

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Vicky Ferguson (Applicant)
AND Temps Blenheim Limited (First Respondent)
AND Trudy Lamborn (Second Respondent)
REPRESENTATIVES Stephanie Moses, Advocate for Applicant
No appearance by First Respondent
No appearance by Second Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 24 April 2006
DATE OF DETERMINATION 27 April 2006

DETERMINATION OF THE AUTHORITY

Nature of determination

- [1] At the end of the investigation meeting, I elected to give an oral decision and I did so.
- [2] This written determination records the basis of that oral decision and of course provides the more detailed reasoning that a written determination affords.

No appearance by either respondent

- [3] Neither respondent party appeared at the investigation meeting nor was any explanation offered as to their absence.
- [4] I deferred the start of the investigation meeting by 10 minutes to account for any reasonable lateness by either respondent and then elected to proceed, taking notice amongst other things of the fact that the second respondent, who is also a director of the first respondent, lives on the same street as the venue for the investigation meeting and within perhaps one or two kilometres of that venue.
- [5] I was also influenced in my decision to proceed without either respondent by the fact that a telephone conference that I convened on 20 March 2006 had as a participant Ms Lamborn, the second respondent, who as I mentioned above, is also a director of the first respondent.
- [6] In that telephone conference, Ms Lamborn accepted the hearing date.

[7] Subsequently, I am satisfied that the Authority's support staff adequately provided written confirmation of the details of that hearing date.

[8] In all the circumstances then, I was persuaded that the Authority had taken all proper steps to ensure that the first and second respondents knew of the investigation meeting date and place and that the evidence suggested that the first and second respondents had made a conscious decision not to be involved.

Employment relationship problem

[9] The applicant (Ms Ferguson) alleges that she was employed by one or other of the respondents, that she was unjustifiably dismissed from her employment and that she was not paid for the work that she did in fact complete.

[10] Neither respondent filed a statement in reply despite two opportunities to do that. At the telephone conference on 20 March 2006, I observed that a statement in reply had yet to be filed and Ms Lamborn claimed that she had in fact filed a statement in reply.

[11] To ensure no prejudice to the respondent, I directed that the respondents were to file a fresh copy of the statement in reply by 4 April 2006. They did not do so.

The issues

[12] The issues in sequential order are:

- (a) Was there an employment agreement to which Ms Ferguson was a party;
- (b) Was either the first or second respondent Ms Ferguson's employer; and
- (c) Are there any enforceable consequences of any employment agreement found to exist between Ms Ferguson and one or other of the respondents?

The evidence

[13] Given that the nature of the investigation meeting revolved around the evidence of one witness, Ms Ferguson, it is useful to briefly record the nature of her evidence and her demeanour. I record that I considered Ms Ferguson to be a truthful witness with a good recall of the matters in contention.

[14] Through her representative, Ms Ferguson filed a brief of evidence which helpfully sets out the nature of this very brief employment relationship.

[15] Ms Ferguson told me that she had applied for a position with the first respondent, had had an interview with Ms Lamborn, the second respondent, and had accepted an offer of full-time employment on 3 October 2005.

[16] The terms and conditions of that offer of employment were, I find, that Ms Ferguson was to be paid \$16 per hour for a 40 hour week even although there was an understanding between the parties that Ms Ferguson might not actually be required for more than 35 hours a week. Ms Ferguson told me (and I accept) that she was advised by Ms Lamborn that there would be a 40 hour a week retainer wage paid even although Ms Lamborn thought that Ms Ferguson would only be actually working for 35 hours a week.

[17] Ms Ferguson told me that she understood that Ms Lamborn was an owner or director of Temps Blenheim Limited. She told me that she knew that Temps Blenheim Limited was a company because her employment when she was recruited by Temps Blenheim Limited was with an accounting firm who had Temps Blenheim Limited as a client.

[18] The arrangement the two women made was that Ms Ferguson was to ring Ms Lamborn when her notice period had one week to run in her then present employment and the two of them would then set matters up for the new employment relationship.

[19] Ms Ferguson said that she did as she was asked and that Ms Lamborn asked her to commence employment on and from 7 November 2005.

[20] Ms Ferguson arrived at the employer's workplace at the appointed time on 7 November and was told that she was not required so she turned up again the following day and was told the same thing.

[21] Ms Lamborn then rang Ms Ferguson on 9 November and asked Ms Ferguson if she could actually start the following week. Ms Lamborn made clear, however, that, consistent with their original understanding, Ms Ferguson would still be paid for this first week because of the retainer arrangement.

[22] Ms Ferguson reported for work on Monday, 14 November 2005 and was again told that she was not required and could she come back again the following day. Ms Ferguson asked Ms Lamborn about an employment agreement and Ms Lamborn made an excuse about her lawyer not being available but said she would *get on to it*. In this conversation, Ms Ferguson also asked which day was pay day and Ms Lamborn told her that wages went in on Thursday evenings.

[23] Ms Ferguson reported for work again on Tuesday, 15 November and was told again that she was not required but also told that she would still be paid.

[24] When Ms Ferguson reported for duty on Wednesday, 16 November, Ms Lamborn asked her to source new office premises for the business and to explore with Telecom changing the telephone number from the present residential address for the business to a proposed new office site.

[25] Acting on those instructions, Ms Ferguson interviewed a variety of real estate agents and viewed office premises. She made an arrangement to take Ms Lamborn to view an office that she thought was suitable but Ms Lamborn cancelled the appointment.

[26] On Thursday, 17 November, Ms Ferguson received a text message from Ms Lamborn saying that the latter had *stuffed up* the pays and that they would go in on Friday instead of on Thursday.

[27] On Friday, 18 November, Ms Lamborn rang Ms Ferguson to say that there was again no work. Ms Ferguson also noted that she had not been paid as Ms Lamborn had promised. She texted Ms Lamborn who claimed that the money had gone out of her bank account and *that she would look into it*.

[28] On Monday, 21 November 2005, Ms Ferguson was rung by an employee of Ms Lamborn called Kate to say that she was again not required. The same thing happened on Tuesday, 22 November.

[29] Ms Ferguson indicated that by this stage she had lost patience and she texted Ms Lamborn and asked her what was going on. It was agreed that there would be a meeting on Wednesday, 23 November to discuss the matter but that meeting never took place.

[30] At five minutes to three in the afternoon of Wednesday, 23 November, Ms Ferguson received a telephone call from Kate who told her that Ms Lamborn had employed her (Kate) as a director of Temps Blenheim Limited, that the position that Ms Ferguson had been employed for was only one day a week and that Kate would be doing that, that there was no job for Ms Ferguson and there was no money to pay her for the work already done.

[31] Ms Ferguson continued with her efforts to try and speak with Ms Lamborn but was always unsuccessful. Ms Ferguson promptly raised a personal grievance with Ms Lamborn by letter dated 25 November 2005 and proposed that the parties seek mediation assistance, again without any response from Ms Lamborn.

An employment relationship?

[32] I am satisfied that the evidence discloses evidence of an employment relationship. I accept Ms Ferguson's evidence that she was offered a position with Temps Blenheim Limited which she accepted and that she changed her position in reliance on that offer and acceptance by, in particular, resigning from her then position.

[33] Further, I am satisfied that the evidence discloses that Ms Ferguson performed actual duties for Ms Lamborn's company in the respect that Ms Lamborn asked Ms Ferguson to organise office accommodation and the change in the telephone number.

[34] Further, Ms Ferguson's evidence consistently attributes to Ms Lamborn comments to the effect that Ms Ferguson would be paid, even although she was not actually performing duties. Those statements are consistent with Ms Ferguson's recollection of the original engagement interview at which she recalls Ms Lamborn saying that she would be paid a guaranteed retainer of 40 hours a week even although Ms Lamborn did not expect her to be used for that number of hours.

Who was the employer?

[35] I am absolutely satisfied that the employer was Temps Blenheim Limited, the first respondent. Ms Ferguson was not clear in her mind whether she regarded Temps Blenheim Limited as her employer or Ms Lamborn, the second respondent, but I am clear that on the evidence, the employer was in fact the first respondent.

[36] Plainly, Ms Lamborn was the governing director for all practical purposes of the first respondent and while she may have made management decisions and given to Ms Ferguson the few instructions that she received in the short period that she was employed, I am clear that it was the first respondent which was actually the employer.

[37] Ms Ferguson was clear that because of her previous employment, she knew that the employer was in fact a limited liability company although she clearly was a little confused about whether she was actually working for that company or Ms Lamborn herself.

Determination

[38] Having found that Ms Ferguson was employed by Temps Blenheim Limited, the only remaining matter is to decide whether Ms Ferguson was unjustifiably dismissed from her employment and what, if any, consequences flow from that.

[39] I am satisfied on the evidence that I have heard that Ms Ferguson was indeed unjustifiably dismissed by Temps Blenheim Limited. Indeed, it would be hard to imagine a more callous dismissal than the one effected here where a person who Ms Ferguson plainly did not even know, a fellow staff member, rang Ms Ferguson and effectively told her that the position that she (Ms Ferguson) thought was hers, had been usurped by the caller (Kate), that there was no work for Ms Ferguson and no money to pay her.

[40] Having found that the dismissal of Ms Ferguson was unjustified, it remains for me to apportion compensation. The effect of the dismissal on Ms Ferguson was grave indeed. She and her husband relied on two incomes. The loss of the job with Temps Blenheim Limited almost resulted in Ms Ferguson and her husband losing their home and the distress which those events occasioned at the time are still palpable today at the investigation meeting.

[41] Ms Ferguson told me that she and her husband had to borrow \$10,000 from her mother-in-law in order to tide them over while Ms Ferguson desperately sought to obtain alternative employment.

[42] I am satisfied that an award of \$2,750 payable under s.123(c)(i) of the Employment Relations Act 2000, is an appropriate award of compensation for Ms Ferguson and I direct that Temps Blenheim Limited pay that sum to Ms Ferguson.

[43] I also need to turn my attention to consider the wages that Ms Ferguson has lost as a consequence of the unjustified dismissal. She was not in receipt of any income for a total of nine weeks but has now been successful in obtaining a replacement position although at a significantly lower rate of pay than she would have enjoyed with Temps Blenheim Limited.

[44] Ms Ferguson's claim for wages lost is \$5,760 which represents the nine weeks that she was without income at the rate of \$640 per week.

[45] Of course, that nine week period includes the period that Ms Ferguson was actually employed by Temps Blenheim Limited (which I round up to three weeks) and the six weeks it took her to obtain alternative employment.

[46] Because I am satisfied that Ms Ferguson has had to take a job at a significantly lower rate of pay (albeit partly compensated for by an increase in hours), I determine that the lost wages due and payable to Ms Ferguson be in the sum of \$6,250 gross.

Summary

[47] I direct that Temps Blenheim Limited is to pay to Ms Ferguson the following sums:

- (a) Compensation under s.123(c)(i) of the Employment Relations Act 2000 in the sum of \$2,750;
- (b) Lost wages (inclusive of holiday pay due and owing and an allowance for her new position being at a lower hourly rate) in the sum of \$6,250 gross.
- (c) Lodgement fee for the filing in the Authority of \$70.