

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 371/08
5106208

BETWEEN DORINA NELIO
 Applicant

AND NEW ZEALAND INSTITUTE
 OF FASHION TECHNOLOGY
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Mark Nutsford for Applicant
 Shannon Kelly for Respondent

Investigation Meeting: 10 June 2008 at Auckland

Determination: 30 October 2008

DETERMINATION OF THE AUTHORITY

[1] New Zealand Institute of Fashion Technology Limited cancelled its employment agreement with Dorina Nelio from 24 October 2007. The Institute decided she had misrepresented her qualifications to work as a tutor in pattern design on one of its courses.

[2] On 17 September 2007 Mrs Nelio had signed an employment agreement with the Institute including the following clause (“clause 29”):

29.1 *You warrant that:*

a. All representations, whether oral or in writing, made by you as to qualifications and experience in applying for this position are true and complete;

b. You have not deliberately failed to disclose any matter which may have materially influenced our decision whether to employ you;

29.2 *You acknowledge that if any representations as to qualifications or*

experience are found to be untrue or incomplete, or if it becomes known that you did not disclose any matter that may have materially influenced our decision to employ you, then we may cancel your employment and/or take disciplinary action up to and including dismissal.

[3] The Institute says that Mrs Nelio misrepresented her qualifications orally during the job interview and in writing on her resume. Under the heading “Education” her resume includes a reference to a “*Diploma of Tailor(sic), awarded in 1999 by the People’s University Deva, Romania, following 6 months of full time study*”.

[4] After Mrs Nelio had completed the Institute’s tutor training course and begun teaching in the pattern design course, concerns arose about her work. From talking with her the Institute’s directors found out that her diploma was not equivalent to a New Zealand diploma of tailoring. They then cancelled her employment agreement.

[5] Mrs Nelio denies misleading the Institute. She says cancelling her employment agreement was an unjustified dismissal. She seeks lost wages, compensation for distress and her costs.

Investigation

[6] Mrs Nelio, the Institute’s managing director Kevin Smith, its academic director Valerie Marshall-Smith and its programme leader Helen Huitema provided written witness statements. They each attended the investigation meeting and answered questions under oath or affirmation. The parties’ representatives had the opportunity to ask additional questions and provided closing arguments on the issues.

Determination

[7] I find that Mrs Nelio was unjustifiably dismissed because she did not misrepresent her qualifications and skills as alleged by Institute. Rather the Institute’s directors made assumptions and failed to ask some basic questions during its interviews of Mrs Nelio before they offered her the job. They were responsible for offering Mrs Nelio a job which proved beyond her capabilities. In these circumstances, consider objectively, the Institute did not act as a fair and reasonable

employer would have done. It summarily dismissed her for what was, effectively, its own inadequate interview and checking process. Mrs Nelio has a grievance and is entitled to remedies.

[8] I have come to this conclusion on the basis of the following evidence.

[9] Mrs Nelio answered an advertisement for a “*pattern making tutor*”. The advertisement said applicants “*should have relevant industry experience*”. It stated that “*specialist tutor training*” would be provided. No reference was made to qualifications.

[10] Mrs Nelio’s letter of application referred to her attributes and attached a curriculum vitae setting out her qualifications and business experience. This included being “*self-employed in dressmaking and alterations*” in New Zealand between 2004 and 2007. It also said Mrs Nelio had been the manager of her own business “*in clothing and dress-making*” in her native Romania between 2000 and 2003 before migrating to New Zealand in early 2003. It listed previous work in Romania as a mining engineer and design engineer between 1985 and 1999.

[11] Under the heading of Education she listed a “*diploma of engineer*” and a diploma in electro mechanics with a statement that both those qualifications had been “*assessed in October 2001 by the New Zealand Qualification Authority*”.

[12] Two other Romanian diplomas were listed, including the “*Diploma of Tailor (sic)*” referred to earlier in this determination.

[13] Ms Marshall-Smith interviewed Mrs Nelio on 31 August 2007. Her interview notes show that Mrs Nelio talked about her experience in dressmaking and answered a question on what students needed to know by referring to “*how to make patterns, how to alter and change*”.

[14] Ms Marshall-Smith was impressed by Mrs Nelio and recommended that Mr Smith also interview her. During that interview Mr Smith asked Mrs Nelio how she had completed what she had listed on her resume as a “*diploma in tailor*” in six months. His evidence was that she replied that she had been able to finish that

qualification quickly because of her other qualifications in engineering.

[15] On her job application form Mrs Nelio had listed her “*relevant skills*” as including “*wide experience in dress making*” and being “*experienced in engineering design and patterns*”.

[16] In their interviews of Mrs Nelio neither Ms Marshall-Smith nor Mr Smith specifically asked about her skills and experience in pattern making. She was not asked to demonstrate any pattern making skills in sample exercises.

[17] She was asked to provide four referees and did so. Only one – involved in a fabric business – was connected with the fashion industry. The others were what Mr Smith called ‘character’ references. None of the referees had any direct knowledge of pattern making or any knowledge of the Applicant’s skills and experience in that area.

[18] The directors did not ask to see Mrs Nelio’s qualifications – particularly the tailoring qualification which it later said was so important – or ask why her CV referred to her other qualifications as having been assessed by NZQA but not the tailoring diploma.

[19] Despite not having checked the qualifications or getting any references which confirmed Mrs Nelio’s patternmaking skills or experience, the Institute offered her a job. After completing an eight day tutor training course – covering teaching skills and administrative requirements – Mrs Nelio began work on 1 October and was working with students in the classroom from 2 October.

[20] By 4 October Ms Huitema, who had previously tutored the course, was concerned about some advice she had heard Mrs Nelio give students. After class had ended she asked Mrs Nelio to demonstrate how she would do two exercises required of students in the course – one involving changing a pattern block and one involving changing a dart. For both exercises Mrs Nelio suggested she would alter an existing pattern rather than making a pattern ‘from scratch’.

[21] Ms Huitema knew that the Institute’s course really required a tutor who could teach students how to make patterns ‘from scratch’ rather than altering existing

patterns. She later described the skills demonstrated by Mrs Nelio as being those of a good dressmaker but not of a pattern maker. She reported those concerns to Mr Smith.

[22] Mr Smith then met with Mrs Nelio and asked about the content of her tailoring qualification. Mrs Nelio described the course she had undertaken as being in dressmaking, using ready made patterns, not making her own patterns. Mr Smith said “*it was assumed*” that Mrs Nelio had the skills in pattern making that would be learned in a diploma of tailoring course.

[23] Mrs Nelio asked for help in developing the specialist skills needed but Mr Smith said it would take months to train her to the level needed to teach students.

[24] Notes taken by an administrator during that meeting say that Mr Smith “*apologised and explained there has been a misunderstanding from both parties*”.

[25] The following day Mrs Nelio was sent a letter calling her to a meeting because she “*may have misrepresented the extent and level*” of her qualifications and advised that the Institute might cancel her employment agreement “*on the basis of these material misrepresentations*”.

[26] That meeting did not occur until 24 October as Mrs Nelio had become ill and provided a medical certificate stating she was unfit for work for 14 days.

[27] At the meeting Mrs Nelio provided a copy of the diploma. This was the first time that Mr Smith and Ms Marshall-Smith had seen it. Mr Smith’s evidence was that Mrs Nelio was “*very open*” and “*very frank*” about the diploma and the extent of information and skills it provided.

[28] The Romanian diploma used the word “*croitorie*” which Mrs Nelio translated as “*dressmaking*”. She had an English translation of the certificate notarised in 1999 which called it “*the diploma of graduation of the tailor’s course*”.

[29] My own limited research of Romanian-English dictionaries available through the internet show the word “*croitorie*” may be translated into English as either

“*dressmaking*” or “*tailoring*”. The word is related to the French word *couture*, familiar to English speakers in the phrase *haute couture* referring to high fashion clothing.

[30] The Institute directors had done no research on the meaning of the Romanian word *croitorie* or the apparently equal validity of both translations. Mr Smith told me they considered no such inquiry was needed because, by the time he first saw the diploma, Mrs Nelio has already “*discredited*” the qualification by explaining that it involved “*dressmaking and knitting only*”.

[31] There is no evidence that, before employing her, the Institute clearly put before Mrs Nelio the list of skills and level of qualifications that it now says it required. Its directors gave evidence that its tutor recruitment process has since been altered so qualifications are checked more thoroughly and applicants are required to complete practical demonstrations of their skills.

[32] Against that background I do not accept that the Institute can rely on clause 29 of its employment agreement to say that Mrs Nelio should have done more to explain her qualifications and how they compared to equivalent New Zealand qualifications. That was the role of the Institute’s directors in the interviews they conducted with Mrs Nelio. As Mrs Nelio said in answer to a question: “*I couldn’t decide if I was the right person for the job. That was their decision.*”

[33] The Institute cannot fairly visit on Mrs Nelio all the consequences of its inadequate questioning and checking as they sought to do by cancelling her employment agreement.

[34] I accept the assessment of Ms Huitema and the Institute’s directors that – as Mrs Nelio accepted throughout – she would have needed considerable assistance to develop the skills needed to do the tutoring job to the standard expected by the Institute. However once it found she was not presently suitable for the role, the Institute should have fairly canvassed alternatives with her. Mrs Nelio was entitled to a minimum of six weeks notice under her employment agreement. The directors say there were no alternative roles or prospects of redeployment but there is no evidence they gave the prospect any real thought. Instead Mrs Nelio was abruptly dismissed

because of the Institute's failure to run a reasonably robust recruitment process.

Remedies

Lost wages

[35] The Applicant seeks lost wages for the 18 week period between her dismissal on 24 October 2007 and beginning a new job – doing interior design by CAD for a yacht building firm – on 26 February 2008. However she accepts she did not seriously begin searching for another job until January 2008.

[36] While she says the delay was caused by the 'knock' to her confidence of losing the Institute job, Mrs Nelio had previously run her own dressmaking business but made no effort to re-establish that, even as a short term measure.

[37] I also allow for the contingency that if the Institute had sought to give Mrs Nelio notice in accordance with her employment agreement, rather than summarily dismiss her, her employment may have continued for only a further six weeks or so.

[38] I accept the Institute's submission that Mrs Nelio's evidence showed she had not done enough to mitigate her losses in the period from her dismissal to finding a new job.

[39] For that reason I also accept its submission that, under s128 of the Employment Relations Act 2000 ("the Act"), lost wages should be limited to no more than three months. I fix the appropriate period as being two months because of Mrs Nelio's limited job search activities. The Institute is to pay Mrs Nelio two months of her ordinary salary for remuneration lost as a result of the grievance.

Compensation for hurt and humiliation

[40] Mrs Nelio gave evidence of the damage to her confidence, embarrassment among family and friends, and emotional distress caused by her abrupt dismissal. Taking into account the particular circumstances and the general range of awards in cases of this type, an award of \$5000 is made under s123(1)(c)(i) of the Act to

compensate Mrs Nelio for humiliation, loss of dignity and injury to feelings.

Contribution

[41] No deduction for contribution is to be made under s124 of the Act. Mrs Nelio's remedies could be reduced for contributing to the situation giving rise to the grievance if she had actively misrepresented her qualifications. However, at worst, she was simply over optimistic about the prospects of being able to do a job which she got because of inadequate prior scrutiny by her employer.

Costs

[42] In closing submissions the representatives both indicated that any costs should be awarded on the basis of the notional daily rate or 'tariff' generally applied in the Authority. On that basis the Institute is to pay to Mrs Nelio \$2000 as a reasonable contribution to her costs for representation in preparing for and attending the investigation. She is also to be reimbursed her \$70 lodgement fee.

Summary of outcome

[43] Mrs Nelio did not misrepresent her qualifications to the Institute and her dismissal on 24 October 2007 was not justified.

[44] In settlement of her personal grievance, the Institute is to pay to Mrs Nelio the following amounts:

- (i) Two months' lost wages under s123(1)(b) and 128(2) of the Act; and
- (ii) \$5000 as compensation under s123(1)(c)(i) of the Act; and
- (iii) \$2000 as a reasonable contribution to costs; and
- (iv) \$70 in reimbursement of her lodgement fee.