

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 353/07  
5088683

BETWEEN                      LYNETTE HUNT  
   Applicant  
  
AND                              UNIQUELY KIWI LTD  
   Respondent

Member of Authority:      Janet Scott  
  
Representatives:            Daniel Erikson, for Applicant  
   Kathy Hughes, for Respondent  
  
Investigation Meeting:     8 October 2007 at Auckland  
  
Submissions received:     8 October & 6 November 2007 for Applicant  
   23 October 2007 for Respondent  
  
Determination:              13 November 2007

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] The applicant claims she was unjustifiably dismissed from her employment with the respondent. To remedy her alleged grievance she seeks lost remuneration, compensation under s. 123(1) (c) (i) of the Act, a penalty for the respondent's failure to provide her with an employment agreement and costs in the matter.

[2] The respondent denies the claims and says the applicant abandoned her employment.

**Background**

[3] The respondent owns and operates a real estate franchise in Manukau City.

[4] The respondent's principals Kevin Arthur and Heather Obern met Ms Hunt as a result of their role in selling properties for her.

[5] It was Mr Arthur's evidence that he developed a very good relationship with Ms Hunt and she discussed with him the fact that she would like to become a real estate sales person.

[6] It is his evidence that when he and his business partner Heather Obern took up a real estate franchise they discussed Ms Hunt's intention of becoming a sales person with her and they offered her a position as a sales person once she became certified. During that discussion Ms Hunt said she would not only like to work in real estate but would like to work for Mr Arthur as well. As a result he contacted the Open Polytechnic to obtain class timetables for the courses Ms Hunt need to complete successfully to obtain her sales licence.

[7] It was also Mr Arthur's evidence that he discussed Ms Hunt's interest in becoming a sales person with one of the company sales associates Jacqui Kendall. He suggested to her that she might like to meet Ms Hunt as he thought they would get on well. Ms Kendall arranged an appointment with Ms Hunt for Thursday 11 January 2007 and it was Ms Kendall's evidence that she visited Ms Hunt at her home and spent over an hour with her talking over a cup of coffee.

[8] It was her evidence that they talked about real estate, the highs and the lows and when Ms Hunt was going to do her licence. Ms Kendall's evidence was that Ms Hunt said she would look at working towards her licence in about May so she had time to finish renovations that she was carrying on at her own home.

[9] Ms Hunt accepts that she had coffee with Ms Kendall on 11 January and she accepts they did discuss the highs and lows of real estate. However, she denies emphatically having discussed the industry in light of any intention on her part to obtain a licence and become a sales person in the industry and says she never had any such intention.

[10] Mr Arthur said it was against this background (Ms Hunt's stated interest in becoming involved in the real estate industry) that he rang her in early March and asked if she would like to work in their real estate office before becoming a real estate sales person. It was his evidence that he advised Ms Hunt that this would give her

some experience of working in a real estate office while she took her exams and before she took up a sales role.

[11] However, it was Ms Hunt's evidence that Mr Arthur rang her on 25 February 2007 (not 4 March) and asked if she would be interested in working for Uniquely Kiwi Ltd as a part time receptionist/administrator, working three days a week. Mr Arthur wanted her to start the following day.

[12] Ms Hunt denies being approached on the basis that this would give her an opportunity to familiarise herself with the industry prior to her obtaining her sales persons qualifications, rather it was her evidence that Mr Arthur rang her and asked her if she wanted the part time position as an office administrator because he knew she was experienced in office procedures.

[13] The position of receptionist/administrator had become vacant as a result of the departure of the company's then accountant, Erin Brinkler. This had seen the then receptionist and office administrator, Vanessa Singh, take on the accounts position. This left the receptionist position available and Mr Arthur rang Ms Hunt to see if she was interested in this position.

[14] As I understand the evidence Ms Hunt commenced employment on 6 March 2007.

[15] It is not in dispute that within a week or two it became apparent that Ms Singh was not happy in the accounts job and it is also the case that Ms Hunt and Vanessa Singh had discussed the situation and agreed between them that they would be happy to swap positions. It was reported that at this time Ms Hunt had said that accounts was her forte.

