

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 143
5438444

BETWEEN CHARLOTTE MCILROY
Applicant
AND CLEMENCE DRILLING
CONTRACTORS LIMITED
Respondent

Member of Authority: Christine Hickey
Representatives: Robert Thompson, advocate for Applicant
Geoff Brodie, counsel for Respondent
Investigation Meeting: 29 August 2014
Determination: 12 September 2014

DETERMINATION OF THE AUTHORITY

- A. Charlotte McIlroy was unjustifiably dismissed.**
- B. Clemence Drilling Contractors Limited must pay Charlotte McIlroy \$7,974.33 gross in lost remuneration plus the employer contribution to Kiwisaver that would have been made over the three months after dismissal.**
- C. Clemence Drilling Contractors Limited must pay Charlotte McIlroy \$6,000 in compensation.**

Employment relationship problem

[1] Ms McIlroy worked at Clemence Drilling Contractors Ltd (Clemence) as an office junior from 20 February 2013 until 9 August 2013. She says she was given two weeks' notice on 25 July 2013 and was unjustifiably dismissed.

[2] By way of remedy Ms McIlroy seeks \$7,000 compensation for humiliation, loss of dignity and injury to her feelings and loss of income from the date of dismissal until the date of the investigation meeting including her employer's Kiwisaver contributions on the lost income.

[3] Clemence says that it was a condition of Ms McIlroy's employment that she needed to obtain her restricted drivers licence within a reasonable time from the beginning of her employment. Because she had not done that by 25 July 2013 Mr David Clemence, the director of Clemence, says that he told her that if she did not get her licence she would have to finish working there. However, Mr Clemence denies that he dismissed Ms McIlroy on 25 July 2013.

[4] In that alternative Clemence submits that if Ms McIlroy was dismissed and that the process required under the Employment Relations Act was not strictly followed, Ms McIlroy should not be awarded the remedies she seeks because that would penalise Clemence for giving Ms McIlroy a chance to get off the unemployment benefit and into her first paid employment.

[5] At the investigation meeting each of the witnesses swore or affirmed their written evidence and answered questions. I heard from Ms McIlroy, Desmond McIlroy, her father, Mr Clemence and Lynette Price, employment coordinator for Work and Income in Rangiora.

[6] As permitted by s 174 of the Act this determination has not recorded all the evidence and submissions received but findings of fact and law are stated and conclusions on the issues for determination are expressed.

Issues

[7] I need to determine whether Ms McIlroy was unjustifiably dismissed. As a part of that enquiry I will consider whether she resigned or not, whether Clemence had a substantive reason for dismissing her and whether the process it used was fair and reasonable.

[8] If I decide Ms McIlroy was unjustifiably dismissed I need to consider what remedies she is entitled to, taking into account whether any of her actions contributed to the situation leading to her personal grievance.

Factual background

[9] At the time Ms McIlroy was employed by Clemence she was 23 years of age and had not previously been employed. Instead, Ms McIlroy had been in receipt of the unemployment benefit. Ms Price approached Mr Clemence to ask if he could create a position to allow Ms McIlroy to get into a job. Mr Clemence asked if Ms McIlroy had her licence as he would like to employ her but part of the job would be to drop off and collect parts so she needed a licence.

[10] Ms Price told Ms McIlroy when they were travelling to the interview for the position that one of the requirements of the job was that Ms McIlroy should obtain her restricted driver's licence as soon as possible. That was also reiterated by Mr Clemence at the interview.

[11] Mr Clemence agreed to create a role for Ms McIlroy as an office junior. Clemence received a wage subsidy from Work and Income to assist it to pay Ms McIlroy in the early part of her employment.

[12] Ms McIlroy entered into an individual employment agreement with Clemence. There was no written condition to the effect that her gaining her restricted licence was a condition of her employment continuing. There was no time limit imposed on Ms McIlroy to obtain her restricted licence. There was no written job description outlining Ms McIlroy's duties as an office junior. The IEA contained a 90-day trial period provision. Ms McIlroy was not dismissed during the first 90 days of her employment, despite not gaining her restricted licence within the first three months of employment.

[13] Ms McIlroy had her learner's permit at the time she began working for Clemence. Once she began working she took two lessons a week with a driving instructor. When Mr Clemence and Ms Price enquired from time to time about her progress towards obtaining her restricted licence she told them that she was regularly taking those lessons and was progressing, although she had not sat her restricted licence test.

[14] Mr Clemence described a number of meetings with Ms McIlroy about when she would get her licence and how it was important that she do so. These were

informal and there are no minutes of them. They consisted of discussions with Ms McIlroy which sometimes were also discussions with another employee Clemence was encouraging to get her licence.

[15] On 25 July 2013 Mr Clemence walked through the smoko room where Ms McIlroy was washing the dishes and asked her how she was going with her progress towards her restricted licence. She reported that she was still having two driving lessons a week and was progressing. Exactly what Mr Clemence then said is contested but he let Ms McIlroy know that if she did not get her licence her employment would or could not continue. Ms McIlroy burst into tears and Mr Clemence fetched her supervisor, Kera Mita, to deal with Ms McIlroy. According to Mr Clemence Ms Mita¹ also told Ms McIlroy that if she did not *get her driver's licence she would have to finish up*.

[16] Mr Clemence left the room. According to Ms McIlroy Ms Mita suggested that Ms McIlroy could finish work in two weeks, the notice period contained in Ms McIlroy's IEA, on 9 August 2013. Ms McIlroy did not tender her resignation to Mr Clemence or to Ms Mita.

[17] A farewell morning tea was organised and held on 8 August and Ms McIlroy left work at the end of the following day.

[18] Mr Clemence says that after Ms McIlroy's father, Des McIlroy, spoke to him on 9 August 2013 he agreed he would speak to Ms McIlroy to clarify that he had not dismissed her and that she could stay on as long as she got her restricted licence quite soon. Mr Clemence says that he and Ms Mita spoke to Ms McIlroy later that day, after the morning tea, and told her that she had not been dismissed and did not have to leave, but that she had to obtain her licence. Mr Clemence says Ms McIlroy told them she would rather leave.

[19] Ms McIlroy denies that conversation ever happened.

[20] As at the date of the investigation meeting Ms McIlroy had not obtained other employment.

¹ Who did not give evidence.

Determination

Was Ms McIlroy dismissed?

[21] A dismissal is the termination of the employment agreement at the instigation of the employer. It is up to the employee to prove that they have been dismissed. Once that is proved then it is up to the employer to prove that the dismissal was justified.

[22] Mr Clemence submits that Ms McIlroy was not dismissed on 25 July 2013. He submits that Ms McIlroy resigned and he assumed that was because she was not able to get her licence. In his written witness statement Mr Clemence wrote:

... by July it became apparent that not only had she not obtained her driver's licence but that she was not able to obtain a licence because she lacked the necessary confidence and/or competence. I infer that she was unable to pass the required test. However, the company cannot employ her without a driver's licence.

... by the time she left in July it was beyond doubt that she could not and was not going to obtain her driver's licence.

[23] Mr Clemence may not have meant his comments on 25 July 2013 to be taken as a dismissal. However, his belief in July 2013 was that Ms McIlroy was incapable of getting her licence. Mr Clemence says that without a licence Clemence had no work for Ms McIlroy. I have no doubt that on 25 July 2013 Mr Clemence's words combined with Ms Mita's suggestion that Ms McIlroy leave work at the end of two weeks combined to mean that Ms McIlroy was dismissed.

[24] If Ms McIlroy was leaving of her own accord it would have been usual for Clemence to receive a resignation. However, Ms McIlroy did not communicate her resignation to Mr Clemence or to Ms Mita. Once Mr Clemence became aware that Ms McIlroy was leaving, he accepted that. If what he had meant to convey on 25 July was that Ms McIlroy should redouble her efforts to get her licence or that there was a time limit on her getting her licence he should have followed up with Ms McIlroy to clarify that when he spoke to her that he did not mean to dismiss her. At the investigation meeting Mr Clemence said that he had done so on Ms McIlroy's last day. However, I prefer Ms McIlroy's evidence on that point because of its logic and consistency. Ms McIlroy was dismissed.

Was the dismissal justified?

[25] The justification for an employee's dismissal is determined under the statutory test in s 103A of the Employment Relations Act 2000. The test requires the Authority to decide the question of justification objectively by asking whether what the employer did, and how it did it, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[26] The Authority may not substitute its opinion for that of the employer but in applying the test it must consider whether the employer acted fairly, in particular whether before deciding to dismiss Ms McIlroy it:

- sufficiently investigated the allegations against her,
- raised its concerns with her,
- gave her a reasonable opportunity to respond to the concerns, and
- genuinely considered any explanation regarding the allegations; and
- whether there were any other relevant factors.²

[27] The Authority should not determine a dismissal unjustified solely because of any defects in the employer's process if the defects were minor and did not result in the employee being treated unfairly.³

[28] Mr Clemence says that even though Ms McIlroy did not obtain her licence within the 90-day trial period he decided to be fair to her and extend the period he could give her to obtain her licence. However, the problem with that argument is that Clemence had never made it clear in a formal way that the gaining of a restricted licence had a time frame attached.

[29] On 25 July 2013 Mr Clemence sufficiently investigated his concern that Ms McIlroy still did not have her restricted licence by asking her whether or not she had it yet. However, he did not adequately investigate why she did not have her licence.

² Section 103A(3) & (4) of the Act.

³ Section 103A(5) of the Act.

[30] In an informal way Mr Clemence raised his concern that Clemence would no longer be able to employ Ms McIlroy unless she got her restricted licence. However, the informal nature of that meant that Ms McIlroy was not given a reasonable opportunity to respond and Mr Clemence did not and could not take into account her explanation before the decision to dismiss her was made.

[31] At the very least Ms McIlroy should have been given a letter outlining Clemence's concern that she did not yet have her restricted licence and inviting her to a meeting to discuss that. The letter could have stated, for example, that there may need to be a specified timeframe within which Ms McIlroy needed to get her licence in order to retain her employment. Ms McIlroy should have been given the opportunity to bring a support person or an advocate to the meeting with her and to have input into any plan that required her to get her licence within a specified period.

[32] The defects in the process were more than minor and resulted in Ms McIlroy being treated unfairly.

[33] Given that Ms McIlroy had not been given a timeframe within which she was required to obtain her restricted licence it could not be reasonable to dismiss her with two weeks' notice because of her failure to obtain the licence. The decision made by Clemence to dismiss Ms McIlroy, and the way that decision was made, were not actions a fair and reasonable employer could have undertaken in all the circumstances at the time. Therefore, Ms McIlroy has a personal grievance of unjustified dismissal. I need to consider her entitlement to remedies.

Remedies

Lost remuneration

[34] Ms McIlroy has not yet obtained work. Mr Thompson submits that she has adequately mitigated her loss by applying for a number of jobs since her dismissal. Therefore, Mr Thompson submits that Clemence should reimburse Ms McIlroy for her loss of earnings from the date of termination of her employment on 9 August 2013 until the date of the investigation meeting on 29 August 2014.

[35] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Clemence of the whole or any part of wages Ms McIlroy lost as a result of her

grievance. Section 128(2) of the Act provides that I must order Clemence to pay Ms McIlroy the lesser of a sum equal to her lost remuneration or to 3 months' ordinary time remuneration. Three months equates to thirteen weeks. The payment of any amount over and above three months lost remuneration is a discretionary consideration.

[36] Ms McIlroy's pay slips show that between 20 February 2013 and 4 August 2013 she worked an average of 44.45 hours per week. Ms McIlroy was paid \$13.80 per hour.

[37] Mr Clemence says that Ms McIlroy did not really work about 90 hours a fortnight but was there earlier in the mornings than she needed to be because she got a ride to work with another employee who worked longer hours than her. However, I note that on public holidays and the two annual leave days Ms McIlroy took she was paid for 9 hours a day. That suggests to me that Ms McIlroy was expected to work 9 hour days.

[38] Under s 128(2) of the Act Clemence Drilling Limited must pay Charlotte McIlroy the amount she claimed of \$7,974.33 gross ($\$13.80 \times 44.45 = \613.41×13 weeks = \$7,974.33) which is 3 months ordinary time lost remuneration at 44.45 hours per week. Ms McIlroy must also be paid the employer contribution to Kiwisaver that would have been paid on that amount. The parties have leave to return to the Authority if they cannot agree on that amount.

[39] I appreciate that Ms McIlroy has not yet been able to obtain alternative employment. However, I am not convinced that even with a fair process Ms McIlroy's employment at Clemence was likely to have lasted much beyond three months from 9 August 2013 because of Mr Clemence's evidence of other areas of dissatisfaction with Ms McIlroy's work. I decline to award any further lost remuneration.

Compensation

[40] Ms McIlroy claims \$7,000 compensation.

[41] Ms McIlroy describes herself as being *upset*, at her dismissal being a *big shock* and being *embarrassed* about losing *my first job in this way* particularly because she *was trying very, very hard to obtain my licence*. She also says she was humiliated having to apply for a benefit again. Ms McIlroy's father says Ms McIlroy has lost confidence as a result of her dismissal.

[42] I consider \$6,000 to be reasonable compensation for Ms McIlroy's humiliation, loss of dignity and injury to her feelings.

Contribution

[43] Having determined Ms McIlroy has a personal grievance s 124 of the Act requires me to consider whether she contributed to the situation which gave rise to her dismissal and if so reduce remedies accordingly.

[44] Clemence invites me to consider that Ms McIlroy was taking an unreasonably long time to obtain her restricted licence and suggests that perhaps she was, or is, never going to be able to gain her licence. There is a suggestion that because she did not have her licence it must not be entirely Clemence's fault that her employment came to an end.

[45] However, I consider Ms McIlroy was taking reasonable steps to obtain her restricted licence and had not had any formal notice that the gaining of her restricted licence was time critical before 25 July 2013. Therefore I do not consider that she contributed to the situation which gave rise to her dismissal.

Costs

[46] Costs are reserved. Generally the successful party can expect a contribution towards their reasonable legal costs.

[47] The Authority often awards costs on a daily tariff approach of a maximum of \$3,500 for a full day of hearing. I invite the parties to reach agreement on costs.

Otherwise any party seeking costs should file a memorandum with the Authority within 28 days of this determination and if it objects to the claim the other party should file a memorandum in response within a further 14 days.

Christine Hickey
Member of the Employment Relations Authority