

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 277
5618113

BETWEEN BELINDA PAALVAST
Applicant

A N D ELMSTONE LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Neil Berryman, Advocate for Applicant
No Appearance for the Respondent

Investigation Meeting: 28 July 2016 at Auckland

Date of Determination: 18 August 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms Paalvast was a permanent employee of Elmstone Ltd (Elmstone) who was unjustifiably dismissed by it.**
- B. Within 14 days of the date of this determination Elmstone is to pay Ms Paalvast the following sums:**
- (i) \$6760.00 gross as lost wages;**
 - (ii) \$6000.00 as compensation for humiliation, loss of dignity and injury to feelings;**
 - (iii) \$208.00 gross for holiday pay;**
 - (iv) \$2,500.00 as a contribution to costs; and**
 - (v) \$71.56 for the filing fee.**

Employment relationship problem

[1] Elmstone was incorporated in August 2015. It established a new business involving retailing and wholesaling designer contemporary furniture, home-staging and renting furniture, and interior design.

[2] In about October 2015, Marie Graham told Belinda Paalvast that she was going into the new Elmstone business with a partner. The women knew each other from living in the same apartment building.

[3] Ms Graham became the general manager of Elmstone. Robert Csurgai is the sole director and shareholder of Elmstone. However, it was Ms Graham, with extensive experience in the industry, who found the people to work in the new venture.

[4] Ms Paalvast asked Ms Graham about the possibility of a job for her with Elmstone, as it was an industry which Ms Paalvast was keen to move into. Ms Graham offered Ms Paalvast a position.

[5] Later Ms Paalvast attended a group meeting at Ms Graham's apartment with Ms Graham, Mr Csurgai and other people who were to work at Elmstone. It was an opportunity for the staff of the new business to meet each other and for them all to meet Mr Csurgai.

[6] At the meeting it was indicated that the business would open on 1 February 2016 and that people's start dates would be confirmed closer to the time, depending on stock arrival. Other than that, there was no discussion at the meeting about terms of employment or the like.

[7] Ms Graham and Ms Paalvast both understood that Ms Paalvast would be working an average of 30 hours per week, but that in weeks when she had child care responsibilities, she could work shorter hours and in the alternate weeks, longer hours. It was agreed that Ms Paalvast would work in the retailing and home staging areas.

[8] Ms Paalvast started at Elmstone on 9 February 2016. A meeting was set between Ms Paalvast and Ms Graham for the next day to talk further about Ms

Paalvast's employment arrangements. However, that meeting was put off due to pressures of work on Ms Graham in the new venture.

[9] On her first day Ms Paalvast worked in the retail area, but after that was moved to home staging.

[10] After three weeks Ms Paalvast had not been paid. She attempted more than once to obtain a written agreement, without success. Ms Paalvast says that other staff had difficulty getting their payments. After some time Ms Paalvast was introduced to Elmstone's new accountant who asked for Ms Paalvast's IRD number, address and bank account details.

[11] After providing her hours for the first three weeks in writing to Mr Csurgai, Ms Paalvast was initially paid for one week's work. Tax had not been deducted from that amount.

[12] Ms Paalvast followed up with Mr Csurgai, which resulted in payment for the remaining hours. Ms Paalvast says that during a brief discussion when their paths crossed, Mr Csurgai indicated that it was Ms Paalvast's responsibility to take out the tax. That was not Ms Paalvast's understanding.

[13] On 6 March 2016 Mr Csurgai emailed Ms Paalvast about her pay and noted that he regarded her as a "casual at this point in time, which [I'm] assuming you've discussed with Marie".

[14] On 8 March 2016 Ms Paalvast received a text message from Mr Csurgai which read:

Hi – my HR guys are making up a causal [sic] contract for you. As advised I will talk with Marie and see what our plans are moving forward as the business evolves.

[15] I take the intended reference to be to "casual" rather than "causal". Casual employment was not what Ms Paalvast understood that she had. However, she did not immediately take up this issue with Mr Csurgai as she was confident that Ms Graham would sort it out for her. Ms Graham was however at a trade show that week, and then absent from work due to illness on 10 and 11 March 2016.

[16] On around Wednesday 9 March 2016 other staff were issued with written employment agreements by Mr Csurgai, seeking their signature by the following Monday. Ms Graham did not consider that the contracts were issued in good faith, given the events of the next few days, referred to below. Ms Paalvast never received a written employment agreement, casual or otherwise.

