

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA Auckland 3
5547479**

BETWEEN

DANA GIN-COWAN
Applicant

AND

TE WHARE WANANGA O
MUMA LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Rowland Ingram, Advocate for Applicant
Willie Jackson, Advocate for Respondent

Investigation Meeting: 22 December 2015 at Auckland

Submissions received: 22 December 2015 from Applicant and from Respondent

Date of Oral Determination: 22 December 2015

Date of written Determination: 5 January 2016

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Dana Gin-Cowan, claims that she has been unjustifiably dismissed by the Respondent, Te Whare Wananga o MUMA Ltd (MUMA)

[2] MUMA claims that it did not employ Ms Gin-Cowan and therefore did not unjustifiably dismiss her.

Issues

[3] The issues for determination are whether or not Ms Gin-Cowan:

- a. was in an employment relationship with MUMA
- b. unjustifiably dismissed by MUMA

Background Facts

[4] In early 2015 MUMA was engaged in a recruitment process with a view to engaging a Centre Supervisor for the new Early Childhood Education Centre it was intending to open in February 2015, and which in fact opened in March 2015.

[5] Ms Gin-Cowan is an experienced registered teacher. In January 2015 she was advised by Ms Tatiana Greening, Project Team Member, that MUMA were looking to recruit a suitably qualified and registered ECE teacher for the preschool it was opening (the Centre).

[6] Ms Gin-Cowan said she was advised that the Centre needed to recruit a Centre Supervisor as a matter of urgency since the school term was about to commence.

3 February 2015

[7] Ms Gin-Cowan had told Ms Greening she was interested in the position, and arrangements were made by MUMA to fly her to Auckland from Kaikohe on 3 February 2015. Ms Gin-Cowan said she was told by Ms Greening that she did not need to provide a CV.

[8] On 3 February 2015 Ms Gin-Cowan was met by Ms Greening at the airport and taken to the Centre where she was given a tour of the premises and met Ms Marama Davis, Academic Lead, who had discussed the Centre's policies and procedures with her and given her an overview on how the Centre would operate.

[9] After lunch which she spent with Ms Greening, Ms Gin-Cowan said she was interviewed by Ms Tania Rangiheuea, the Tamuaki of the Centre, who asked her standard job interview questions, including about her experience.

[10] Ms Rangiheuea said that when she met Ms Gin-Cowan she had explained that Ms Gin-Cowan's visit to the Centre was in the nature of a "*meet and greet*" and not a formal interview, or offer of employment, and that she believed Ms Gin-Cowan had understood that.

[11] Ms Gin-Cowan said that after her interview with Ms Rangiheuea she had been introduced to the Centre teachers, who in turn introduced her to the various Head of Departments.

4 February 2015

[12] The next day Ms Gin-Cowan said she had a meeting with Mr Wyn Osbourne, General Manager of MUMA. During that meeting, at which Ms Greening had been present, Mr

Osbourne had confirmed she was the successful job applicant and asked her how soon she would be able to start. She had said this would be as soon as her resignation, which she would provide immediately, had been accepted by her current employer.

[13] Mr Osbourne said that he had been encouraging during the meeting on 4 February 2015 with Ms Gin-Cowan as he had seen a solution to the Centre opening with a Centre Supervisor in place, and said that various options on accomplishing this had been discussed, including Ms Gin-Cowan undertaking engagement as a contractor for a 3 month period.

[14] He had asked Ms Greening to provide Ms Gin-Cowan with an employment agreement on the basis that this was standard procedure for applicants.

[15] Ms Greening said Mr Osbourne had asked her to provide Ms Gin-Cowan with an employment agreement, which she finalised following the meeting with Mr Osbourne. She had given her a copy of it (the Employment Agreement) and also emailed a copy to Ms Gin-Cowan. Ms Greening said that the purpose of doing so had been in order that Ms Gin-Cowan could see if the job conditions matched her expectations.

[16] Ms Gin-Cowan said she had read the Employment Agreement carefully, accepted the terms and conditions set out in it, and signed it dating it 4 February 2015 after the statement confirming that:

I was given a copy of my intended agreement and informed that I was entitled to seek independent advice about that agreement.

I was given a reasonable opportunity to seek independent advice.

Any issues I have raised have been considered and responded to.

I agree to comply with any company policies which may be changed from time to time at the Company's sole discretion.

I have read and fully understood these terms and conditions of employment and accept them fully.

[17] The signed Employment Agreement had been returned to Ms Greening who had in turn placed it on Mr Osbourne's P.A.'s desk.

5 February 2015

[18] The following day, 5 February 2015, Ms Gin-Cowan resigned from her current employment and later that day received a text message from Ms Greening stating: “*everyone is very happy. Wyn has requested you start Monday 9th and ready your staff. You/we/me still need to find one other staff member asap as your 4th person. Talk later about it*”.

[19] Later that evening Ms Gin-Cowan said she received a phone call from Ms Greening asking her to provide her CV. As she was away over the weekend, she emailed the CV to Ms Greening on Sunday 8 February 2015.

[20] Ms Gin-Cowan said she travelled to Auckland and arrived at the Centre at 10.00 a.m. on 9 February 2015. Shortly after her arrival she received a telephone call from Mr Osbourne asking her to attend a meeting at 12.30 p.m. Mr Osbourne did not explain the reason for the meeting and she assumed it to be connected to administration requirements.

[21] Following the telephone call, she had commenced reading the Centre policies and procedures, and the curriculum, and talking to the other teachers.

Meeting 12.30 on 9 February 2015

[22] Ms Rangiheuea said that she had been unable to contact the Head Teacher who was provided as Ms Gin-Cowan’s referee, but had spoken to her reliever, who had provided Ms Gin-Cowan with a reference that persuaded Ms Rangiheuea that the Centre should not employ her.

[23] At the meeting held at 12.30 p.m. Ms Gin-Cowan was advised by Ms Rangiheuea that MUMA would not be proceeding with the employment as her references were not satisfactory.

[24] Ms Gin-Cowan protested on the basis that she had signed the Employment Agreement and commenced employment, however she had been asked to collect her belongings and leave the Centre.

Determination

Was Ms Gin-Cowan in an employment relationship with MUMA?

(ii) *Person intending to work*

[25] The Employment Relations Act 2000 defines a person intending to work in s 5:

Person intending to work means a person who has been offered and accepted work as an employee;

[26] In s 6 of the Act an employee is further defined in s 6(1) (b)(ii) as: “*a person intending to work*”.

[27] Section 6 (2) of the Act requires that I determine the real nature of the relationship between the parties when determining whether or not a person is employed under a contract of service. This means that I must consider all relevant matters that indicate the intention of the parties but not treat as determinative any statement by the parties describing the nature of their relationship.

[28] The usual principles of contract formation apply in an employment context, and I therefore examine them in the context of this case.

Offer and Acceptance

[29] The parties disagree on what was discussed during the meetings held on 3 and 4 February 2015, however Ms Gin-Cowan is clear that she was offered employment by Mr Osbourne by means of his advising her she was the ‘successful candidate’ and discussing her potential start date at the meeting held on 4 February 2015.

[30] Mr Osbourne instructed Ms Greening to provide Ms Gin-Cowan with the Employment Agreement which Ms Gin-Cowan signed after the meeting with Mr Osbourne on 4 February 2015 confirming that she had read and understood the terms and conditions of employment, and accepted them fully.

[31] The Employment Agreement confirmed the commencement date of employment as 9 February 2015 and this was later confirmed in the text Ms Greening sent on 5 February 2015 to Ms Gin-Cowan acting in accordance with Mr Osbourne’s stated intentions.

[32] Whilst Ms Rangiheuea claims that she advised Ms Gin-Cowan that employment would be subject to the receipt of satisfactory references, Ms Gin-Cowan denies this, and there is no supporting documentary evidence that this was the case.

[33] Significantly the Employment Agreement provided to Ms Gin-Cowan contains no proviso that employment was subject to receipt of satisfactory references.

[34] Whilst Ms Gin-Cowan accepted that reference checks were normally part of a recruitment process, she said she had previously been appointed to two teaching roles without references having been sought.

[35] Ms Gin-Cowan was told by Mr Osbourne that she was the successful applicant; he instructed Ms Greening to provide her with the Employment Agreement and instructed Ms Greening to send the text message asking her to start employment on Monday 9 February 2015.

[36] Although Ms Rangiheuea said she had the ultimate authority to make a decision to appoint an employee, I note that the MUMA authorised signatory on the Employment Agreement was not Ms Rangiheuea, nor was Ms Gin-Cowan advised that the decision lay with Ms Rangiheuea.

[37] Mr Osbourne is the General Manager of MUMA. Ms Gin-Cowan said that she believed he had the authority to offer her the position of Centre Supervisor.

[38] In *Nelson v Porirua Community Law Resource Centre Incorporated*¹ the then Chief Judge Goddard set down the test to be applied in a situation in which there is an issue regarding ostensible authority:²

“Ostensible means overt. The test is how did it look to the applicant? How would it have looked to any reasonable person in the same situation? ... The fact that as between them and the respondent there is a limitation of authority unknown to the applicant cannot be allowed to affect his position. It was up to the respondent to notify him of the existence of the limit.”

[39] Although the Employment Agreement states that the effective date: *“is the date it is signed by both parties and the date of promulgation, whichever is the later”* I find that Ms Gin-Cowan was entitled to believe that Mr Osbourne as General Manager had the authority to make her an offer of employment, and she had accepted this offer.

[40] I find that there had been offer and acceptance by the parties.

Mutual Intention to create legal relations

[41] Ms Gin-Cowan states that she was made an unconditional offer of employment by Mr Osbourne. Whilst Ms Rangiheuea states that she told Ms Gin-Cowan on 3 February 2015 that any employment offer would be subject to receipt of further information, namely

¹ [1993] 2 ERNZ 1109 (WEC39/93)

² Ibid at page 17

reference checks, this is denied by Ms Gin-Cowan and there is no supporting documentary evidence of MUMA's formal recruitment procedures or that references would be required.

[42] Moreover the Employment Agreement which was provided to Ms Gin-Cowan after the meetings with Ms Rangiheuea and Mr Osbourne set out in detail the terms and conditions of employment and which stated at clause 28 that is: "*is the complete agreement and replaces all previous written or oral agreements or understandings*".

[43] The Employment Agreement and the offer of employment it contains is not conditional upon further recruitment steps being undertaken by MUMA.

[44] I find that there was a mutual intention to create legal relations.

Certainty of terms

[45] The terms and conditions of Ms Gin-Cowan's employment were set out in the Employment Agreement, including the job title, salary, hours of work and notice period.

[46] Not only did the Employment Agreement specify the commencement date as 9 February 2015, this was also subsequently confirmed to Ms Gin-Cowan by text message, from Ms Greening.

[47] I find that there was certainty of terms.

Commencement Date of Employment

[48] Ms Gin-Cowan was paid \$550.00 in respect of her attendance at the Centre on 3 and 4 February 2015. It is submitted for Ms Gin-Cowan that her employment at the Centre started on 3 February 2015 and that she was therefore a pre-existing employment at the date she signed the Employment Agreement. I have considered this submission.

[49] Ms Greening's evidence is that she had requested, and Mr Osbourne had agreed, that Ms Gin-Cowan be recompensed from taking two days absence from her current employment.

[50] Whilst Ms Gin-Cowan may have reviewed the proposed policies and procedures for the Centre during that period, there is no basis for believing that her prospect of employment was dependent on that work, or that she provided anything tangible to the Centre on which it relied subsequently. Indeed the time to undertake any detailed drafting would have been very limited, given the evidence of Ms Gin-Cowan of the site visits and meetings with members of management and teachers during that period.

[51] The offer of employment was not made to Ms Gin-Cowan until her meeting with Mr Osbourne on 4 February 2015, during which a possible commencement date was discussed.

[52] The Employment Agreement confirms the commencement date as 9 February 2015, and Ms Gin-Cowan signed her acceptance of this term and condition. This date of 9 February 2015 as the commencement date of employment was confirmed in the text message received by Ms Gin-Cowan on 5 February 2015.

[53] I find that Ms Gin-Cowan's employment at the Centre commenced on 9 February 2015. Consistently with this conclusion, the invoice provided sent by Ms Gin-Cowan to MUMA in respect of the 3 and 4 February 2015 refers to "*Consultancy*" and the payment is a gross payment.

[54] Having considered all the circumstances, I determine that Ms Gin-Cowan was an employee of MUMA with effect from 9 February 2015.

Was Ms Gin-Cowan unjustifiably dismissed by MUMA?

[55] The Employment Agreement contained a trial period provision at clause 3.

Effect of the trial period contained in the Employment Agreement

[56] The Employment Agreement provided to Ms Gin-Cowan contained a trial period provision at clause 3 and stated at clause 3.1:

The Employee and the Employer agree that the Employee's employment is subject to a trial period of 90 days duration and the trial period will commence on the day the Employee starts work..

[57] The Act makes provision for trial periods at ss 67A and 67B. The Act states:

S 67A When employment agreement may contain provision for trial period for 90 days or less

(1) *An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3) and an employer*

(2) ***Trial provision*** means a written provision in an employment agreement that states, or is to the effect, that –

(a) *For a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period, and*

(b) *During that period the employer may dismiss the employee; and*

(c) *If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*

(3) **Employee** means an employee who has not previously been employed by an employer

S 67B Effect of trial provision under section 67A

(1) *This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.*

[58] The effect of a valid trial period provision is that if the employee is given notice of dismissal during the trial period, he or she cannot raise a personal grievance for unjustified dismissal.

[59] Ms Gin-Cowan had confirmed in signing the Employment Agreement that she had: *“read and fully understood these terms and conditions of employment and accept them fully.”*

[60] I have found Ms Gin-Cowan to have been an employee of MUMA. Her employment commenced on 9 February 2015 and was terminated on that same day.

[61] In accordance with the trial period provision in the Employment Agreement, I find that Ms Gin-Cowan cannot raise a personal grievance for unjustifiable dismissal.

Remedies

[62] Ms Gin-Cowan is not entitled to any remedies in respect of unjustifiable dismissal, however I find that she was entitled to a 4 weeks' notice period in accordance with clause 12.1 of the Employment Agreement.

[63] Since Ms Gin-Cowan did not work the 4 week period of notice I find that she is entitled to 4 week's payment of salary in lieu of notice.

[64] I order MUMA to pay Ms Gin-Cowan the sum of \$5,786.85 gross in respect of the unpaid 4 week notice period.

[65] Ms Gin-Cowan is to be reimbursed the filing fee of \$71.56.

Costs

[66] Costs are reserved. Given the extent to which both parties have been successful I am of a mind to let costs lie where they fall, however, in the event that costs are sought, the parties are encouraged to resolve that question between them.

[67] If the parties fail to reach agreement on the matter of costs, they may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority