

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Alley Toloke (Applicant)  
**AND** Logan & Associates New Zealand Limited (Respondent)  
**REPRESENTATIVES** For the Applicant - Tim Oldfield  
For the Respondent - Jason Logan Fenandos,  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 31 March 2005  
**DATE OF DETERMINATION** 18 May 2005

**DETERMINATION OF THE AUTHORITY**

**The Employment Relationship Problem**

- [1] Ms Toloke worked as a Caregiver at the Landscape Lodge Rest Home, Mt Roskill, Auckland. She claims that she was unjustifiably dismissed on 18 December 2003. Ms Toloke seeks that the Authority finds that she has a personal grievance and award her various remedies. A penalty is also sought for failing to provide a wage and time record.
- [2] Mr Jason Fenandos was, at the material times<sup>1</sup>, the owner/operator of the Landscape Lodge Rest Home (“the Rest Home”) via his company, Logan & Associates New Zealand Limited (“Logan”). Mr Fenandos denies that Ms Toloke was dismissed. He says that she abandoned her employment on 16 December 2003, following the receipt of a final written warning.

**Background**

- [3] Ms Toloke started her employment at the Rest Home in 1999. In November 2001, the Rest Home had a change of owner and Ms Toloke was employed by Trigg Holdings Limited, a company owned and operated by Mrs Faye Brice and her daughter, Ms Belinda Brice.
- [4] Ms Toloke says that in late November 2003, the Rest Home staff was informed by the Brices that Mr Fenandos would be taking over the business and he would be immediately taking over the management of the business.
- [5] The evidence of Mr Fenandos is that he took up residence at the Rest Home on 1 November 2003 in order that he could have two weeks’ training. Mr Fenandos says that he took possession of the business on 17 December 2003.

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<sup>1</sup> Mr Fenandos sold the business in August 2004.

- [6] I conclude that it is more probable that it was late November 2003 that Mr Fenandos began managing the business but nothing rests upon establishing the exact date that Mr Fenandos began managing the Rest Home, except to say, that there appears to have been a period where he was making decisions about the operation of the Rest Home, albeit it was still owned by Trigg Holdings Limited. It is doubtful that Mr Fenandos had any authority to make the decisions that he did
- [7] On or about 7 December 2003, Mr Fenandos issued a “NOTICE TO ALL STAFF” advising that it had been brought to his attention by the previous management that theft had been a major problem. Among other things, Mr Fenandos also conveyed that the “new management” would not be providing any meals except tea and coffee and staff were requested to “bring your own meals.”

### **The Evidence of Ms Toloke**

- [8] The evidence of Ms Toloke is that at the end of her shift, about 10:00pm, on 18 December 2003, she was called to the office of Mr Fenandos. Ms Toloke says that Mr Fenandos informed her that he: “had to let me go.” When she asked why, Ms Toloke was told that she was not to be trusted and that he personally did not trust her. Ms Toloke says that she was also accused of taking Rest Home food from the kitchen fridge for two years and in more recent times, fruit salad. The further evidence of Ms Toloke is that Mr Fenandos accused her of not carrying out a proper handover to the incoming staff member at the end of her shift the night before.
- [9] Ms Toloke says that she most upset about being accused of things that she had not done. She tried to explain to Mr Fenandos that she had not done anything wrong but she says he would not listen. Ms Toloke then requested that she say goodbye to one of the residents that she had become close to during her work at the Rest Home. Ms Toloke paid her regards to the resident and then gathered her belongings and left. Before leaving, Ms Toloke asked for her personal file and for payment for the days of 17 and 18 December. The evidence of Ms Toloke is that she never received her personal file, wages or holiday pay due to her.
- [10] Mr Mac Makatoa, Ms Toloke’s partner, conveyed in a written statement, that he had to wait outside in his car for half an hour until Ms Toloke came out of the Rest Home. He says that it was unusual to have to wait and he confirmed that the last day of employment for Ms Toloke was 18 December 2003.

### **The Evidence of Mr Fenandos**

- [11] Mr Fenandos says that he encountered some difficulty with the conduct of Ms Toloke, particularly regarding her practice of helping herself to food that was provided for the residents of the Rest Home. Mr Fenandos also says that this practice was not new and he presented a letter alluding to earlier similar misconduct on the part of Ms Toloke. Mr Fenandos claims that this letter was written and signed by Mrs Faye Brice, the previous owner of the Rest Home. The Union acting for Ms Toloke submitted that they believed that this letter had been constructed by Mr Fenandos and that the signature of Mrs Brice had been forged.
- [12] Subsequent to the investigation meeting, I spoke to Mrs Brice and she confirmed to me that she had viewed the letter in question, having received it from the Union. Mrs Brice informed me with the utmost certainty that she had not written the letter and she was sure that her

signature had been forged. I accept the evidence of Mrs Brice without hesitation and find that Mr Fenandos has attempted to mislead the Authority in a most serious manner indeed.

- [13] The further evidence of Mr Fenandos is that he issued a written warning to Ms Toloke on 10 December 2003 and he presented this document to the Authority. I note that the date on this typed letter has been altered by hand. Ms Toloke says that she had never sighted this document before until the Union received it in the course of preparing her case. I accept that this is so and while I can not be certain, I suspect that this document may also have been constructed by Mr Fenandos in order to justify his actions against Ms Toloke.
- [14] The evidence of Mr Fenandos is that on or about 10 December 2003, he had occasion to issue a warning to Ms Toloke regarding her “conduct and rebellious behaviour” and for “eating resident’s food and not complying with your duties. ....”  
The warning also conveyed that Mr Fenandos was confident that “we can resolve issues” and invited Ms Toloke to “work together.” Mr Fenandos proposed a meeting with her but that does not appear to have occurred and I have no evidence of any actual discussion occurring pertaining to the reason/s for the warning being issued. Ms Toloke says that she had never sighted this written warning until it was received by the Union and I accept her evidence about that.
- [15] Mr Fenandos also provided a written statement dated 12 December 2003. He says that this statement was prepared by the Registered Nurse/Manager at that time, Ms Ronda Mash. There is also an “Incident Report Form” that Mr Fenandos says was prepared by Ms Mash. Mr Fenandos refers to Ms Mash in a “FINAL WARNING NOTICE 16 DECEMBER 2003.” The notice is badly constructed, but in summary, it refers to several transgressions on the part of Ms Toloke, including:
- Continuing to steal food from the fridge
  - Neglecting to disperse medication to residents and signing the medication chart
  - Making “long distance” phone calls and mobile phone calls
  - The racial statement made to Ronda Mash
- [16] Ms Toloke was informed that if there was further misconduct she would be “dismissed instantly.” Ms Toloke denies receiving this warning also and despite the evidence of Mr Fenandos to the contrary, I accept her evidence.
- [17] My further investigation reveals that it is doubtful that there ever was a person called Ronda Mash working at the Rest Home. While I can not be certain and make no definitive finding, having inspected and compared the respective handwriting, I suspect that the documents that Mr Fenandos says were written by the identity Ronda Mash, were more likely to have been prepared by him.
- [18] The evidence of Mr Fenandos is that he presented the final written warning to Ms Toloke at about 9:00pm on 16 December 2003. He says that he left the warning on a table in the kitchen in front of Ms Toloke but there was no discussion then or beforehand. Mr Fenandos says that he later had an argument with Ms Toloke in his office about her eating Rest Home food and not giving medication or writing reports. Mr Fenandos says that the outcome of the argument was that Ms Toloke left the Rest Home and never returned.

## **Determination**

- [19] I conclude that Ms Toloke may have been less than a satisfactory employee and Mr Fenandos may well have had some grounds for taking issue with her on certain aspects of her conduct.

[20] However, I do not accept that Ms Toloke left her employment on 16 December 2003 as claimed by Mr Fenandos. I have to say that while Mr Fenandos was quite plausible while giving his evidence at the investigation meeting, a closer inspection of the documents that he relied upon to support his oral evidence, reveals not only some discrepancies but also a degree of dishonesty that could be seen as fraudulent. Therefore, I largely accept the overall evidence of Ms Toloke and reject that of Mr Fenandos.

[21] Given the overall evidence, I find that it is more probable than not that Ms Toloke was dismissed from her employment on 18 December 2003. I also find that the dismissal was substantively and procedurally unjustified. Ms Toloke has a personal grievance and is entitled to remedies.

## **Remedies**

### *(a) Reimbursement of Wages*

[22] Ms Toloke was able to obtain part-time work (5 hours a day) at another rest home. She then obtained full-time work in early January 2004. There is no evidence of the loss of wages, if any, and no order is made.

### *(b) Compensation*

[23] Ms Toloke seeks the sum of \$15,000 but that claim is excessive in the circumstances. However, I do accept that the dismissal and the manner in which it was implemented, affected Ms Toloke to a degree that warrants appropriate compensation. The evidence of Ms Toloke is that she had difficulty sleeping properly and that she was emotionally and mentally distressed. She also says that she lost a lot of her confidence and self esteem.

Contrasted with that, is the evidence that she went on to obtain full-time employment almost immediately.

Given the totality of the evidence regarding the effect of the dismissal upon Ms Toloke, under the provisions of s123(c)(i) of the Employment Relations Act, I order Logan & Associates New Zealand Limited to pay to Ms Toloke the sum of \$6,000.

### *(c) Penalty*

[24] There is some difficulty in establishing just where the responsibility lies for the provision of the overall wage and time records of Ms Toloke. Mr Fenandos, via his company, had only been in business at the Rest Home for two days, including the day that Ms Toloke was dismissed. Prior to 17 December 2003, the business was owned by Trigg Holdings Limited. There is no evidence of what was to occur in regard to matters such as accumulated leave upon Mr Fenandos taking over the business. Given the uncertainty of where the responsibility for monies that may be due should lie and that a complaint has not been placed with a Labour Inspector under s229(1)(c)(i) of the Employment Relations Act, an order for a penalty is not available from the Authority.

## **Wage Arrears and Holiday Pay**

[25] I am satisfied that Ms Toloke has not been paid for working on the days of 17 and 18 December 2003 and that she is entitled to payment for those days. The gross sum owing is \$168.00. Logan & Associates New Zealand Limited is ordered to pay to Ms Toloke wages of the gross sum of \$168.00.

[26] In regard to holiday pay that may be owing, there is no evidence available as what may be due to Ms Toloke. There is also the uncertainty as to whether the liability should rest with Logan or Trigg Holdings Limited. Should Ms Toloke, via her Union, wish to pursue this matter, then that should be done by making a complaint with a Labour Inspector under the appropriate provisions of the Employment Relations Act. There is also the problem that Logan is no longer trading and may soon be removed from the Register of Companies.

### **Summary of Orders**

1. Logan & Associates Limited is ordered to pay compensation to Ms Toloke of the sum of \$6,000.
2. Logan & Associates Limited is order to pay to Ms Toloke wage arrears of the gross sum of \$168.00.

### **Costs**

Logan & Associates Limited is ordered to pay to Ms Toloke \$70.00 for the application fee paid to the Authority.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**