

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Marie Ann Ramsay (Applicant)
AND Stephen Funeral Home Limited (Respondent)
REPRESENTATIVES Shelley Gray, Counsel for Applicant
Christine French, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING Gore 13 July 2006
DATE OF DETERMINATION 27 September 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Graham and Heather Stephen are the shareholders and directors of a company called Stephen Funeral Home Limited which owns and operates a funeral director's business based in Gore. In November 2004, the company employed Marie Ramsay but later dismissed her by giving her one month's notice in writing on 29 July 2005. Ms Ramsay says that the dismissal is unjustifiable and she claims compensation for lost remuneration, compensation for distress and costs. Ms Ramsay is also claiming reimbursement of the cost of a course she attended.

[2] The company says that Ms Ramsay was dismissed justifiably after it attempted to resolve performance concerns through a procedure set out in the applicable employment agreement. It also says that it did not agree to reimburse Ms Ramsay's course costs.

[3] To resolve the problem, it is necessary to set out relevant terms of the employment, explain how concerns about Ms Ramsay's work performance developed and led to the realisation that Ms Ramsay is dyslexic, then review and resolve some evidential disputes about what happened in the several meetings convened before the company decided to dismiss Ms Ramsay. Finally, I will determine on an objective basis whether the company's actions and how the company acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

Terms of employment

[4] There is a written employment agreement. It contains provision for a three month probationary period during which the employer will conduct a minimum of two reviews, communicate clearly any performance concerns and offer whatever reasonable assistance and resources which are realistically available to assist improving performance. Mr Stephen's evidence, which I accept, is that during the trial period Ms Ramsay was not doing much paperwork and that

the aspects of the job that she did perform were, in the main, fine. Mr and Mrs Stephen confirmed Ms Ramsay's employment at the end of the probationary period.

[5] The employment agreement includes a declaration signed by Ms Ramsay. It declares that she does not have any disability affecting her capacity to carry out her duties; that the employment may be terminated immediately if Ms Ramsay misled the company; that all the information provided at the interview was accurate and correct to the best of Ms Ramsay's knowledge; and that she has not withheld any information that may have reasonably caused the employer not to offer her the position. Mr Stephen says in evidence that he is sure that Ms Ramsay was genuinely unaware at the time of her appointment about her dyslexia. Ms Ramsay also says that she did not know. I accept this evidence.

[6] Clause 20 of the agreement sets out a procedure for dealing with performance concerns. The employer must meet with the employee to outline the areas of dissatisfaction, give the employee an opportunity to explain, set the required standard and discuss any assistance, and specify the period not less than one month by which the employee must meet the required standard. The employer must make a record of this meeting and give the record to the employee. During the review period, the employer must regularly meet with the employee to discuss progress. At the end of the review period, there must be a further meeting to determine whether the performance standards have been met. If standards have not been met, the employer must allow a further opportunity for any explanation before deciding whether to terminate the employment on notice.

Genesis of concerns

[7] Ms Ramsay believes that Mr and Mrs Stephen took exception to her decision to decline an opportunity to run a branch of the business to be established in Balclutha. Ms Ramsay says that the offer was made on 27 April 2005 and she declined it on 2 May 2005. However, there was no link between this offer and the concerns about Ms Ramsay's work performance. By 4 May 2005, the company had decided not to proceed with establishing a branch in Balclutha because of potential difficulties with resource consents. There was no reason for Mr and Mrs Stephen to be disappointed with Ms Ramsay for deciding that she did not want to work in Balclutha when it transpired soon after that there was no position there to fill.

[8] Ms Ramsay's evidence, which I accept, is that Mr Stephen mentioned to her on 3 May 2005 about a number of mistakes she had made in some letters. Next day, Mr Stephen spoke to her again about errors and asked if she might be dyslexic. The following day, Mrs Stephen gave Ms Ramsay a test with a checklist of questions found on the internet. Ms Ramsay completed the test and it indicated she might be dyslexic. Ms Ramsay discussed that with Mr and Mrs Stephen who did some research on available help. On 9 May 2005, Mr Stephen gave Ms Ramsay information about a programme offered in Dunedin. Ms Ramsay's evidence is that Mr Stephen told her that they may be able to help by putting some money toward the course and they would support her. This is the evidence supporting the claim for reimbursement of the cost of the course. It falls short of establishing a promise by the company to pay some or all of the course costs, so the claim is rejected. In any event, Ms Ramsay arranged to attend a meeting in Dunedin on 20 May 2005 with Shelley McMeeken, a licensed facilitator for the Davis Dyslexia Correction Programme.

