

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA161/08
5116726

BETWEEN KATHRYN EMILY LANUEL
 Applicant

AND P L DESIGN LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Bruce Boivin, Counsel for Applicant
 Peter Lewis, Advocate for Respondent

Investigation Meeting: 22 July 2008 at Queenstown

Submissions received: 28 July 2008 from Applicant
 7 August 2008 from Respondent

Determination: 24 October 2008

DETERMINATION OF THE AUTHORITY

[1] Mrs Lanuel says she was unjustifiably dismissed from her position as Office Manager for the respondent. She said the arrangement was that she would start on a salary of \$37,000 which would increase to \$40,000 after a two month trial period. Mrs Lanuel claims that after 5½ weeks the respondent's General Manager, Gaye Bartlett, told her she was to receive her salary increase. The applicant then processed the documents which increased her salary to \$40,000.

[2] The respondent's view is that the increase was not agreed to nor approved by Mrs Bartlett nor by Mr Lewis, the Managing Director and once aware of the situation, convened a meeting to discuss the matter. It says that it advised Mrs Lanuel in advance of the meeting and of what was to be addressed, although it accepts there was some confusion in the company over providing the letter to Mrs Lanuel prior to the meeting.

[3] The company says the situation was serious and the applicant's actions justified dismissal.

[4] Mrs Lanuel claims \$5,781.42 gross in lost remuneration, \$1,554.21 in unpaid holiday pay and \$10,000 compensation for hurt and humiliation.

[5] The respondent says it has no obligations in terms of holiday pay and in fact claims it has overpaid the applicant by a sum of \$1,147.92. It seeks to recover this sum and further, says it regarded the applicant's actions as amounting to theft and opposes the remedies Mrs Lanuel seeks.

The issues

[6] To resolve the matter, the Authority needs to make findings on the following issues:

- What were the terms of the offer to the applicant;
- Were any variations to those terms approved by the respondent;
- Was the procedure adopted by the respondent on discovering irregularities and mistakes appropriate;
- Was the dismissal of the applicant predetermined and unjustified;
- Did the applicant contribute to the circumstances which gave rise to her dismissal; and
- What, if any, remedies are due to the applicant?

Events

[7] There is little dispute over the hiring of the applicant, who responded to an advertisement in the newspaper, was the preferred candidate and was offered a starting salary of \$37,000. A primary issue is whether or not Mrs Lanuel was told her salary would increase to \$40,000 after a two month trial. Also, the applicant says the agreed hours were 8.00am to 4.30pm with a 1 hour break for lunch.

[8] Mr Lewis and Mrs Bartlett say the hours were 8.00am to 5.00pm with an hour for lunch and both deny raising the increase of salary to \$40,000 after a two month trial period in the course of discussions with the applicant prior to her being hired. They say they told Mrs Lanuel that after a trial they would review her salary. Further,

they say all the office staff at that time began on \$37,000 and this was reviewed after staff had become familiar with their assigned tasks.

[9] Mrs Lanuel says she needed to pick up her daughter from childcare at 5.00pm each day and that it took around 10-15 minutes to drive from the workplace into Queenstown. Further, she says she needed the hour at lunchtime for childcare arrangements.

[10] Mrs Bartlett says the 8.30am to 4.30pm hours were not formally agreed and were, from the day the applicant started, a *fait accompli*. She says that the company finally accepted the practice and that after the new year Mrs Lanuel reduced her lunch hour break in an attempt to compensate. The company says this matter was to be addressed with Mrs Lanuel in the new year. However, other events overtook this intention.

[11] Mrs Lanuel says she received only three days training from Rachael Morris prior to the latter's departure and that no performance issues were ever raised with her until a meeting in November 2007 when she says Mr Lewis was upset about two or three incorrect payments she had made and was critical of her tendency to be abrupt with people on the phone and with Mrs Bartlett. The result was that Mrs Bartlett took over direct debit payments and double-checked all invoices entered into Quickbooks, the company computerised accounting system.

[12] The respondent's evidence is that Mrs Bartlett in particular had informally brought several matters to Mrs Lanuel attention. It also says that training in the accounting system was undertaken by Lucy, a specialist in the system, who remained available to the applicant if needed. Further, the system manual was in the office at all times if reference to it was required.

[13] Mrs Lanuel's evidence is that she was responsible for the Ace Payroll system. The respondent agrees. The respondent strongly disagrees that it authorised the applicant to increase her salary to \$40,000.

[14] On this key issue Mrs Bartlett told the Authority Mrs Lanuel raised the salary increase with her in October 2007. She says she told Mrs Lanuel there would be no increase as she was now working shortened hours and further, that any increase would need to be authorised by Mr Lewis. Mrs Bartlett was adamant that at no time did she approve the increase.

[15] In reply to a question from Mr Boivin, she said *I had no idea she was up to \$40,000*. When counsel put to her that she could have accessed the applicant's folder in the payroll system to determine the applicant's salary at any time, Mrs Bartlett replied *We would only go to a folder if there was a query from some employee. We would have queried it if we had seen it, but we did not see it*.

[16] Mrs Lanuel says Mrs Bartlett raised the salary increase with her

after 5½ weeks ...Gaye happily told me that I was to receive my salary increase early that I was doing a good job and was no longer in training. When I entered my new salary amount I turned to Gaye to ask if it was okay and to show her on the screen the changes I had made. She said yes that's alright and continued with her work.

[17] The company says it discovered the increase after employing Ms Kirsteen Mannington in the role of Office and Factory Manager. This was a position which would oversee that held by Mrs Lanuel. Ms Mannington says that in the course of a site visit with Mrs Bartlett on 20 February 2008 (the day she started work for the respondent) the latter told her that the company needed to address Mrs Lanuel's reducing her hours but remaining on a salary based on a full 40 hour week. The witness said she asked Mrs Bartlett what salary Mrs Lanuel was on and was told \$37,000, which was the salary on which Ms Mannington began her employment with the company. Further, Ms Mannington says

this highlights the fact that nor (sic) Peter or Gaye were aware of Kathryn's salary being \$40,000 as my starting offer was confirmed at \$37,000. My performance was to be reviewed in two months from the commencement of work, as per the company policy.

[18] The following day Mrs Lanuel was taking Ms Mannington through the operation of Ace Payroll and the witness noted the entry of \$40,000 as the applicant's salary rate. After Mrs Lanuel had left work for the day, Ms Mannington brought the matter to Mrs Bartlett's attention. A printout confirmed that the change occurred 22 days after the applicant began her employment.

[19] Ms Mannington's evidence confirms the decision to advise Mrs Lanuel of a meeting to be held at 11.00am the following morning by way of a letter to be given to the applicant upon her arrival at work at 8.00am. It also confirms that upon Mrs Lanuel's arrival at work Mrs Bartlett informed her of her right to bring a support person to the meeting. There is evidence of a brief conversation between Mrs Bartlett

and Mrs Lanuel of which Ms Mannington says *I remember that Kathryn's first response to Gaye was*

“but that's how Rachel set it up”. This was not correct as Rachel Morris ceased employment with PL Design on the 15th August 2007 – one month earlier to the date of the change of salary. Gaye and I were both confused by her response. It was further into the conversation at that time when Kathryn said “but you were sitting next to me when I changed it”.

[20] It is common ground that following this discussion Mrs Lanuel left the office and returned at 11.00am that morning accompanied by her husband Shai as her support person for a meeting with Mr Lewis and Mrs Bartlett.

[21] For reasons which will become evident shortly, I do not intend to cover the meeting in any detail.

The investigation meeting

[22] At the investigation meeting the Authority heard evidence from Mrs Lanuel and from her husband Shai. From the company, I heard evidence from Mr Lewis, Mrs Bartlett and Ms Mannington. I found all to be open and cooperative when giving their evidence and had no reason to doubt the honesty of any witnesses or their belief in the truth of what they were telling me.

Discussion and analysis

[23] On the matter of the alleged authorisation of the salary increase, I favour the evidence of Ms Mannington in particular. I am reinforced in that view as it seemed inherently improbable that the company, dissatisfied as it was over the abbreviated hours being worked by Mrs Lanuel from the outset, and which was intending to renegotiate her salary to reflect her actual working hours, would have agreed to an increase.

[24] I have no idea how the applicant came to the view that she had been granted a raise in her salary, but am surprised that an administrator of her experience would not have had the adjustments to Ace Payroll made by someone other than herself if only to ensure the transparency of the exercise. Had she done so, the situation would likely never have arisen.

[25] In respect of the hours of work issue, the respondent was dilatory in addressing its concern, and in fact did not address it before it became aware of the salary increase on 21 February 2008. Events may have developed differently had the matter been addressed in the first week or two of Mrs Lanuel's employment rather than being allowed to drift on.

[26] Turning to the meeting at which the dismissal occurred and the immediate preamble to it, I am satisfied that while the company, through Mrs Bartlett, attempted to follow appropriate procedures, Mr Lewis had made up his mind that Mrs Lanuel had to go. Again, it is Ms Mannington's evidence which is of material assistance. She told me *This was then brought to Peter's attention who was equally shocked. He replied "I've had enough. That's it. She's out of here."*

[27] Mr Lewis accepted he had said this, or words to that effect. This clearly establishes a pre-determined mindset by the decision maker prior to the investigation meeting. There were other flaws in the process, such as the short notice to Mrs Lanuel and the difficulty of getting representation for the meeting. However, these are peccadilloes compared to the grave fault of pre-determining an outcome before allowing Mrs Lanuel to be heard. To his credit, Mr Lewis fronted to and accepted responsibility for this, but pointed out he was not prepared to have the applicant in a position where she could access the company's financial details and bank accounts.

The determination

[28] Returning to the issues set out above in this determination, I find:

- The offer of the position to Mrs Lanuel was on the terms that the role required her to be available to the employer from 8.00am until 5.00pm on each week day and with an hour for lunch. The agreed initial salary for the position was \$37,000 with a review after two months.
- I find that the respondent, although unhappy with the applicant working shortened hours, remained silent on the matter and to that extent tacitly approved, at least in the interim, the behaviour of the applicant in respect to her hours of work.
- I find on the balance of probabilities that Mrs Lanuel did not receive an increase in her salary and was not entitled to raise it to \$40,000. While

I am at a loss to understand how this came about, I have no reason to believe it was by reason of dishonesty on the part of the applicant.

- As indicated above, the procedure adopted by the respondent on discovering the irregularities in relation to the increase of salary were seriously inadequate.
- I find the applicant was unjustifiably dismissed because the respondent, in breach of natural justice, had decided to dismiss before providing Mrs Lanuel the opportunity to be heard.
- I find that the applicant contributed to the circumstances giving rise to her dismissal by increasing her salary without authorisation and by not seeking formal approval for her reduction in working hours.
- I find Mrs Lanuel has a personal grievance and now turn to the matter of remedies.

Remedies

Lost Remuneration

[29] The applicant detailed her financial losses resulting from her termination and says she suffered the loss of six weeks salary inclusive of 8% holiday pay. This she calculates to be \$3,914.70 gross. The applicant has detailed her claim for \$1,866.72 being the difference between a new part-time position secured and the position she held with the respondent. Excluding her claim for holiday pay of \$1,537.27, Mrs Lanuel's claim for loss of remuneration amounts to \$5,781.42.

[30] I find that these amounts are due to the applicant.

Compensation

[31] The applicant sought compensation in the sum of \$10,000 for the stress and humiliation suffered due to her dismissal.

[32] I have considered this matter with some care and with regard for the length of the employment relationship between the parties.

[33] I think it just in all the circumstances to award the applicant the sum of \$5,000 under s.123(1)(c)(i) of the Act.

Overpayment of holiday pay and sick leave

[34] On the evidence before the Authority, there was no written employment agreement between the parties. While the Authority declines to consider a penalty in this particular case, the lack of an agreement entitling the respondent to recover overpayment under s.6 Wages Protection Act 1983 would normally prevent recovery.

[35] However, in this case the applicant was the payroll officer of the respondent and an aspect of the employment problem before the Authority is the issue of Mrs Lanuel's performance in a payroll setting. The applicant paid holiday pay and special leave entitlements to her account prior to her statutory entitlements to such payments becoming operative. This matter came to light only after the dismissal.

[36] In these circumstances, it would be unjust to allow the applicant to retain these payments and I order Mrs Lanuel to repay the respondent the sum of \$1,147.92 within 28 days of the date of issue of this determination.

Contribution

[37] As required under s.124 of the Act, I have considered the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance and find that those actions require a reduction in the remedies that would otherwise have been awarded.

[38] I find the contribution of the applicant in this matter to have been significant and accordingly reduce the remedies outlined above by 50%.

Summary of orders

[39] The respondent is to pay the applicant

- the sum of \$2,890.71 gross under s.123(1)(b) of the Act;
- the sum of \$2,500 without deduction for hurt and humiliation under s.123(1)(c)(i) of the Act.

[40] I order the applicant to pay the respondent the sum of \$1,147.92 as repayment of overpaid holiday and special leave.

Costs

[41] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority