

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 46
5338375

BETWEEN	JUSTINE DANDO MCDONALD Applicant
AND	PORSE IN-HOME CHILDCARE (NZ) LIMITED Respondent

Member of Authority: Philip Cheyne

Representatives: Anjela Sharma, Counsel for Applicant
Maree Kirk, Counsel for Respondent

Investigation Meeting: 31 March 2011 at Nelson

Determination: 8 April 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Justine McDonald worked for Porse In-Home Childcare (NZ) Limited (Porse) until she was dismissed following an investigation into alleged serious misconduct. Ms McDonald says that she was unjustifiably dismissed and she is seeking compensation and reinstatement to remedy her personal grievance. She is also seeking interim reinstatement, the part of the problem with which this determination is concerned.

[2] As is usual for determining a claim for interim reinstatement I have received affidavits in support and in opposition and given both parties as opportunity to make submissions based on that evidence. The findings expressed here are for the purpose of resolving the claim for interim reinstatement only. Final findings of fact will have to wait until after a full investigation including the opportunity to test the evidence.

[3] Ms McDonald was dismissed on 1 March 2011. Most of the present application was delivered to the Authority after business hours on 18 March 2011. There was a phone conference on 22 March and arrangements were made for the respondent to lodge a statement in reply and affidavits in opposition by 30 March 2011. After the investigation meeting Ms Sharma forwarded to the Authority an email with an attachment asking that the enclosed information be taken into account as part of this determination. I have seen the email but not the attachment. I do not intend to look at the attachment. In the several weeks before filing the application Ms McDonald had a reasonable opportunity to compile information in support of her application for interim reinstatement. There is a second email raising some issues about the substantive meeting but that can be addressed later.

[4] I have received a substantial volume of material, all of which I read before the investigation meeting. Both parties then provided comprehensive submissions, addressed me orally and responded fully to the issues I raised. However, in this determination I will only refer to the most important aspects of the problem so as to avoid delay. The situation in Christchurch has delayed getting this determination into print in the first place so I do not want to delay further.

Arguable case?

[5] I find that Ms McDonald has an arguable case of unjustified dismissal.

[6] In January 2011 while on holiday Ms McDonald went camping at Kaiteriteri with some friends. She used her work car which is apparently branded with the company name. There was a disagreement between Ms McDonald and some other campers. Sometime later, Porse received three written complaints about Ms McDonald's behaviour at the camping ground. Copies of the complaints were forwarded to Ms McDonald by letter dated 15 February 2011. The letter cautioned Ms McDonald that the matters were serious, could constitute serious misconduct and could result in a disciplinary outcome since:

We are very concerned about these issues, you were using the PORSE car and clearly damaging the company's reputation – not only in the area – but in the areas from where the witnessing holiday makers come from.

[7] Two of the complaints are undated. One starts *Hi Megan*. There is an indication in another of the complainant's prior knowledge of Porse. During the second disciplinary meeting Ms McDonald was told that one of the complainants rang *Megan* the night of the incident. *Megan* apparently proffered her opinion that the complainants were *credible and trustworthy people*. During the disciplinary investigation, Ms McDonald disputed the differing accounts contained in the three written complaints. The names of the complainants, details of their prior connection with Porse and the circumstances by which they came to put their complaints in writing were never disclosed to Ms McDonald. Arguably, all that information should have been given to Ms McDonald to give her a fair opportunity to answer the concern about *damaging the company's reputation*.

[8] Determining what actually happened at Kaiteriteri needed to be an important part of Porse's investigation. A transcript of the first disciplinary investigation records Ms Sharma (Ms McDonald's representative at the meetings) saying that the group with whom Ms McDonald was camping would all say that the allegations in the written complaints were *grossly inaccurate*. Emma Murphy is Porse's manager who made the decision to dismiss Ms McDonald. She did not hear anything specific from this group, nor did she talk with the complainants, apparently limiting her inquiries to reading the complaints, speaking to *Megan* and learning her opinion about the complainants' veracity and hearing from Mrs McDonald. During the second disciplinary meeting on 1 March 2011 Ms Murphy expressed her conclusions about the incident and said that it amounted to serious misconduct. Ms McDonald's representative attempted to get Porse to hear from one witness in particular. Porse declined to do so on the basis that Ms Murphy was at that stage only prepared to consider information about whether Ms McDonald should be dismissed for the established misconduct. It is arguable that a fair and reasonable employer would not have limited their inquiries in this way.

[9] I have been provided with an affidavit from Paul Vuillermin, the person referred to above. His evidence is that Ms McDonald was told by a man to *Fuck off to a motel* and she responded telling him to *Fuck off to Christchurch*. The context was an exchange between Ms McDonald and the man about noise from the man's and his campmates' children waking up Ms McDonald's child. That followed on from Ms McDonald speaking to these children about noise. He says he does not recall

Ms McDonald threatening to throw water on the group's tent as alleged. He says that the complainants have twisted the truth of the matter and embellished the situation to make it appear worse than it was. He says that it was a *flash in the pan* and that the other group moved the location of the children's tent at his suggestion.

[10] There are some significant differences between the complainants' accounts. One complainant says that Ms McDonald was *loudly abusing our children ...[using] bad language at the children and [accusing] them of being loud*. The other two say she *yelled at our Children to Shut Up and started very aggressively telling the children that her child was asleep and our kids could stop making any noise and that she didn't want to put up with them talking at 4am again*. As a result Ms McDonald was *confronted by my Partner and myself* (according to one complainant). According to another *Gareth went down to speak to her and soon after Phillippa joined Gareth*. During the exchange Ms McDonald *continued to abuse us with no reasoning or said she would ...throw a bucket of water over [Gareth]*. During this some of the children were in tears and were frightened. The children's tent was moved *as they were too scared to be right next to her*. The complainants make other allegations. One says that Ms McDonald drove the Porse car with two children on the front seat, one clearly not belted up. Another says *We also witnessed her yelling at her own Children with an abusive tongue*. The third says *either she or her daughter had, apparently, called one of Gareth's boys a "stupid bitch"*. *I had earlier heard her telling her own children that they needed to get the "f...ing potatoes peeled*. All three complainants thought that Ms McDonald's conduct reflected badly on Porse.

[11] Ms Murphy concluded from her investigations that *the children, who we believe are aged 6 – 11, we believe 4 of them were yelled at and frightened by Justine, that they were crying*. Ms Murphy also concluded, in light of Ms McDonald's propensity to *swearing, loud and aggressive manner* that the exchange with the father of one of the children *encompassed references from him about you f...ing off to a motel, and from you about him f...ing off back to Christchurch, and that you made reference to a bucket of water over his head ...if there were further problems*. Ms Murphy further concluded that there was sufficient relationship between the conduct at Kaiteriteri and the nature of Porse's business for the conduct to damage or potentially damage Porse's business reputation and that Ms McDonald was in breach of her obligations to her employer so as to amount to serious misconduct on her part.

[12] It is arguable that those conclusions are not the ones that a fair and reasonable employer would have reached in all the circumstances at the time. The conclusion that Ms McDonald *yelled at* children depends on accepting the description given by only one of the complainants. Another described it as speaking *aggressively* which might be thought less objectionable, while the third accused Ms McDonald of using *bad language*. Presumably neither tone nor bad language would be acceptable in Ms McDonald's dealings with clients' children but it is far from clear that doing so on one occasion could amount to serious misconduct justifying dismissal even if the parents said that such behaviour damaged their respect for Porse. Behaving that way outside work while on holiday could hardly be regarded as more serious.

[13] There is an additional difficulty, at least to an arguable level, with Ms Murphy's conclusions. She expressly relied on Ms McDonald's *propensity* for swearing and being loud and aggressive. I take that to relate to the conclusions with respect to Ms McDonald's exchanges with the man. The claim about a *propensity* was raised with Ms McDonald during the second disciplinary meeting. What was never given to Ms McDonald was a written communication from Michelle Collier (a colleague of Ms McDonald's) to Ms Murphy on 11 February 2011 strongly criticising Ms McDonald for that and other behaviour. The email also contains indications that Ms Murphy had been privy to earlier similar discussions with Ms Collier. It is strongly arguable that a fair and reasonable employer would have disclosed the written communication so as to allow Ms McDonald an opportunity to respond.

[14] Finally I should mention that the disciplinary investigation extended to several other points. The only one that need be mentioned is the issue about whether Ms McDonald performed 40 hours work per week for her employer. The written communication from Ms Collier contains evidence that she did not, another reason why it should have been disclosed. In the disciplinary meetings the debate centred on whether Ms McDonald was contractually entitled to work from home. On her account she was and it was on that basis that she took the job. Ms McDonald's explanation about her total hours of work was to the effect that Porse needed to include the time she spent working at home in order to assess her total hours of work. Eventually Porse concluded that Ms McDonald was in breach of her contractual obligations but ostensibly took that conclusion no further in light of its conclusion on

the primary issue. On the evidence before the Authority at this stage there are elements of a dispute about this issue. For that reason it is arguable that a fair and reasonable employer would have first resolved the dispute rather than dealing with the matter as one of misconduct.

[15] These are the principal reasons for the conclusion that Ms McDonald has an arguable case of unjustified dismissal.

[16] The prospects of reinstatement as a remedy for an established personal grievance are less strong on an arguable basis.

[17] If Ms McDonald establishes a personal grievance the Authority must, whether or not it provides for other remedies, provide wherever practicable for reinstatement. While s.125 of the Act was amended with effect from 1 April 2011, it is the former provision just summarised that must apply given the date of the dismissal. Practicability includes an assessment of whether or not workplace relationships can be restored. In this case there is evidence that Ms McDonald's two Nelson workplace colleagues harbour substantial concerns about whether they can work with her again. The 11 February 2011 communication from Ms Collier indicates that her negative feelings predated the dismissal. I assume that Ms McDonald will dispute at least some of what her colleagues say but it is not possible to resolve any dispute at this point. I should simply acknowledge that Ms McDonald will have to overcome more than just her former employer's opposition to reinstatement. There is more than a theoretical risk that Ms McDonald might establish a personal grievance but fail to obtain reinstatement.

[18] That leads me to conclude that Ms McDonald has an arguable but not a strongly arguable case for reinstatement.

Balance of Convenience

[19] The claim for interim reinstatement is advanced principally on the basis that Ms McDonald will suffer serious financial difficulties if she does not have the regular income from her former employment, pending determination of her substantive claim. She needs the income to meet living expenses including support for her child. She

may end up in default on her mortgage payments. Ms McDonald also relied on her work car and does not have a vehicle of her own.

[20] That picture is complicated by the fact that Ms McDonald has secured some temporary work at least until 17 April 2011. I am asked to delay the effect of any interim reinstatement order until after that date. Ms McDonald's earnings from this alternative employment are at a significantly lower rate than from her full-time work with Porse but it does help her financial situation to some degree and therefore diminishes the force of her case for interim reinstatement.

[21] Arrangements are in place for an investigation meeting in early May. There is agreement to participate in mediation beforehand. If Ms McDonald is not granted interim reinstatement her prospects for permanent reinstatement are not reduced by the passage of time to an investigation meeting or to a determination following that meeting.

[22] It has not been suggested that Porse could not meet any compensation for lost remuneration, should Ms McDonald eventually succeed. Awards of compensation could substantially or wholly restore Ms McDonald to her pre-dismissal position.

[23] If Ms McDonald was reinstated in the interim there is a possibility that Porse's other Nelson based staff will leave. That could have a substantial effect on its operation in that area. It is hard to see how any such effect could be remedied by an award of damages against Ms McDonald even if her undertaking covered such a loss.

[24] Overall I consider that the balance of convenience favours the respondent.

Overall Justice

[25] There appear to be some issues with the quality of Porse's investigation. It is also somewhat less than certain even if Ms McDonald behaved towards some children more or less as alleged during her holiday, that it would amount to serious misconduct in her employment justifying a dismissal on an objective standard. Even if a grievance is established, it may not be practicable to reinstate Ms McDonald.

[26] Ms McDonald's case for permanent reinstatement is not so strong that she should be reinstated in the meantime even though the balance of convenience favours the respondent.

Summary

[27] The application for interim reinstatement is declined.

[28] Costs are reserved.

[29] A conference call will be arranged to deal with arrangements for the substantive investigation meeting in case the parties are not able to resolve this problem with mediation assistance.

Philip Cheyne
Member of the Employment Relations Authority