

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Romy Daske
AND	Tile New Zealand Limited
REPRESENTATIVES	Clive Bennett for Applicant Graeme Norton for Respondent
MEMBER OF AUTHORITY	Marija Urlich
INVESTIGATION MEETING	31 October 2006
SUBMISSIONS RECEIVED	13 and 21 November 2006
DATE OF DETERMINATION	11 December 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Romy Daske was employed by Northzone Limited as a Showroom Assistant from 22 September 2004 until 28 August 2005. She alleges that she was unjustifiably dismissed. Mrs Daske says that when she attended work on 29 August she was asked by Paul Lever, Northzone's Managing Director, what she was doing at work because he understood she had resigned her employment when her daughter Nicole had left the day before. When Mrs Daske said she had not resigned Mr Lever told her to leave. Mrs Daske seeks to be reimbursed lost wages and compensated for hurt and humiliation consequent to her dismissal.

[2] Northzone says Mrs Daske resigned of her own free will on 28 August and attended the workplace on 29 August to return her work clothes and ask for her holiday pay, which she was advised would be paid the next pay day. It also says that in any event, Mrs Daske's fixed term employment agreement was due to expire in two days time.

[3] I record that the parties have attended mediation in an attempt to resolve this employment relationship problem.

[4] I record that I was assisted in the investigation of this employment relationship problem by a translator of the German language.

Fixed term agreement?

[5] It is accepted by the parties that Mrs Daske was first employed by Northzone on a fixed term agreement for a period of six months, which was the estimated time initially given to a project Mrs Daske was to work on setting up a tile library. At the completion of the six month period the tile library was not completed and Mrs Daske's fixed term was extended. This extension was not put in writing. Mr Lever relies on file notes, written by him, which span the period of Mrs Daske's employment with Northzone. The relevant file note records that the reason for the extension of the fixed term was the completion of the tile library and the expiry of Mrs Daske's work permit¹.

[6] Mr Lever said that in early August he and Mrs Daske agreed 31 August would be her final

¹ Refer Paul Lever file note 14/3/05

date of employment. Mrs Daske says there was no such conversation. She says she and her daughter told Mr Lever that they expected the permanent residency application would be granted around the time the work permit expired. Mrs Daske said she understood that nothing would change when the permanent residency came through and that she would continue her employment with Northzone. None of the file notes record an expiry date of Mrs Daske's 31 August.

[7] There is no evidence to support Mr Lever's claim that he and Mrs Daske agreed 31 August would be her final day of employment. He could not recall any discussion with her regarding this issue after Ms Walters' discussion with Mrs Daske on 4 August and the file notes do not record any agreed date. I accept that prior to 4 August Mr Lever had meet with Mrs Daske and made it clear that he would extend Mrs Daske's fixed term for two or three weeks beyond the expiry date of her work permit (which was due to expire on 10 August). However, this note records that the parties agreement was to extend the employment agreement to allow more time to complete the tile library set up.

[8] Notwithstanding Northzone's claims that Mrs Daske's employment would have expired by effect of the employment agreement on 31 August 2005 it has difficulty meeting the mandatory requirements of section 66 of the Employment Relations Act 2000. Subsections (4) to (6) were inserted, as from 1 December 2004, by section 27 of the Employment Relations Amendment Act (No 2) 2004. The written employment agreement expired in March 2005. There is no evidence that the parties entered another employment agreement in compliance with the provisions of section 66(4), which requires that parties to fixed term employment agreement must put in writing the way the employment will end and the reasons for the employment ending in that way.

[9] If I am wrong and there was no obligation on the parties to comply with the subsection 66(4) amendments, because the parties entered the employment agreement prior to December 2004, then Northzone faces difficulty establishing it has complied with its obligations under section 66(2) of the Act. At 31 August the tile library was not complete and there was no evidence that the parties had agreed on an expiry date of 31 August. I accept that Mr Lever had made it clear that he did not want to employ Mrs Daske beyond two to three weeks after the expiry of her work permit however, as there is no evidence Mrs Daske agreed that her employment would end² in that way Northzone cannot establish compliance with section 66(2). I find that Mrs Daske was a permanent employee³.

What happened on 28 August?

[10] Throughout her employment with Northzone Mrs Daske attended work with her daughter, Nicole. Mrs Daske is a recent immigrant to New Zealand as is her daughter. During her employment with Northzone Mrs Daske held a work permit, Ms Daske did not. Mrs Daske has limited English, Ms Daske's English is fluent. The arrangement reached with Northzone was that Ms Daske would attend work with Mrs Daske on a voluntary basis to facilitate her mother's employment by acting as her interpreter and gain work experience. There is no dispute that it would be difficult for Mrs Daske to perform her duties without the assistance of her daughter as interpreter.

[11] Mr Lever says that on 28 August he was told by Odette Mancer, Northzone's business manager, that Mrs Daske had told her 14 year old daughter Jaimee, earlier that day, that she was leaving. Mr Lever said he was shocked to hear this and meet with Mrs Daske. Also present were Ms Mancer and Ms Daske.

[12] Ms Daske said it was her, not her mother, who told Jaimee she was leaving that day. She said she had made the decision because the day before, 27 August, she had asked Mr Lever to confirm her employment now that the family had been granted permanent residency and Mr Lever replied that he understood she did not wish to work there any longer. Ms Daske

² ibid

³ Section 66(6) Employment Relations Act 2000

said this conversation upset her and she decided that she would stop coming in from the following day. She said she was upset because she had expected, after months of unpaid work for Northzone, that Mr Lever would offer her employment once the family's application for permanent residency had been confirmed. Ms Daske said the family's permanent residency application was granted on 27 August. I accept that that was the case.

[13] Mr Lever said that he could not recall any discussion along those lines with Ms Daske on 27 August.

[14] It is very likely that Ms Daske would advise Mr Lever as soon as the family's permanent residency application had been granted. Mr Lever had made inquiry of immigration as to Mrs Daske's permanent residency application. I find that it is very likely that the conversation between Ms Daske with Mr Lever took place on 27 August as she has described.

[15] Mr Lever says that when he heard from Ms Mancer what Jaimee had told her he meet with Mrs Daske and asked her if it was true that she wanted to leave. Mr Lever said Mrs Daske confirmed she wanted to leave and finish that day. Mr Lever's written statement is silent as to the involvement of Ms Daske in this conversation. I accept that her involvement in the meeting was extensive. During the investigation meeting Mr Lever said Ms Daske did a lot of the talking in the meeting. He said he made sure Mrs Daske understood what was being discussed by asking her directly if what he had heard was true, that she replied that she was unhappy and that she did not want to talk about it. Mr Lever said he was shocked when he heard this because he thought everybody was happy and he did not know what had happened to make her want to leave so quickly. Mr Lever's claim of surprise at Mrs Daske's expression of unhappiness has a disingenuous ring to it; his earlier file note records his concern that Mrs Daske was unhappy and given that he did not offer Ms Daske a position the preceding day, when she had worked voluntarily for him over the course of her mother's employment, it is understandable that Mrs Daske would be unhappy.

[16] Mrs Daske says the meeting occurred at the end of the working day. She says Ms Daske told Mr Lever that she was going to leave but made it clear that Mrs Daske would continue to work. Mrs Daske says Mr Lever then became very angry and asked her how she could leave after everything he had done for her.

[17] It does not make sense that Mr Lever would become very angry when Ms Daske advised him that she would cease her voluntary work; he had told her the day before that he would not offer her a position. I think it is more likely that Ms and Mrs Daske were upset given their disappointment that Ms Daske had not been offered a position.

[18] Mr Lever asked Mrs Daske to confirm her decision to leave and she did. I accept that he put this question to Mrs Daske because this is the information relayed to him by Ms Mancer from Jaimee. I accept that Mr Lever understood she confirmed her decision to resign with immediate effect. Mrs Daske denies that this question was put to her. There was no evidence that Ms Daske assisted her mother with translation during this meeting. I find that given Mrs Daske's upset and disappointment she did not accurately follow the conversation.

[19] Did Mr Lever have a reasonable basis to believe Mrs Daske had resigned? I believe he did. For the reasons set out above, I accept he directly asked Mrs Daske if it was her intention to leave. Given that Ms Daske was present and she had always assisted her mother with translation Mr Lever could reasonably expect Mrs Daske to rely on her daughter's translations skills if she had thought that was necessary.

What happened on 29 August?

[20] Mrs Daske says she attended work at her usual time on 29 August. She says she was dressed for work and had her daughter's work clothes with her to return. She gave the bag of clothes to Tina Lever, the store manager. Mrs Daske says Mr Lever approached her and asked what she was doing at work. She replied that she was there to work and Mr Lever told her she

had said she wanted to go the day before and he sent her away. Mrs Daske said she later left her work clothes in a bag outside the front door of the business.

[21] Mr Lever says Mrs Daske returned the following day to return company clothing and property and asked when she would receive her holiday pay. He said she arrived later than her usual time. Mr Lever told Mrs Daske her holiday pay would be paid on the next pay day. He said he was surprised and disappointed at this request because in asking for her holiday pay Mrs Daske inferred he would not pay it. His evidence is consistent with a file note he wrote that day recording his conversation with Mrs Daske.

[22] Ms Lever's evidence confirmed that of Mr Lever. She said Mrs Daske gave her a bag with both Mrs and Ms Daske's clothes in it and their name tags. She did not bring the bag to the investigation meeting. Mr Lever said no bag was later found with clothes in it outside the store.

[23] There is no overlap in the starkly contrasting evidence of Mrs Daske and Mr Lever as to what happened on 29 August. The key witnesses did not resile from their respective stories under questioning. The only near contemporaneous record of this meeting is a file note made by Mr Lever on 29 August. Mr Lever's file note making was a feature of his employment of Mrs Daske; he recorded all his significant dealings with her in this manner (with the notable exception of the alleged fixed term expiry date of 31 August). Given that making file notes was his invariable practise it is unlikely that the 29 August file note was created for any self serving purpose other than to record the noteworthy events of the day. I find that Mr Lever's 29 August it is most likely to be an accurate record of the events of that day.

[24] I am reinforced in the view that Mr Lever's account is the most accurate by my findings regarding the events of 28 August. I am further by Mrs Daske's evidence that she left her clothes outside the shop without drawing this to Northzone's attention. This conduct is not consistent with the careful steps Mrs Daske described to return Ms Daske's work property.

[25] For these reasons I find Mrs Daske was not unjustifiably dismissed and that she resigned her employment on 28 August 2005.

Costs

[26] Costs are reserved.

Marija Urlich
Member of Employment Relations Authority