

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Lisa Connolly (Applicant)
AND 360 Degrees Limited (Respondent)
REPRESENTATIVES Robert Thompson, Advocate for Applicant
Noel Daniel, Advocate for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 16 November 2005
DATE OF DETERMINATION 28 February 2006

DETERMINATION OF THE AUTHORITY

[1] Ms Connolly, in a statement of problem lodged with the Authority on 23 May 2005, alleges she was unjustifiably dismissed by the respondent. She seeks reimbursement of unpaid wages, compensation for hurt and humiliation in the sum of \$8000, a penalty for an alleged breach of section 130 of the Employment Relations Act 2000 and costs.

[2] In a statement in reply lodged with the Authority on 19 October 2005 (some four months late) the respondent lodged a statement in reply defending its position in respect of the applicant's claim. While not specifically rejecting the claim made by the applicant, it is nonetheless clear that the company's directors were opposing Ms Connolly's claim.

A brief history

[3] Ms Connolly says she began her employment with the respondent as a part time marketing assistant in the week before Christmas 2004. She says that she first applied for the position in October 2004 but was unsuccessful however, she was telephoned and offered the position in December that year. Ms Connolly says that in the first interview she wasn't asked to fill out any position application and that while she cannot remember any specific questions is confident that she told the respondent that she did not have a drivers licence. She says she did *advise her that I was going down south but I did not tell her that I was driving myself*. From this it is clear that Ms Robin Eden, a director, conducted the interview with the applicant.

[4] The applicant began full time employment on 17 January 2005. The individual employment agreement signed by the parties clearly includes a three month probationary clause. The annual salary stated in the agreement is \$22,800 per annum gross.

[5] The respondent quickly became dissatisfied with the applicant's performance. The issues were her lack of a full drivers licence, her quiet disposition and telephone manner and her limited knowledge of office procedures, but in particular her *communicative and intellectual skills were not*

suitable for the position for which she was employed. This statement is prefaced by an assessment based upon the background of some 70 years combined experience of the directors.

[6] In short, the directors say they needed to react quickly to the applicant's perceived shortcomings and terminated her employment three days rather than three months into the contracted probationary period. Further, the directors say that their requirement of the applicant to improve her performance was discussed with the applicant daily.

[7] The applicant says she was denied the opportunity to improve because she was not told of her shortcomings apart from her quiet telephone manner, and was taken by surprise when she was dismissed without being put on notice that her employment was at risk.

[8] The respondent says the applicant had received *significant coaching* from Ms Eden and that Ms Connolly had not responded to that coaching. That, in addition to Ms Connolly not holding a full drivers licence, led to the dismissal.

[9] The respondent says that the applicant misrepresented herself to the respondent in that she claimed to have a full driving licence.

The employment agreement

[10] The company's employment agreement describes the applicant's position as *marketing assistant/personal assistant/office manager* and as *reporting to Robin Eden/Noel Daniel directors*.

[11] The agreement states that a three month probationary period for the marketing assistant position applied. The agreement is signed by Robin Eden, director/sales manager and by Lisa Connolly, the applicant. In short, the agreement binds both parties.

The issues

[12] The Authority is tasked with resolving the following issues:

- Was the employer entitled to find the applicant's performance so irremediable after three days that it was entitled to dismiss her under the terms of the signed agreement; and
- What steps were taken by the respondent to remedy the perceived deficiencies in the applicant's performance; and
- Did the applicant misrepresent her qualifications, in particular her driving licence, in order to secure her position with the respondent; and
- Is the respondent entitled to void the agreement under the Contractual Remedies Act 1979; and
- What if any remedies are due to the applicant.

The investigation meeting

[13] The Authority heard from the applicant herself and from a supporting witness, Ms Rachel Winter, who had worked for the respondent for two weeks leading up to Christmas.

[14] For the respondent the Authority heard from Mr Daniel. There was no evidence submitted in any form by Ms Eden, Mr Daniel's fellow director.

Analysis and discussion

[15] The basis of resolution of this matter lies initially with the signed employment agreement. Essentially, the respondent offered employment to a young woman whom it had employed briefly on a casual basis for about a week before Christmas 2004. The respondent then offered her permanent employment subject to a three month probationary period at an annual salary of \$22,800 gross per annum.

[16] Three days into the permanent employment the employer through Ms Eden terminated Ms Connolly's employment on the ground of the capacity of the applicant to meet the expectations of the respondent. The individual agreement at section 26 clearly states that the employee is entitled to *appoint another person or an organisation to act as their authorised representative in employment matters*. It appears that Ms Connolly was not given the opportunity to invoke this entitlement before being dismissed on 20 January 2005.

[17] There is an exceptionally unusual clause in the agreement at section 20. It states; *Four weeks notice of termination shall be given by either party except in the case of a probationary employee when one hour's notice shall be given*.

[18] This is at variance with the established principle that a probationary employee is in fact a *permanent* employee except that he or she needs to be confirmed in the position. A notice period of one hour is the standard and accepted notice for a casual worker, that is, an employee employed on an *as and when required* basis.

[19] A difficulty the Authority faces in this case is that the primary interface Ms Connolly had in respect to her employment was not with Mr Daniel but with Ms Eden. As observed above, the Authority heard nothing from her, even affidavit evidence. As a result, the Authority has largely hearsay evidence provided through Mr Daniel and with respect to him, such evidence carries little weight.

[20] I have studied the respective submissions of Mr Daniel and Mr Thompson. In brief, I do not accept the respondent's submission that it *did indeed perform an in depth enquiry as to their ability to aid the applicant* (emphasis is mine). Given the time of three working days the respondent's claim is simply not credible.

[21] A further difficulty facing the Authority in respect of the driving licence issue is that it heard sworn evidence from the applicant. Ms Connolly said *I am confident that I advised the respondent that I did not have my drivers licence. I did advise her that I was going down south but I did not tell her that I was driving myself*. In rebuttal, the Authority has only the denial from Mr Daniel, who was not present at the interview. In the absence of a completed application form which would likely determine this issue, the weight of the evidence must rest with the unchallenged evidence of Ms Connolly.

The determination

[22] I find the applicant has been unjustifiably dismissed because the respondent has not acted in a fair and reasonable manner under the terms of the signed written agreement in effecting the dismissal. The dismissal was both substantively and procedurally unjustified.

[23] Turning to the issues the Authority needed to determine;

- I find that the respondent was not entitled under the agreement to find the applicant's performance unable to be remedied.

- I find that the alleged *in depth* counselling to improve the applicant's alleged deficiencies was insufficient to meet the respondent's obligations under the agreement.
- I prefer the sworn evidence of the applicant to the hearsay evidence of the respondent in respect to the issue of the driving licence and therefore do not accept the contract is voidable on the basis of misrepresentation.

Remedies

[24] The applicant seeks reimbursement of underpaid salary in the sum of \$169.24 gross and of underpaid holiday pay in the sum \$74.45 gross plus interest on these sums.

[25] Further, Ms Connolly seeks compensation in the sum of \$8000 for the hurt and humiliation resulting from her dismissal.

[26] Ms Connolly also asks for reimbursement of \$1900 gross for lost remuneration for the time between losing her employment with the respondent and finding another position.

[27] The applicant also seeks a penalty pursuant to section 130 of the Employment Relations Act 2000 in respect of the respondent's failure to provide wage and tie records.

[28] Finally, the applicant seeks costs of \$1500 against submitted actual costs of \$2624.09 inclusive of GST.

[29] Having considered the evidence and weighed the issues I make the following orders;

- The respondent is to pay the applicant the sum of \$243.69 gross for underpaid salary as set out in the employment agreement.
- The respondent is to pay the applicant the sum of \$1900.00 gross being the remuneration she lost between dismissal and finding alternative employment.
- The respondent is to pay the applicant the sum of \$3500.00 for hurt and humiliation. For the record, the Authority rejects the respondent's claim of voidable contract and contributory conduct.
- The claim for a penalty has been seriously considered in this case given what might be perceived a reluctance on the part of the respondent to provide records. The respondent has explained those delays to the Authority's satisfaction in this instance however, the respondent would be wise to adhere in the future to the accepted practice of advising the reasons for delay in meeting statutory requests at the time rather than attempt an explanation later. The Authority is puzzled how a *downsizing of the company in 1994/1995* is relevant to the issue at hand, but nonetheless declines to order a penalty against the respondent.

Costs

[30] In order to avoid further costs or expenses to either party I make an order for costs in respect to this determination.

[31] At the investigation meeting which took two and a half hours the Authority heard from three witnesses. The issues were not complex however I accept the applicant has incurred additional costs as a result of the dilatory responses from the company and the delay in beginning the

investigation meeting due to Mr Daniel's late arrival. I make an order for costs in favour of the applicant in the sum of \$1250.00.

Paul Montgomery
Member of Employment Relations Authority