[16] Following this agreement between the two women, Ms Singh approached Mr Arthur and Ms Obern and explained she was not enjoying the accounts role and explained that Ms Hunt would be happy to do accounts. Mr Arthur and Ms Obern discussed this with Ms Hunt and discovered that she was not comfortable doing the receptionist and administration work and would rather do the accounts as she had done this type of work before.

[17] As a result Ms Singh moved back to the receptionist role and Ms Hunt moved into the accounts role. This was still intended to be a temporary position, as Mr

Arthur and Ms Obern still believed that Ms Hunt intended to obtain her certificate to practice as a sales person.

[18] When this change took place Ms Hunt asked for a pay rise and Mr Arthur and Ms Obern agreed to this. She then asked if the pay raise could be split between herself and Vanessa Singh and again the company principals agreed to this and the pay for both workers was lifted to \$17 per hour.

[19] Within a short time it appeared to Mr Arthur that Ms Hunt was having difficulty with the accounts role. This surprised him as she had previously told him she was experienced in accounts work. In conversation both with him and with Heather Obern Ms Hunt said, *“If Erin comes back she can have her job back”*. Ms Hunt repeated this statement several times over the course of her employment.

[20] Because Ms Hunt was having difficulty with accounts Mr Arthur suggested that Erin Brinkler (the former accountant) return to the office to provide Ms Hunt with some accounts training. It was his evidence that Ms Hunt agreed to this but again said *“If Erin wants her job back she can have it”*.

[21] As a result Erin Brinkler was contracted back to the company on a contract for services to do an audit of the accounts and to provide accounts training for Ms Hunt. This included training on MYOB as well as in the specialist real estate software.

[22] It is Ms Hunt’s evidence that she had no difficulty with the MOYB software but that she was experiencing difficulty with the specialist real estate software used by the company. Ms Hunt denies repeatedly telling Mr Arthur and Ms Obern that if Erin came back she could have her job back. It is Ms Hunt’s evidence that on one occasion, that is when the topic of Erin coming back to provide her with training was being discussed, she said to both Kevin Arthur and Heather Obern that as this training would be costly (effectively two wages) she suggested that he speak to Erin Brinkler about whether she would like to return and take up her job again before spending this money. She also explained to Vanessa Singh over a coffee that she had put this proposition to both Kevin Arthur and Heather Obern.

[23] It was Ms Hunt’s evidence that she was told by the respondent’s principals that Erin Brinkler did not want to return to work for Uniquely Kiwi Ltd and thereafter Ms Hunt felt that her position was secure.

[24] It was Ms Brinkler's evidence that she recommenced working for Uniquely Kiwi Ltd on 5 April 2007 as a consultant. It was her evidence that essentially she came back on her own terms. The arrangement she had with Mr Arthur was to check if the accounts were in order for the period since she had left Uniquely Kiwi Ltd and to train Ms Hunt in accounts and the real estate software Office Sales Partner. She agreed to come back on her own terms and working hours that suited her.

[25] For the first part of her employment period back with Uniquely Kiwi Ltd she undertook a mini audit and in that process she showed Ms Hunt what she was doing and why and fixed problems that were showing up in the accounts.

[26] It was Ms Brinkler's evidence that while she was carrying out that work Ms Hunt advised her on numerous occasions that she could have her old job back and she would not stand in her way. Ms Hunt advised her she would be happy for her (Ms Brinkler) to tell her what to do and she would be the run-around. It was Ms Brinkler's evidence that she took from Ms Hunt's statements the inference that Ms Hunt did not want the responsibility of the accounts role and would be happy to be the assistant. She gave the impression she was struggling in the role.

[27] Throughout the period that Ms Brinkler was undertaking the mini audit, she sat at the accounts desk every day and Ms Hunt would sit beside her if she was working on the same day, and she would watch what Ms Brinkler was doing.

[28] On 26 April 2007 Ms Hunt left her employment with Uniquely Kiwi Ltd. The parties have very different perceptions of the events that occurred that day.

[29] It is Mr Arthur's evidence that on the morning of 26 April Ms Brinkler arrived at work at 8.30am and took up her usual position at the accounts desk. Mr Arthur said he was already at work and he put his head in the office and asked Erin how everything was going. Ms Brinkler commented to him that she felt that Ms Hunt didn't want to do the accounts position and she (Ms Brinkler) offered to stay for a bit longer to help the business out.

[30] It was Mr Arthur's evidence that he was not surprised by this comment as it reiterated the statements made by Ms Hunt to himself and Ms Obern on several occasions. He wondered if because of their friendship Ms Hunt was finding it difficult to tell Mr Arthur that she was unhappy with the work.

[31] Ms Hunt arrived at work at 9am and came into the accounts office where Mr Arthur and Ms Brinkler were still talking. Everyone said good morning. Ms Hunt then said, "*This looks serious*" and Mr Arthur replied, "*Lynn, Erin is staying*". Ms Hunt response was to say, "*Right then I will be off I will just fill out my timesheet and you can pay me next week*". Ms Hunt then filled out her timesheet, patted Ms Brinkler on the shoulder and said, "*No hard feelings love*" and walked out of the door of the office.

[32] Mr Arthur's evidence was that he was stunned by this and he said to Ms Hunt on her way out "*Drop in any time for a coffee and there are any little jobs come up can we give you a ring?*" Ms Hunt replied, "*Yes*" and as she walked out of the office she said to Ms Brinkler in a jovial tone that she would be ringing her up to hassle her.

[33] Mr Arthur re-emphasised that this conversation took place very quickly and he was stunned by Ms Hunt's quick exit. He did have the feeling that Ms Hunt did not like her job but he had not expected her to just walk out.

[34] It was Mr Arthur's evidence that after Ms Hunt had left he went down to reception, this is approximately ten minutes later, and was surprised to find that Ms Hunt had gone from the reception area as well as he thought she and Ms Singh would be talking. He asked where Lynn was and Ms Singh replied "*She walked out saying I will see you later*". Ms Singh expressed the opinion that she thought Ms Hunt had gone home for something. Mr Arthur told her that Ms Hunt had left her employment.

[35] Mr Arthur told the Authority that he had considered telephoning Ms Hunt after this, however in the event he did not do so.

[36] Ms Brinkler's evidence as to the words spoken between Mr Arthur, herself and Ms Hunt on the morning of 26 April was that Mr Arthur told Ms Hunt that she had agreed to stay. He did not say that she (Erin) would be taking Ms Hunt's job. Ms Hunt then said that would be great and that she had her husband's books to do. Ms Hunt completed her time sheet that was in the accounts office and they briefly went through a couple of outstanding issues and Ms Brinkler thanked her for her work. Ms Hunt said she would ring her up and hassle her over the phone. She said this in a friendly manner.

[37] It was both Mr Arthur and Ms Brinkler's view that Ms Hunt simply made a decision to leave her employment and for all intents and purposes she left on good terms and was happy to be leaving.

[38] Ms Hunt has a different perspective on these matters. She told the Authority she arrived at work on 26 April to find Mr Arthur and Ms Brinkler in the accounts office. She asked if everything was okay to which Mr Arthur replied, "*Well actually, Erin is taking your position*". It was Ms Hunt's evidence that this was a complete surprise to her and she was quite stunned. She said all she could say was "*Oh*" and then Ms Brinkler said "*No hard feelings*". Ms Hunt said that there was a period of silence and she decided there was no point in hanging around if she had been dismissed and she told them she would go home and do her husband's books. She said she went out into the reception area and told Ms Singh that Ms Brinkler was taking her job. Ms Singh said, "*I know*". Ms Hunt said she was surprised and upset that a decision to dismiss her had been discussed with another employee prior to her being told. She completed her timesheet for that week, showed it to Ms Brinkler and she made a correction.

[39] It was Ms Hunt's evidence that she then left the office, no one made an effort to explain to her what had happened or why she was being replaced or dismissed. She passed Mr Arthur in the hall as she was getting her timesheet from reception. He did not say anything to her.

[40] After arriving home she thought about what had happened and became angry and upset. She sent an email to Ms Obern that afternoon in the following terms.

*Hi Heather.*

*I am assuming you are now aware that Erin has taken my position in accounts with Remax.*

*Upon my arrival at home I have been going over of how this was approached and presented to me this morning on my arrival at work by Kevin and Erin. Not very nice and to be honest right out of the blue.*

*Erin last week was approached by Kevin to take this position. She declined but offered to train me in the accounts procedures within Remax. My position was secure.*

*This morning at 9am I walked into my office and was informed by Kevin that Erin was now taking this position, and quite frankly in front of Erin. No quiet talk privately with me, very embarrassing moment I can assure you.*

*I know I told Kevin I do not stand on protocol but you will be well aware this is not the way to treat staff or dismiss staff. I know I went home but can you blame me.*

*I suggest you have a meeting with Kevin as I am notifying Remax as of now this is wrongful dismissal and I suggest that an exit package be presented to me by your firm within the next 24 hours or I am registering this to the Employment Court.*

*I am quietly upset.*

*Yours faithfully  
Lynn Hunt*

[41] Ms Hunt subsequently forwarded this letter to Kevin Arthur at Remax.

[42] It was the evidence of Kevin Arthur and Heather Obern that this email was not received by either of them. The email address used by Ms Hunt was an old address and had been changed prior to her joining the company and was never in use when she worked for them. Given that Ms Hunt had handled correspondence while working with them, using the correct email address, it was a surprise to the company that she would have used this email address.

[43] As a result of their failure to receive the email that had been sent by Ms Hunt, the company had no idea that she was claiming that she had been unjustifiably dismissed and the first they knew of Ms Hunt's claim was when they received the Statement of Problem that was filed in the Employment Relations Authority.

[44] It is not disputed between the parties that Ms Hunt's former legal adviser had written to the company returning her keys and asking for a return of her property file (relating to a proposed sale of Ms Hunt's current home). After receipt of that letter from John Gray Mr Arthur had telephoned the Hunt residence and spoken to Mrs Hunt Snr (Ms Hunt's mother in law). Unfortunately he was advised that Ms Hunt had gone out. She did not return his call. A week or two later Mr Arthur and Heather Obern went to Ms Hunt's house to return the file. Ms Hunt was working in the garden of that property with another person. There was exchange of small talk between them and Ms Obern and Mr Arthur returned her property file to her at that time. Ms Hunt said nothing about her claim for unjustified dismissal and there was no discussion about it.

## Issues to be Determined

- Was Ms Hunt dismissed from her employment with the respondent?
- If she was, what remedies are available to her?

## Legal Considerations

[45] The burden rests with Ms Hunt to demonstrate – on the balance of probabilities - that she was dismissed from her employment.

[46] If Ms Hunt can demonstrate her departure came about as a result of a dismissal then the respondent's actions must meet the test set out in s.103A of the Act.

*For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[47] In applying this section I must make an objective assessment of the employer's actions and weigh those actions against those of a *fair and reasonable employer ...in all the circumstances ...at the time....*

## Discussion and Findings

[48] I was presented with significantly different stories by and for the parties to this matter and so credibility findings are called for.

[49] Contrary to the bad press given to the real estate industry and real estate agents Mr Arthur, Ms Obern and their staff impressed me as very genuine and fair-minded people. They were accommodating of the difficulties their employee Vanessa experienced in the accounts role and readily agreed to the plan worked out and presented to them by Vanessa and Lynn Hunt to swap jobs. They readily agreed to the proposal that there be a wage increase for both workers and when Ms Hunt was experiencing difficulty in the accounts role they sought Ms Brinkler's assistance to provide training and paid for Ms Brinkler to return to Remax to provide Ms Hunt with that training. They did all this I find when Ms Hunt's commitment to the business and industry was in the air as Ms Hunt had by then indicated she would be more interested

in a role in any rental business the respondent's might establish. The respondent's general behaviours conformed to the good faith obligations imposed by law on parties to employment relationships and were supportive of successful employment relationships.

[50] I must find too that the weight of the evidence supported the respondent.

[51] As a result where there the evidence is in dispute it is the evidence of the respondent's witnesses that I prefer.

### **Findings**

[52] I find that Ms Hunt did speak affirmatively to Mr Arthur, Ms Obern and Ms Kendall about her intention to take her real estate exams and to become a sales person in the industry.

[53] Given her stated intentions Mr Arthur thought of Ms Hunt when the receptionist's vacancy came up and he telephoned Ms Hunt to inquire whether she might be interested in the role. He had in mind it would allow Ms Hunt to familiarise herself with the business and industry prior to her taking up a sales role.

[54] When Ms Singh decided she was unhappy in the accounts role she and Ms Hunt agreed to swap roles and Mr Arthur and Ms Obern agreed to this. At Ms Hunt's suggestion Mr Arthur agreed to give both women a pay rise and their rates moved to \$17 per hour.

[55] I find that soon after taking up the accounts role Ms Hunt was experiencing difficulties with using the software involved particularly the real estate software used by the company. In conversation with Mr Arthur and Ms Obern I find she told them that if Erin Brinkler came back she could have her job back.

[56] Mr Arthur suggested to Ms Hunt that the company would re engage Ms Brinkler to provide her with training in her accounts role. Ms Hunt agreed to this and reiterated her statements that Erin could have her job back if she wanted it.

[57] After Ms Brinkler commenced work Ms Hunt continued to repeat her statement that Ms Brinkler could return to her role. She also told Ms Brinkler this and suggested she could be Ms Brinkler's assistant.

[58] I find that on 26 April Ms Brinkler raised with Mr Arthur her belief that Ms Hunt did not want to do the accounts work. She offered to stay on for a while to help out. At this point Ms Hunt arrived and Mr Arthur told her that Erin would be staying on.

[59] I find that all this happened in a flash. Ms Brinkler had said she would stay on and Mr Arthur simply communicated this to Ms Hunt on her arrival. Mr Arthur had not even had a chance to conclude arrangements with Ms Brinkler, let alone time to reflect the future of Ms Hunt's employment when Ms Hunt announced – given the communication that Ms Brinkler was staying – that she would be off and that she would fill out her time sheet and go home and do her husband's books.

[60] Ms Hunt filled out her time sheet that I find was held in the accounts office. She told Mr Hunt and Ms Brinkler there were no hard feelings and Mr Hunt (believing that Ms Hunt was voluntarily leaving her employment) said he would contact her if any work was available that might suit her. Ms Hunt expressed concurrence with this idea.

[61] Ms Hunt then left the office and I find there was no statement by Ms Singh that she had prior knowledge that Ms Brinkler was to take over Ms Hunt's job.

[62] I find Ms Hunt's demeanour throughout was positive and breezy. There was no hint of rancour or unhappiness on her part.

[63] That she was unhappy is however clear because shortly after returning home she drafted an email to the respondent's where it was made clear she thought she had been dismissed and she demanded an exit package. I find that email was not received by the respondents and the first they knew that Ms Hunt had a problem was when they received the Statement of Problem lodged with the Authority.

## **Conclusion**

[64] I find both parties were shocked by the rapidity of events that day.

[65] It is clear that Ms Hunt took Mr Arthur's statement that Erin was staying on as a statement that her employment was ended. She did not, however, seek any clarification regarding what this meant for her own employment.

[66] Mr Arthur and Ms Brinkler took Ms Hunt's words "Right then I'll be off" as a statement she was voluntarily leaving her employment and viewed in the context of her repeated statements that Ms Brinkler could have her job back if she wanted it and her demeanour at the time, it is understandable that Mr Arthur and Ms Brinkler interpreted her words and actions that way.

[67] In hindsight Ms Hunt's words to Ms Brinkler "No hard feelings" could have probably have signalled to Mr Arthur that Ms Hunt did consider the fact that Ms Brinkler was staying on meant she was being dismissed which would have called for some clarification of the position on his part. On the other hand it could have meant Ms Hunt hoped there would be no hard feelings on the respondent's part about the suddenness of her departure.

[68] Good faith obligations cut both ways, I find, and while it would have been appropriate for Mr Arthur to telephone Ms Hunt following her departure to clarify matters with her it is also the case that Ms Hunt herself sought no clarification of her position. Instead she walked out and before the day was out she presented an ultimatum to the respondent – an exit package within 24 hours or this goes to the Court.

[69] Each case must be decided on its own unique facts and after weighing all the facts in this case I conclude that Ms Hunt has not shown – on the balance of probabilities - that she was dismissed from her employment.

## **Determination**

- Ms Hunt was not dismissed from her employment and her claim is declined.
- Further, given the overall facts of this case I am not inclined to award a penalty against the respondent for failure to provide an employment agreement. The respondent is reminded to be mindful of this issue in future regardless of the expected duration of the employment.

## **Costs**

[70] The parties are to attempt to resolve the issue of costs between them. If they are unable to do so then they are directed to file and serve submissions with the Authority to allow this issue to be determined.

Janet Scott  
Member of the Employment Relations Authority