

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Eneida Leonor Christo da Cruz (Applicant)

AND Rush Security Ltd (First Respondent)
AND Darien & Larissa Rush (Second Respondent)

REPRESENTATIVES Chris Patterson, Counsel for Applicant
Darien Rush, Advocate for First and Second Respondent

MEMBER OF AUTHORITY Vicki Campbell

INVESTIGATION MEETING 11 August 2004

SUBMISSIONS RECEIVED 18 August 2004 and 20 August 2004

DATE OF DETERMINATION 24 September 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The applicant Ms Eneida da Cruz filed a statement of problem in the Authority on 7 May 2004. On 4 August 2004 Ms da Cruz filed an amended statement of problem. The problem Ms da Cruz wishes the Authority to resolve for her is a claim for unjustified dismissal. Ms da Cruz seeks payment of wages owing including holiday pay and compensation for hurt and humiliation. Ms da Cruz also seeks various penalties against both the first and second respondents.
- [2] In its statement in reply filed on 26 May 2004 the respondent Rush Security Limited (“RSL”) denies Ms da Cruz was employed by the company and therefore denies the unjustified dismissal. By way of counter-claim the respondent claims Ms da Cruz was misleading and deceptive in her application to work for the company and has asked the Authority to award damages of \$35,000. In addition to damages the respondent seeks a \$10,000 penalty and a written apology from Ms da Cruz.

Background

- [3] Ms da Cruz is originally from Calgary, Alberta in Canada. During 2003 Ms da Cruz travelled to New Zealand to visit her older sister and family in Hamilton.
- [4] Ms da Cruz applied for and was granted a Canadian working holiday permit. The working holiday permit allowed Ms da Cruz to work in New Zealand for twelve months. There were two specific conditions attached to the working holiday permit. Ms da Cruz:

- Could not work for the same employer for more than three months; and
- Must not undertake permanent employment, unless granted an ordinary work permit.

- [5] Ms da Cruz met Mr Garrick Loft while on holiday in Taupo in December 2003. The relationship between Mr Loft and Ms da Cruz developed quickly. Ms da Cruz told me that on 11 March 2004 she and Mr Loft opened a joint account because it provided proof of their commitment to each other and because it provided evidence that they lived together in a stable relationship. These were two tests required to be met by the Immigration Service where a person wishes to apply for a working permit under the family stream option.
- [6] The family stream option allows a person who is a partner (either legally married or in an interdependent partnership akin to a marriage) of a New Zealand citizen or resident, to apply for a Work Visa or Permit for a maximum stay of two years from the date of arrival in New Zealand.
- [7] On 20 March 2004 Ms da Cruz applied for the position of office manager advertised in the weekend Herald that same day. She forwarded her application by email enclosing a copy of her CV. That same day Mrs Larissa Rush, who worked as the accountant at RSL, contacted Ms da Cruz and invited her to meet and discuss the position over coffee the next day. It was agreed that the pair would meet at the Mecca coffee shop in Newmarket.
- [8] Mrs Rush, has herself, been an immigrant and empathised with Ms da Cruz.
- [9] Ms da Cruz and Mrs Rush met as planned on Sunday 21 March 2004. Both ladies got on very well. Mrs Rush says that Ms da Cruz seemed very genuine, independent and honest.
- [10] Ms da Cruz explained to Mrs Rush that she was on a holiday work permit. At the investigation meeting Mrs Rush told me that Ms da Cruz explained to her the condition applying to her permit which prohibited Ms da Cruz from working for one employer for more than three months.
- [11] Having reviewed all the evidence I am satisfied that Ms da Cruz disclosed the three month condition to Mrs Rush but not the condition about accepting permanent employment. I am supported in my view by Ms da Cruz evidence where she stated:
- I fully disclosed to Larissa Rush that I was on a working holiday visa, which entitled me to work in any one place for up to three months. ... I never said that I could undertake permanent employment. I told Larissa Rush that I could work for the same employer for up to three months and that I could apply for a permanent work visa during that time.*
- [12] Mrs Rush told me she made it clear to Ms da Cruz that the position was a permanent position and she explained to Ms da Cruz the importance of the position to the ongoing success of the company. At the investigation meeting Ms da Cruz told me that Mrs Rush had told her they (RSL) wanted someone they could keep in the company for a long time.
- [13] It was common ground at the investigation meeting that there was discussion during the meeting about salary. Mrs Rush confirmed to me that they discussed a ball park figure of \$40,000. Ms da Cruz told me Mrs Rush said the intended salary was \$40,000.

- [14] At about 11.30am Mr Darien Rush joined the two ladies in their discussions. Mr Rush met Ms da Cruz and enquired as to her immigration status. It was common ground that Mrs Rush explained to Mr Rush that this should not be a problem, that Ms da Cruz could work for 3 months and RSL could assist with a change to her holiday work permit by writing a letter.
- [15] Mrs Rush told me there were two candidates for the position. She told me that Mr Rush preferred the alternative candidate as he didn't want to be involved in immigration as he perceived it as being complicated.
- [16] Mrs Rush was satisfied that Ms da Cruz would be the better candidate. It was decided Mrs Rush would undertake reference checks. The first referee on Ms da Cruz's CV was a Mr Peter Loft. Mr Loft is Mr Garrick Loft's father. When Mrs Rush spoke with Mr Loft he did not advise Mrs Rush that he was related to Mr Garrick Loft or in any way connected to Ms da Cruz other than as an employer.
- [17] Soon after the telephone call with Mr Loft, Ms da Cruz contacted Mr Rush and explained to him that Mr Peter Loft was her partners father. During that conversation Mr Rush discussed with Ms da Cruz whether she could start work on the 22 March 2004. Ms da Cruz had been working for a temping agency on an assignment but told Mr Rush that she would try to start on 23 March, if she was offered the job.
- [18] At about 3.45pm on Sunday 21 March Mrs Rush contacted Ms da Cruz and offered her the position.
- [19] Neither Mr nor Mrs Rush asked to view a copy of the holiday work permit.
- [20] Ms da Cruz commenced employment with RSL on 23 March 2004. As events transpired, this was to be the only day of work for Ms da Cruz.
- [21] Ms da Cruz told me that when she arrived at work Mrs Rush provided her with two copies of a signed written individual employment agreement. The document produced to the Authority has been signed by both parties and dated 23 March 2004.
- [22] The individual agreement is an ongoing permanent employment agreement. The agreement provides for annual performance reviews, annual holidays after each year of employment and special leave after six months employment.
- [23] Clause 15 of the agreement states:
- The offer of employment is based on information provided by the Employee in their application form, resume, pre employment questionnaire, and formal job interview(s). If any false or misleading information was given or any material facts suppressed, the Employee may be dismissed for serious misconduct.*
- [24] Mrs da Cruz was also provided with keys to the offices and the security code.
- [25] During the day Ms da Cruz undertook the usual duties of an office manager.
- [26] As is usual in a new job Ms da Cruz was given on-the-job training by Mrs Rush. After lunch Mrs Rush provided training on specific computer software packages used by RSL. During this training Mrs Rush enquired about Ms da Cruz' immigration status. It is common ground that as a part of that discussion Ms da Cruz mentioned that in order to obtain a visa under the Talent Scheme should would need an offer of employment which

included a salary of \$45,000. Mrs Rush has taken this discussion as an “*outrageous demand*” by Ms da Cruz for an increase in her salary, which left her feeling “*completely betrayed and blackmailed.*”

- [27] Ms da Cruz accessed the Immigration Department web page which identifies all the various options for obtaining work permits including the conditions attached to those and invited Mrs Rush to view it with her. The link to this web site was saved in the “Favourites” file on Ms da Cruz’s login.
- [28] Mrs Rush told me that during the day Ms da Cruz asked if she was going to get a company car and a mobile phone. Mrs Rush considered this to be a negotiation over the terms and conditions of employment. Ms da Cruz told me that she had received a phone call from one of the sales staff requesting a letter from RSL to enable them to get finance approval for a car. Ms da Cruz told me she asked Mrs Rush if RSL provided staff with a car.
- [29] When she left the office Ms da Cruz felt that she had done a good job. As she left, Mr Rush asked her to be in the office at 7.30am the following day.
- [30] I am satisfied that as Ms da Cruz left the office at the end of 23 March 2004, there were no issues regarding the way in which she had performed her duties.
- [31] However, immediately after Ms da Cruz had left the office, Mrs Rush spoke with the senior management of the company and told them “...*what happened during the day and have described Eneida’s conduct and behaviour, everyone was absolutely bewildered and repulsed with such audacious behaviour on someone’s first day.*”
- [32] Ms Rush is referring to her perception that Ms da Cruz had demanded more money by way of salary, and had attempted to negotiate the terms of her employment.
- [33] It was decided not to continue with Ms da Cruz employment and between 6.00pm and 7.00pm attempts were made to contact Ms da Cruz to advise her of this decision. Unfortunately those attempts were unsuccessful. A telephone message was left requesting Ms da Cruz to contact RSL.
- [34] At 6.53pm that night Mrs Rush emailed Ms da Cruz and said:

After discussing with Darien issues you have raised today with regards to your immigration status and the relevant requirements, Darien feels we were misled regarding the agreed Salary. As a consequence of that and other issues that arose we are withdrawing our offer of employment to you forthwith.

We regret that it has come to this but believe that it is better to deal with these issues immediately. Can you please arrange to return our keys?

Please e-mail me the details of your bank account so I can pay you your day’s wages.

- [35] At the investigation meeting Mr Rush confirmed that he had seen the email sent to Ms da Cruz before Mrs Rush sent it to her.

Discussion and determination

- [36] Ms da Cruz says the email on 23 March 2004 dismissed her and that the dismissal was unjustified.

- [37] At the investigation meeting Mr Rush accepted that a dismissal had occurred, however, he says he was justified in dismissing Ms da Cruz because she was not entitled, under the terms of her holiday work permit to enter into permanent employment.
- [38] Contrary to that, in his submissions Mr Rush says the applicant and respondent never entered into an employment agreement and therefore Ms da Cruz was not dismissed. I simply do not accept that submission.
- [39] Ms da Cruz was offered and accepted employment on 21 March 2004. Ms da Cruz commenced that employment on 23 March 2004. Ms da Cruz was an employee. I have concluded that through the email sent to Ms da Cruz on 23 March 2004 Ms da Cruz was dismissed from her employment.
- [40] The legal principles to be applied to claims of unjustified dismissal have been clearly set out in a number of Court decisions.

Substantive Reasons for Dismissal

- [41] When an employer takes disciplinary action against an employee it must ensure that what it does is just and fair in all the circumstances. The main focus of the Authority is not whether there was misconduct but whether the employer had reasonable grounds for believing that there was misconduct.
- [42] In *W & H Newspapers v Oram* [2000] 2 ERNZ 448, 457, the Court of Appeal at paragraphs [31] and [32] said:
- The Court has to be satisfied that the decision to dismiss was one that a fair and reasonable employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to use this in terms of "could" rather than "would" used in the formulation used in the second BP Oil case [1992] ERNZ 483 (CA) at 487.*
- The burden on the employer is not that of proving to the Court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.*
- [43] In *Oram* the Court of Appeal held that if a fair and reasonable employer is able to view the conduct disclosed by its investigation as deeply impairing of the basic trust and confidence essential to the employment relationship, it is hardly necessary for the employer to consider whether in all the circumstances the employee ought to be dismissed, since dismissal will be within a range of disciplinary measures available to the employer for it to choose from.
- [44] At the investigation meeting Mrs Rush told me that the reasons for dismissing Ms da Cruz were:
- Ms da Cruz never accepted the agreement in good faith; and
 - Ms da Cruz has failed to disclose material facts pertinent to the job offer; and
 - Ms da Cruz has breached New Zealand Immigration Law, which states that you must not undertake permanent employment until the relevant permits have been obtained; and
 - The offer of employment was conditional on Ms da Cruz meeting the relevant requirements of the New Zealand Immigration Service.

- [45] Mr Rush told me the conduct of Ms da Cruz in not disclosing the prohibition on entering into permanent employment is conduct which justifies dismissal.
- [46] Mr Rush submitted that had RSL not withdrawn its offer of employment then the company would have been in breach of section 39 of the Immigration Act 1937 which states:

Every employer commits an offence against this Act who allows or continues to allow any person to undertake employment in that employers service knowing that the person is not entitled under this Act to undertake that employment.

- [47] I do not accept these submissions. On 23 March 2004 Ms da Cruz was dismissed because Mrs Rush believed Ms da Cruz had demanded more money, a company car and a mobile phone. Having reviewed all the evidence I have concluded that the issue regarding Ms da Cruz ability or otherwise to undertake permanent employment did not surface as a reason for the dismissal until after 23 March 2004.

Procedural Fairness

- [48] In *Petersen v Board of Trustees of Buller High School CC 7/02* (unreported) the Chief Judge described the following essential elements of procedural fairness.

The minimum requirements can be said to be –

- (a) *notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;*
- (b) *a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and*
- (c) *an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations".*

- [49] In *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZILR 584, the Court of Appeal held at p591 that:

What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault. Obviously, the employer who has a business to run cannot be expected to conduct a formal hearing in the nature of a trial but equally obviously the employer has not made reasonable enquiries if the employee has not had a sufficient opportunity to answer the employer's complaint.

- [50] In the employment agreement signed by the parties clause 3.4 deals with disciplinary procedures. These documented procedures required RSL:

Before considering any form of disciplinary action an investigation into the alleged misconduct must be carried out promptly.

- [51] The clause required RSL to advise Ms da Cruz of the specific allegation and likely consequences should the allegation be found to be true together with an opportunity to provide her explanation and any mitigating factors prior to any decision on the appropriate course of action.

- [52] The employment agreement also provided for suspension to enable a full investigation to be undertaken. This was certainly an option open to RSL at the time as an alternative to immediately dismissing Ms da Cruz.
- [53] The Employment Court has previously held that failure to follow the companies own procedures can render a dismissal process unjustified (see *Magnum Corp Ltd v Jenkins* [1994] 2 ERNZ 443).
- [54] In this matter, there has been a complete lack of any process whatsoever. If RSL had taken the time to carry out a full and proper investigation before making its decision to dismiss, they may well have had reasonable grounds to dismiss based on the conditions attached to the holiday working visa. Unfortunately the grounds for the dismissal on 23 March 2004, as I have stated earlier in this determination were unrelated to the conditions attached to the working holiday permit.

I find that Ms da Cruz has a personal grievance for which remedies are available.

Remedies

Lost Wages

- [55] Ms da Cruz seeks payment for the day worked on 23 March 2004 in the sum of \$110.00 plus 6% holiday pay on that amount. It was common ground that Ms da Cruz worked for the respondent for the day on 23 March 2004. Ms da Cruz is entitled to payment for that work.
- [56] I have calculated the pay for one days work for Ms da Cruz based on a salary of \$40,000. My calculations show that Ms da Cruz should have been paid \$153.43 gross plus holiday pay of \$9.21.

Rush Securities Limited are ordered to pay to Ms da Cruz the sums of \$153.43 gross and \$9.21 gross as wages and holiday pay owing. Such payment is to be made within 28 days of the date of this determination. This amount may be offset by the cheque paid to Ms da Cruz, but not banked, on 6 August 2004.

Reimbursement of lost earnings

- [57] Ms da Cruz seeks reimbursement of lost wages for the period of 24 March to 11 August 2004. Ms da Cruz was unemployed for the period 24 March 2004 to 14 April 2004. From 15 May 2004 to 1 June 2004 Ms da Cruz was working in part time employment for 13.5 hours per week at the rate of \$25.00 per hour. For the period from 1 June to 11 August 2004 Ms da Cruz worked for 30 hours per week at the rate of \$25.00 per hour.
- [58] Based on the evidence provided I am not satisfied that this is a case where I should use my discretion to award Ms da Cruz more than three months lost wages. Ms da Cruz was under a legal obligation not to work for one employer for more than three months.
- [59] For the Authority to make an award for lost remuneration, it has to be satisfied that the loss has been incurred, and that save for exceptional circumstances, the employee has tried to mitigate his loss. I am satisfied that Ms da Cruz did attempt to mitigate her loss.
- [60] In submissions the applicant has quantified her loss as being \$2,307.69.

Rush Securities Limited is ordered to pay to Ms da Cruz the sum of \$2,307.69 gross.

- [61] Ms da Cruz seeks \$10,000 compensation for hurt and humiliation. Ms da Cruz gave evidence that she was embarrassed after the dismissal. When she had been successful in gaining the employment she had immediately told all her family members and friends. After one day, she was now faced with the prospect of advising them she was no longer employed. I am satisfied that Ms da Cruz has suffered injury to her feelings as a result of her unjustified dismissal.
- [62] Not content with dismissing Ms da Cruz, RSL wrote to the Immigration Service on 4 April 2004 identifying Ms da Cruz, providing full contact details including telephone and mobile contact numbers and lodged a formal complaint “...*regarding misleading and manipulative conduct used by Eneida da Cruz to get a long term work permit in New Zealand.*”
- [63] On 9 August 2004, two days before the Investigation Meeting, Mr Rush followed up his complaint by writing to the Minister of Immigration requesting him to investigate the matter.
- [64] In making an award under section 123(c)(i) of the Employment Relations Act I have taken into account Ms da Cruz limited tenure of employment, the suddenness with which she found herself out of employment with little explanation, and the attacks on her credibility made by RSL to the Immigration Service and the Minister of Immigration after her dismissal and without any opportunity to respond.
- [65] The Authority is bound by section 124 of the Act to consider the extent to which the actions of Ms da Cruz contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies. As I have already stated in this determination, the issue regarding the conditions attached to the holiday work permit for Ms da Cruz did not come to the attention of RSL until after the events on 23 March. On that basis I find no contribution arises in this case.

Rush Securities Limited is ordered to pay Ms da Cruz the sum of \$3,500.00 without deduction pursuant to s. 123(c)(i) of the Act within 28 days of the date of this determination.

Penalties

- [66] Ms da Cruz seeks payment of penalties against RSL for breaches of her employment agreement and breaches of the Wages Protection Act.
- [67] The jurisdiction to order the payment of penalties is punitive in nature and it is long-established law that claims for penalties must be proved beyond reasonable doubt. Here I have assumed that the claim for a penalty for a breach of the employment agreement was intended to refer to breaches of the obligation of fairness and such other obligations as may be identified in the course of addressing the personal grievances. I assume, too, that the claim related to the breach of clause 3.4 of the employment agreement.
- [68] In relation to the penalty for breaches of section 64 of the Employment Relations Act, there was evidence that Ms da Cruz was able to take the Employment Agreement away from the office with her to check it out. I am not satisfied that RSL have breached section 64(2) to

the extent that a penalty is warranted as the section was met in part when RSL provided a copy of the intended agreement.

- [69] In relation to the penalty for breaches of the Wages Protection Act, in the email dismissing Ms da Cruz, Mrs Rush specifically requested details of a bank account in order for wages to be paid. Ms da Cruz did not provide that information. On 6 August 2004 Mr Rush sent a cheque for gross wages of \$153.43 and gross holiday pay of \$9.21. This cheque has been received by Ms da Cruz but not banked.
- [70] In this matter I am not persuaded there were any breaches warranting the imposition of a penalty.

Second Respondent

- [71] Ms da Cruz has sought a penalty against the second respondent in this matter under section 134(2) of the Employment Relations Act. It was submitted that the second respondents are jointly liable for a penalty for inciting, instigating, aiding and abetting the First Respondent to withhold payment of Ms da Cruz's final pay and holiday pay.
- [72] I have already found that Mr Rush took early steps to effect payment of the outstanding wages and holiday pay. It is therefore not appropriate to award a penalty here.

Counterclaim

- [73] RSL counterclaims against Ms da Cruz alleging it has suffered loss as a result of Ms da Cruz misleading and deceptive conduct in her application to work for the company. The losses claimed against Ms da Cruz are in the total sum of \$35,000.
- [74] In addition to damages the respondent seeks a \$10,000 penalty and a written apology from Ms da Cruz.
- [75] I am satisfied on the balance of probabilities that it is more likely than not, that had Mrs Rush known of the specific prohibition on Ms da Cruz being entitled to engage in permanent employment she would not have offered permanent employment to Ms da Cruz. The evidence is clear that Ms da Cruz has only disclosed to Mrs Rush one of the conditions pertaining to her work permit and not the most important condition which is that Ms da Cruz could not enter into permanent employment.
- [76] RSL say 3 sales people had to be made redundant as the company had failed to provide adequate office support and that this has cost the company \$35,000.
- [77] In support of this contention RSL produced three letters to individual employees dated 24 March 2004 giving notice of redundancy. The reason for the redundancy was that the cost of the overhead structure could no longer be sustained. This indicates it was a financially driven process. Ms da Cruz was not employed to make sales for the company. Ms da Cruz position had no direct impact on the profitability or otherwise of the company. I do accept the position provided a support function to the sales representatives but had no direct bearing on the company being able to meet overhead costs. If anything, the addition of a new person on a salary of \$40,000 was an added burden to the overhead costs.

[78] Having reviewed all of the evidence I am not satisfied that the claim for damages has been made out. There is been no evidence from the respondent of any losses flowing from directly Ms da Cruz's conduct.

[79] In relation to the application for a penalty, I have been unable to identify any breaches by Ms da Cruz of her employment agreement.

[80] I have no jurisdiction to order Ms da Cruz to provide a written apology to RSL.

I am unable to assist RSL any further in its counterclaims.

Costs

[81] Ms da Cruz and RSL are invited to attempt to resolve the question of costs between them. If they are unable to do so Ms da Cruz should file a memorandum of costs within 28 days of the date of this determination. RSL has a further 14 days from date of receiving Ms da Cruz's memorandum in which to file a memorandum in response. Ms da Cruz should file anything in reply within 3 days of receipt.

Vicki Campbell
Member of Employment Relations Authority