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Coventry v Digi Poll Limited AA333/10 (Auckland) [2010] NZERA 618 (23 July 2010)

Last Updated: 4 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 333/10 5285204

BETWEEN

AND

SHERALEE COVENTRY Applicant

DIGI POLL LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Vicki Campbell

David Hayes for Applicant Rachel Dekel for Respondent

23 and 26 March 2010

23 July 2010

DETERMINATION OF THE AUTHORITY

[1] Digi Poll Limited ("DigiPoll") is a Hamilton based survey research company founded in 1997. The company specializes in conducting telephone surveys for a range of clients. In 2006 DigiPoll formed a Business Team (Bizteam) of interviewers to meet the needs of a particular client. As the contract was important to DigiPoll it invited some of its top interviewers to become part of the Bizteam. Ms Sheralee Coventry was one of those interviewers invited to join the Bizteam.

[2] All members of the Bizteam were asked to sign fixed term employment agreements which would expire on 20 December 2008. Ms Coventry did not sign an agreement at that time but did sign one on 8 December 2008. The contracts were specifically tied to the client's contract with DigiPoll. As an inducement to enter into the fixed term contracts employees were offered a higher hourly rate and a bonus system.

[3] In March 2009 Ms Coventry was asked to sign a further fixed-term employment agreement, this time with an expiry date of 20 June 2009. Ms Coventry refused to sign this agreement because of the expiry date being so close to the date on which the agreement was offered to her. This agreement was also tied the ending of the commercial contract entered into by DigiPoll and its client.

[4] Ms Coventry, along with other members of the Bizteam were advised on 18 May that the client had decided not to renew the contract between it and DigiPoll. The team were advised that the contract would therefore come to an end

[5] Ms Coventry claims that her employment was permanent and not fixed-term, that she was disadvantaged in her employment and was then constructively dismissed. DigiPoll denies the claims.

[6] The issues for determination are:

- Was Ms Coventry subject to a fixed term employment agreement or was her employment permanent?
- Was Ms Coventry disadvantaged by an unjustifiable action of the employer during her employment?
- Was Ms Coventry constructively dismissed?
- What, if any, remedies should be awarded to Ms Coventry?

Was Ms Coventry subject to a fixed term employment agreement or was her employment permanent?

[7] There is no dispute that in December 2008 Ms Coventry signed a fixed term employment agreement with an expiry date of 20 December 2008. The employment did not end on the expiry of the agreement and therefore Ms Coventry says she was a permanent ongoing employee.

[8] Ms Rachel Dekel, a Director and shareholder of DigiPoll, says at the time they signed the agreement she explained to Ms Coventry that a new contract would be issued in 2009 and that due to uncertain economic times and an absence of written confirmation from DigiPoll's main client, she did not know when the 2009 contract would expire.

[9] DigiPoll had one nationwide client which had contracted DigiPoll's services until June 2009. Section 66 of the Employment Relations Act ("the Act") sets out the circumstances under which an employer and an employee may agree to a fixed term employment agreement. Of significance is the fact that such agreements must be in writing. This is significant, because where such agreements are not set out in writing, the employer may not rely on the expiry of the fixed term to terminate the employment of the employee.

[10] Ms Coventry received a second fixed term agreement in March 2009 but refused to sign it. This was some three months after the December agreement had passed its expiry date with no steps taken to terminate Ms Coventry's employment. At the time Ms Coventry was offered the second fixed term agreement her employment had become permanent and ongoing.

[11] On 18 May Mr Abeer Badil, HR Manager, met with Ms Coventry and advised her that as the commercial contract was not being renewed, her employment would cease on 20 June. Ms Coventry was invited to apply for casual work which would be offered on an as and when required/available basis.

[12] On 20 May Ms Coventry left her employment and has not returned. She raised a personal grievance on 21 May 2010 claiming she had been disadvantaged in her employment.

[13] I find Ms Coventry's employment was permanent and ongoing from 21 December 2008, the day after the only signed fixed term agreement had expired.

Unjustified disadvantage

[14] Ms Coventry claims she was disadvantaged in her employment by the actions of DigiPoll in failing to make her workplace safe and as a result of a written warning issued to her on 11 May.

[15] I am required to examine DigiPoll's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[16] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether DigiPoll's actions disadvantaged Ms Coventry in her employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.[\[1\]](#)

[17] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If DigiPoll can establish justification for a disadvantageous action, there is no grievance.[\[2\]](#)

[18] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.[\[3\]](#)

Health and safety concerns

[19] Ms Coventry says the workplace was not safe and that even though she had raised issues with respect to health and safety nothing had been done. Ms Coventry says she first noticed pains and strains relating to her work in October 2008. Ms Coventry attributes these pains to her working conditions.

[20] Ms Coventry says she raised her health issues with her supervisors on a regular basis but says her complaints were ignored. Approximately two months after Ms Coventry began experiencing pain associated with her work, the Bizteam moved to alternative premises located at the Ag-Research site in Ruakura.

[21] DigiPoll says its new offices were different, they had moved from a large open space, to smaller offices. In January or February 2009 Ms Coventry made complaints about her desk. As a result Ms Coventry was issued with another desk. Ms Coventry also made a request to change rooms which was agreed to. Ms Coventry chose which room she would work in and which desk she would work at.

[22] Ms Coventry was absent from work from 5 March until 27 April 2009. On 12 May 2009 ACC declined to cover Ms Coventry's absence when it determined her pain was not the result of a work related gradual process injury. In a written decision by ACC Reviewer, J M Maher, dated 24 August 2009, the reviewer confirmed the earlier decision by ACC that Ms Coventry's pain was not caused by a gradual process injury.

[23] In the report, the reviewer reported the findings of Dr Prestage, who interviewed Ms Coventry and reported to ACC on 11 May 2009 that Ms Coventry had been under stress over the past two to three years due various medical procedures, and including the death of an aunt.

[24] The report states:

Dr Prestage confirms that the fixed posture at work is an aggravating factor and Dr Milne confirms that the pain suffered by Ms Coventry is not chronic regional pain syndrome by myofascial pain secondary to a fixed posture at work.

[25] The conclusions of the Reviewer were that although Ms Coventry suffered from pain as a result of her work and other non work related stressors, she did not suffer from an injury, and therefore could not be covered by ACC.

[26] On 21 May 2009 Ms Glenda Harris, a Health and Safety Inspector from the Department of Labour, inspected the worksite of DigiPoll following a complaint by Ms Coventry and another employee. Ms Harris concluded that with the exception of one workstation, all the workstations appeared okay and were fully adjustable. Ms Harris advised that OT assessments should be undertaken if individuals identify any issues.

[27] The evidence shows Ms Coventry did suffer from some pain as a result of her work-station, but there were also significant other contributing factors which were not work related.

[28] I accept the evidence of DigiPoll that Ms Coventry enquired as to whether she could take breaks of 1-2 minutes each hour to stretch and was told she was welcome to take breaks for medical reasons over and above her normal breaks. DigiPoll says that all interviewers were expected to take 1-2 minute micropauses each hour as set out on the health and safety posters which were visible in the workplace.

[29] Further, the notes of the 11 May meeting show that Ms Coventry was reminded that DigiPoll was happy to provide unpaid breaks for medical reasons and that DigiPoll was already providing her with fewer hours due to her medical situation.

[30] I find Ms Coventry has not established to my satisfaction that she suffered from an unjustified disadvantage in the workplace as a result of the health and safety concerns.

Unjustified warning

[31] On 1 May Ms Coventry and two other employees were observed to be chatting during their shift instead of working. The interview Calling Report showed Ms Coventry was idle for 1 hour and 17 minutes over a period of 1 hour and 45 minutes. Ms Coventry says that on 11 May she attended a disciplinary meeting which resulted in the verbal warning. Ms Coventry says she and two other employees had taken time off their job to discuss bonuses and hit rates.

[32] Following an interview with Ms Coventry where she was advised of the seriousness of the matter, and after seeking her explanation as to why she had not been working, Ms Coventry was issued with a verbal warning. This verbal warning affected the payment of Ms Coventry's bonus.

[33] The other employees who had been part of the discussions on 1 May were also subjected to disciplinary meetings and were also issued with verbal warnings.

[34] I find that the issuing of the warning did result in a disadvantage to Ms Coventry in that she did not receive the monthly bonus, however, I find that disadvantage was justified.

Unjustified constructive dismissal

[35] It was common ground that Ms Coventry had worked for DigiPoll since 2002 as a Telephone Interviewer. DigiPoll says Ms Coventry was employed as a casual employee working as and when she was required and subject to her availability. DigiPoll says the 7 years were not continuous and that Ms Coventry had significant amount of time away from the workplace.

[36] It is common ground that the nature of the employment relationship changed on 8 December 2008 when Ms Coventry accepted a fixed term employment agreement. I have already found that when that agreement expired and no further fixed term arrangements were agreed to Ms Coventry's employment became ongoing and permanent.

[37] On 20 May 2009 Ms Coventry left her employment and has not returned. This departure followed her meeting with Mr Badil on 18 May when he gave her notice that her employment would end on 20 June. I find Mr Badil relied on his misapprehension that Ms Coventry was subject to a fixed term employment agreement when he gave her notice of the ending of the employment relationship.

[38] Ms Coventry says she was constructively dismissed on or about 20 May as a result of the actions of the employer with regards to concerns about breaches of health and safety obligations and when her request to contact her doctor by telephone from the workplace on 20 May was denied.

[39] To be successful in her claim for constructive dismissal Ms Coventry must establish that DigiPoll conducted itself in a way that would amount to a breach of the employment agreement. Such breach must impinge on the relationship in the sense that looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in her employer.^[4]

[40] In coming to conclusions under this heading the Authority must determine the following issues:

- did Ms Coventry resign from her employment as a result of a breach of duty on the part of DigiPoll? and
- if there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Ms Coventry would resign?^[5]

[41] Ms Coventry relies on the issues raised under her claim for disadvantage to support her contention that she was justified in ending her employment relationship. She says that DigiPoll failed to provide her with a safe and healthy working environment. I have earlier found that DigiPoll's actions did not disadvantage Ms Coventry in her employment.

[42] In addition Ms Coventry says that on 20 May 2010 she spoke to two supervisors and requested permission to contact her Doctor as she was in pain. She says she was denied permission to make the call.

[43] DigiPoll denies Ms Coventry's version of events. It says Ms Coventry did seek permission from two supervisors to make a call. The first supervisor was interrupted by a telephone call before permission could be either granted or denied. The second supervisor suggested Ms Coventry use her personal cell phone and denies Ms Coventry advised the supervisor that she was in pain or that it was a medical emergency.

[44] Ms Coventry says that the way DigiPoll conducted itself was dismissive and destroyed the relationship of confidence and trust required in an employment relationship.

[45] I find Ms Coventry left her employment predominantly because of her perception that she had been disadvantaged in her employment. The evidence does not support a finding that there was a breach on the part of DigiPoll with regard to the health and safety issues or the issuing of the verbal warning.

[46] It was common ground that Ms Coventry was suffering from pain in her shoulders and that this pain was caused, only in part, by her work situation and that there were other contributing non-work related causes. Ms Coventry had been told she could take breaks to stretch, there was information in the form of posters explaining to staff about taking micro pauses, and she had been allowed to reduce her hours of work to take into account her medical situation.

[47] In conclusion I have found there to be no breach which could cause Ms Coventry to resign from her employment. Indeed, there was no evidence to show Ms Coventry did in fact resign from her employment. At the investigation meeting Ms Coventry told the Authority that when she left the workplace on 20 May she intended to return to work.

[48] For the reasons set out above I find Ms Coventry was not constructively dismissed from her employment. However, the Authority has the power, pursuant to section 160(3) of the Employment Relations Act ("the Act"), to concentrate on resolving the employment relationship problem and is not bound to treat a matter as being a matter of the type described by the parties.

[49] I find that while Ms Coventry was not constructively dismissed, she was actually dismissed when she was given notice on 18 May that her employment would end on 20 June. This notification was then confirmed in writing on 2 June 2009. As already stated, this notice was given in reliance on a fixed term agreement which Ms Coventry was entitled to treat as ineffective. The dismissal is therefore unjustified.

[50] I find the actions of DigiPoll and how it acted in bringing Ms Coventry's employment to an end was not how a fair and reasonable employer would have acted in all the circumstances at the time the dismissal was notified. Ms Coventry is entitled to remedies.

Remedies

Contribution

[51] Before contemplating the level of remedies to be awarded, in accordance with s 124 of the Act, I have considered whether Ms Coventry contributed to the situation giving rise to her grievance. I have concluded Ms Coventry did not contribute in any blameworthy way and therefore the remedies will not be subject to any reduction.

Lost wages

[52] Ms Coventry seeks unspecified lost wages as a result of her unjustified dismissal. The evidence from Ms Coventry about her attempts to find alternative employment fails to meet the standard required to show mitigation of loss. For that reason Ms Coventry is entitled to lost wages for three months but no longer. A review of the last month of Ms Coventry's employment shows that she earned an average of \$576.32 per week.

Digi Poll Limited is ordered to reimburse Ms Coventry the sum of \$7,492.16 being 13 weeks of lost wages, pursuant to section 123(1)(b) of the Act. Payment is to be made within 28 days of the date of this determination.

Compensation

[53] Ms Coventry seeks \$3,000 compensation. In all the circumstances I am satisfied this is a reasonable award.

Digi Poll Limited is ordered to pay to Ms Coventry the sum of \$3,000 pursuant to section 123(1)(c)(ii) of the Act. Payment is to be made within 28 days of the date of this determination.

Costs

[54] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Coventry may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply being lodged with 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell

Member of Employment Relations Authority

[1] *Mason v Health Waikato* [1998] 1 ERNZ 84

[2] *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

[3] *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

[4] *Malik v Bank of Credit and Commerce International SA (in liq)* [1997] UKHL 23; [1998] AC 20; [1997] 2 All ER 1 5CA). (*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] NZCA 250; [1994] 1 ERNZ 168).