

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 162/08  
5102426

BETWEEN PAMELA HOLT  
Applicant  
AND ZEALANDIA MARINE  
GROUP LIMITED  
Respondent

Member of Authority: R A Monaghan  
Representatives: L Pattullo, Advocate for Applicant  
T Skinner, Advocate for Respondent  
Investigation Meeting: 26 February 2008  
Submissions received: 27 March 2008 from Applicant  
20 March 2008 from Respondent  
Determination: 01 May 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Pamela Holt says her former employer, Zealandia Marine Group Limited (“ZMGL”), dismissed her unjustifiably.

[2] Ms Holt also seeks a penalty in respect of ZMGL’s failure to provide a written employment agreement which included a description of the work she was to perform.

[3] ZMGL says there was no dismissal, rather there was an agreed termination of employment.

## **The employment relationship**

[4] Ms Holt had just sold her shares in a real estate business in Coromandel when she approached a recruitment agent, Rob Everall, about the possibility of obtaining employment through his agency. Although she had been in the real estate industry for more than 10 years she had a strong interest in the marine industry and held a local launch master qualification. She had also spent 10 years as a commercial fishing skipper in the Hauraki Gulf area. She told Mr Everall she sought a position in the marine industry.

[5] Mr Everall offered a specialist service in the industry. He was acquainted with Mark Helas, the sole director and shareholder of ZMGL. Messrs Everall and Helas had recently discussed a possible vacancy for an administrative position at ZMGL, although details of the position had not been finalised. At a meeting with Ms Holt on 17 May 2007 Mr Everall mentioned there may be a position at ZMGL. He told Ms Holt the position had not been finalised or approved, but that Mr Helas was looking for a person with an interest in the marine industry and who had some computer skills. He said in evidence that he told Ms Holt the boundaries of the role were fluid and Mr Helas had couched the position in general terms to attract a broad range of applicants with diverse skills.

[6] Later Mr Everall provided Ms Holt with a draft of an advertisement for the position, which Mr Helas had approved. Mr Everall emphasised the informal nature of the draft in his covering note, commenting too that the brief was open and depended on the skills and attributes of the successful candidate.

[7] Ms Holt underwent psychometric testing as part of a general assessment of her skills and attributes, but her computer skills were not tested.

[8] According to the draft advertisement, the position title was 'Marine Office PA/Administrator'. The position would demand 'a complex mix of capabilities'. At the core would be 'your experience as a PA, managing the business calendar, calls and correspondence and providing additional eyes and ears for the MD at all times'. Crucially, from ZMGL's point of view, the advertisement went on to say:

“Therefore the ability to drive the key desk top Office and Publishing tools effectively is a given. You will also be acquainted with the more routine aspects of office finances, using the in-house accounts package for the more routine daily entries (but this is not an accounts role).”

[9] Ms Holt had limited experience in the use of desk top office software but considered herself a quick learner and was confident she could pick up the rest. She told Mr Everall she was computer literate but had not done any accounting. Her CV asserted she was ‘computer literate’ and had ‘the necessary skills for creating reports and analysis.’

[10] Ms Holt said in evidence she had acquired her computer literacy and skills through day-to-day use in her real estate work, and the skills centred on MS Word and Power Point rather than MS Excel. From the point of view of the real estate agent she had been, her assertions regarding her skills were optimistic but genuinely held. However her CV indicates, and I find, that she did not have the detailed background in office administration which would have given her a realistic appreciation of the level of computing skills likely to be expected of her in another employment environment. Thus while Messrs Everall and Helas believed the reference in the advertisement to the ability to ‘drive’ certain software being ‘a given’ was a sufficient indicator of the level required, to someone with Ms Holt’s background it was not sufficient.

[11] In addition, the draft advertisement included other requirements such as ‘you will be a natural ‘people person’, ‘a working acquaintance with ... nautical terminology would be a distinct advantage’, and ‘marketing will figure in your daily activities’. Ms Holt believed she had these attributes. Not surprisingly, given her background, she said in evidence that those requirements ‘resonated’ with her. Unfortunately her understanding of those references was different from that of Mr Helas. To Mr Helas, ‘marketing’ was little more than a reference to the way in which Ms Holt communicated with clients, and that component was secondary to office administration activities. To Ms Holt, ‘marketing’ meant far more than that.

[12] A report from Mr Everall caused Mr Helas to be interested enough in Ms Holt to arrange an interview for 24 May 2007.

[13] During the interview Mr Helas told Ms Holt the position was sole charge, and was being created because he wanted a single employee rather than two part time office staff. There was some flexibility about the hours of work for the new employee. The staff members to whom Mr Helas was referring were Dorothy Hannan and Janie Dowler. Ms Hannan had been engaged as a contractor, with marketing and administration duties. One reason for the creation of the new position was that she was planning to leave. Ms Dowler had also been engaged as a contractor, working at ZMGL one day a week on accounting and administration duties. Both Ms Hannan and Ms Dowler would make themselves available to assist the appointee in the short term.

[14] Otherwise much of the discussion during that interview was about boats.

[15] There was a second interview on 25 May. Mr Helas showed Ms Holt the company's accounting software, Quick Books, which supplements Excel. Ms Holt told Mr Helas she was not familiar with Quick Books, and there was a discussion about whether and how she would be trained in it.

[16] There was also a discussion about the use of spreadsheets. Mr Helas' evidence was that Ms Holt told him she had used spreadsheets to do accounts and budgets for the clients of her real estate business. He said she did not give any indication that she had limitations in the use of Excel. I accept Mr Helas' account of the information Ms Holt gave him about her use of spreadsheets in that she gave no indication of any limitations (other than her comments regarding Quick Books), and asserted she would learn quickly. I also accept that Mr Helas showed Ms Holt examples of the kinds of documents she would be expected to work with, and she gave no indication that they might cause difficulty.

[17] Unfortunately neither Mr Helas nor Ms Holt appreciated the relative unsophistication of Ms Holt's experience in the use of spreadsheets. As Ms Holt said at the investigation meeting, in the boatbuilding industry information is broken down more finely than in the real estate industry. It seems she appreciated too late the implications of this when it came to her use of spreadsheets.

[18] Ms Holt was offered the position. She was provided with a written employment agreement, which she annotated and signed on or about 31 May 2007. One of her annotations was to complete the otherwise blank 'Schedule A Job Description' by recording 'Office administration P.A. Please Define'. That matter went no further at the time, and forms the basis of the claim for a penalty.

[19] The employment relationship began on Monday 25 June 2007. Mr Helas regarded that day as an orientation day. Ms Holt was asked to organise the company's supply cupboards, which she began to do. Mr Helas said in evidence that nothing of concern to him occurred that day.

[20] Ms Dowler was to assist Ms Holt on Tuesday 26 June. Tuesdays were pay processing days. Ms Dowler was aware Ms Holt was not familiar with Quick Books, but expected Ms Holt to be able to use an Excel spreadsheet for wage data and to be familiar with PAYE calculations and payment. Her expectations were not met. In particular when Ms Dowler suggested the wage data be kept on an Excel spreadsheet rather than in a wage book, she perceived that Ms Holt was reluctant to do this. On further discussion with Ms Holt, she found Ms Holt had no experience in other office procedures of a clerical nature such as dealing with creditors' invoices.

[21] Ms Dowler was concerned about Ms Holt's apparent lack of knowledge of office procedure. When Mr Helas came into the office later that day, she reported her concerns, including her view that Ms Holt was unwilling to use Excel. Mr Helas was also concerned.

[22] On 27 June Mr Helas gave Ms Holt further work requiring the use of Excel spreadsheets, this time for invoicing purposes. He was present in the office while she attempted to do the work, and observed that she struggled. Ms Hannan was to assist Ms Holt more directly. She made the same observation and I accept it was valid.

[23] On either 26 or 27 June Mr Helas contacted Mr Everall to express his concerns. In a written statement of evidence Mr Helas said he told Mr Everall he would consider 'my next step which was one of approaching Pam with some questions regarding her abilities or lack thereof.' Mr Everall said in his written statement that he was told Mr Helas had 'profound reservations about PH's actual capabilities in specific work applications, such as

MS Excel, which was badly undermining her ability to undertake training and to thus perform her basic duties. Moreover, the observed behaviour indicated that she lacked a basic understanding of even the most simple of spreadsheet tasks and techniques ...’ The oral evidence included a further discussion of these accounts, with both Mr Everall and Mr Helas expanding on them. As a result, although both continued to be careful about their responses, I consider it unlikely that the tone was as restrained as suggested by the written accounts. The message to Mr Everall was that the placement was unsatisfactory and Mr Everall would be expected to find a replacement.

[24] Mr Helas decided to meet with Ms Holt on 28 June to discuss her role.

[25] I doubt that either account of that meeting was fully accurate in that both accounts paraphrased the parties’ exchanges as the individuals saw them. However there were several elements in common. In particular the conversation was initiated by Mr Helas and began with his expression of concern about Ms Holt’s ability to do the job. Mr Helas told Ms Holt he felt Ms Holt’s skills had been misrepresented to him. Ms Holt offered to take courses in her own time, to which Mr Helas replied that he was not prepared to pay her the level of salary she was receiving so she could be on a ‘learner’s licence’. It was important to Mr Helas that Ms Holt’s work be accurate and that he could trust her to run the office when he was not there. Ms Holt recognised that the outcome was disappointing for Mr Helas, but said it was devastating for her. Towards the end of the conversation Ms Holt asked if she would be paid for the work she had done, and was advised she would be paid for that week.

[26] There was a conflict in the evidence about whether Mr Helas told Ms Holt ‘it’s over’ or ‘you have to go’. Mr Helas said in evidence he was careful not to use such words, and was aware he should embark on a performance management procedure to address any dissatisfaction with Ms Holt’s performance. Ms Holt was adamant that he did use such words. She said Mr Helas told her he had spoken to Ms Hannan and Mr Everall, that he felt Mr Everall had failed in not testing her software skills, and variously that ‘it’s over’ and she ‘had to go’. During the discussion about her offer to take courses in her own time, Mr Helas said it was ‘too late’ and he could not leave her in charge of the office on her own. Conversation of that kind caused her to ask if she would be paid.

[27] There was no suggestion that Ms Holt indicated to Mr Helas that she took the conversation as a dismissal.

[28] Ms Holt's employment ended with her departure on 28 June 2007. She was paid for that week.

[29] There was a further conflict in the evidence concerning whether Ms Holt acknowledged in a subsequent phone call to Mr Everall that her employment had terminated by agreement. Mr Everall said in his written statement that Ms Holt telephoned him on 27 June (although he must have meant 28 June) to 'confirm the circumstances of her departure, including that it was by mutual agreement'. He said she was clearly distressed. Ms Holt said she left messages for Mr Everall but did not speak to him directly until the following week. She denied saying the termination of her employment was by agreement. Her evidence, and that of a friend who heard Ms Holt's end of the conversation, was that she told Mr Everall Mr Holt had dismissed her.

[30] Ms Holt's friends were credible witnesses and I accept their evidence that the view Ms Holt expressed to them was that she had been dismissed. I also accept the evidence of Ms Holt's friend regarding Ms Holt's part in the conversation with Mr Everall. I found Mr Everall's evidence that Ms Holt told him the termination was by mutual agreement to be less persuasive, primarily because I have reservations about the accuracy of his accounts of the subsequent contact he had with Ms Holt. On balance I do not consider Ms Holt believed at the time that her employment had been terminated by agreement.

[31] Her position was subsequently readvertised with the title 'marine office administrator'. This time the advertisement included a more detailed account of the office skills required, specifying that the appointee should be ready to 'hit the ground running' and to 'show off your Excel skills during the application process'. Payroll administration and proficiency in the use of typical accounting software for small businesses was also required. Marketing was not mentioned.

### **Whether employment terminated by agreement or by dismissal**

[32] Dismissal has been defined as the termination of employment at the initiative of the employer.<sup>1</sup> The use of the word 'dismissed', for example, is not required in order to establish there has been a dismissal and there was no allegation it was used here. Regarding the existence of a dismissal, this determination turns on whether the evidence shows Ms Holt's employment was terminated at the initiative of Mr Helas, or whether there was an agreement regarding the termination.

[33] Concerning the existence of an agreement, Mr Helas focussed primarily on Ms Holt's action in asking whether she would be paid and accepting what she was told about that. He said, too, that in the course of the conversation Ms Holt accepted she was not able to meet his requirements.

[34] I do not agree with that construction of the conversation. In particular, in order to accept there was a meeting of the minds that the employment relationship should end I would expect some independently reached acknowledgement from Ms Holt that that the relationship was not working or that she was not suited to the position.

[35] There was no real meeting of the minds. Mr Helas called Ms Holt to a discussion without warning, and began immediately to express his dissatisfaction in strong terms. He told Ms Holt she did not have the skills necessary to do the job, that she had misrepresented her abilities, and that he was not satisfied with her offer to undertake additional training. He also referred to other conversations he had held about Ms Holt's suitability - extending to his acknowledgement that he had discussed the matter with Mr Everard.

[36] Against that background while I am prepared to accept Mr Helas did not use words such as 'it's over' or 'you have to go', the language he did use, as well as the tone of the conversation, mean he conveyed precisely that message. Mr Helas said in evidence he did not intend to dismiss Ms Holt, and that he would have embarked on a performance management programme had Ms Holt not left. While I accept that Mr Helas was aware of the procedure for addressing his concerns about performance and was prepared to follow it if necessary, I find he closed the door to that possibility by the nature of his assertions to Ms Holt concerning her lack of skills and his

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<sup>1</sup> **Wellington etc Clerical etc IUOW v Greenwich** (1983) ERNZ Sel Cas 95; [1983] ACJ 965

unwillingness to wait while she undertook further training. Ms Holt was correct to discern Mr Helas' intention not to continue her employment, and he said nothing to indicate that he had any confidence the relationship could continue successfully.

[37] Accordingly I do not accept that Ms Holt's enquiry about payment, and apparent acceptance of the response, was an indication of her agreement to leave. It was no more than an acknowledgement of the message Mr Helas had given her.

[38] For these reasons I conclude that the termination of employment was at Mr Helas' initiative and that Ms Holt was dismissed.

### **Justification for dismissal**

[39] Since the procedure Mr Helas was aware should be followed was not followed, and in other respects Ms Holt's failings to date were not properly put to her, the dismissal cannot be justified.

[40] Accordingly I find Ms Holt has a personal grievance on the ground of unjustified dismissal.

### **Remedies**

[41] Ms Holt seeks reimbursement of remuneration lost as a result of her grievance, in the sum of \$7,230.77.

[42] In addressing that matter I am obliged to consider whether Ms Holt's actions contributed to the circumstances of her grievance.

[43] Ms Holt was over optimistic about her ability to pick up Excel in particular, and should take some responsibility for her misappreciation of the position, although I do not believe she was over optimistic to the point of misrepresentation. That is because I have found her optimism was genuine, and further: she was not given a more detailed job description when she asked for one; the draft advertisement shown to her prior to her employment was not specific enough about the level of skill

required in the use of desk top office software; and she was told that the brief for the position was 'open'.

[44] At the same time just as there were shortcomings in the way the position was put to Ms Holt, to Ms Holt the important aspects were the marine connection and her understanding of the 'marketing' element. During her second interview Mr Helas gave her enough information to indicate the office administration associated with the position would be more complex than she was used to, but this aspect was not her focus and the implications were lost on her.

[45] Finally, after the investigation meeting Ms Holt filed the results of a 'candidate test' which she undertook on 30 July 2007. Some of her scores, notably in respect of 'analysis' and 'customising Excel', were low. They tended to support comments Mr Helas and his staff had made.

[46] Overall I accept Ms Holt was not suitable for the position, and it is unlikely that she would have been able to achieve the level of skill required within a reasonable period. Her employment could not have continued, and one month's notice of its termination would have been appropriate. ZMGL is therefore ordered to reimburse Ms Holt in a sum equivalent to one month's pay, less the two extra days for which she was paid.

[47] There was evidence that Ms Holt was very distressed by the termination of her employment. Again, some of this arose because her optimism had blinded her to certain features of the position which were brought to her attention and I take that into account. It is also relevant that the position was not, in any event, suitable for her.

[48] ZMGL is therefore ordered to compensate Ms Holt for the injury to her feelings in the sum of \$4,000.

### **Claim for penalty**

[49] Section 133 of the Employment Relations Act gives the Authority jurisdiction to deal with actions for the recovery of penalties for any breach of an employment

agreement, or for a breach of a provision of the Act for which a penalty is provided in the particular provision.

[50] A penalty was sought in respect of a breach of s 65(2)(ii) of the Act. Section 65(2) lists the matters which must be included in an individual employment agreement, with a description of the work to be performed by the employee required under s 65(2)(ii). However s 65 has no provision for a penalty in respect of any breach of the section. Such penalties were formerly available through s 64(2) and under s 64(3), both of which have been repealed.

[51] Accordingly, whether or not there has been a breach of s 65(2)(ii), the absence of any provision in the section for a penalty means this claim cannot succeed.

### **Summary of orders**

[52] ZMGL is ordered to pay to Ms Holt:

- (a) one month's pay, less two days, as reimbursement of remuneration lost as a result of her grievance; and
- (b) \$4,000 as compensation for injury to feelings.

### **Costs**

[53] Costs are reserved.

[54] The parties are invited to agree on the matter. If either seeks a determination of the Authority there shall be 28 days from the date of this determination in which to file and serve a memorandum on the matter. If the other party wishes to reply there shall be 7 days from the receipt of the memorandum in which to file and serve the reply.

R A Monaghan

Member of the Employment Relations Authority

