

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 139/07
File number: 5080359

BETWEEN AROHA WENDY DALTON
(Applicant)

AND AWHINA WAHINE INC
(Respondent)

Member of Authority: P R Stapp

Representatives: Applicant in Person and Ben Dalton Support Person
Robert Foitzik, Advocate for Respondent

Investigation Meeting: 8 August 2007, Wellington

Further Information and Submissions: 15 & 17 August 2007 from the Respondent¹
The Applicant decided not to reply by 12 September 2007

Determination: 15 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant alleged that Awhina Wahine Inc failed to act in good faith causing her undue stress when her original contract was not properly renewed, she was performance reviewed and that a payment of an agreed bonus was not paid.

[2] Awhina Wahine Inc (Awhina Wahine) has denied the claims.

The Issues

- Was there an agreement reached between the parties on an extension to a purported fixed term contract that expired on 9 September 2006?
- Were terms that were discussed between the parties revoked by the respondent?

¹ Affidavit received from Ema Mitchell, counsellor and a witness for Awhina Wahine Inc, and Memorandum received from Counsel for Awhina Wahine Inc.

- Was the applicant offered, and did she agree, to the payment of a bonus during her job interview prior to commencing work on 3 March 2006?
- Has the applicant established a personal grievance involving any unjustified action by the respondent, and has she been disadvantaged in respect of her employment or terms and conditions of employment, for any personal grievance remedies to apply?

The Background

[3] Mrs Dalton started work on 6 March 2006 under the terms of a purported fixed term employment agreement. She commenced her employment as the office support worker. The employment agreement had provision to end on 3 September 2006 but it did not include in writing the way the agreement would end and the reasons for ending in that way.

[4] One of Mrs Dalton's tasks was to organise the funding for her position.

[5] Mrs Dalton says that during her interview with Fiona Barribal, a volunteer and chairperson of Awhina Wahine's "governance group", and Ema Mitchell, a counsellor and member of the Awhina Wahine collective, that she was offered and accepted a bonus. It is common ground that there were funds available for six months to fund and sustain the position. Ms Barribal and Ms Mitchell denied that claim.

[6] On 7 March 2006, Mrs Dalton and Ms Barribal signed off an individual employment agreement that purported to be for a fixed term. That agreement made provision for the applicant to be employed as the office support worker and it included a term headed: *3.1 Individual agreement of ongoing and indefinite duration:*

This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The employment shall commence on 06.03.06 and is fixed for six months to 03.09.06.

[7] The same employment agreement made provision for Mrs Dalton to be paid an hourly rate of \$11.50. It also made provision for:

7.2 Review

The Employer agrees to review the Employee's salary-wages on the 12th month anniversary of this employment agreement and every 12 month anniversary thereafter. The parties agree that the Employee shall not have any necessary entitlement to an increase, but, the

Employer agrees to conduct this review in good faith and to consult with the Employee during the review.

[8] During the term, the parties entered into some discussions on the renewal of the contract. At least by August this had involved the Awhina Wahine offering the applicant an extension of her contract until 3 March 2007, an increase in her hours from 30 to 35 per week, an increase in her hourly wage of \$2 taking her hourly rate to \$13.50, and a change to the title of the position to that of *Administrator*. The applicant says that her hours were changed much earlier and that the hourly rate was increased in September. This was denied by Awhina Wahine's witnesses;-Ema Mitchell and Fiona Barribal, and Pania Mitchell, the secretary/treasurer.

[9] There was another meeting held with Mrs Dalton on 30 August 2006. At that meeting, she presented to the "*governance group*" a new typed up employment agreement that she had drafted. At that meeting, the draft was discussed and Awhina Wahine witnesses say that the "*governance group*" reiterated their previous offer.

[10] Ema Mitchell, Fiona Barribal and Pania Mitchell say agreement was reached on a new employment agreement incorporating a number of changes and including the change in title, the hourly rate and the extra hours. However, Mrs Dalton says that she concluded from the meeting that she was to hear back from the "*governance group*" with regard to the matter of her bonus she had raised and the funding. She says she then tidied up the contract, signed it and sent it out to the chairperson for signing.

[11] There is a conflict in regard to the parties' intention after the meeting held on 30 August 2006. The Applicant became dissatisfied because Awhina Wahine had not signed the contract. Awhina Wahine was dissatisfied because it believed Mrs Dalton presented a new employment contract that she drafted that included changes that had not been agreed to and that she was asked to change the contract and resubmit the changed draft that she did not properly do. Awhina Wahine envisaged at least two changes that involved the arrangements around the term since it was for a purported fixed term and a performance review provision instead of a salary review to be consistent with the requirements of a fixed term arrangement.

[12] On 6 December 2006, there was a further discussion about the contract and changes, but no agreement was reached on the terms. Nevertheless, the implemented changes involving the title, the hourly rate and the hours remained in place. Mrs Dalton

alleged that Awhina Wahine “*revoked*” the agreement she believed had been reached. Pania Mitchell, Fiona Barribal and Ema Mitchell denied that claim.

[13] In January 2007, Pania Mitchell and Fiona Barribal commenced a performance appraisal of the applicant following up on the applicant’s earlier request for a performance review. Fiona Barribal and Pania Mitchell accepted the performance review was late but explained that this was caused because they were volunteers and that affected their availability. Pania Mitchell explained that she had an idea very earlier on in the applicant’s employment that there were performance issues but accepted they were not addressed at the time. There was a meeting for the performance review on 24 January 2007. Difficulties arose in that appraisal when an assessment was made that the applicant did not agree with. The final typed version of the performance review was completed after the applicant had left but I accept she understood the details before she left.

[14] Mrs Dalton raised a personal grievance in writing in a letter dated 15 February 2007. Matters relating to the personal grievance were not settled and on 23 February 2007 Mrs Dalton was advised that her employment would come to an end on 3 March 2007.

The Evidence

(1) The Bonus Claim

[15] Mrs Dalton could not substantiate her claim that a bonus had been agreed to during her interview. Her claim is not assisted by the fact that there was never any bonus paid at any time during the course of her employment. Further, she is not supported by the fact that in at least the first employment agreement that was signed off, there was no provision for a bonus. Therefore, it is more likely that the bonus became a matter of discussion some time after the commencement of her employment but without any agreement being reached. I am not satisfied a bonus was agreed.

(2) Mrs Dalton’s Claim That Agreement on Hours, Rate of Pay and the Title of the Position Had Been Revoked

[16] Mrs Dalton has claimed that Awhina Wahine “*revoked*” the agreement to increase her hours, her pay rate to \$13.50 and change the title of the position. The fact is that these terms continued during the attempt by the parties to renegotiate her

employment agreement. Further, Mrs Dalton produced a letter dated 1 September 2006 from Awhina Wahine's "governance group" as follows:

Thank you for accepting our offer of \$13.50 per hour for 35 hours per week. This will extend your contract for a further six months to 3 March 2007.

We would like to meet with you Wednesday, 6 September 2006, at 1pm, at Te Korowai Aroha Office, Level 3, Pember House, Hagley Street, Porirua to confirm contractual details.

[17] Therefore, it is clear to me that it is more than likely the hours were not revoked. Also, the rate of pay and the title of employment and the term that provided for a further six months to 3 March 2007 were not revoked. Indeed, this letter confirmed the continuing provision of those matters. It also confirmed that the contractual details needed to be confirmed. This suggested that there were still some outstanding matters in regard to fixing inherent contradictions in the employment agreement as it applied to a purported fixed term agreement, but did not go so far as to meet the requirements of s 66(4) of the Employment Relations Act, to include in writing the way the agreement would end and the reasons for it ending.

[18] Although it is not central I find that the differences between the parties about the employment agreement and whether or not changes were agreed or made without authority is more likely to have been because of a genuine misunderstanding. I can not take that matter any further.

(3) The Job Performance Appraisal

[19] The job performance appraisal was delayed. I am satisfied that there was nothing untoward about that given the availability of Fiona Barribal and Ema Mitchell as volunteers. The delay was not fatal, I hold, although best practice should have involved the appraisal being dealt with in a more timely fashion. It was commenced under the terms of the employment agreement.

[20] Therefore, I find that the delay while unfortunate was not unjustified and there was no apparent disadvantage to Mrs Dalton because she knew what was involved and what the outcome was before she left.

(4) The Funding Arrangements In Respect of the Administrator Position

[21] Mr Dalton's role required her to raise funds to enable her role to continue. The reason that the agreement was terminated related to the parties' belief that it was a fixed term agreement.

[22] In this regard the reason for it ending and how it was to end is problematic because of the differences between the parties on the funding arrangements to pay for Mrs Dalton's position. In fact Mrs Dalton's evidence was not sufficiently particularised to support her claim that funds were available for her to continue. Ema Mitchell has said that what funds were left meant that Awhina Wahine could not have afforded Mrs Dalton's position.

[23] Nothing turns on this because Mrs Dalton never raised a personal grievance about the termination of her employment. Her grievance was related to actions during the employment. Thus, since there is no causal nexus between the two this is not a situation to find that the nature of the grievance is a type different to that alleged (applying s122 of the Act) because there was a common belief that the employment agreement would end. This is supported by Mrs Dalton not raising a grievance about the termination of her employment. Moreover there is nothing in Mrs Dalton's claims that suggest that any of the unjustified action claims disadvantaged her because her employment ended, as both parties understood the employment would end and the reasons for it ending under the purported fixed term arrangement.

(5) The Fixed Term Nature of the Employment Agreement

[24] The purported fixed term nature of the employment agreement did not meet the requirement for an explanation in writing of how that agreement would end under s 66 of the Employment Relations Act 2000. This does not affect the validity of the employment agreement between the parties (see s 66 (4) and 66(5) and 66(6) of the Act) and the agreement would have continued to apply under the law.

Conclusion on the Personal Grievance Claim

[25] The personal grievance claim related only to a claim of unjustified action disadvantaging Mrs Dalton. It was alleged that Awhina Wahine failed to act in good faith causing Mrs Dalton undue stress when her original contract was not properly renewed, she was performance reviewed late and that an alleged agreed bonus was not

paid. The claims she has made do not on an assessment of the evidence amount to unjustified action because:

- The parties were negotiating a renewal of the agreement (which was open to them to do and where the agreement would continue to apply under the law because it failed to meet the requirements of a fixed term agreement).
- The agreement provided for an appraisal (it is not unreasonable to apply the agreement) and there was no agreement on a bonus established (no term to apply).
- The evidence was not satisfactorily sufficient to establish any agreement reached was revoked.
- Both parties mutually used the agreement as a fixed term agreement albeit that it did not meet the legal requirements under the Act.
- There was no independent evidence of the causation of any stress.

[26] The reason for Mrs Dalton leaving her employment was the common belief that the purported fixed term agreement had expired and I am satisfied could not have related to performance because there were not enough funds to pay for the position continuing according to Ema Mitchell; (this was not challenged and the evidence Mrs Dalton produced was not sufficiently particularised to refute it); changes were made after Mrs Dalton left and the employer has been consistent throughout that the contract would end at the expiry of the term.

[27] Even if Mrs Dalton might think that the lateness of the performance review and the negative performance appraisal might have been linked to her employer wanting to end her employment, she has not been able to prove it, given the common belief that the contract was a purported fixed term agreement.

Decision

[28] Mrs Dalton's claims for unjustified action by her employer affecting her employment, or her terms and conditions of employment, to her disadvantage, are dismissed.

[29] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority