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## Miller v Auckland Cat Practice Limited (Auckland) [2007] NZERA 54 (27 February 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 51/07 5040214

BETWEEN

AND

ROBYN MILLER  
Applicant

AUCKLAND CAT PRACTICE LIMITED  
Respondent

Member of Authority: Representatives:

Determination:

Leon Robinson

Brian Spong for Applicant Mark Robson for Respondent

27 February 2007

### DETERMINATION OF THE AUTHORITY

#### Employment relationship problem

[1] The applicant Ms Robyn Miller ("Mrs Miller") applies to the Authority for an investigation into her dismissal from her employment with Auckland Cat Practice Limited ("the Practice"). She says she was unjustifiably dismissed and the Practice breached its duty of good faith owed to her. Mrs Miller asks that the Authority resolve the problem by making formal orders for reimbursement, compensation and penalties. The Practice denies Mrs Miller's various claims.

[2] The parties were unable to resolve the problem between them by the use of mediation.

#### The facts

[3] Mrs Miller was initially employed by the Practice as its Practice Manager. On 27 July 2005 Mrs Miller resigned from that employment giving notice that the employment would terminate on 9 September 2005.

[4] Mrs Miller agreed to continue working for the Practice on a part-time basis and commenced in that capacity on 12 September 2005. She was asked to stay on and train a replacement which was said to involve a period of one to two months.

[5] On 29 September 2005, Mrs Miller was provided with a written individual employment agreement. The document stated it was made on 15 September 2005. Annexed to it is an appendix 1 Job Description which is headed *Position of Temporary Part Time Office Manager - Principal Nurse* but which later variously refers to a position of *Office Manager/Principal Nurse*. It specifies duties of the position with this point:-

*r. It is recognised that the Employee is working in a temporary part time capacity and that a primary responsibility is training the new person in the full responsibility of the position previously occupied by the Employee. This training is to be carried out expeditiously so that the new person can take over any responsibility handed to her. It is anticipated that the new person will be Danielle Marks. In the meantime the Employee will continue to carry out the above duties and the remuneration paid to her takes this into account.*

[6] Mrs Miller was advised to read over the document, to take advice about it if she wished and to return it when she had done so. She returned it signed in early October 2005.

[7] In late October 2005, Mrs Miller met with Ms Janet Merchant the spouse of a director of the Auckland Cat Practice Limited ("Ms Merchant"). Mrs Miller says that Ms Merchant asked if she was interested in staying on by job share with Ms Danielle Marks ("Ms Marks"). According to Mrs Miller, Ms Merchant explained that although Mrs Miller's former position had been advertised, no suitable candidate had been found. Then, Mrs Miller says, Ms Merchant offered her permanent part-time employment in a job share arrangement with Ms Marks.

[8] Mrs Miller says that immediately after this meeting, both women attended on Ms Marks to inform her of the situation and that Ms Marks accepted the arrangement.

[9] Between October 2005 and February 2006 Mrs Miller and Ms Marks worked together apparently job sharing the administrative role Mrs Miller formerly performed. This is evidence both Mrs Miller and Ms Marks give to the Authority.

[10] According to Mrs Miller, Ms Marks was fully trained by November 2005. By January 2006, Mrs Miller says she was working Monday to Friday most weeks, generally 28 - 31 hours per week.

[11] On 28 February 2006, Mrs Miller telephoned a director Mr Keith Bunyan to ascertain whether there was any difficulty with her hours. Ms Marks had informed Mrs Miller that Mr Bunyan had enquired about her hours. When Mrs Miller spoke with Mr Bunyan, he assured her there was no problem.

[12] At 1.00 pm on 1 March 2006, Ms Merchant informed Mrs Miller that her employment was being terminated on notice as a full time veterinary nurse had been hired.

[13] In that same month, the Practice advertised a part-time administrative role on two occasions. I find that Mrs Miller saw one of these advertisements and then requested a meeting with a director of the Practice Mr Mark Robson ("Mr Robson") which took place on 9 March 2006. Mr Robson confirmed that all directors had decided that Mrs Miller be given notice. Ms Robson undertook to go back to the directors to review the decision.

[14] On 13 March 2006, Mr Robson advised Mrs Miller the termination would stand. He told Mrs Miller she had not been offered the advertised part-time role because of financial considerations.

[15] Mrs Miller now asks the Authority to investigate this dismissal because she claims it is unjustifiable.

### **The merits**

[16] Mrs Miller says she was dismissed unjustifiably. Section 103 A of the [Employment Relations Act 2000](#) ("the Act") prescribes a statutory test of justification. The Practice says Mrs Miller was only a temporary employee and the employment ended according to its agreement with Mrs Miller.

[17] I find that Ms Merchant did offer Mrs Miller ongoing indefinite employment when she invited Mrs Miller to stay on job sharing with Ms Marks sometime in late October 2005. I rely on Ms Marks' evidence as corroborative of that finding. As a result, Mrs Miller had ongoing indefinite part-time employment which could only be terminated for cause. When that offer was made and accepted, it was required to have been recorded in writing. It was not however. I make these findings because I prefer Mrs Miller's evidence over that given by Ms Merchant.

### **The determination**

**[18] When Ms Merchant terminated Mrs Miller's employment at 1.00 pm on 1 March 2006 on notice, there was no cause for dismissal. The dismissal was unjustifiable. I find that Mrs Miller has a personal grievance for unjustifiable dismissal. She is entitled to remedies in settlement of that personal grievance.**

### **The resolution**

[19] Having made the above findings and in considering both the nature and the extent of remedies to be provided, I am bound by [section 124](#) of the [Employment Relations Act 2000](#) to consider the extent to which Mrs Miller's actions contributed to the situation that gave rise to the personal grievance I have found, and if those actions so require, to reduce the remedies

that would otherwise have been awarded accordingly. I find that there are no actions by Mrs Miller which could be described as blameworthy and therefore, there is no basis for reducing either the nature or extent of any remedies to be granted.

[20] Mrs Miller claims \$2,905.00 gross wages as reimbursement. I am satisfied she has lost this sum as a result of the personal grievance. **I order Auckland Cat Practice Limited to pay to Robyn Miller the gross sum of \$2,905.00 as reimbursement.**

[21] Mrs Miller claims the sum of \$15,000.00 as compensation. She gives evidence she has been very hurt by the Practice's actions towards her and has found events deeply distressing. She also says she has felt completely misused by the Practice. I accept Mrs Miller has suffered embarrassment, anxiety, hurt and humiliation as a result of the personal grievance. **I order Auckland Cat Practice Limited to pay to Robyn Miller the sum of \$5,000.00 as compensation.**

### **Penalties**

[22] I conclude that there is no case for penalties here and I decline to exercise the discretion to order the same.

### **Costs**

[23] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Spong is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Robson is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson

**Member of Employment Relations Authority**

### Summary of orders

Auckland Cat Practice Limited is ordered to pay to Robyn Miller the gross sum of \$2,905.00 as reimbursement.

Auckland Cat Practice Limited is ordered to pay to Robyn Miller the sum of \$5,000.00 as compensation

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