

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Faye McKenzie (Applicant)
AND Hawksbury Community Living Trust Inc (Respondent)
REPRESENTATIVES Joe Davies, Advocate for Applicant
Martin Harris, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 25 July 2006
DATE OF DETERMINATION 5 September 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Faye McKenzie, commenced her employment with the respondent on 8 September 1999. She looked after adults with intellectual disabilities in community homes run by the respondent. Ms McKenzie worked permanently in one of the community homes but worked in other homes when required.

[2] Ms McKenzie was party to an individual employment agreement dated 10 August 2004 with the Trust. She agreed to be bound by virtue of her employment agreement by the respondent's policies and procedures.

[3] The respondent is the Hawksbury Community Living Trust Inc ("the Trust") which provides residential support to people with intellectual disabilities.

[4] There were no significant issues during Ms McKenzie's first five years of employment.

[5] In May 2005 Ms McKenzie was given a formal verbal warning when the Trust believed that she was sleeping during a shift on 15 April 2005. In July 2005 Ms McKenzie received a written warning for falsifying a timesheet and lateness for duty.

[6] On 3 October 2005 Ms McKenzie was summarily dismissed from her employment for habitual lateness after she was late to work on 7 September and 8 September 2005. Ms McKenzie did not report her lateness to the residential manager of the Trust as she was required to do in terms of the written warning issued on 13 July 2005.

[7] Ms McKenzie says that she was unjustifiably dismissed in her employment and/or unjustifiably disadvantaged. She seeks an award of lost wages and compensation. She also seeks costs.

[8] The Trust say that Ms McKenzie's dismissal was justified, that she was not disadvantaged and does not have a personal grievance.

The Issues

[9] This was a situation where Ms McKenzie was dismissed, not for one incident of serious misconduct, but for conduct over a period of time. The earlier warnings were taken into account at the time of dismissal.

[10] The questions that require determination in terms of the test for justification in section 103A of the Employment Relations Act are the following:

- (i) Were two warnings actually issued to Ms McKenzie and if so were they justified?
- (ii) Was Ms McKenzie habitually late for work in terms of the Trust policy which provides that *habitual lateness of arrival for work or leaving early* is misconduct which may result in summary dismissal?
- (iii) Would a fair and reasonable employer have dismissed Ms McKenzie in all the circumstances?
- (iv) If the dismissal was unjustified was there contributory conduct on the part of Ms McKenzie which should reduce any remedies awarded to Ms McKenzie?

The First Warning

[11] On 6 May 2005 Ms McKenzie attended a disciplinary meeting with her union representative Joe Davies to discuss an allegation that she had been sleeping on duty and therefore had not heard a staff member ringing the door bell on 15 April 2005. There was an incident report from the staff member who complained that no one answered the door bell to enable her to commence her shift at 11.00pm until 11.30pm.

[12] Operations manager, Martin Harris and the residential manager, Nicki King attended the disciplinary meeting on behalf of the Trust.

[13] Ms McKenzie denied sleeping on the job. The notes taken at the meeting reflect that Mr Harris was not convinced about Ms McKenzie's denial. Concerns were raised about Ms McKenzie's other employment and the hours she was working in that role. Ms McKenzie accepted that she had been unwell at the time. Ms McKenzie told me, although I am not satisfied that she said this by way of explanation at the time of the disciplinary meeting, that she had in fact been on the telephone at the material time.

[14] A letter was sent to Ms McKenzie dated 10 May 2005 which provided in terms of the outcome from the disciplinary meeting that:

Faye, following our discussion and due consideration of this incident and your response we have made a decision to issue you with a Formal Verbal Warning. The Trust's expectations on you are to be able to complete all rostered duties on your shifts in a safe and effective manner, ensuring the safety and wellbeing of the people we support.

To support you in the future we have also made the decision that we will only require you to work your contracted hours per fortnight. We will monitor this for the next six weeks and then review the situation.

I would also recommend that you consider the amount of hours you work outside of Hawksbury Trust, as we believe that this was a contributing factor in relation to this incident.

[15] I find that the Trust had formed an honest belief on reasonable grounds that it was probable that Ms McKenzie had fallen asleep. This was in circumstances where there was no satisfactory explanation from Ms McKenzie as to why she had not opened the door for the staff member who was to take over from her on the next shift and she was unwell.

[16] Mr Harris was concerned about the considerable number of hours Ms McKenzie was working and her health. Ms McKenzie had worked 121 hours for the fortnight before the disciplinary meeting and also had other employment. Those factors were considered and taken into account by the Trust in its decision to issue her with a formal verbal warning and also to restrict Ms McKenzie's hours to her contracted hours for a six week period. After that period the restriction was reviewed and overtime reinstated. Mr Davies initially raised a grievance and sought mediation assistance about the warning after it was issued. There is a dispute about the circumstances in which mediation was subsequently cancelled. I shall refer to that later in this determination.

[17] Considering all the circumstances I find that the Trust justifiably issued Ms McKenzie with a formal verbal warning. Mr Davies raised an issue as to whether the letter of 10 May 2005 was sufficient to constitute a formal verbal warning. Both Mr Davies and Ms McKenzie were waiting for a further document to issue. I am of the view that the letter adequately records the issue of a formal verbal warning to Ms McKenzie in terms of the incident on 15 April 2005

The second warning

[18] On 13 July 2005 Ms McKenzie was asked to attend a disciplinary meeting to discuss an allegation that she entered a start time for her shift on 29 June 2005 of 11.00pm on her timesheet when in fact she did not arrive at work until 11.30pm. Ms McKenzie attended the meeting with Mr Davies. Mr Harris and Ms King attended for the Trust.

[19] Ms McKenzie explained that writing the wrong time on her timesheet had been an honest mistake. She apologised to Mr Harris and Ms King and offered to pay the extra time back.

[20] There was a discussion about the fact Ms McKenzie was late to work on 29 June 2005. This was the less serious of the two allegations. In terms of the allegation that she had falsified her time sheet she was warned and advised that it was serious and could lead to dismissal. She was not warned again in terms of the lateness. Given it was the less serious of the two allegations it is not surprising in my view that the warning about the possibility of dismissal was not repeated in terms of the matter of lateness. Ms McKenzie said that she had not set her alarm clock and therefore slept in which made her late for work.

[21] Ms McKenzie was told that she would be issued with a formal written warning lasting six months. There were some conditions attached to the warning.

[22] Ms McKenzie said that she thought she was required to drop the request for mediation over the formal verbal warning or she would be dismissed. Mr Harris did not accept any such ultimatum

was given. Mr Davies said that he thought initially if Ms McKenzie did not drop the mediation she would be dismissed. He then said that he thought Mr Harris was genuine and that *he wasn't using the warnings pretence to dismiss Ms McKenzie*. There was then agreement to cancel the mediation about the formal verbal warning. I am not satisfied in all the circumstances that Ms McKenzie was given an ultimatum about mediation with respect to the earlier warning.

[23] There was an issue raised by Mr Davies as to whether the letter prepared after the disciplinary meeting on 13 July 2005 constituted the issue of a formal written warning in the absence of provision of a further document. The letter dated 13 July from Ms King sets out the background about the incident on 29 June 2005 and the allegations of falsifying the timesheet and lateness for duty. It records Ms McKenzie's explanations and the concern about her tiredness. It then sets out the decision and conditions. I have set these out below:

Faye, as you are aware we considered your response to the issues raised and have decided not to dismiss you in this instance. As you are also aware (as discussed at our meeting) we are now issuing you with a Formal Written Warning.

However in reaching this decision we have felt it necessary to include certain conditions.

They are as follows:

- *Your Formal Written Warning will be bound with your previous Formal Verbal Warning which was issued on 10 May 2005. Both of these warnings will remain in effect for six months.*
- *I will review (with you) your duties performed on each shift.*
- *You agree to report any absence from duty, minor or major, to me.*
- *We need to insist on complete confidentiality of everything discussed at this meeting.*
- *For you to take one week annual leave by the end of August 2005.*

We discussed these conditions today with you and your Union Representative Joe Davies, and after careful consideration you agreed to accept these terms.....

[24] Mr Davies and Ms McKenzie said that they both waited for a warning document to issue. I am of the view that if there was any concern or confusion about the warning then they could have approached either Ms King or Mr Harris. I find that the formal written warning was adequately issued to Ms McKenzie by the letter of 13 July 2005. It followed a meeting where there had been discussion about the issue of a written warning and the attached conditions. The letter clearly sets out the misconduct as falsifying a timesheet and lateness for duty. I am satisfied that a written warning was justified in all the circumstances.

Was Ms McKenzie habitually late for work in terms of the Trust policy?

[25] Ms McKenzie was dismissed from her employment on 3 October 2005 for serious misconduct on the basis that she was habitually late and that she did not report her lateness on 7 and 8 September 2005 to Ms King in terms of the formal written warning of 13 July 2005.

[26] I need to consider the occasions on which Ms McKenzie was late to assess whether there was lateness by Ms McKenzie that a fair and reasonable employer would regard as habitual and therefore serious misconduct.

[27] Ms McKenzie was late on 29 June 2005. She received a written warning for that and the failure to record the lateness on her timesheet.

[28] Ms McKenzie was late on 23 August 2005 when she arrived for work at 11.30pm instead of at the start time of the shift 11.00pm. On the morning of 24 August 2005 Ms McKenzie telephoned Ms King and advised her of her lateness. Ms King took down a note of the conversation. It records Ms King had telephoned Ms McKenzie during the day on 23 August 2005 to ask her if she could swap her nightshift the next week on the Tuesday/Wednesday and do an afternoon shift instead. Ms McKenzie advised Ms King that she was relaxing at home on 23 August when she wondered if she was in fact meant to be at work that night. She could not remember whether it was that week or the following week that Ms King had asked her to swap a shift. Ms McKenzie then recalled that she was supposed to be at work that night and arrived late at 11.30pm. She filled in her timesheet correctly. Ms King accepted the explanation at the time and I am of the view that a fair and reasonable employer would put that incident of lateness to one side in any later deliberations about habitual lateness.

[29] On the night shifts of 7 September 2005 and 8 September 2005 Ms McKenzie recorded on her timesheets that she arrived for an 11.00pm shift on 7 September 2005 at 11.15am and for an 11.00pm shift on 8 September 2005 at 11.10pm. Ms McKenzie said at a disciplinary meeting on 3 October 2005 to discuss the lateness on these two occasions that she had only put those times down because the staff member she was reliving from had put the times down on her own timesheet. Ms McKenzie said that in fact she had arrived on 7 September at 11.08pm and on 8 September 2005 at 11.04pm. She said that she had kept a careful record of her arrival times since 13 July 2005 and that she had not been late prior to these two occasions.

[30] Ms McKenzie said that she was late one of the two nights in September because she had to put her rubbish bags out at home and only remembered after she had headed off to work and had to go back. On the other night Ms McKenzie said that she had arrived for duty on time but had to get out of her car and open the driveway gates and then close it again after she had gone through. She also said that on that night she had to shut the two garage doors on the property. In terms of why she had not reported her lateness to Ms King, Ms McKenzie said that she did not think it was worth mentioning.

[31] Ms McKenzie did not accept during the meeting that she was habitually late arriving to work.

[32] The meeting then adjourned for Mr Harris and Ms King to make a decision. Mr Harris and Ms King said that they did not accept Ms McKenzie's explanations for the lateness were reasonable. Mr Harris and Ms King felt that they had been very fair toward Ms McKenzie in the past. Ms McKenzie was advised by letter provided to her later on 3 October that she was summarily dismissed from her employment.

[33] Habitual lateness may constitute serious misconduct. A fair and reasonable employer would have considered, notwithstanding the written warning, whether in fact Ms McKenzie was habitually late. I am not satisfied that there was sufficient focus by Mr Harris and Ms King on the occasions when Ms McKenzie had been late and probably too much emphasis on previous disciplinary action for issues other than lateness. Ms King said at the investigation meeting that *a penalty short of dismissal had been done earlier.*

[34] I do not find a fair and reasonable employer would have concluded that three incidences of unacceptable lateness, one in late June and two in September constituted habitual, in the sense of repeated and regular, lateness so as to be regarded as serious misconduct.

[35] Ms McKenzie should have advised Ms King about her lateness. She did record her lateness on her time sheet. I do not find that that failure on its own amounts to conduct capable of amounting to serious misconduct which would justify dismissal.

[36] In conclusion I do not find that there was conduct by Ms McKenzie in this case which a fair and reasonable employer would regard as habitual lateness and therefore serious misconduct.

Would a fair and reasonable employer have dismissed Ms McKenzie in all the circumstances?

[37] I have found that there was no conduct on the part of Ms McKenzie that a fair and reasonable employer would regard as serious misconduct. The summary dismissal of Ms McKenzie was unjustified.

[38] Ms McKenzie has a personal grievance that she was unjustifiably dismissed and is entitled to remedies. Ms McKenzie does not have a personal grievance that she was unjustifiably disadvantaged in her employment that should be remedied separately to the unjustified dismissal.

Remedies

Contribution

[39] I am required under section 124 of the Employment Relations Act 2000 to consider the extent to which Ms McKenzie's actions contributed toward the situation that gave rise to the personal grievance. If I consider that there is contribution then I must reduce the remedies that may otherwise be awarded.

[40] Ms McKenzie had received a written warning for lateness and then she had been late again on two occasions. She had not telephoned Ms King as she was required to do in terms of the warning of 13 July 2005 although had correctly filled out her time sheet. There was no policy about the types of disciplinary action that the Trust could impose. I am of the view that a fair and reasonable employer would have given Ms McKenzie a warning in terms of her lateness and failure to telephone Ms King. Ms McKenzie by arriving late would have caused some inconvenience to the staff member who she was to take over from. I assess an appropriate award for contribution in these circumstances at 30%.

Lost Wages

[41] Ms McKenzie was not in a position to advise me of the amount of lost wages that she was claiming for the period of three months. Ms McKenzie was on ACC for some weeks after dismissal and continued with her secondary employment. I order the Trust to pay to Ms McKenzie three months lost remuneration from 3 October 2005. I shall leave the amount of lost wages for the parties to calculate. The period spent on ACC, any remuneration that Ms McKenzie earned during the three month period and the contribution that I have assessed at 30% will have to be taken into account. In the event of any difficulty then I reserve leave for either party to come back to the Authority.

Compensation

[42] Ms McKenzie said that she felt really upset by her dismissal and that she really liked working for the Trust. She enjoyed the interaction with the residents and felt that she gave them satisfactory service. When Ms McKenzie was dismissed she could not afford to continue to pay rent on her house and had to live with her daughter. She had worked for the Trust for six years at the date of her dismissal.

[43] I am of the view that a suitable award in all the circumstances for Ms McKenzie is \$5000.00.

[44] Taking contribution into account Hawkesbury Community Living Trust is ordered to pay to Faye McKenzie the sum of \$3,500.00 without deduction being compensation for humiliation, loss of dignity and injury to feelings under section 123 (c)(i) of the Employment Relations Act 2000.

Costs

[45] I reserve the issue of costs. The parties may be able to agree to costs and I would encourage this. In the event that agreement cannot be reached then the applicant should lodge and serve her submissions as to costs by 26 September 2006 and the respondent should lodge and serve any submissions as to costs in reply by 10 October 2006.

Summary of orders and findings

- I have found that two warnings were issued to Ms McKenzie and that they were justified.
- I have found that Ms McKenzie was unjustifiably dismissed on 3 October 2005 but I have not found unjustified actions by the Trust that disadvantaged Ms McKenzie that should be separately remedied.
- I have ordered the Trust to pay three months lost wages to Ms McKenzie from the date of dismissal. The parties are to calculate the lost wages taking into account the period that Ms McKenzie was on ACC, contribution assessed and any earnings during the three month period. I have reserved leave for the parties to return to the Authority if there are any difficulties in such calculation.
- I have ordered the Trust to pay to Ms McKenzie the sum of \$3,500.00 without deduction for compensation.
- I have reserved costs and in the event that agreement cannot be reached have timetabled an exchange of submissions.

Helen Doyle
Member of Employment Relations Authority