

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Kathryn Mitchell (Applicant)  
**AND** Select Recruitment & HR Limited (Respondent)  
**REPRESENTATIVES** Jenny Beck, Counsel for Applicant  
Sharon Knowles, Counsel for Respondent  
**MEMBER OF AUTHORITY** Philip Cheyne  
**INVESTIGATION MEETING** 15 August 2005  
5 September 2005  
**DATE OF DETERMINATION** 7 September 2005

DETERMINATION OF THE AUTHORITY

***Employment Relationship Problem***

[1] Select Recruitment & HR Limited operates a staff recruitment and temping agency in Dunedin and elsewhere. Part of the business is to employ staff and place them with Select's clients to meet those clients' needs for additional labour. Select employed Kathryn Mitchell and placed her as a temp to assist with Select's own business from 9 November until 19 November 2004. A written employment agreement was provided to and signed by Ms Mitchell. On 19 November 2004, Select decided it no longer required Ms Mitchell's services and ended the placement in reliance on the written terms of employment. Ms Mitchell says that she was promised work until Christmas and that the earlier termination of the work amounts to an unjustifiable dismissal.

[2] Karen Bardwell is Select's managing director. Ms Mitchell says that when she was first employed, Ms Bardwell guaranteed her full-time work until Christmas. Beverley Brensell is a Select consultant and was present during the discussion between Ms Mitchell and Ms Bardwell. Both Ms Bardwell and Ms Brensell deny that there was any guarantee of full-time work until Christmas. I will need to assess the evidence given by the three women to determine whether Select gave any guarantee to Ms Mitchell.

[3] If Ms Mitchell is correct in saying that she was guaranteed work until Christmas, it will be necessary to consider the effect of the terms of the written employment agreement and Ms Mitchell's assertion that she was not given a reasonable period of time in which to get advice about that agreement before she signed it. If there is a valid grievance, I will also have to assess the effect on appropriate remedies arising from Select's offer to Ms Mitchell of alternative work. Ms Mitchell says that the offers were unsuitable and by that time she had lost trust and confidence in Select.

[4] Ms Mitchell and Select were not able to resolve the problem despite mediation assistance.

***Was there a guarantee of work until Christmas?***

[5] In November 2004, having finished her university study, Ms Mitchell was looking for additional work prior to commencing a full-time position in Wellington in January 2005. She approached Select and was interviewed by Ms Brensell on 8 November 2004. Ms Brensell knew that her manager (Ms Bardwell) was looking for a temp to do some work associated with Select's attempts to source potential employees from overseas so she called Ms Bardwell in to talk to Ms Mitchell about that opportunity. The only relevant factual dispute is what Ms Bardwell told Ms Mitchell about the duration of the assignment. Ms Bardwell told me (and I accept) that she is experienced in communicating with potential employees about the duration of assignments. That is an important part of consultants' training and it is crucial to be accurate when communicating about the duration of any assignment. Ms Bardwell's evidence is that Ms Mitchell asked about how long the job would last. In response, Ms Bardwell spoke about why they had a need for the temp assignment to explain that she was uncertain how long the work would last. Ms Mitchell was not satisfied with the response and asked more about the duration of the assignment. In response, Ms Bardwell said that *...from what we know, the work should go through until Christmas*. There was also some discussion about when Ms Mitchell could start and her other work commitments. Ms Bardwell left Ms Brensell to finalise the arrangements with Ms Mitchell.

[6] Ms Mitchell was specifically looking for additional work until Christmas to supplement an existing part-time job. Her evidence is that Ms Bardwell said *I can guarantee you full-time work with us here at Select until Christmas; the project will last at least that long*. Ms Mitchell says that she was asked to come back in later with her curriculum vitae which she did the same day. She says that she was then given the individual employment agreement which she signed the next day (9 November) when she commenced work. However, Ms Brensell's covering letter that accompanied the employment agreement is dated 9 November and I accept that the covering letter, the agreement and the *Candidate Assignment Advice* were all given to Ms Mitchell on 9 November, the date she commenced work.

[7] There are file notes entered into Select's computer system by both Ms Bardwell and Ms Brensell about the 8 November discussion. The file notes support Ms Bardwell's and Ms Brensell's accounts of the discussion. Ms Bardwell's note is dated 8 November. She told me and I accept that the computer generates the date automatically. Accordingly, I find that Ms Bardwell did make a file note on 8 November and Ms Brensell did make her file note on 9 November. However, Ms Bardwell also told me that it is possible to amend the text at a later time, once the record exists. It may be possible for computer forensic analysis to establish whether the note was later amended but Ms Bardwell's evidence is that she did not make any change to the record once she had created it on 8 November. Ms Brensell's evidence is to like effect.

[8] I find that it is possible but unlikely that Ms Bardwell and Ms Brensell later amended their separate file notes. It is also unlikely that Ms Bardwell would give an unequivocal assurance about the duration of the work and I prefer her recollection of what was said to that of Ms Mitchell's. It follows that there was no enforceable promise to Ms Mitchell about the duration of the assignment. It is necessary to consider how the written employment agreement applied to the situation.

***The written terms of the employment***

[9] Ms Mitchell told me that she was not offered a reasonable period to consider and take advice on the proffered agreement. Her difficulty with this is that she dated and signed the agreement immediately under the words *I also acknowledge that I have been told that I am entitled to take independent advice about this agreement and have been offered the opportunity to do so*. I find that

Select complied with section 64 of the Employment Relations Act 2000 which then applied. Ms Mitchell had a reasonable opportunity to get advice; she simply chose not to.

[10] The agreement says:

*6.3 If, for any reason whatsoever, the Client reassesses its needs and terminates an Assignment earlier than originally indicated, then my employment will terminate and the Company is under no obligation to offer me an alternative or additional Assignment.*

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[11] There was an argument made that these clauses do not apply as the employment agreement is drafted on the basis that the client is not party to the employment relationship. It is correct that the present form of agreement is used by Select for the more common situation where it employs a temp to place with the client who is a separate entity. For its own administrative reasons, Select decided to treat itself as a client in respect of Ms Mitchell's engagement. However, even if clause 6.3 did not apply, clause 6.4 would cover the situation to entitle it to terminate the assignment.

[12] Accordingly, I find that Ms Mitchell agreed to and was bound by the express terms contained in the written employment agreement. In reliance on the written terms of the employment, Select ended the assignment which resulted in the termination of the employment. Ms Mitchell does not have any sustainable grievance about this.

### ***Offers of other assignments***

[13] Given the above findings, it is not necessary to deal with this point. However, for completeness, I should explain what happened on and after Friday 19 November, the date the assignment was terminated. On that day, in the afternoon, Ms Bardwell and Ms Brensell met with Ms Mitchell and told her that the temp assignment would end that day as Select had decided it could accommodate the required work within its existing workforce. Ms Bardwell was apologetic and gave an undertaking that they would look to find other work for her as quickly as possible. The discussion was handled sensitively and there is no basis for any complaint about that. It was not a disciplinary situation so there was no requirement to forewarn Ms Mitchell about the purpose of the meeting or give her an opportunity to get advice.

[14] On Saturday 20 November, Ms Mitchell was phoned and offered some waitressing work for that same evening. That was one of the categories of work in which Ms Mitchell had expressed interest when she was first interviewed by Ms Brensell. However, Ms Mitchell had other commitments and declined the offer. Ms Mitchell cannot be criticised for declining that work.

[15] On Wednesday 24 November, Ms Brensell phoned Ms Mitchell and offered her an assignment with another Select client doing data entry and administration work. There is a dispute in evidence about whether Ms Brensell said it was for two weeks or whether she said it was initially for two weeks with the possibility of being extended. Ms Mitchell said she would think about it and call back. Ms Mitchell later left a message for Ms Brensell saying that she would not take the position. She did not give any indication about why she was declining the assignment.

[16] The offers of alternative work demonstrate that the termination of Ms Mitchell's Select assignment came about only because Select no longer required a temp. Ms Mitchell told me that she refused the second offer because she no longer trusted Select. However, I do not accept that there was any proper basis for that conclusion.

[17] Later, Ms Bardwell received a letter dated 30 November 2004 in which Ms Mitchell raised her grievance about the end of her assignment on 19 November. This was the first indication to Select of any problem. Ms Bardwell phoned Ms Mitchell in response. Ms Mitchell says in evidence that she received an *intimidating phone call* but I do not accept that is a fair description. No doubt Ms Bardwell firmly advocated her view that there was no sustainable grievance but she was entitled to do that. Ms Bardwell offered to pay the three days lost remuneration between the end of the first assignment and the offer of the second assignment but that was not acceptable to Ms Mitchell.

[18] Select made reasonable attempts to resolve the problem once it was raised by Ms Mitchell.

***Summary***

[19] Ms Mitchell does not have any grievance against Select.

[20] Costs are reserved.

Philip Cheyne  
Member of Employment Relations Authority