[17] On the morning of 11 March 2016, Ms Graham was contacted by some Elmstone suppliers. They were trying to find out what was going on as they had been notified by Mr Csurgai on 10 and 11 March that they should come and collect their stock.

[18] Later on 11 March Mr Csurgai asked Ms Graham to come into the office for an important meeting. As Ms Graham was off work sick, the meeting did not occur until Sunday 13 March 2016. At that meeting Ms Graham says that Mr Csurgai told her that the staff (including her) were going to be made redundant. She says that there was no discussion or consultation with staff before that.

[19] On 14 March 2016 Ms Paalvast went in to work. She was aware that a staff meeting was to be held, but was told that she was no longer required to attend and could go home.

[20] That afternoon, at 4.27pm, she received a text from Mr Csurgai, which read:

We are closing staging effective today Belinda – so there [won't] be any more casual work. Sorry.

[21] On 16 March 2016 Ms Paalvast's representative emailed Mr Csurgai a letter asserting that she was a permanent employee, raising concerns about her dismissal and seeking (amongst other things) payment for her outstanding wages. These wages were later paid.

[22] Seemingly in response to Ms Paalvast's representative's letter, Mr Csurgai texted Ms Paalvast:

You must be joking, You're unbelievable with this claim. Any grievance you have is with Marie and you need to talk to her. You know damn well you were casual and guaranteed nothing.

[23] The next day Ms Paalvast received an email from Mr Csurgai entitled “*Redundancy Notice for Belinda Paalvast – 2 weeks notice effective today 17 March 2016*”, which included the following:

Further to our recent discussions and ongoing consultation process you are aware that we have been reviewing the viability of our business ...

I have now carefully considered all factors, including your own response and your input into this process, I now confirm that unfortunately I will be winding up the Elmstone Limited business effectively commencing today, 17 March, 2016.

All stock will be sold wholesale and all other business activities will cease from this date. As a result of this decision there will be no employing entity and therefore no positions to undertake, this means your own position of casual staging stylist will be disestablished.

I will be implementing your redundancy notice period of two weeks effective immediately and I will require you to work through your notice period to help wrap up the business. ... You will receive salary payments up to your last day of work and any approved annual leave owing to you.

As you are a casual with no set or guaranteed hours, your settlement will be based on the average hours per week.

Also, [it's] come to my attention, that I must deduct PAYE from your YTD wages so I will need your IRD number.

[24] Although the email referred to Ms Paalvast working out her notice, she had not been at work since 14 March, and other than the reference in the email, Elmstone make no attempt to require her to work. She was not paid out any notice period.

[25] Ms Paalvast's representative challenged the notice, describing it as a template which did not accurately record what had occurred, as Ms Paalvast had not been involved in any relevant discussion or consultation, or provided any response or input.

[26] Ms Graham continued to have some involvement in Elmstone after Ms Paalvast finished. Ms Graham says that although home staging ceased, the retailing side of Elmstone kept going to sell off stock, and she believes it was still going as at the time of the investigation meeting. She is also aware that Mr Csurgai hired two or three new staff to work in the shop.

[27] Material filed by Mr Csurgai included a statement that termination by text (on 14 March) was “appropriate for a casual contractor”; to Ms Paalvast being a “casual

external contractor” and disagreeing that Ms Paalvast was a permanent part time employee. Mr Csurgai also stated that the redundancy notice of 17 March related to the casual employment offer made the previous Friday but never accepted and then cancelled following the weekend’s decision to cancel staging. The Friday prior to that was 11 March 2016.

[28] Ms Paalvast evidence was that she was not aware of anything related to her employment status happening on 11 March. There is no evidence of any written offer of employment being made on that date.

[29] The investigation meeting in this case was originally set down for 21 June 2016. Shortly before then Mr Csurgai advised that he was unavailable on 21 June and the meeting was adjourned to 28 July 2016.

[30] Mr Csurgai did not attend the Authority on 28 July 2016. He has been involved in the process, was given the opportunity to appear on 28 July 2016 but failed to do so. In the circumstances I was satisfied that he was aware of the date and I proceeded to investigate the employment relationship problem.

[31] I heard evidence from Ms Paalvast in person and Ms Graham by telephone. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received but states findings of fact and law on issues necessary to dispose of the matter and specified orders made as a result.

Issues

[32] The issues for investigation and determination are:

- (a) Was Ms Paalvast an employee of Elmstone?
- (b) If she was, was she a permanent or casual employee?
- (c) Was Ms Paalvast unjustifiably dismissed?
- (d) If so, what remedies (if any) should she receive?
- (e) Is Ms Paalvast owed any holiday pay by Elmstone?

Was Ms Paalvast an employee of Elmstone?

[33] Elmstone's position, according to its statement in reply, was that Ms Paalvast was initially a contractor, and was later offered (but had not accepted) casual employment.

[34] If Ms Paalvast was an independent contractor under a contract for services with Elmstone, then she cannot bring a personal grievance claim, as only employees can bring such claims.

[35] Under s 6(1) of the Act an employee is defined to mean any person employed by an employer to do any work for hire or reward under a contract of service.

[36] In accordance with s 6(2) of the Act, for the purposes of determining whether a person is employed under a contract of service, I must determine the "*real nature of the relationship*" between the parties. Section 6(3) expands on this, specifying that I must consider all relevant matters, including any matters that indicate the intention of the persons involved, and is not to treat as a determining matter any statement by the persons describing the nature of their relationship.

[37] The intention of the parties is a relevant consideration, but is not decisive¹ and other tests are to be considered, including the control test, the integration test and the economic reality test.

[38] I now examine the real nature of the relationship between Elmstone and Ms Paalvast. I start by noting that there was no written employment contract between the parties nor written contractor agreement. There was no written offer of employment or job advertisement. The parties therefore agreed on no written label for their relationship.

[39] Ms Graham offered Ms Paalvast the Elmstone work. Although Ms Paalvast met Mr Csurgai once before she started work, there was no discussion then about her status.

[40] Ms Paalvast and Ms Graham both gave evidence that they considered Ms Paalvast to be an employee and that that had been their intention in the lead up to Ms Paalvast starting and once she had started work.

¹ *Koia v. Carlyon Holdings Ltd* [2001] 1 ERNZ 585, Full Bench Employment Court

[41] Ms Graham gave evidence that no one working at Elmstone was an independent contractor. She also says that she and Mr Csurgai never had any discussion about people being contractors.

[42] Mr Csurgai appeared to consider that Ms Paalvast was a contractor, but has provided no specific evidence as to why that was.

[43] I am satisfied that the common intention between Ms Paalvast and Ms Graham, Elmstone's general manager, was that Ms Paalvast was to be an employee.

[44] I now examine other factors. As regards the control over Ms Paalvast's work, she worked directly under Elmstone's home staging manager. Her work was described by Ms Graham as being an integral part of the business. Ms Paalvast said that she was told in the lead up to the group meeting at Ms Graham's apartment, that she was coming on board with everyone else and that she would be part of the team.

[45] Ms Paalvast did not have to provide equipment for the Elmstone role. On one occasion she used her own car, but generally the trips to home staging sites were made in the Elmstone's car.

[46] In terms of payment, Ms Paalvast was paid an hourly rate. She did not submit invoices but nor did she receive payslips. Mr Csurgai did not deduct tax from the money he paid Ms Paalvast and said that she should deduct her own tax. However, Elmstone's accountant asked Ms Paalvast for her IRD number. And in the redundancy notice of 17 March, Mr Csurgai stated:

“... [it's] come to [my] attention, that I must deduct PAYE from your YTD wages so I will need your IRD number.”

[47] In terms of industry practice Ms Graham, with over 20 years' experience in home staging businesses, says that contractors are not common. However, if a home staging stylist is a contractor they would be paid a percentage of the fee for the job, rather than an hourly rate. Ms Paalvast was not paid a percentage of the fee.

[48] These other factors predominantly indicate that Ms Paalvast was an employee. I am satisfied that the real nature of the relationship was that of a contract of service, with Ms Paalvast being an employee of Elmstone.

Was Ms Paalvast a permanent or casual employee?

[49] Ms Paalvast had no letter of offer or employment agreement. After she had been working for Elmstone for about a month, Ms Paalvast received an email and text from Mr Csurgai including references to “casual”². She was told that a casual contract was being made up for her.

[50] Other employees were provided with contracts on 9 March. However, within the next day or two, Mr Csurgai was advising suppliers that they should pick up their stock from Elmstone. Ms Graham questioned the good faith in Mr Csurgai issuing of employment agreements at this point. In any event, Ms Paalvast was not given an employment agreement.

[51] The 17 March redundancy notice, although stating that Ms Paalvast was casual with no set or guaranteed hours, also purported to provide two weeks’ notice, which suggests permanent employment.

[52] Ms Paalvast had an expectation of permanent part-time employment. Ms Graham, who offered Ms Paalvast the job, confirmed that this was her understanding as well.

[53] In support of the understanding of permanent employment, text messages on 29 February 2016 between Ms Graham and Ms Paalvast’s partner were filed. Ms Paalvast’s partner asked if it was okay for Ms Paalvast to have a few days off work, when he took Ms Paalvast on a surprise birthday trip in May 2016. Ms Graham approved the time off. This suggests an expectation that Ms Paalvast’s employment would continue for at least three more months.

[54] In Ms Paalvast’s five weeks at Elmstone, there was no indication of her stopping and starting periods of employment, or being called in some days but not others. She worked through, albeit with flexible hours, as was also the case with at least some other staff. This was not intermittent or irregular work.

[55] I find that Ms Paalvast had permanent employment, although there was some flexibility regarding hours.

² 6 and 8 March 2016

Was Ms Paalvast unjustifiably dismissed?

[56] Elmstone's statement in reply indicated that Ms Paalvast was a casual contractor and it had treated her in an appropriate way on that basis. However, I have found Ms Paalvast was a permanent employee and thus the question of her termination must be considered on that basis.

[57] I find that Ms Paalvast was dismissed by text message from Mr Csurgai received on 14 March 2016, when he told her that home staging was being closed effective today, and there would not be any more work.

[58] The question is then whether Ms Paalvast's dismissal was justified. As noted by the Court of Appeal in **Brake v Grace Team Accounting Ltd**³ the justification test in s 103A of the Act applies to redundancy situations as well as to other dismissals.

[59] Were the employer's actions those which a fair and reasonable employer could have taken in all the circumstances at the time? In **Brake** the Court held that if a redundancy was genuine and the notice and consultation requirements in s 4 of the Act had been duly complied with, that would go a long way towards satisfying the s 103A test.

[60] In terms of the genuineness of the redundancy, I accept that the home-staging part of the business which Ms Paalvast had been working in was closed down and that her work there was redundant. However, there remain the questions about the procedure for carrying out the redundancy and whether there was the possibility of redeployment.

[61] I find that the procedure used was not that which a fair and reasonable employer could undertake. Ms Paalvast received a text message on 14 March 2016 advising her that her position was being made redundant immediately. I accept Ms Paalvast and Ms Graham's evidence that there had been no prior notice to Ms Paalvast of that possibility nor discussion or consultation with her about that. She had been excluded from a staff meeting where staff were reportedly told that the business was closing.

³ [2014] ERNZ 129

[62] The 17 March 2016 email purporting to be a redundancy notice referred to “*our recent discussions and ongoing consultation process*”. However, I find that there was no discussion or consultation which Ms Paalvast was involved in. In any event, when she received the redundancy notice email, Ms Paalvast had already been dismissed by text message three days before.

[63] It appears that Ms Paalvast was sent a version of a template letter also sent to other staff, with some amendments. However, as she had not attended the 14 March meeting, the reference to recent discussions and consultation was at best erroneous, and at worst, an attempt to provide evidence of events which had not occurred to assist the company’s legal position.

[64] I am not satisfied that the email of 17 March 2016 contained a genuine offer of work for Ms Paalvast during a supposed notice period.

[65] I find that a fair and reasonable employer could not have acted as Elmstone did by the use of a text message as notification of redundancy, with no previous discussion or consultation, and the requirement to effectively finish immediately.

[66] There is also the issue of redeployment which was not discussed with Ms Paalvast.

[67] Ms Paalvast was originally employed for retail and home-staging work, although had only worked for a day in retail. There was a real prospect that Ms Paalvast could have worked in the retail side. Newspaper advertising in May 2016 indicated that Elmstone’s shop was still operating then.

[68] Ms Graham says that the shop continued at least until the time of the investigation meeting, in an attempt to sell the furniture which had been bought by Elmstone. Ms Graham said that her understanding was that some new staff, around two to three, had been hired by Elmstone to help operate the shop.

[69] In his notes filed in the Authority on the statement of problem Mr Csurgai notes that the issue was not Ms Paalvast’s performance, but the home staging business closing down. There was one negative comment elsewhere but there was no indication that that would have prevented Ms Paalvast working in the shop.

[70] I find that Elmstone failed to explore the possibility of redeployment with Ms Paalvast, whereas a fair and reasonable employer would have done so.

[71] I do not consider that the defects in Elmstone's process were minor.

[72] I find that Ms Paalvast's dismissal was unjustified for the reasons outlined above.

Remedies

Lost wages

[73] Ms Paalvast claims lost wages from her dismissal on 14 March 2016 up until the time of the investigation meeting. This claim was based on the 30 hours' average per week which Ms Paalvast and Ms Graham had discussed. However, given that the average hours which Ms Paalvast actually worked for Elmstone were 26 per week, I am proceeding to consider the claim on that basis.

[74] A claim for lost wages, particularly covering several months, may well not have been tenable regarding the home staging work as that part of the business was closed down. However, the retailing side remained open and redeployment to that side was feasible on the basis of the evidence before me. Ms Paalvast was employed to work in retailing and home staging. Her first day's work for Elmstone was in the retail area.

[75] I am satisfied that Ms Elmstone could have worked in the retail area and that this would have resulted in her receiving wages for a period of time. There was no evidence that a different rate was paid for retailing work. Ms Paalvast appears to have been paid at the same pay rate for the time she worked in retail, as when she worked in home staging.

[76] Under s 128 (2) of the Act where the employee has lost remuneration as the result of a personal grievance, I must order payment of the lesser of the lost remuneration or three months' ordinary time remuneration. I order that Elmstone pay Ms Paalvast three months' lost wages. Ms Paalvast was paid \$20.00 per hour, which at an average of 26 hours per week, gives weekly earnings of \$520.00 gross. For 13 weeks that amounts to \$6760.00 gross lost wages.

[77] Given uncertainties regarding the Elmstone retail arm and how long Ms Paalvast would have continued to work there, I do not order any further lost remuneration.

[78] I am satisfied that Ms Paalvast made attempts to mitigate her loss. She says that she had really lost her confidence after the dismissal. However, she got in touch with contacts in her previous area of work and applied for some positions. I accept that she was somewhat restricted by trying to find work with hours which would accommodate her childcare obligations. She was anticipating starting in a new position very shortly after the investigation meeting.

[79] Although Ms Paalvast has claimed Kiwisaver contributions, she was not a Kiwisaver member when she started at Elmstone and could not recall any discussion with the company about that. I am not satisfied that she has established her entitlement to be reimbursed regarding Kiwisaver.

Compensation under s 123 (1)(c)(i)

[80] Ms Paalvast claimed \$10,000 as compensation for humiliation, loss of dignity and injury to feelings.

[81] Ms Paalvast gave some, but not extensive, evidence regarding the effects of the dismissal on her. Ms Paalvast says that she was so upset to get the text terminating her employment. She had been very keen to get into the industry and I accept that it was disappointing to her not to be able to establish herself in it. She lost her confidence after the dismissal.

[82] I take into account that this was a short period of employment and a redundancy situation, albeit with redeployment prospects. These factors are balanced against the harsh nature of the process with Ms Paalvast being notified by text of her work ceasing immediately, the complete lack of consultation and what appears from her perspective to be a subsequent attempt⁴ to cover the company's position by stating that discussion and consultation had occurred when it had not.

[83] I order Elmstone to pay Ms Paalvast \$6,000, under s123(1)(c)(i) of the Act.

⁴ The redundancy notice of 17 March 2016

Is Ms Paalvast owed holiday pay by Elmstone?

[84] Ms Paalvast was not paid any holiday pay by Elmstone. Her total earnings were \$2600.00 gross (130 hours at \$20.00 per hour). Elmstone must pay Ms Paalvast \$208.00 gross, being 8% of her total earnings.

Costs

[85] Costs were sought on Ms Paalvast's behalf. The investigation meeting took slightly less than half a day. On the basis of the Authority's notional daily tariff of \$3,500, this would indicate a starting point of \$1750.

[86] However, Mr Berryman sought an additional day's costs on the basis that the investigation meeting had previously been set down for 21 June 2016 and had had to be adjourned at relatively short notice due to Mr Csurgai being held up in London regarding his business issues. I accept that Mr Csurgai's unavailability and the adjournment caused some additional cost to Ms Paalvast. However, I do not consider the adjournment justifies the addition of costs for an entire extra day. I would expect at least some other work to be able to be undertaken by Ms Paalvast's representative on the vacated day.

[87] I order Elmstone to pay \$2,500.00 as a contribution towards Ms Paalvast's costs, and reimburse her \$71.56 for the filing fee.

Nicola Craig
Member of the Employment Relations Authority