[9] Because Mr and Mrs Stephen came to think that Ms Ramsay might be dyslexic, I infer that there must have been a reasonable number of errors made by Ms Ramsay up to May 2005 such as transposing numbers or letters. Later, Mr and Mrs Stephen started to keep any documents containing such errors but there are only a few examples that pre-date May 2005. I accept nonetheless that the level of such mistakes was sufficient to raise the possibility of dyslexia.

[10] Ms Ramsay met with Ms McMeeken on 20 May 2005. Mr and Mrs Stephen had offered to take Ms Ramsay to Dunedin but she declined. At the meeting, Ms Ramsay told Ms McMeeken that her employers had brought to her attention some errors, raised the possibility of dyslexia and said that she needed to do something about it or she would not be able to continue in her job. Ms Ramsay also asked Ms McMeeken to contact her employer to explain dyslexia. Mr and Mrs Stephen did not know that Ms McMeeken would call.

[11] Ms McMeeken phoned on Sunday, 22 May 2005 and spoke to Mr Stephen. Mrs Stephen also participated in the call. There is some conflicting evidence about this call but it is not necessary to resolve the conflicts. Mr and Mrs Stephen were made aware that Ms McMeeken had assessed Ms Ramsay as being dyslexic. They explained the problem for their business with spelling mistakes and Ms McMeeken outlined the nature of dyslexia and the effect of the Davis Programme.

[12] On Monday, 23 May 2005, Mr and Mrs Stephen called Ms Ramsay to a meeting. Ms Ramsay expected that there would be a meeting following her appointment with Ms McMeeken but her evidence is that she had no forewarning of when this was to be. Mr Stephen does not dispute that evidence. He also says that he is unsure if it was specifically said to Ms Ramsay that the meeting was to discuss work performance concerns. I accept Ms Ramsay's evidence that this was not said to her. Although Mr Stephen asked at the beginning of the meeting whether Ms Ramsay wanted a support person, she declined because she did not know that the meeting was being convened under clause 20 of the employment agreement.

[13] Mrs Stephen took notes during the 23 May meeting which were typed up later and given to Ms Ramsay as required by clause 20 of the agreement. At the end of the typed notes, Ms Ramsay wrote *It needs to be noted that I am not happy with the content of this letter, in particular (iii) (v) and all four paragraphs on this page of this letter. 26/5/05 [signed]*. Ms Ramsay's evidence is that the issues referred to in (iii) and (v) were not discussed at the meeting. However, I accept Mr Stephen's evidence that they were referred to during the meeting. Neither issue was the main focus of the meeting and it is not surprising that Ms Ramsay did not recall them when later given Mrs Stephen's typed notes.

[14] In the ... *four paragraphs on this page* ..., the notes refer to the earlier discussion about dyslexia, arrangements for Ms Ramsay to be assessed and to undertake the Davis Programme starting 13 June 2005, removal of some duties in the meantime (arranging funerals, some paperwork and being on call), an intention to review Ms Ramsay's work performance at the end of July and the possibility of the employment being terminated if Ms Ramsay was not able to meet the requirement for accuracy. Ms Ramsay's handwritten note reflected her surprise that the meeting had been about work performance concerns. Both Mr Stephen and Ms Ramsay say that she became upset later on 23 May when Mrs Stephen gave her the typed notes and Mr Stephen took her home early from work.

[15] Mrs Stephen's evidence, which I accept, is that she intended to explain to Ms Ramsay when she gave her a copy of the typed notes that they were obliged under the employment agreement to give her the written record. She did not give that explanation because Ms Ramsay became upset and would not talk to her. Mrs Stephen's evidence confirms that Ms Ramsay had not been told about the purpose of the meeting. After receiving the typed notes, Ms Ramsay asked another employee (Stephen Ridley) to take her home because she was upset. Ms Ramsay showed the typed notes to Mr Ridley who said to her that Mr Stephen had already told him about the dyslexia course, the review period and the possibility of dismissal. Subsequently, Mr Stephen took Ms Ramsay home early.

[16] The working relationship between Ms Ramsay and Mrs Stephen became tense after the 23 May meeting. In evidence, both understandably attributed responsibility for that to the other, but

it is not necessary to resolve that difference. On 25 May, Mr Stephen initiated a discussion between both women who agreed to try and put matters behind them and work together.

[17] Ms Ramsay took a week's leave commencing 13 June 2005 to participate in the Davis Programme. She returned to work on 20 June and there was a brief meeting between Ms Ramsay and Mr and Mrs Stephen. Ms Ramsay said that she had a letter from Ms McMeeken to give to Mr and Mrs Stephen. However, Ms Ramsay did not have the letter with her and it was not made available for Mr Stephen to copy for several weeks.

