms Park said she had been working late on the evening of 25 June 2020 to try to locate the missing documentation for the audit. As Executive Assistant Ms Park said Ms Leota Lu had oversight of employee files which were stored in her (Ms Leota Lu) office.

[33] By 10 p.m. she was feeling tired and still had over 110 files to find. She had gone into Ms Leota Lu's office to look for fuel card which had been ordered, and which some ChoiceKids Managers had requested. While searching for the gate remotes in the drawers of Ms Leota Lu's desk she had found the missing fuel card gate which had been reported as stolen and cancelled. The fuel card had been used three times while reported as missing.

[34] Ms Park said she had locked both her own office door and that of Ms Leota Lu's office due to confidential files being exposed and left the premises. She had intended to be at work the next morning prior to Ms Leota Lu commencing work.

[35] Once in her car she had telephoned Mr Davys and notified him that she had found the missing fuel card in Ms Leota Lu's office.

[36] Mr Davys said due to there being a number of documents missing at the end of the working day on 25 June 2020, he audited ChoiceKids email accounts to look for any files which had been scanned and therefore were stored in electronic form.

[37] In doing so he had come across an email to Ms Leota Lu's email account dated 6 March 2020 which had a PDF document attached. Mr Davys said it appeared that Ms Leota Lu had scanned the document to herself from the photocopier in the ChoiceKids office then forwarded the document to her personal email address.

[38] The document was a letter from the CEO of Ms Leota Lu's previous employer dated 19 November 2019. The letter was entitled 'Disciplinary Meeting: Performance and Conduct', contained allegations about Ms Leota Lu's performance and invited her to a meeting to discuss to some 'serious concerns'.

[39] Mr Davys said that although the letter was not a final outcome letter, it did give him grave concern because it was the first he had heard of Ms Leota Lu having faced disciplinary action from her previous employer, and the letter referred to potential dismissal.

[40] Therefore when Ms Park telephoned him and advised about the missing fuel card, he had told her about the letter he had found on Ms Leota Lu's emails.

[41] He asked Ms Park if Ms Leota Lu had disclosed anything about it during her interview but Ms Park said she had not done so. At that point Mr Davys said he believed an investigation might be necessary, but instructed Ms Park to continue with the audit process the next morning whilst he tried to find out more information.

Events 26 June 2020

[42] The following morning Mr Davys said he telephoned Ms Leota Lu's previous employer and spoke to the person who had provided the reference for her. The person had told him that Ms Leota Lu had been a great employee and he had no hesitation in recommending her for employment. However when asked why she had left, he avoided the question.

[43] Mr Davys said he telephoned again and this time asked to speak to the CEO. The CEO told him that Ms Leota Lu had reported directly to him, there had been issues in her employment and whilst he could not discuss those for privacy reasons, he confirmed that she had been dismissed.

[44] Mr Davys said he then telephoned Ms Park, informed her that he had obtained confirmation that Ms Leota Lu had been dismissed from her previous employment, and instructed her to start an investigation and disciplinary process into that matter and the missing fuel car issue.

[45] He and Ms Park had discussed the possible suspension of Ms Leota Lu while investigating, but he told Ms Park to talk to the ChoiceKids lawyers before doing so.

[46] Mr Davys said he had also spoken to Ms Chatterley and asked her to re-send him the reference checks that had been done for Ms Leota Lu. She had done so, and he said he received them at 7.12 a.m. He then asked her to send a follow-up email if she was aware of any employment issues when Ms Leota Lu worked for her previous employer.

[47] Ms Chatterley did so at 10.21 a.m. Her email stated that she had recorded Ms Leota Lu stating that:

Towards the end of my employment, there were some issues with the teams and management. I voiced my opinions to my managers but they weren't [sic] in a position to make any changes.

I decided that it wasn't a management team that I wanted to work for in the long term so I decided to move on.

[48] Ms Chatterley confirmed that Ms Leota Lu had given no indication that there were any disciplinary issues in her previous employment.

[49] Mr Davys said he had copied the CEO of Ms Leota Lu's previous company into his reply to Ms Chatterley in which he had advised Ms Chatterley that she could contact the CEO. The CEO had responded directly to Ms Chatterley, copying Mr Davys into the email. In the email the CEO advised that Ms Leota Lu's employment: "was terminated after numerous serious breaches of her Individual Employment Agreement".

[50] Ms Park said she took legal advice following the conversation with Mr Davys and made notes to ensure she acted appropriately during the process with Ms Leota Lu.

[51] She had also noted clause 15.3 (i) of the Employment Agreement which entitled ChoiceKids to suspend Ms Leota Lu while it investigated any matter related to her employment.

Meeting on 26 June 2020

[52] Ms Park said she sent a message to Ms Leota Lu early on the morning of 26 June 2020 asking her to meet her at a nearby café to discuss something important.

[53] Ms Leota Lu said she had arrived at the ChoiceKids office to find her office locked. She had received a message from Ms Park at approximately 8.00 a.m. asking her to meet at a café. She had asked the reason but Ms Park did not tell her. On arrival at the cafe Ms Park had asked if she could record the meeting, and she had agreed on the proviso that she would receive a copy of the recording.

[54] Ms Leota Lu said the first thing Ms Park told her was that she was suspended on full pay while ChoiceKids investigated two allegations. She said she had been completely shocked.

[55] Ms Park had told her the first allegation was that she had used a company fuel card on three occasions which astonished her as she believed that issue had been resolved. Ms Park told her that ChoiceKids was awaiting CCTV footage from the petrol stations to confirm who had used the card. Ms Leota Lu said this was not of concern to her since she knew she had not used the fuel card.

[56] The second allegation was that she had misled ChoiceKids about the reason she had left her previous employment.

[57] Ms Leota Lu said she was very upset, especially as she was being told about the allegations in a public place.

[58] Ms Leota Lu said Ms Park told her not to go onto any ChoiceKids premises or childcare centres and to return her gate key and mobile telephone. This necessitated her having to return to her home to retrieve the gate key and remove her personal information from the ChoiceKids phone.

[59] When she returned to the café Ms Park told her that ChoiceKids would continue investigating and she was to attend a disciplinary meeting on 29 June 2020.

[60] Ms Park said that Ms Leota Lu had not asked her why her office door was locked when she had telephoned her. At the start of the meeting Ms Park said she had asked Ms Leota Lu for permission to record the meeting on her mobile phone and advised that she would be reading from her notes during the meeting.

[61] Ms Park said she commenced the meeting by advising Ms Leota Lu that ChoiceKids was proposing to suspend her on full pay pending an investigation. Subsequently she confirmed that she had referred to suspension but that was a slip of the tongue which she had corrected.

[62] Ms Park said she had given the reasons for the suspension and proposed that Ms Leota Lu take the morning to seek advice on the suspension proposal, and to meet back at the ChoiceKids office at 2.00 p.m. that day for Ms Leota Lu to provide any response on the proposal. Ms Leota Lu initially agreed but then asked if she could take the weekend to consult a lawyer. Ms Park had agreed to this.

[63] After that was agreed, Ms Park said it was Ms Leota Lu who offered to return “all my stuff” to the office before 2 p.m. that day. Ms Leota Lu had left the café and returned approximately one and a half hours later with the mobile phone and the gate key.

[64] Ms Park said when she returned to her car she discovered that her mobile phone battery had run flat and assumed the meeting had not been recorded, however several months afterwards she discovered that the first four and a half minutes of the meeting had been recorded.

[65] The following had been recorded of the meeting:

JP: You know, I understand that we are in the middle of going through a restructure proposal process, however, in light of a couple of things that have been brought to my attention we are today proposing to suspend you on full pay pending an investigation.

KL: OK.

JP: So, before I start, I do need to emphasize that obviously no implications are being made, no conclusions have been drawn, but we are just simply following protocol.

KL: OK.

JP: So we're standing you down – well [*inaudible*] Suspending your employment on full pay pending an investigation into two things

JP: So, like I said, we're proposing to suspend your employment on full pay while we investigate this matter. You are welcome to seek advice on this proposal - ...

JP: ... if you can return to the office at about 2 o'clock this afternoon, obviously take the morning and go and seek advice –

KL: Yeah, yep

JP: Come back at 2 o'clock, and we'll meet again and we'll hear any feedback that you wish to provide on this proposal to suspend?

KL: Today?

JP: Yep.

KL: I don't think I can do today.

JP: OK, when do you think you'll be able to come back to ...

KL: Probably I'd need over the weekend because I need to, like you said, I need to go and see a lawyer ...

JP: OK. All right, no that's alright.

KL: [*inaudible*] ... I mean, I can return all my stuff to the office, that's not a problem.

JP: Yep.

KL: I can do that, before the end ... before 2 o'clock today, that's not a problem at all.

JP: OK.

[66] Ms Leota Lu said that she received a letter later that same day, 26 June 2020, which was undated but which was headed: 'Notice of Disciplinary Investigation and Proposal to Suspend'. Ms Leota Lu said she had been confused by the letter reference to 'proposal to suspend' because she believed she had already been told by Ms Park that she had been suspended.

[67] Ms Park said she had emailed Ms Leota Lu on Friday 26 June 2020 advising that the letter attached: "1. Letter, outlining our proposal to suspend your employment on full pay ..."

[68] The letter signed by Ms Park set out the allegations in detail, advised that :

As you are aware, we are proposing to suspend you on full pay pending our investigation into these matters, and have scheduled a meeting with you at **2.00 p.m. on Monday, 29 June 2020**, for the purposes of hearing your feedback on our proposal to suspend, and making a decision on whether or not suspension is required.

[69] The letter then set out the allegations in detail, and concluded:

Next Steps

You are required to attend a disciplinary investigation meeting on **Monday at 2pm ...** to provide your explanations in relation to the above concerns.
You are welcome to bring a representative or support person to the meeting

We will listen to any explanations you wish to provide, and we will consider these before any final decision is made.

Please note however, that if we are not satisfied with your explanation in relation to either or both of the above matters, disciplinary action may be taken, up to and including termination of your employment with ChoiceKids.

[70] Ms Leota Lu emailed Ms Park on Sunday 28 June 2020 stating that "due to the serious nature of these allegations ... I now require time to seek legal representation as I am taking this matter very seriously."

[71] Ms Park emailed in response confirming that the suspension meeting would be deferred until Wednesday 1 July 2020.

Emails 29 June 2021

[72] On Monday 29 June 2020 at 6.31p.m. Ms Leota Lu emailed Ms Park stating:

What do you mean the meeting is about the suspension? And some sort of proposal.

You have suspended me! You've taken my keys and locked me out of my office.

...these allegations are totally unreasonable and there is no risk to you with me continuing working. ... you clearly want me gone.

[73] Ms Park responded at 7.05 p.m. noting that the email she had sent attaching the letter of 26 June 2020 had stated 'proposal to suspend' which was reinforced in the letter attached to the email; Ms Park stated that:

The meeting that was scheduled today that has now been moved until Wednesday due to your unavailability is **NOT a Disciplinary meeting.** this meeting is a notice of a disciplinary investigation and an opportunity for you to respond to the issues raised in the attached Proposal to Suspend.

[74] At 7.42 p.m. Ms Leota Lu emailed Ms Park, asking in the email if she could return to work the following day. Ms Park responded by email at 8.12 a.m. confirming the meeting to be held on 1 July 2020 but did not answer Ms Leota Lu's question if she could return to the office.

Emails 30 June 2020

[75] At 9.45 a.m. on 30 June 2020, Ms Leota Lu emailed Ms Park again asking if she could return to the office and adding:

We both know I am not able to return as you have already told me I am suspended. You have taken my phone and locked me out of my office.

[76] Ms Park did not respond to the email until 5.30 p.m. when she noted that she had been in meetings all day, provided explanations for the locked office door and the return of the company phone and gate remote, but did not answer Ms Leota Lu's query about whether or not she could return to the office.

[77] At 8.51 p.m. on 30 June 2020 Ms Leota Lu emailed Ms Park stating:

You have not been clear in why you have taken my phone from me? You have no basis for removing my phone unless I have been suspended.

You issued me with the gate remote? Now you claim I "*should never have had it in my possession*", You gave it to me? Why did I have to return it to you at the same time as having my office door locked preventing access and you taking my phone?

My office door has never been locked. There have been plenty of occasions where sensitive material may have been able to be exposed, but its one big coincidence this is the day you lock me out. Unless of course you had suspended me. You locked it to keep me out because you had suspended me. You never told me it was a proposal,

just that I was being suspended. I was not allowed to return and again you took my phone from me. ...

You have suspended me. You told me of the same and then prevented me from attending work. I repeatedly asked if I could return to work and you evaded the questions. ...

... You have already suspended me, prevented me from attending my work place and taken all of my work equipment ...

Emails 1 July 2020

[78] The following morning, 1 July 2020 Ms Leota Lu emailed Ms Park. The email stated:

...

I have never had my phone taken off me before, for any reason, it is not believable and does not make sense that you would take it from me to aide me seek legal advice? ...

My office has never been locked to prevent my access before. Never. Just on the same day as my phone is taken off me.

I have repeatedly requested if I may return to work. You have evaded this question.

You suspended me, you know it and it could not be clearer from the above.

[79] On Wednesday 1 July 2020 Ms Park emailed Ms Leota Lu at 12.15 p.m. advising that the gate remote, the phone and the locked office had nothing to do with the proposal to suspend and that in the event that Ms Leota Lu was not suspended the following day, the phone would be returned to her.

[80] At 12.43 p.m. Ms Leota Lu emailed Ms Park stating that she saw no point in attending the scheduled meeting since she had been suspended and asking when the disciplinary meeting would take place.

[81] By letter dated 1 July 2020 Ms Park confirmed the decision of ChoiceKids to suspend Ms Leota Lu on full pay and confirming the disciplinary meeting to be held on 3 July 2020.

Disciplinary meeting 3 July 2020

[82] The meeting held on 3 July 2020 was attended by Ms Leota Lu and her husband, Ms Park, and Mr Church who conducted the meeting on behalf of ChoiceKids.

[83] During the meeting Mr Church asked Ms Leota Lu for her response to the allegation that she had potentially misrepresented her employment history. Ms Leota Lu explained that there had been an unresolved legal dispute with her previous employer, but stated that she had been "open and honest" with Ms Chatterley about what had happened and that at the time of the interview with Ms Park she had been relying on Ms Chatterley's instructions.

[84] When questioned about what she had said to Ms Park during the interview, Ms Leota Lu commented that she doubted the accuracy of the notes taken by Ms Park. She commented: “When one person’s writing and taking notes talking, you don’t always capture everything ...”.

[85] Mr Church asked Ms Leota Lu to comment on the letter that Mr Davys had discovered from Ms Leota Lu’s previous employer but she refused to discuss it. Mr Church also asked Ms Leota Lu about the email sent by the CEO of the previous employer which stated that Ms Leota Lu’s employment had been terminated.

[86] Ms Leota Lu refused to discuss it.

[87] In regard to the second allegation concerning the missing fuel card, Ms Leota Lu explained about the card being cancelled, the fact that there had been two cards issued with the same number, and another employee having confirmed that she had used the fuel card on three occasions.

[88] Ms Park confirmed that she remembered cancelling the employee’s card and ordering her a new one, and said she would check the details provided by Ms Leota Lu.

[89] Mr Church provided another opportunity for Ms Leota Lu to comment on what had occurred with her previous employer, but her response was: “I’d rather not discuss this, it has no bearings on this at all whatsoever.”

Termination of employment 6 July 2020

[90] On 6 July 2020 ChoiceKids wrote to Ms Leota Lu and confirmed the termination of her employment. The letter set out what had been discussed during the meeting held on 3 July 2020 and the findings:

Regarding the second allegation, we find that this is unsubstantiated.

...

We have decided to give you the benefit of the doubt regarding the fuel card issue, ...

With regard to the first allegation however, we find that this is substantiated.

In the absence of any credible explanation from you, or indeed, any explanation at all, regarding the circumstances of the termination of your employment with [previous employer], we need to rely on the information we have available to us. ...

...

We find it more likely than not that you were dismissed from [previous employer], and that you failed to disclose this during the recruitment process. ...

At no point were we informed of disciplinary proceedings and/or a dismissal by your previous employer, and/or that there was a “*legal dispute*” (of whatever nature) between you and your previous employer. Had we been aware of these matters, this may have materially impacted on our decision regarding whether or not to offer you employment.

We find you have breached clause 17.5(ii) of your employment agreement, which provides that:

“The Employee acknowledges that ... they have not deliberately failed to disclose any matter that could have materially influenced the Employer’s decision on whether to employ the employee

...

We find that your representations to ChoiceKids that you left ... of your own accord were incorrect and/or materially misleading in view of the fact that there were disciplinary proceedings against you, that you were apparently dismissed, and that there is a legal dispute with them, and we relied on your representations when offering employment to you. ...

In view of the above we are invoking our right under clause 17.5 (vii) of your employment agreement and have decided to terminate your employment without notice, and with immediate effect.

Was Ms Leota Lu unjustifiably disadvantaged by being suspended by ChoiceKids?

[91] ChoiceKids had the right pursuant to clause 15.3 of the Employment Agreement to suspend Ms Leota Lu, however that clause specifies that ChoiceKids should discuss the proposal of suspension with Ms Leota Lu and consider her views prior to implementation of suspension.

[92] On 26 June 2020 Ms Leota Lu arrived at work to find her office door locked. She then received a message from Ms Park asking to meet at a café rather than in the office premises.

[93] Ms Park’s opening remarks at the café meeting referred to the restructuring process and then stated that ‘in light of a few things’ that had been brought to her attention, ChoiceKids was proposing to suspend Ms Leota Lu. This statement was followed by the comment by Ms Park: “So we’re standing you down – well ... suspending you on full pay.” Ms Park said during the Investigation Meeting that this was a “slip of the tongue”.

[94] Later in the café meeting, following an outline of the allegations against Ms Leota Lu, Ms Leota Lu offers to return “her stuff” to the office. This offer was agreed to by Ms Park.

[95] Ms Park in the recording on her mobile phone subsequently reiterates that it is a proposal to suspend. The transcript of the recording notes that part of that sentence was inaudible but records Ms Park commenting that she would not speak too loudly.

[96] The meeting to discuss the proposal to suspend and the accusations against Ms Leota Lu was held in a public venue. I consider that the choice of venue, the obvious lowering of the voices due to the fear of being overheard, and the public nature of what was discussed (namely concerning and serious allegations), would have had the effect of placing Ms Leota Lu at a disadvantage and in a position in which she would find it difficult to concentrate and clearly discern whether she was being suspended or whether it was only a proposal.

[97] Ms Leota Lu's subsequent offer to return her 'stuff' was accepted by Ms Park with no clarification as to their return to Ms Leota Lu; and the gate remote and the mobile phone were returned to Ms Park at the café.

[98] The meeting was followed up by the letter sent by Ms Park that same day, which reiterated that Ms Leota Lu was not suspended but was on paid leave while she sought legal assistance.

[99] Although the letter (undated but agreed by the parties to have been sent on 26 June 2020) referred to both the proposal to suspend and the disciplinary investigation, I find that by conflating the two issues, it would be reasonable for Ms Leota Lu to consider that the proposed meeting to be held on 29 June 2020 (at that date), was to discuss the allegations rather than a suspension proposal. This I find to be especially so in light of the statement: "You are required to attend a disciplinary investigation meeting on **Monday at 2 pm at [café]** to provide your explanations in relation to the above concerns" after the setting out of the allegations.

[100] In the emails which follow, Ms Leota Lu asserts that she had been suspended at the meeting held on 26 June 2020. Ms Park denies that this is the case, but I note that Ms Leota Lu's specific requests to return to the office in the emails sent at 7.42 p.m. on Monday 29 June 2020 and repeated at 9.54 a.m. on 30 June 2020 were not responded to by Ms Park.

[101] Whilst I accept that ChoiceKids provided plausible reasons for the locked office and the return of the gate remote and mobile phone, I find that in the circumstances in which Ms Leota Lu:

- a. arrived at work to find her office door locked;
- b. was asked to attend a meeting in a public place;
- c. it was agreed that she should return her mobile telephone and the gate remote;
and
- d. her requests for information whether she could return to work prior to the meeting on 1 July 2020 were unanswered by Ms Park

I find that it was reasonable for her to conclude that she had been suspended on 26 June 2020.

[102] I consider that had no decision been made as to whether or not to suspend, Ms Leota Lu should have been advised that she was free to return to work pending the meeting on 1 July 2020 if she wished to do so, particularly when she specifically asked Ms Park if she could do so.

[103] Moreover as Ms Leota Lu had returned her work phone to Ms Park, she was unable to work remotely.

[104] Considering all the circumstances at the relevant time, I determine that Ms Leota Lu was unjustifiably disadvantaged by being suspended by ChoiceKids.

Was Ms Leota Lu unjustifiably dismissed by ChoiceKids?

[105] Ms Leota Lu was dismissed on 6 July 2020 for failing to disclose a matter which materially influenced ChoiceKids decision on whether to employ her in breach of clause 17.5(ii) of the Employment Agreement.

[106] Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification.

[107] The Test of Justification requires that the employer acted in a substantively and procedurally fair manner, and that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Substantive Justification

[108] Ms Leota Lu had been provided with an Employment Agreement which set out her responsibility pursuant to clause 17.5 (ii) not to deliberately fail to disclose any matter which might materially affect ChoiceKids decision on whether or not to employ her.

[109] Clause 17 of the Employment Agreement also set out at clause 17.5 (iii) that Ms Leota Lu had the right to take independent advice of its terms. Ms Leota Lu was aware of this requirement prior to commencing employment. Further at clause 17.5 (vii) Ms Leota Lu had been advised that if any of the information she provided to ChoiceKids was incorrect or misleading in any material effect, ChoiceKids could terminate her employment.

[110] Ms Leota Lu had signed the Employment Agreement acknowledging that she agreed to be bound by the terms set out in Employment Agreement, and had initialled each page. I find that ChoiceKids was entitled to rely on Ms Leota Lu's acknowledgement.

[111] I find that Ms Leota Lu was fully aware of her responsibility to provide accurate information to ChoiceKids in respect of any material information which might affect its decision to employ her.

[112] ChoiceKids had not been made aware of any employment relationship issue between Ms Leota Lu and her previous employer prior to its offer of employment to her. Had it been

made aware, ChoiceKids may have been materially influenced in its decision whether or not to make that offer.

[113] In all the circumstances, ChoiceKids decided that by failing to disclose a prior dismissal and/or disciplinary action, Ms Leota Lu had breached clause 17.5 (ii) of the Employment Agreement and it was entitled to dismiss her pursuant to clause 17.5 (vii).

[114] I find that ChoiceKids had substantive justification for its decision to terminate Ms Leota Lu's employment.

[115] Ms Leota Lu's evidence was that she relied upon the advice of Ms Chatterley during her interview with Ms Park. I accept that she may have done so.

[116] However Ms Chatterley's evidence was that she had relied, when providing advice, on her understanding from Ms Leota Lu, that she had resigned from her previous employment. Without the full details of the circumstances of Ms Leota Lu's reason for leaving her previous employment, any advice provided by Ms Chatterley would be based upon a false understanding.

[117] Moreover once Ms Leota Lu had been provided with the Employment Agreement, she was fully aware of the requirements of its terms and conditions and she had signed in acknowledgement of them. That was solely her responsibility.

Procedural Justification

[118] ChoiceKids had made Ms Leota Lu aware of the allegations against her prior to the meeting held on 3 July 2020 at which Ms Leota Lu was provided with the opportunity to respond. She confirmed that she was able to do so.

[119] Despite the opportunity to do so, Ms Leota Lu chose not to offer, in response to questions about the situation in respect of her previous employer, an explanation.

[120] ChoiceKids was required to genuinely consider Ms Leota Lu's explanations prior to making a decision. I find that it did so, nothing that the first allegation regarding the fuel card was found to be unsubstantiated following Ms Leota Lu's explanation.

[121] I find that ChoiceKids followed a fair process.

[122] I determine that Ms Leota Lu was not unjustifiably dismissed by ChoiceKids.

Did ChoiceKids breach the duty of good faith it owed to Ms Leota Lu?

[123] I find that in respect of the process regarding suspension, ChoiceKids did not act in good faith towards Ms Leota Lu.

Did Ms Leota Lu breach her contract of employment with ChoiceKids?

[124] By failing to disclose a matter which could have materially influenced ChoiceKids decision to employ her, I find Ms Leota Lu breached clause 17.5 (ii) of the Employment Agreement.

Did Ms Leota Lu breach the duty of good faith she owed to ChoiceKids?

[125] By failing to disclose a matter which could have materially influenced ChoiceKids decision to employ her, I find Ms Leota Lu breached the duty of good faith she owed ChoiceKids.

[126] ChoiceKids claims that Ms Leota Lu also failed to act in good faith by failing to: “be active and constructive in establishing and maintaining a productive employment relationship in which the parties are ... responsive and communicative.”¹

- i. By refusing to attend the meeting to discuss suspension on 1 July 2020;
- ii. By making derogatory comments to Ms Park in the email exchanges; and
- iii. By failing to provide a full explanation regarding the circumstances of her departure from her previous employer.

[127] I have found that it was ChoiceKids who failed to act in good faith in respect of the suspension process.

[128] Ms Leota Lu did make derogatory comments in the emails to Ms Park, although I accept that the failure by Ms Park to respond to her requests to return to the office may have aggravated her level of frustration and aggrievement. Nonetheless the comments were disrespectful and unhelpful in resolving the matter, and caused some distress to Ms Park.

¹ Employment Relations Act 20002 s4(1A)9b0.

[129] I find that Ms Leota Lu failed to act in good faith by not providing full responses as to her reasons for the ending of her employment with her previous employer during the meeting on 3 July 2020, and that this contributed to ChoiceKids decision to dismiss her.

Remedies

[130] I have found that Ms Leota Lu was unjustifiably disadvantaged by ChoiceKids. Ms Leota Lu said that she felt disheartened by the way ChoiceKids treated her, and she became depressed and suffered from anxiety. I observe that a large cause of any anxiety and depression could be attributed to the dismissal process, and that I have found the dismissal to be justifiable.

[131] ChoiceKids is ordered to pay Ms Leota Lu the sum of \$3,000.00 as compensation pursuant to s 123(1)(c)(i) of the Act.

Contribution

[132] I am required under s 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[133] I find that Ms Leota Lu did not contribute to the circumstances regarding the suspension process.

Penalty

[134] I have found that Ms Leota Lu breached the Employment Agreement and failed to act in good faith by not acting in good faith in the emails to Ms Park and by failing to responsive and communicative during the disciplinary meeting.

[135] As observed, the primary purpose of a penalty is to punish the wrongdoing and to act as a deterrent to further breaches by the relevant party and the deterrence of others with respect to obligations of good faith and fidelity.

[136] Section s133A of the Act outlines the matters the Authority and Court must have regard to in determining the amount of penalty. In considering this issue, I have regard to the fact that in addition to the s 133A considerations, the Employment Court has given guidance on the factors to be taken into account when assessing penalties in *Borsboom and Preet PVT Limited*.² I have taken these principles into account when considering what penalty may be appropriate in this case.

² *Borsboom v Preet PVT Limited* [2016] NZEmpC 143.

Identify the nature and number of statutory breaches

[137] There is one breach of the Employment Agreement and two of a statutory duty. Each merit a penalty to a maximum amount of \$10,000.00. This is a potential total penalty of \$30,000.00.

Step Two- assess the severity of the breaches

[138] The aggravating factors include the fact that Ms Leota Lu had the opportunity to read and consider the terms and conditions contained in the Employment Agreement before signing it; and was provided with an opportunity to respond to the allegations against her, and failed to do so when provided with that opportunity.

[139] Ameliorating factors include the failure of ChoiceKids to act appropriately regarding the suspension process which resulted in a level of frustration on the part of Ms Leota Lu and may have impacted on the tone adopted in writing emails to Ms Park.

[140] I also note the failure of Ms Leota Lu to act in good faith regarding the breach of the Employment Agreement and during the disciplinary meeting which resulted in the termination of her employment with ChoiceKids.

Ms Leota Lu's financial circumstances

[141] Ms Leota Lu is not a highly remunerated employee, although I observe that both she and her husband are employed so could manage to make some payment of any penalty awarded against Ms Leota Lu.

Proportionality

[142] In considering the level of penalties awarded in similar cases decided since *Preet*, all the circumstances of this case, and considering the impact on the Applicant in this case, I consider the appropriate level of the penalties in this matter to be (i) \$150.00 in respect of the breach of the Employment Agreement; (ii) \$150.00 in respect of the two breaches of the statutory duty of good faith.

Should any part of the penalty be paid to ChoiceKids?

[143] The purpose of penalties is to deter, not to compensate. The penalties imposed are to bring home to Ms Leota Lu the importance of adhering to the freely agreed terms of Employment Agreements and to act in good faith during the employment relationship.

[144] I order Ms Leota Lu to pay the full penalties amount of \$300.00 to the Authority for transfer to a Crown Bank Account.

Costs

[145] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[146] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[147] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[148] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

**Eleanor Robinson
Member of the Employment Relations Authority**

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].