

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Phillip Biddick (Applicant)
AND Mangonui Computers 2004 Limited (Respondent)
REPRESENTATIVES Bryce Quarrie, Counsel for Applicant
Murray Broadbelt, Advocate for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 24 November 2005
DATE OF DETERMINATION 16 January 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant submits that he was unjustifiably dismissed. To remedy his alleged grievance he seeks lost remuneration and compensation pursuant to s. 123 (1) (c) (i).

The respondent denies that Mr Biddick was unjustifiably dismissed and submits that he was employed on a two week trial that did not work out.

Background

On 15 November 2004 Mr Biddick walked into the respondent's business, Mangonui Computers, and asked if there were any jobs available for a computer technician. Mr Biddick was engaged immediately and started work that afternoon allegedly on a trial basis. Mr Biddick then worked 8 hour days at the rate of \$12.50 per hour.

The parties had discussions during the first week of Mr Biddick's employment relating to the possibility that the employer might qualify for payment of a Job Plus subsidy because Mr Biddick had previously been on a benefit. Ms Teixeira made contact with WINZ in Kaitaia and steps were taken to action an application for a subsidy. The subsidy which was due to start on 29 November was approved. The parties also discussed the possibility that Mr Biddick might be appointed to the position of Service Manager.

However, concurrent with this Ms Teixeira began to have concerns about Mr Biddick's competency, his customer service, his standard of dress and his attitude in general.

On 26 November Ms Texeira called Mr Biddick into her office and told him things just weren't working out and that she wished him to leave. Mr Biddick refused to leave and the police were called. Mr Biddick left the premises at the request of the police.

Positions of the Parties

Applicant

Mr Biddick denies he was employed on a trial basis. He submitted he asked if there was a job for a computer technician and he was employed there and then. It was some days later before a pay rate was discussed and agreed. It was about this time that the parties discussed the possibility of the Ms Texeira being eligible for a subsidy to employ Mr Biddick.

Mr Biddick agrees Ms Texeira did discuss his standard of dress. Ms Texeira did not want him to wear jeans and running shoes for work. He considered he was tidy. However he agreed to improve his dress standard as soon as he was paid and could afford to buy new clothes.

It was Mr Biddick's evidence that no performance issues were raised with him during his employment.

It is Mr Biddick's evidence that during the second week of his employment he was asked if he would like to be employed as Service Manager on a two week trial. He agreed and on 25 November he was given a draft employment agreement to review.

That afternoon he was asked by the Shop Manager to do a job but he reminded her that he had a doctor's appointment and could not take that job. Ms Texeira was aware of this appointment and he did not think there was any issue over this.

However, on the morning of 26 November he was called to Carol Texeira's office and told he was dismissed. This came as a complete shock to him. He was told he did not fit in and that there had been complaints about him including one from a residential customer regarding a scanner and another from the principal of Kaeo School that he had been rude and arrogant towards her and that he had not fixed the problem that he had been sent to fix.

It was Mr Biddick's evidence that when he was dismissed Ms Texeira indicated he would not be paid for the work he had done. This enraged him and he refused to leave until he was paid. The police were called and he left at the request of the police. He telephoned about his pay and decided to peacefully protest outside the shop. However, in the event he was paid all he was owed.

Respondent

It is the respondent's position that Mr Biddick presented without qualifications or references. She had more work than she could handle so he was engaged immediately but on a trial for two weeks to enable her to assess his qualifications and ability to do the job.

There is no dispute that she did apply for a subsidy to employ Mr Biddick and that she did discuss employing him as Service Manager. It was her evidence she made this suggestion as a 'carrot' to encourage Mr Biddick to improve his performance.

It was Ms Texeira's evidence that she met with Mr Biddick frequently (3 or 4 times) over the two week period of his employment to specifically address her concerns relating to his dress standard,

his approach to customer service and his general performance. Mr Biddick was argumentative and refused to accept there was anything wrong with his dress or approach to customers. In respect to his failure to problem solve a faulty line connection for one client he said “that wasn’t his job”.

On 24 December Mr Biddick was sent to do a job at Kaeo School. Ms Teixeira said that the next day she received a call from the school principal who requested that Mr Biddick not be sent to the school again. The principal said he was argumentative and did not fix the problem he had been sent to fix.

On the 25th Mr Biddick refused to go to a job when requested because he had a doctor’s appointment and when he was asked to do the job later he refused because he was going to see a real estate agent. He had not advised of these appointments, nor had he sought time off.

On 26 November Ms Teixeira said she called Mr Biddick into her office for another discussion regarding his duties and performance. After the previous meetings, called to address his dress standard, performance and service, she was disappointed with his refusal to do the job assigned on 25 November. She said things weren’t working out and she asked him to leave. Mr Biddick refused to leave. Eventually the police were called and he was escorted from the premises. His pay was paid on-line the same day.

Legal Framework

Section 64 of the Employment Relations Act provides that individual employment agreements must be recorded in writing.

Section 67 of the Act makes provision for trial periods and it stipulates that they must be specified in writing. Essentially, however this legislative provision codifies the position that had already developed through case law under the Employment Contracts Act 1991. The case law as it developed requires employers to supervise and review a probationer’s performance, communicate any concerns to the probationary worker, give fair warning that the employment will not be made permanent if the required performance standards are not met and a reasonable opportunity for improvement must be allowed. In short these requirements are the same as those that apply to any worker – probationer or permanent – in the management of performance concerns.

I note for the record that an amendment to the Act in 2004 has strengthened the law relating to trial/probationary periods. If they are not specified in writing the employer may not rely on any such agreed terms and the employment may become permanent. (Section 28 of the Employment Relations Amendment Act (No.2) 2004 effective 1 December¹).

Turning now to the tests to be applied in determining this matter I have had to keep in mind the following legal principles (*W & H Newspapers Ltd v Oram* [2002] 2 ERNZ 448).

The evidence discloses that Mr Biddick was summarily dismissed. The principle issue to be decided here (having determined whether or not Mr Biddick was indeed employed on a trial basis) is whether the decision to dismiss Mr Biddick one that a reasonable and fair employer could have taken in the circumstances?

It is convenient in determining whether or not the employer has acted fairly and reasonably in all the circumstances to consider whether it had **good reasons** for the actions it took in respect of Mr

¹ This amendment came into effect after Mr Biddick’s employment ended and does not impact on it.

Biddick's employment and *whether he was treated fairly in the process*. Demonstrating the following steps were taken is essential to showing that a dismissal is justified.

Investigation: the employer must carry out a full investigation of all the relevant facts before actually terminating the employee and the result of such an investigation should be communicated to the employee. The investigation carried out by the employer must be fair and thorough and sufficient to allow the employer to arrive at a reasonable belief that misconduct or poor performance exists such that dismissal is warranted. *Airline Stewards and Hostesses (NZ) IUOW v Air New Zealand Ltd* [1990] 3 NZILR 797. No investigation will be thorough and complete without inquiry of the worker.

Warning: The employer must warn the employee in relation to any misconduct or poor performance. The employee must be advised his or her job is on the line if there is no improvement in conduct or performance and the employee must be given sufficient time to show improvement. Where poor performance is an issue the respondent must provide the training necessary to enable the employee to reach the required standard of performance.

Opportunity to be heard: Before the dismissal is effected the employee must be provided with a real opportunity to be heard and to offer an explanation to the allegations made. The worker should be advised of their right to representation and notice to the employee should advise how seriously the allegations are viewed and if the worker's employment could be in jeopardy. An opportunity to be heard also requires that serious consideration will be given to the worker's explanations. That consideration must be free from bias and predetermination.

Reasons: Reasons for the dismissal must be given to the employee before the dismissal is effected and it is only the reasons given at the time of the dismissal that may be subsequently relied on to justify the dismissal.

Issues to be Decided

- Was the applicant employed on a trial basis?
- Did Ms Teixeira carry out a thorough and fair inquiry that disclosed conduct capable of being regarded as serious misconduct?
- Was dismissal an option open to Ms Teixeira based on the inquiry conducted?
- Did the applicant contribute to the events giving rise to his dismissal?

Discussion and Findings

Credibility

The parties' evidence is seriously in dispute on key issues – particularly as to whether or not Mr Biddick was engaged on a two week trial and the extent to which Mr Biddick was advised (if he was advised at all) that his performance was deficient.

I find that Ms Teixeira was desperate for staff when Mr Biddick turned up looking for a job. He was taken on immediately. The fact that not even the rate of pay was discussed and agreed at the commencement of the employment suggests to me that Ms Teixeira rushed into this employment

relationship with no thought whatsoever let alone reaching agreement that there would be a trial period for 2 weeks. Further, it is inconceivable to me that Ms Texeira would have discussed with Mr Biddick a position as Service Manager on 25 November² if she was so concerned about his attitude and performance that it had led to three or four meetings over a period of nine working days – that now being her evidence.

As a result on these issues it is the evidence of the applicant that I prefer.

Findings

I am not satisfied that Mr Biddick was engaged on the basis of a two week trial. At best it is possible that Ms Texeira thought in her own mind that she could try him out sort out the terms of the arrangement later including whether or not the employment would be permanent. However, even if Ms Texeira thought she could employ Mr Biddick on a trial basis it was not communicated to Mr Biddick for his agreement. It does not therefore have any contractual force and I find the parties simply agreed that Mr Biddick would become an employee of Mangonui Computers with an immediate start and other details to be confirmed later. Mr Biddick's employment was for the purposes of this dispute that of a permanent employee.

I find the details of the employment were agreed over the next few days i.e. that Mr Biddick would be paid \$12.50 per hour and that he would work 40 hours per week.

I find, too, that Mr Biddick was a contrary employee and that indeed he was inclined to argue in relation to issues relating to his dress standard and his approach with customers. I accept this caused some disquiet to Ms Texeira. I can also accept she counselled him as to her expectations. However, I find that there were no formal discussions held with Mr Biddick, where performance concerns were unequivocally spelt out together with a warning that his position would be in jeopardy if his attitude and performance did not improve.

As late as 25 November, even after Ms Texeira received a complaint about Mr Biddick from the principal of Kaeo School and a request that he not be sent there again, Ms Texeira had a discussion with Mr Biddick about confirming him in the role of Service Manager.

I find, however, that Mr Biddick's refusal to attend a job on the afternoon of 25 November led Ms Texeira to reflect on the employment and she determined to dismiss him the next morning. I find that contrary to the reasons given at the time of the dismissal (which related to complaints from three customers) the issue that triggered this dismissal was Mr Biddick's alleged refusal to take on a job on the afternoon of 25 October. This may have led Ms Texeira to reflect on customer complaints particularly that of Ms Knight from Kaeo School.

Mr Biddick was, I find, dismissed the following morning in accordance with Ms Texeira's predetermined plan. Only after Mr Biddick was dismissed were the reasons given at the time spelt out and discussed with him.

Conclusion

The problem with this dismissal is that was conceived and carried out in a manner that was completely inconsistent with the rules of natural justice (procedural fairness). There had been no unequivocal notice to Mr Biddick that his attitude and performance was unsatisfactory and needed

² The fact this was proposed was not in dispute between the parties.

to improve. He had received no warning that his employment could be in jeopardy. The employer carried out no inquiry into the any of the claimed concerns with the applicant's employment. There being no full and fair inquiry it was just not possible for Ms Texeira to arrive at a genuine belief, honestly held that Mr Biddick was guilty of the conduct complained of. The failure to carry out any inquiry was compounded by the failure to put the worker on notice of the allegation(s) against him (including notice of the seriousness with which those allegations were viewed), the failure to allow him the opportunity to obtain representation and the failure to allow him the opportunity to explain/refute the allegation(s).

Determination

Mr Biddick was unjustifiably dismissed from his employment and he has a personal grievance against his former employer.

Remedies

Section 124 of the Act dictates that I consider the extent to which (if at all) the worker contributed to the events that gave rise to the personal grievance.

I find that the problem that has arisen between these parties had its origins in the exceptionally poor selection/hiring process followed by the respondent in employing Mr Biddick. Ms Texeira conducted no inquiry into Mr Biddick's qualifications for the job. There was no competency testing or reference checks. Ms Texeira could have engaged Mr Biddick on a trial basis but that would have required an agreement between the parties which was reduced to writing. While that would not have absolved Ms Texeira from her obligations to follow all the appropriate steps to inform Mr Biddick of deficiencies/warn him etc it would have afforded some protection in the event that Mr Biddick was shown to be unsuitable for the position.

Sadly, Ms Texeira did none of this.

I can accept there were deficiencies in Mr Biddick's performance and attitude. But on balance I must find that the respondent's steps to address the concerns she had were so deficient that it is not appropriate to find that Mr Biddick has contributed to the events that gave rise to the personal grievance such that I should reduce remedies for his contribution in the matter.

Lost Remuneration

Mr Biddick claims three months lost remuneration less an amount of \$160 that he earned during the period claimed. By my calculation that yields the sum of \$6340 gross.

The respondent is therefore directed to pay to the worker the sum of \$6,340 gross to compensate him for wages lost as a result of his grievance.

Compensation pursuant to s.123 (1) (c) (i)

The period of employment was extremely short. However, I accept the dismissal came as a shock to the worker and that it was an upsetting experience.

The respondent is directed to pay the worker the sum of \$2,000 net under this head.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Janet Scott
Member of the Employment Relations Authority