[18] On 18 July 2005, Mr and Mrs Stephen met with Ms Ramsay to discuss progress with rectifying the performance concerns. Again, there was no forewarning about this meeting. There is a typed note describing what happened during the discussion which I accept as an accurate summary. To summarise, Mr and Mrs Stephen asked Ms Ramsay how she thought she had progressed since the course and Ms Ramsay responded that she felt she was making good progress but made most of her mistakes when outside influences stopped her concentrating on her work. Mr and Mrs Stephen asked if they could do anything to help but Ms Ramsay said they could not. Mr Stephen referred to a funeral arranged by Ms Ramsay which had generated a phone call from the family who said that Ms Ramsay had made a number of errors in the memorial register book. Mrs Stephen also referred to recent mistakes in written work and went to the office to retrieve examples. Ms Ramsay told Mr and Mrs Stephen that she had made an appointment for a driver's licence test for 4 August 2005, but could not get an earlier appointment because of the inspector's availability. It was also agreed that the next meeting to assess Ms Ramsay's performance would be on Friday, 29 July 2005 rather than Sunday, 31 July. I accept the evidence of Mr Stephen that Ms Ramsay was given the choice of meeting on the Sunday in order to allow her to bring a friend for support.

[19] The meeting on Friday, 29 July was in the afternoon. Ms Ramsay's evidence is that she was not advised that her employment was likely to be terminated. However, it is clearly stated in the notes of 23 May 2005 and 18 July 2005 that a decision about termination of the employment would be made at the meeting at the end of July. There had been discussion on 18 July about whether Ms Ramsay would bring a support person to the next meeting but she decided not to.

[20] Ms Ramsay's evidence is that Mr Stephen said that they had been happy with most of Ms Ramsay's work but that there were still mistakes being made and they could not have that in their business. Mr Stephen said that they would have to let her go with one month's notice with Ms Ramsay to decide whether or not to work out or be paid for the notice period. Ms Ramsay was asked if she had anything to say but replied *no*. Mr Stephen offered to assist Ms Ramsay with finding other work but she again replied *no*. Ms Ramsay said that she felt Mr and Mrs Stephen had made their decision two months earlier. Mr Stephen said *if I had a child, not that you are a child Marie, I would like to think that they would work at something they could do*. Mr Stephen then said that Ms Ramsay could pack up if she wanted to. Ms Ramsay then left.

[21] There is a file note created by Mrs Stephen that refers to some discussion during the 29 July meeting. According to the note, Mr Stephen asked if Ms Ramsay wanted to make any comment, Ms Ramsay said that it had been a hard two months and Mr Stephen said that it had been hard for them as well and that they did not enjoy having to check Ms Ramsay's work for corrections. Ms Ramsay's response was that people had been correcting her all her life and so she was used to it. I accept that these things were said before Mr Stephen gave Ms Ramsay notice of dismissal. Mr Stephen's evidence, which I accept, is that he offered a reference as well as assistance with finding another job, both of which Ms Ramsay declined.

[22] The meeting concluded with Mr Stephen's offer to Ms Ramsay to finish early as it was nearly 5pm. As Mr Stephen said in evidence, he knew that Ms Ramsay would obviously and understandably be upset.

[23] Mr and Mrs Stephen drafted a letter confirming their decision and delivered it to Ms Ramsay's letterbox. It reads:

29 July 2005

Dear Marie

As per our previous discussions and correspondence, an assessment on your capabilities to carry out your duties as a Funeral Director and Embalmer was to be made at the end of July. Over recent weeks it has been apparent that accuracy in your written and verbal work has not been to a satisfactory standard to attain the right level of service to our clients.

It is with regret that one months notice is given to terminate this Employment Agreement on 26 August 2005 or earlier by mutual agreement.

HEATHER AND GRAHAM STEPHEN

[24] Ms Ramsay wrote a note to Mr and Mrs Stephen dated 31 July 2005 saying that her preference was not to work out the notice period but to spend that time searching for alternative employment. A week or so later, Ms Ramsay received a *Record of Settlement* signed by Mr and Mrs Stephen purporting to record the arrangement as a full and final settlement. Ms Ramsay did not sign or return this document.

Justification for dismissal

[25] It is necessary to determine on an objective basis whether the company's actions and how the company acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[26] I accept the company's point that attention to detail was an important part of the requirements for the position. This was stated in the advertisement which Ms Ramsay responded to before she was appointed. Mistakes in formal documents, public notices and service materials would be upsetting for the company's clients, whatever their cause. Viewed objectively, Ms Ramsay was not discharging this aspect of her duties to the employer's satisfaction. Mr and Mrs Stephen cannot be criticised for treating the situation as a work performance issue in accordance with clause 20 of the employment agreement. As explained above, I reject the contention for Ms Ramsay that the employer's concern was caused by or linked to Ms Ramsay's decision to decline an interest in a move to Balclutha.

[27] A fair and reasonable employer would have given an employee involved in a meeting such as occurred on 23 May 2005 prior advice about the meeting so they could decide whether to be represented or supported or whether a mutually agreed mediator should be involved. Under clause 20 the employee is also entitled to an opportunity to explain any alleged non-performance and possibly avoid the invocation of the formal review following which there is the risk of dismissal. However, Mr and Mrs Stephen had decided to invoke the formal review period before giving Ms Ramsay this opportunity. These actions when initiating the review period were not those of a fair and reasonable employer. As a result, Ms Ramsay became upset and there developed some tension between her and Mrs Stephen. However, in the end, this lapse is not sufficient to vitiate an otherwise proper process.

[28] There is complaint that Mr and Mrs Stephen removed various duties from Ms Ramsay. The typed record of the 23 May 2005 meeting records that Ms Ramsay *will continue her duties with the exception of arranging funerals, some paperwork, and being on call as these are both difficulty areas for her at present*. I am satisfied that this was discussed with Ms Ramsay. The proposal was consistent with the advice Mr and Mrs Stephen received from Ms McMeeken to reduce Ms Ramsay's workload in order to give her space. Other intended support was also not well received. Mrs Stephen suggested that Ms Ramsay take sick leave (rather than use annual leave) to attend the course but Ms Ramsay took offence at the implication that she was unwell. Despite how this was viewed by Ms Ramsay, these actions by the company were consistent rather than inconsistent with those of a fair and reasonable employer.

[29] It is said that Mrs Stephen in particular excessively scrutinised Ms Ramsay's work after the course in mid June 2005. Ms Ramsay's evidence is that Mrs Stephen was constantly looking over her shoulder and undermining her work. For part of this time, Mrs Stephen made corrections thinking that Ms Ramsay was not aware of this. Then Mr and Mrs Stephen decided that they should not correct Ms Ramsay's work without her knowledge so corrections were pointed out to Ms Ramsay. A trigger for Ms Ramsay's dyslexia is anxiety and stress. A reasonable employer needed to balance keeping Ms Ramsay properly informed about the situation with allowing her an opportunity to demonstrate that she could achieve the requirement for accuracy in her affected work. I am satisfied that Mr and Mrs Stephen did so.

[30] There is a complaint that Ms Ramsay was not properly forewarned about the final meeting on 29 July 2005. However, it was abundantly clear from the notes of the two earlier meetings that there would be a final meeting at the end of July 2005 to assess whether Ms Ramsay had achieved the standard of accuracy required by the company. Ms Ramsay had an opportunity to be supported or represented at this meeting but chose not to be. There was a brief opportunity for Ms Ramsay to comment but she had nothing to add. It was well recognised between Ms Ramsay and Mr and Mrs Stephen that Ms Ramsay had continued to make errors such as spelling mistakes and transposing letters and figures in important documents. Mr Stephen announced the decision to dismiss Ms Ramsay on notice. Mr Stephen's evidence which I accept is that he and Mrs Stephen had reached their decision to dismiss a week or so earlier subject to anything said by Ms Ramsay at the 29 July 2005 meeting. Ms Ramsay believes that the decision to dismiss her was predetermined, and in particular that Mrs Stephen had made up her mind as early as May 2005. However, I accept that Mr and Mrs Stephen remained open to Ms Ramsay demonstrating after the Davis course the required level of accuracy. Unfortunately, as the materials provided show, Ms Ramsay continued to make errors in important documents at a significant rate.

[31] Part of the argument for Ms Ramsay is that no fair and reasonable employer would have dismissed her because the mistakes were caused by her dyslexia. However, this was not a dismissal for misconduct. Ms Ramsay was dismissed on notice after being given a reasonable opportunity to demonstrate that she could fulfil an essential part of the work required in her position. Mr and Mrs Stephen made reasonable efforts to assist and support Ms Ramsay although that was not always recognised or welcome. Viewed overall, their actions were those of a fair and reasonable employer. It follows that Ms Ramsay was not unjustifiably dismissed.

[32] There is also an argument that Ms Ramsay was discriminated against because of her dyslexia. I do not accept that is what happened. Ms Ramsay was dismissed because she was not able to meet a reasonable standard of accuracy in her work. She was not dismissed or treated differently because of her dyslexia.

Summary

[33] Ms Ramsay does not have any sustainable personal grievance against the company.

[34] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority