

Attention is drawn to the order prohibiting publication of certain information contained in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 456/10
5297520

BETWEEN JOANNA FARRIMOND
 Applicant

AND FAIRFAX NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: C Patterson, Counsel for Applicant
 A Scott-Howman, Counsel for Respondent

Investigation Meeting: 12 August 2010 at Auckland

Determination: 22 October 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Farrimond, says that she was offered, and she accepted, permanent employment with the respondent, Fairfax New Zealand Limited, (“Fairfax”), but that before she commenced employment, she was told that the role agreed to was no longer available. Ms Farrimond claims that while she never actually commenced employment with Fairfax, she was a person intending to work under the provisions of sections 5 and 6 of the Employment Relations Act 2000, hence she was an employee with associated rights to pursue a personal grievance relating to the failure of Fairfax to employ her as allegedly agreed. In the event that the Authority finds that Ms Farrimond was an employee and does have a personal grievance, she claims the remedies of reimbursement of lost wages and compensation of \$22,000.

Ms Farrimond also claims that Fairfax breached section 12 of the Fair Trading Act 1986 and section 6 of the Contractual Remedies Act 1979 in that Fairfax engaged in misleading or deceptive behaviour and misrepresentation. Finally, Ms Farrimond claims that there was a breach of section 4 of the Employment Relations Act 2000 in that she was misled and deceived by Fairfax.

[2] While it is acknowledged that there was some discussion about the possibility of Ms Farrimond working for the company on the *Cuisine* magazine on a permanent basis in a particular role, Fairfax say that she was never offered the employment in question, hence she could not and did not, accept work as an employee. Therefore, Ms Farrimond does not meet the definition of “employee” under the relevant provisions of the Employment Relations Act 2000 and so she is unable to bring her claims under the jurisdiction of the Authority.

Order prohibiting publication of certain information

On the unopposed application of the respondent, pursuant to clause 10 of the Second Schedule to the Employment Relations Act 2000, the publication, directly or indirectly, of any information about or relating to, the incumbent Creative Director for *Cuisine* magazine is prohibited.¹

Background Facts and Evidence

[3] In addition to various documents provided by both parties, the Authority has received evidence from Ms Farrimond, Mr Kelly Farrimond and Dr Grieg McCormick. For Fairfax, there is evidence from Mr Eric Matthews, Ms Lynley Belton, Ms Toni Mason, Ms Elizabeth Mattila, Mr John McClintock and Dr Ian Miller. All of the evidence available has been closely considered albeit it may not be specifically referred to in this determination.

[4] As evidenced by her curriculum vitae (CV), Ms Farrimond has an accomplished career in senior creative art/design roles with reputable companies. Prior to this dispute arising, Ms Farrimond was based in New York and employed as the Art Director for the prestigious magazine, *Sports Illustrated*. She commenced her employment there on 21st September 2003.

¹ For the purposes of this determination this person will be referred to as Mr C.

[5] Ms Farrimond was born in New Zealand and has family here. Her father, Mr Kelly Farrimond, is the owner and Managing Director of a communications company, Farrimond Limited, which specialises in the development and execution of advertising and promotional material. The company is under appointment by *Cuisine* magazine (published by the Fairfax group) to design and produce the front covers for the magazine. The evidence of Mr Farrimond is that as a result of this business relationship, he was involved in a number of publication related meetings with the (then) editor of *Cuisine*, Mr Eric Matthews.² Mr Farrimond says that during these meetings, Mr Matthews expressed dissatisfaction with the incumbent Creative Director employed by *Cuisine* magazine and conveyed an intention to remove him. Mr Farrimond attests that on 24th July 2009, Mr Matthews expressed a “*keen interest*” in meeting with Ms Farrimond when she would be back in Auckland visiting family. There were further discussions between Mr Farrimond and Mr Matthews. Consequently, Ms Farrimond forwarded her CV and an edited portfolio for the perusal of Mr Matthews.

[6] The evidence of Ms Farrimond and Mr Matthews is rather vague as to when they first met but it appears from the evidence of Mr Farrimond that it was 21st August 2009. The evidence of Mr Matthews gives the impression that Mr Farrimond was going to be present at this meeting but it is uncertain if he was and given that Mr Farrimond has been quite precise about recording other events, one would have anticipated that he would have recorded something about the discussion between Mr Matthews and Ms Farrimond had he been there.

[7] Ms Farrimond attests that when she spoke to Mr Matthews he stated to her that he had no confidence in the incumbent Creative Director for *Cuisine* and he felt that Ms Farrimond would be a “*far better fit*” in relation to her skills and experience. Ms Farrimond says that Mr Matthews “*stipulated*” that he would be terminating Mr C’s employment by January 2010 and that he attended to replace Mr C with Ms Farrimond. The further evidence of Ms Farrimond is that:

Mr Matthews made it very clear to me that he was anxious to have me as part of the team. He stated that he would like to initially employ me as a freelance creative from November 2009 until [Mr C’s] employment was terminated in January 2010. Mr Matthews was extremely enthusiastic about the possibility

² Mr Matthews left the magazine in early 2010.

of us commencing our employment relationship and having me ultimately take on the role of Design Director.³ He made various statements supporting his enthusiasm along the line of “You are the one I have been waiting for, I only want you.” And that I “was a perfect fit for Cuisine and was the person he had been patiently waiting for.” He also discussed the advantages of me working with the team on a freelance basis before commencing my full time position.

Mr Matthews says that he does not recall saying that Ms Farrimond was the one that he had been waiting for, or some of the other comments that Ms Farrimond attributes to him, but he acknowledges that he would have said something along the lines that he was looking for an art director of some repute and that Ms Farrimond would “*fit the bill.*”

[8] Ms Farrimond says that she was “*extremely excited*” at the prospect of working for Cuisine and that Mr Matthew’s enthusiasm to have her “*come on board*” and become part of the team as soon as possible was “*extremely reassuring.*”

[9] On 28th August 2009, Ms Farrimond met with Mr Michael McHugh, the owner and editor of *MiNDFOOD* magazine. Ms Farrimond attests that Mr McHugh offered her a role with his magazine which would commence in January 2010 when the current Art Director’s contract expired. Therefore it appears that as of 28th August 2009, Ms Farrimond was discussing two possible job opportunities; one with Mr McHugh - *MiNDFOOD* and the other with Mr Matthews – Cuisine. Ms Farrimond says that Mr Matthews was aware that she had been offered a role with *MiNDFOOD* and on two separate occasions he contacted her, attempting to persuade her to decline the offer from *MiNDFOOD*. She also says that Mr Matthews “*verbally affirmed*” to her that the role with Cuisine was secure.

[10] On 31st August 2009, Ms Farrimond couriered to Mr Matthews a disc containing her redesign proposal with redesigned articles, cover concepts and some additional design ideas for Cuisine. In an email of the same date, Ms Farrimond records the sending of her work and also says that:

As you are aware I am heading back to New York next Tuesday, September 8th and would really appreciate being able to formalise an arrangement with you before I depart. I am available to meet with you anytime this week and it may be best to co-ordinate a meeting through Kelly if this is convenient.

³ It appears that Ms Farrimond suggested the title of Design Director in order to distinguish her anticipated role from that held by Mr C.

[11] Via an email dated 1st September 2009, Mr Matthews complimented the work of Ms Farrimond with some effusion and then records that:

I have started the process with our HR department regarding dates and the procedure that is required for the finalising of the current situation in the art department,⁴ I am also in discussion with the GM about the new role and am in the process of drawing up a draft contract for you, I am not sure that it will be ready before you go but certainly I will have a significant update before you depart. Should we try and get together before you head off, what about Monday in the afternoon, let me know when you can.

Ms Farrimond responded the next day and confirmed that she would meet Mr Matthews on Monday 7th September. Ms Farrimond concluded her email:

I also look forward to getting an update from you formalizing an offer when we met on Monday.

Mr Matthews and Ms Farrimond subsequently agreed (on 4th September) they would meet at 3:30p.m, Monday, 7th September.

Termination of employment at Sports Illustrated

[12] On Saturday, 5th September 2009, Ms Farrimond sent two emails. The first was to Mr Terry McDonell, her editor at Sports Illustrated:

I am writing to seek your advice and also to thank you for giving me this time to sort some things out with my life. It has been good to be back in New Zealand with my family and to have time to think about my future. One of the options I have been thinking about is to return to New Zealand and to see what opportunities exist for me here. During the last week I have been approached by 2 different publishing companies. I have met with the editor of an Australasian publishing company who publish a magazine called MindFood and they have offered me an Art Directors position in Sydney. I have also had a second opportunity presented to me on Wednesday of this week to effectively take a Creative Directors role with a leading food magazine called Cuisine, part of the Fairfax group. The job is based in Auckland, however it is not available to me until early January 2010.

Ms Farrimond indicated that for career and personal reasons, she would like to take “this opportunity” with *Cuisine* magazine and she enquired if Mr McDonell would require her to return to New York to enable him to “find a suitable replacement for my position.” Mr McDonell responded the next day (6th September) and conveyed that Ms Farrimond was not required to return to New York and he wished her “the best of good luck.” In responding on 8th September, Ms Farrimond thanked Mr McDonell for his understanding and for not having to work out a notice period. And:

It is now possible for me to start my new role in early November so your understanding works out perfectly for me.

⁴ The Authority understands that this is a reference to the role of Mr C.

[13] A meeting duly took place at the offices of Mr Farrimond's business on 7th September 2009. There is conflicting evidence as to what was discussed at this meeting. There is also conflicting evidence as to the outcome of the meeting. And while the evidence of Mr Matthews and Ms Farrimond is consistent in regard to them meeting, Mr Matthews also says that Mr Farrimond was present. But Ms Farrimond makes no mention of her father being present. Indeed, Mr Farrimond attests to a meeting with Mr Matthews and another person (Ms Cunningham) at the Farrimond offices at 3:30p.m. on 7th September 2009 to discuss the Christmas *Cuisine* cover. Mr Farrimond says that Mr Matthews advised him that: [*...he was delighted to have reached agreement with Joanna on the following:*

- (a) *Title of Design Director;*
- (b) *Salary equal or above that of [the incumbent Creative Director];*
- (c) *Start date November to freelance until January;*
- (d) *January 2010 officially take position of Art Director; and*
- (e) *Joanna's contract being finalised by Fairfax's Human Resources and Legal Departments and would be emailed to Joanna in New York.*

But I do not think that this evidence can safely be relied on as it was not possible for Mr Matthews to be in two meetings at 3:30p.m. on 7th September, and both he and Ms Farrimond agree that they met then.

[14] Ms Farrimond says that she met with Mr Matthews at the Farrimond offices and he told her that the role of Mr C would be *disestablished* upon this person returning from leave in January and that this would allow Ms Farrimond to; *seamlessly move into the role of Design Director*. Ms Farrimond also attests that:

Mr Matthews also confirmed that I would be taking over [Mr C's] role in a new capacity as Design Director with a salary equal to or above [Mr C's] current salary. Mr Matthews and I discussed the title of Design Director and we agreed that given that Cuisine had decided to terminate Mr C's employment by way of redundancy, that his title of Creative Director could not be used.

[15] The evidence of Mr Matthews is that by the time he met with Ms Farrimond (and Mr Farrimond)⁵ at the meeting on 7th September 2009, he had met with some people from the Fairfax human resources department and had been told that there would be a process to work through before: [*... it could be confirmed that we could make [Mr C's] role redundant. They told me the process could take a number of months.* Mr Matthews says that he could offer Ms Farrimond freelance work as had

⁵ It seems unlikely that Mr Farrimond was present.

previously been discussed with Ms Farrimond and that this work would start when Mr C went on leave in December 2009 at a pay rate of \$45 an hour. However, I prefer the evidence of Ms Farrimond in regard to what was discussed at the meeting as the following email seem to collaborate, to some extent, what she says, notwithstanding Ms Farrimond withholding from Mr Matthews that she had already resigned from Sports Illustrated prior to meeting with him.

[16] On 9th September 2009 Ms Farrimond sent an email to Mr Matthews:

Further to our meeting on Monday, I would appreciate receiving the letter of confirmation that we discussed, prior to my departure back to New York. I am hoping to leave Auckland by this coming weekend. As we discussed, in order for me to be back in early November, I will need to give notice immediately on my return to New York and obviously need a commitment in writing from you and Cuisine before doing this. Eric, I am really excited by the opportunity we have discussed and particularly being able to start in November albeit in a freelance capacity until January. I look forward to receiving from you confirmation in writing by the end of this week.

[17] But Ms Farrimond was being less than honest in regard to the purported intention to “give notice immediately” upon her return to New York: as the previously revealed evidence is that as of 6th September 2009, it had been confirmed that she would not be returning to her job in New York. This is further confirmed by the evidence of Ms Elizabeth Mattila, the Human Resources Director of Sports Illustrated; she states that Ms Farrimond resigned on 5th September 2009. Upon being pressed by Mr Scott-Howman, Ms Farrimond conceded that she did misled Mr Matthews as she was attempting to bring some pressure on him to finalise an agreement. Regrettably, the charade pertaining to Ms Farrimond’s supposed continuing employment with, and purported pending resignation from Sports Illustrated, was also being played out by Mr Farrimond.⁶ His evidence is that during a *Cuisine* cover meeting with Mr Matthews on 18th September 2009, he advised Mr Matthews that: *Joanna needed to do the right thing by her current employer Sports Illustrated Time Inc by giving sufficient notice. And further: I stated that Joanna was reluctant to resign from Sports Illustrated until a contract had been agreed to and signed.* While it is possible that Mr Farrimond may not have been aware that his daughter had already resigned, I suspect it is more likely that Mr Farrimond was aware of the resignation and that he, more probably than not, was also attempting to put some pressure on Mr Matthews to present something in writing to Ms Farrimond.

⁶ Ms Farrimond only revealed to Mr Matthews on 21st October 2009 that she had resigned but never told him the actual date the resignation was effective from.

[18] The further evidence of Mr Farrimond is that Mr Matthews stated to him that: *[... the contract was a mere formality and that he was having difficulty finalising Joanna's contract due the sensitive nature of [Mr C's] employment position. However, he stated that he would continue to pursue Fairfax's Legal Department to finalise Joanna's contract. Mr Matthews further stated that he had confirmed with Joanna her title, salary and start date and that his commitment as Editor of Cuisine was final and that Joanna should have confidence to proceed with resigning from her current employment.*

Mr Farrimond attests that he advised Mr Matthews on 21st September 2009 that Ms Farrimond had resigned from Sports Illustrated.

[19] Ms Farrimond did return to New York to finalise her affairs including vacating her apartment and arranging to have her personal property returned to New Zealand. On or about 21st October 2009, she was made aware that Mr Matthews was resigning from his role at Cuisine. As a consequence, she emailed him that day and conveyed her disappointment that Mr Matthews was leaving but that:

I remain excited and challenged by the opportunity you have presented to me. I have taken the decision to resign and plan to be back in New Zealand and will be able to start working with you as we discussed on a freelance basis from the second week in November. It would be good to know what you have in mind in this regard in terms of work location and freelance rates and also if Cuisine is able to provide me with a computer.

[20] Mr Matthews responded the same day via an email, the substance of which is telling and pertinent to Ms Farrimond's claims:

Jo, excellent to hear that your plans remain the same, I am sorry that I will not have the opportunity to work with you in the future but **I am committed to ensure that you will be working with us on a freelance basis until we can place you permanently on the magazine early next year**, I will be here until the deadline of the March issue which is February 4th 2010. We can only have a computer for you in the office and we are PC sadly. **Currently [Mr C] the creative director, will be on leave from December 14th, my plan is to have you in the office working from that day until he comes back which is January 19th, this will give you time to actually be in the office and get used to the environment. The restructuring, (which will mean [Mr C] does not come back) will be delivered to him on his return, this is simply telling him that his position has been disestablished, he will be paid and then leave, you will simply stay and take over the newly established role.** [Emphasis added]

[21] The evidence of Mr Matthews is that it was his intention to undergo a redundancy process with Mr C which would have resulted in the position of Creative Director "*becoming surplus*" by January 2010. Mr Matthews says that:

My intention was to be able to offer the job to Jo once [Mr C] had been told that he had been made redundant – and his role disestablished. That was consistent with what Jo and I had spoken about in the past – namely that my

hope was to make [Mr C] redundant as soon as I could, following which I would be able to offer her a job.

Unfortunately, as with some of the other evidence of Mr Matthews⁷, I do not find this evidence to be credible and it is quite at odds with the content of his email to Ms Farrimond on 21st October 2009.

Commencement of employment at *Cuisine* magazine

[22] On 14th December 2009, Ms Farrimond started work at *Cuisine* in a freelance role, filling in for Mr C while he was on leave. There was an issue in regard to whether she agreed to a paid rate of \$45 an hour but this has now been resolved. It seems that Ms Farrimond was well regarded during her tenure in the freelance role. The evidence of Ms Farrimond is that on 13th January 2010, she requested a meeting with Mr Matthews to discuss the progress as to the anticipated changeover in roles. That is, moving from the freelance role to the permanent role held by Mr C. Upon discussing this with Mr Matthews, Ms Farrimond says that he informed her that he: *[... was receiving resistance to [Mr C's] termination and subsequent appointment, from Ms Belton.* Ms Farrimond attests that this comment caused her concern as it conflicted with the “*understanding*” she had with Mr Matthews that the role of Design Director was to be hers and that it was merely an “*administrative process*” that needed to be completed for her to move into the role. However, Ms Farrimond says that Mr Matthews assured her that he would continue to ensure that the necessary changes were in place before he left *Cuisine* and that he also discussed the procedures necessary to terminate the employment of Mr C and that he hoped to have this achieved within a few weeks.

Meeting with Ms Belton

[23] As Ms Farrimond was concerned that Mr Matthews was about to leave his employment with *Cuisine*, and because all her dealings had been with him, she thought it prudent to get some clarification of her future with the magazine from Ms Lynley Belton, the General Manager of Fairfax Media magazines division. A meeting took place between the two women on 15th January 2010. The evidence of Ms Farrimond is that Ms Belton informed her that it was not legally possible to terminate the employment of Mr C or to disestablish his role. Ms Farrimond says that Ms Belton

⁷ In particular, his oral evidence that Ms Farrimond was just one possible candidate who was being considered to replace Mr C.

said that it was not possible to “honour” the agreement with her. But Ms Belton does not recall using such language, albeit she acknowledges that she informed Ms Farrimond that the business was in no position to terminate the employment of Mr C, hence it was not possible to offer Ms Farrimond the role of Design Director. Ms Farrimond also says that Ms Belton told her that Mr Matthews had misled her and that he did not have the authority to make an offer of employment until approval had been received from her.

[24] Ms Belton recalls that at the meeting on 15th January 2010 she made a number of comments to Ms Farrimond. In particular, the fact that Ms Farrimond had not been presented with an employment contract offering her the role of Design Director was discussed. Ms Belton says that as part of the Fairfax policies, any new appointments have to be cleared, the salary confirmed and a written contract prepared for presentation to any new employee and none of these things had occurred. Ms Belton attests that:

Eric had not received any clearance from me to employ a new Design Director, nor had there been any discussion about salary, or a contract for the new person.

Ms Belton says that she particularly remembers her discussion with Ms Farrimond because:

I was incredulous that Jo had not been presented with anything in writing, yet was telling me that she had been offered, and accepted, the job of Design Director for Cuisine.

I found the evidence of Ms Belton to credible overall and I can only conclude that Ms Belton had not been fully briefed by Mr Matthews as to how far he had progressed matters with Ms Farrimond.

[25] There was a further meeting between Ms Farrimond and Ms Belton on 18th January 2010 at which Ms Farrimond sought a solution, given that it was clear that the anticipated role of Design Director was not going to come to fruition.

Alternative offer of employment

[26] The evidence of Ms Belton is that following the second meeting she turned her mind what she could do to assist Ms Farrimond. Ms Belton concluded that Ms Farrimond could be offered the role of Design Director for Cuisine *Wine Country*

magazine. Via Mr Matthews,⁸ Ms Farrimond was subsequently offered what was effectively full-time (40 hours each week) being freelance work on the *Wine Country* magazine and *Sky Sport* magazine. This work would have been available to September 2010. The evidence of Ms Belton is that at a paid rate of \$45 an hour, annualised, the potential income available to Ms Farrimond (\$93,000 per annum) would have been within the range that Mr C was being paid. Ms Belton says that the work available to Ms Farrimond on Cuisine *Wine Country* would have been exactly the same as the work with *Cuisine* magazine and the expertise that Ms Farrimond had demonstrated at Sports Illustrated made her “*perfect*” for the *Sky Sport* magazine.

[27] Ms Farrimond say that she rejected the freelance work being offered as she no longer felt comfortable about any relationship with Fairfax, given the conduct of Mr Matthews to date. Also, Ms Farrimond was of the view that the rate of payment being offered was “well below” her market value, though Fairfax say that the rate of \$45 hour is the top rate that is paid to any other provider of freelance services. Upon the return of Mr C from his leave, Ms Farrimond ceased her freelance engagement at Cuisine on or about 19th January 2010.

Analysis and Conclusions

[28] Section 5 of the Employment Relations Act 2000 (“the Act”) provides that:

a **person intending to work** means a person who has been offered, and accepted, work as an employee; and **intended work** has a corresponding meaning.

Section 6(1)(b)(ii) provides that the meaning of an **employee** includes:

a person intending to work; ...

[29] The primary question for the Authority to determine is: Was a binding employment agreement entered into to the extent that the parties went beyond mere discussion and in fact both intended to enter into a binding legal relationship with each other and on the same terms as each other⁹ to such a degree that the above provisions of sections 5 and 6 of the Act are satisfied, in that Ms Farrimond can be defined as an employee with consequent rights to pursue a personal grievance?

⁸ And again via a letter dated 10th February 2010 from Mr Scott-Howman (acting for Fairfax), to Mr Patterson, (acting for Ms Farrimond).

⁹ *Canterbury Hotel etc IUOW v The Elm Motor Lodge Ltd* [1989] 1 NZLIR 958.

[30] I believe that the approach to be taken by the Authority is succinctly set out by Goddard J (as he was then) in *Canterbury Hotel etc IUOW v The Elms Motor Lodge Ltd* [1989] 1 NZILR 958 at 965:

In the present case, as a result, we approached the matter on the basis that the grievant can have a personal grievance only if there has been a breach of a duly concluded contract of employment. The contract must have all the incidents of a contract: offer, acceptance, consideration and intention to enter into binding legal relationships. The consideration will consist normally of the exchange of mutual promises to work in a particular capacity in return for remuneration and will not normally be the cause of any difficulty where the other elements are present. For there to be a contract, it must appear that the parties went beyond mere discussion and, in fact, both intended to enter into a binding legal relationship with each other and on the same terms as each other.

[31] Applying the criteria set out by Goddard J, the first question that arises is: were the incidents of a contract present? As of 1st September 2009, Mr Matthews notified (via his email of this date) Ms Farrimond that: “I am also in discussion with the GM about the new role and am in the process of drawing up a draft contract for you....” I find that there was probably not adequate certainty, then or as of 5th September 2009, for Ms Farrimond to confidently rely on, as being sufficient to resign from her employment with Sports Illustrated and it was imprudent for her to resign from this employment without further tangible commitment from Mr Matthews, which of course she sought via her email of 9th September 2009,¹⁰ notwithstanding that (unknown to Mr Matthews) she had already resigned.

[32] But in any event, I conclude that however doubtful (or arguable) it might be, as to whether a contract was formed pertaining to the employment of Ms Farrimond, prior to 21st October 2009, that doubt is removed by Mr Matthew’s email of that date. The relevant extracts bear repeating:

[... I am committed to ensure that you will be working for us on a freelance basis until we can place you permanently on the magazine early next year.

And:

Currently [Mr C] the creative director, will be on leave from December 14th, my plan is to have you in the office working from that day until he comes back which is January 19th, this will give you time to actually be in the office and get used to the environment. The restructuring, (which will mean [Mr C] does not come back) will be delivered to him on his return, this is simply telling him that his position has been disestablished, he will be paid and then leave, you will simply stay and take over the newly established role.

¹⁰ See para [16]

[33] I find that upon the receipt of this email, Ms Farrimond was entitled to conclude that she had an employment contract with Fairfax. In legal terms, the essential elements of a contract were present: offer, acceptance, and coupled with the earlier indications from Mr Matthews about providing a written contract, an intention to enter into legal relationships. There was also reasonable certainty. In regard to consideration, as was held in *The Elms* case:

The consideration will consist normally of the exchange of mutual promises to work in a particular capacity in return for remuneration ...

In Mr Farrimond's circumstances, given the "particular capacity" the salary applicable to the position held Mr C could reasonably have been anticipated to be the consideration that would have applied.

[34] I have taken into consideration the view of Ms Belton, and the submissions for Fairfax, that a written employment contract was not entered into, but I am also cognisant of the words of Goddard J in *The Elms*:

It would be most inconvenient if it were to be the law that a contract of employment cannot be relied on until reduced to writing and duly signed. Often employees have to take preparatory steps before taking up employment that has been offered. Some of these steps involve a serious alteration of position and sometimes they need to be taken without delay. It would be an undue impediment to normal business practices if one party to a contract of employment is to be at liberty to withdraw from it at any time before it is reduced to writing.

[35] There are two other matters that need to be considered. Firstly, the fact that it was not possible for Ms Farrimond to take up the role offered by Mr Matthews as it was occupied by Mr C and I accept Ms Belton's evidence about that. The second matter follows from this; that is whether Mr Matthews had the ostensible or implied authority to offer Ms Farrimond the role occupied by Mr C. It is remarkable that Mr Matthews was so deficient in his understanding of the basic concepts of employment law that he thought that he could simply remove Mr C without good reason and then replace him with Ms Farrimond. Clearly, Ms Belton knew better, but I conclude that by the time she became aware of what Mr Matthews had proposed, the essentials of a contract had been agreed to between Ms Farrimond and Mr Matthews, and Ms Farrimond (perhaps naively) had reasonable expectations (certainly from 21st October 2009) that she would commence work on a freelance basis and then move into the permanent role that Mr Matthews had led her to believe would be vacated by Mr C.

[36] In regard to whether or not Mr Matthews had the authority to commit Fairfax to a contract with Ms Farrimond, while I accept the evidence of Ms Belton that certain procedures or policies were required to be followed and that Mr Matthews did not observe these, Ms Farrimond could hardly be expected to know that and I find that given the senior management role held by Mr Matthews, she was entitled to take at face value the commitment he made on behalf of Fairfax, albeit a subsequent difficulty arose for the company.

Was Ms Farrimond a person intending to work?

[37] On the basis of the above findings I hold that from 21st October 2009, a valid and binding contract existed whereby Fairfax would employ Ms Farrimond initially on freelance work and subsequently from some time in January 2010, on a permanent basis in the role held by Mr C. Therefore, I find that Ms Farrimond was a person intending to work and hence an employee pursuant to sections 5 and 6 of the Employment Relations Act 2000 (“the Act”). It follows that she has the right to pursue a personal grievance under section 103 of the Act.

Does Ms Farrimond have a personal grievance?

[38] Due to the fact that obviously Fairfax could not remove Mr C as intended by Mr Matthews, it was not possible for the company to uphold the undertaking given by Mr Matthews. But that was not the fault of Ms Farrimond and I find that she was unjustifiably dismissed effective from on or about 19th January 2010 and hence she has a personal grievance.

Remedies

[39] Under the provisions of s 123 of the Act, where the Authority finds that an employee has a personal grievance, it *may* in settling the grievance, provide various remedies. In this case, the discretion of the Authority has some particular significance in regard to the claim for reimbursement of lost remuneration.

Reimbursement of lost remuneration

[40] Ms Farrimond seeks reimbursement of lost remuneration from when she ceased the freelance work with *Cuisine* magazine (on or about 19th January 2010) until 1 August 2010 when she started new employment with *MiNDFOOD* magazine.

Under the provisions of s 123(1)(b) of the Act the Authority has the ability to award to the employee reimbursement of a sum equal to the whole or any part of the wages or any other money lost as a result of the grievance. And s 128 of the Act provides that if an employee is found to have a personal grievance, and the employee has lost remuneration as a result, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration; and there is a discretion to award a greater sum.

[41] A submission for Fairfax is that Ms Farrimond had an obligation to mitigate her loss of income. Therefore, because Fairfax offered her ongoing freelance work on the *Cuisine Wine Country* magazine and *Sky Sport* magazine, at a rate of pay equivalent to what she would have earned had the permanent position come to fruition, and because there was no good reason for turning that offer of potential income down, Ms Farrimond is not entitled to be reimbursed for her loss of income. I find that there is considerable merit in that submission as I am satisfied that the work that was offered was of a sufficient quality and of duration (to September 2010) to enable Ms Farrimond to recover the loss of income that arose from circumstances that created the personal grievance. Ms Farrimond says that the rate of pay offered was not adequate, she did not like the insecurity of freelance work and furthermore, she did not trust Fairfax after the manner in which she had been treated by Mr Matthews. It is quite understandable that Ms Farrimond would be wary of any further involvement with Mr Matthews. But he left *Cuisine* early in February 2010. Mrs Belton promptly took reasonable steps to address the situation that Ms Farrimond found herself in, hence it does not seem reasonable for Ms Farrimond to reject the offer of work that was made. I find that Ms Farrimond had a duty to mitigate her loss of income and she had a fair and reasonable opportunity to do so but rejected it, hence I must take that into consideration when considering the appropriate reimbursement of lost income that Ms Farrimond is entitled to.

[42] But as legal precedent on this issue reveals, it is not just a simple matter of concluding that by failing to accept the opportunity mitigate her loss Ms Farrimond should be deprived of any remedy in regard to loss of income,. In *Trotter v Telecom Corporation NZ Ltd* [1993] 2 ERNZ 659 at 693, Goddard C.J. discussed this issue:

There is a discretion to award the whole or any part of that loss, but that is a closely fettered discretion because of the provisions of s 41¹¹ and because even apart from those provisions, **there must be some good reason for refusing to award the full amount of the loss. One such reason, as is now firmly established, is a failure by the applicant to take steps to mitigate his or her loss.** That is a rule made by this Court and its predecessors out of considerations of fairness for employers. It is nowhere to be found in the Act, but it is part of the exercise by this Court of its jurisdiction in equity and good conscience.¹² (Emphasis added)

[43] The issue was also examined by Travis J. in *Betta Foods (NZ) Ltd v Briggs* [1997] ERNZ 456 at 460:

As to the period for which lost remuneration is to be awarded, that is a matter within the discretion of the Tribunal [Authority] in terms of s 41(2) [s 128] and as Mr Butler has submitted, both *Macadam*¹³ and *Pascoe*¹⁴ provided guidance on the approach the Tribunal adopted. The first is that the Tribunal must be satisfied that the loss suffered would not have been sustained but for the personal grievance and, secondly, once loss is proven, the Tribunal should look at factors which suggest that the discretion to extend the 3 month period should not be exercised.

[44] I think that what can be distilled from *Betta Foods* is that under the provisions of s 128 of the Employment Relations Act 2000, once the Authority is satisfied that that the loss suffered by Ms Farrimond would not have been sustained but for the personal grievance, the Authority should then look at factors which suggest that the discretion to extend the 3 month period should not be exercised. And, according to *Trotter*; a factor or reason for refusing to award the full amount of the loss is the failure by Ms Farrimond to take enough, or sufficiently effective steps, to mitigate her loss.

[45] While I am satisfied that the loss of income suffered by Ms Farrimond would not have been sustained but for the personal grievance, a substantial factor or reason why she should not be awarded more than the 3 months' loss of income under s 128, is that she failed to mitigate her loss of income by refusing a reasonable and valid offer of alternative employment, which as has been proven, would have taken her through to when she obtained alternative permanent employment. Frankly, I have some sympathy for the argument advanced for Fairfax that given the fair and reasonable offer of valid alternative employment made to Ms Farrimond, there should be no entitlement to any loss of income. However, apart from the mandatory

¹¹ Section 41 of the Employment Contracts Act 1991. This was superseded by s 128 of the Employment Relations Act 2000.

¹² The Authority also must act as it sees fit in equity and good conscience. [s 157(3)]

¹³ *Macadam v Port Nelson Ltd (No 2)* [1993] 1 ERNZ 300.

¹⁴ *Pascoe v Covic Motors Ltd* [1994] 2 ERNZ 152.

provisions of s 128, and the precedents laid down by the Employment Court, I accept that having been sadly let down by Mr Matthews, Ms Farrimond, understandably, was most probably not in an appropriate frame of mind to make a rational or prudent decision about remaining in a freelance role with Fairfax, hence an award of loss of income for 3 months is appropriate. Ms Farrimond should be reimbursed for 3 months' loss of income at the rate of \$45 an hour¹⁵ for 40 hours a week for 13 weeks; being the gross sum of \$23,400. An order will follow.

Compensation

[46] Ms Farrimond seeks an award of \$22,000. Given the range of awards made by the Authority (and the Employment Court) this claim is at the upper end. In support of her claim Ms Farrimond says that she suffered “*immense levels*” of humiliation and distress because of Fairfax “*reneging*” on their “*commitment*” to her. Ms Farrimond also says that she left friends and work colleagues in New York to relocate to New Zealand to specifically take up the role with Cuisine. But I do not think that this is so as the overall evidence points to her very actively job searching for a new role in Australasia, most probably to be closer to her family. However, I do accept her evidence that she was embarrassed and humiliated to have to tell people in New York that the role she thought she had, had been “*pulled*” from under her. Ms Farrimond also related to being out of a permanent job in the midst of a recessionary economy and to the “*gap*” that now exists in her employment history. Ms Farrimond also attested to a feeling that Ms Belton implied that she was being dishonest about her discussions with Mr Matthews, that she was made to feel that it was her fault for misreading the situation, and that having to defend herself against such implications is insulting and humiliating.

[47] In all the circumstances I accept Ms Farrimond was humiliated and suffered a considerable loss of dignity due to what happened to her and that an award of compensation in the sum of \$12,000 is appropriate. An order follows.

¹⁵ For calculation purposes this reasonably approximates what Ms Farrimond most probably would have earned if the role of Design Director had come to fruition.

The claims made under the Fair Trading Act 1986, the Contractual Remedies Act 1979 and a breach of section 4 of the Employment Relations Act

[48] As I understand it, these claims were advanced in the alternative event that I found Ms Farrimond was not a person intending to work and hence not defined as an employee under the Employment Relations Act. Mr Patterson advanced the argument that under the provisions of s 162 of the Act, the Authority has jurisdiction to make findings and orders pertaining to the Fair Trading Act 1986 and the Contractual Remedies Act 1979. But as Mr Scott-Howman has correctly submitted, the jurisdiction of the Authority emanates from the existence of an employment agreement. But in any event, now having found that Ms Farrimond was an employee and that she has a personal grievance, remedies have been awarded under the Employment Relations Act and it is not appropriate that there be “double dipping” as it were, in regard to remedies under the other two Acts. Ms Farrimond also claims that Fairfax breached s 4(1)(b) of the Employment Relations Act 2000 in that she was misled as to the position in question. But I conclude that rather than deliberately misleading Ms Farrimond, Mr Mathews displayed an abysmal lack of knowledge (and/or application) in regard to fundamental employment law principles; the outcome being, that appropriate remedies have now been provided to Ms Farrimond.

Determination

[49] For the reasons set out above, I find that:

- (a) Ms Farrimond was a person intending to work and hence an employee under the provisions of sections 5 and 6 of the Employment Relations Act 2000 (“the Act”) and she has a personal grievance in that she was unjustifiably dismissed.
- (b) Pursuant to sections 123(1)(b) and 128 of the Act, Fairfax New Zealand Limited is ordered to pay to Ms Farrimond the gross sum of \$23,400 as reimbursement of lost remuneration for 3 months.
- (c) Pursuant to section 123(1)(c)(i) of the Act, Fairfax New Zealand Limited is ordered to pay to Ms Farrimond the sum of \$12,000 as compensation.

Costs: The parties are invited to resolve the matter of costs if they can. In the event they cannot, the applicant has 28 days from the date of this determination to file and

serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority