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Reynolds v Burgess CC 5/07 [2007] NZEmpC 27 (2 March 2007)

Last Updated: 28 May 2007

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 5/07
CRC 30/04**

IN THE MATTER OF of a challenge to a determination of the Employment Relations Authority

BETWEEN FRANCESCA REYNOLDS
Plaintiff

AND DEBORAH JANE BURGESS
Defendant

Hearing: 19 and 20 June 2006

(Heard at Christchurch)

Appearances: Francesca Reynolds, In person
Grant Slevin, Counsel for Defendant

Judgment: 2 March 2007

JUDGMENT OF JUDGE A A COUCH

- [1] Ms Reynolds operates a business known as Eftpos Easy and Cash Register Hire. Over the last several years, two companies have traded under that name: Shelton Holdings Limited and Eftpos Easy Limited. Ms Reynolds is managing director of both companies.
- [2] In January 2002, Ms Burgess replied to an advertisement placed by Ms Reynolds for a personal assistant. She was offered employment and began work on Monday 21 January 2002.
- [3] That employment came to an end on Friday 1 February 2002. Ms Burgess says that she was dismissed and that her dismissal was unjustifiable. Ms Reynolds says that Ms Burgess was only ever employed for a fixed term of 2 weeks and that her employment therefore came to an end by agreement. Ms Reynolds also says that Shelton Holdings Limited employed Ms Burgess, not her.
- [4] Ms Burgess pursued her personal grievance before the Employment Relations Authority which gave its determination on 27 October 2004 (CA 129/04). The Authority found in favour of Ms Burgess. It found that she had been employed as a personal assistant on an open ended basis, that she was dismissed and that her dismissal was unjustifiable. The Authority also determined that Ms Reynolds was liable as Ms Burgess' employer because she had entered into the employment agreement as agent for an undisclosed principal.
- [5] Ms Reynolds challenged the whole of the Authority's determination. At her election, the matter proceeded by way of a hearing de novo.
- [6] These proceedings have had a long and difficult history before the Court. The statement of claim was filed in November 2004 but the substantive hearing was not conducted until June 2006. What occurred in the interim and gave rise to such delay is set out in my interlocutory judgment dated 10 May 2006 (CC 5/06).
- [7] At the substantive hearing of this matter, Ms Reynolds presented her case first. For ease of understanding,

however, I deal with Ms Burgess' evidence first in this judgment.

Case for Ms Burgess

- [8] The case for Ms Burgess was clear and relatively straight forward. Her evidence was to the following effect.
- [9] In late 2001 Ms Burgess and her husband moved to Kaiapoi, near Christchurch. Prior to her arrival, her mother had arranged a job for her at Raeward Fresh. This company provides fresh produce to hotels, restaurants and other wholesale customers on a daily basis.
- [10] Ms Burgess was employed by Raeward Fresh on what she described as a "*casual contract*". She explained that the arrangement was that she would work the hours required to do the work available. Although her hours varied from day to day, she worked at least 5 days each week. Ms Burgess' weekly earnings from that work varied from about \$220 to more than \$500.
- [11] On 5 January 2002, Ms Burgess saw the following advertisement in the Christchurch Press:

PERSONAL ASSISTANT

This is a full time permanent position.

The ideal person will be

Honest, friendly, helpful and confident.

Familiar with general office software. Experience preferred but not essential. Good work ethic and the ability to manage time efficiently.

*Applicants must apply in their own handwriting to
P O Box 26 195
CHRISTCHURCH*

- [12] Ms Burgess responded to this advertisement. On 9 January 2002 she sent a letter addressed to "*The Manager*" at the address in the advertisement enclosing a copy of her curriculum vitae and giving other information about herself
- [13] On Sunday 13 January 2002, Ms Burgess returned from work to receive a message that someone had telephoned her about her job application. She returned the call and spoke to a man called Martin. He asked her to go to the office of Eftpos Easy at 4pm the following day to be interviewed by Fran Reynolds for the personal assistant position. It was common ground during the hearing that "Martin" was Martin Foley, who was Ms Reynolds domestic partner at the time.
- [14] Ms Burgess did as she was asked. On Monday 14 January 2002, she went to see Ms Reynolds who interviewed her for about 30 minutes. Ms Reynolds then asked Ms Burgess to come back the following day at 5pm for a second interview with her and Mr Foley.
- [15] Again Ms Burgess did as she was asked. She attended for the interview before 5pm but had to wait for some time because Mr Foley did not arrive. Eventually Ms Reynolds went to collect Mr Foley in her car, taking Ms Burgess with her. They returned to the premises of Eftpos Easy where the interview began at about 6pm. It was a detailed interview based on an extensive, pre-prepared schedule of questions and topics. As the interview progressed, Ms Reynolds made handwritten notes on a copy of the schedule which was headed up "*Debrah*" [sic].
- [16] The interview schedule consisted of 5 pages. The last page was headed "*OTHER ISSUES*". On this page, Ms Reynolds recorded a number of notes. In a group towards the top of the page, she noted "*Inhouse packages*", "*Office*", "*Excell*" [sic], "*Debtor/Creditors*", "*50/W/M*" (which I take to mean a keyboard speed of 50 words per minute), "*PAYE, GST*". Ms Reynolds then recorded "*Smoker*" and "*8.30 40 hour week*". The page contained a pre-printed question "*HOURLY RATE SEEKING?*" along side which Ms Reynolds had written "*9.50*". Towards the bottom of the page, Ms Reynolds had written "*(5am-1-2 6 days a week)*".
- [17] During the interview, Ms Reynolds said she realised Ms Burgess did not have all the skills and experience necessary for the job but that training would be provided. Ms Reynolds also said that there would be an initial 1 month trial followed by a pay review and then a further pay review 3 months later. Ms Reynolds said it would take a good 9 months before Ms Burgess knew everything about the position.
- [18] Towards the end of the second interview, Ms Burgess was offered the position and accepted it. She did not recall being offered a written employment agreement or signing such a document either at the interview or at any time during her employment.
- [19] Ms Burgess was to begin work at Eftpos Easy on 21 January 2002. In anticipation of that, she resigned from her position at Raeward Fresh. She also spent \$440 on new clothes to wear when working at Eftpos Easy.
- [20] On Sunday 20 January 2002, Ms Burgess went to Eftpos Easy where she was shown how to operate the

telephone system. This was at Ms Reynolds' request.

- [21] Ms Burgess began work at Eftpos Easy as arranged on Monday 21 January 2002. Her hours of work were 8.30am to 5pm each day with half an hour for lunch.
- [22] The Eftpos Easy premises were located inside the premises of another business, Coates Industries. These premises were in the form of a warehouse to which there was access through a roller door and a normal door alongside. This meant it was necessary to go through the part of the premises used by Coates Industries to get to the offices and storage area used by Eftpos Easy.
- [23] Ms Burgess arrived at the premises between 8.10am and 8.15am each day. By that time the warehouse manager for Coates Industries had arrived and the door to the premises as a whole was open. This enabled Ms Burgess to have access to the offices of Eftpos Easy which she said were unlocked when she arrived. Once at work, Ms Burgess would answer the telephone and take messages until Ms Reynolds arrived some time later. Ms Burgess said that this was the pattern from her first day of work.
- [24] During her first week of work at Eftpos Easy, Ms Burgess did a variety of tasks. This included a physical stock-take of cash registers which Ms Reynolds asked her to do in order to become familiar with the various models of machine the business dealt in. For similar reasons, she was also asked to do a stock-take of the storeroom. Other work Ms Burgess described doing during her first week included banking, receiving messages from customers and sending messages to them and dispatching orders. Ms Burgess said that, contrary to what she had been led to believe, Ms Reynolds gave her little assistance or guidance in doing these tasks and was critical of mistakes she made.
- [25] At the beginning of her second week on the job, which would have been Monday 28 January 2002, a new employee called Linda started work at Eftpos Easy. Ms Burgess recalled that she answered the telephone and took orders.
- [26] On Tuesday 29 January 2002, Ms Burgess began processing some orders in the morning. When she was uncertain about an aspect of this task she asked Ms Reynolds for help but this was not forthcoming. Later in the morning, Ms Reynolds took Ms Burgess to task over a mistake made by Linda which she felt Ms Burgess should have corrected. She also criticised Ms Burgess as being slow on the job.
- [27] When Ms Burgess returned to work after lunch that day, Linda was gone and Ms Burgess did not see her again. After that, Ms Burgess answered phone calls from people asking about a job available at Eftpos Easy.
- [28] That day, there was a meeting between Ms Reynolds and Ms Burgess. Ms Burgess said that the catalyst for this meeting was a further occasion on which Ms Reynolds was critical of her work and said they better have a talk in her office. Ms Burgess' evidence about that meeting was:

25. I went into her office and she said it was not working out. She said my performance level was not up to scratch and that she believed I had no idea how an office worked. She told me that the job was above my head. She asked me what I knew how to do and I told her I knew how to invoice and dispatch. She said that I did not know how to do these things. She said it took me most of the day to dispatch a few goods when it would have taken her only 15 minutes. I explained to her that I had been waiting for her to help me and check whether I had done the job correctly. I said to her "so you want me to finish up". She said yes I could either finish up then or work through until Friday of that week, it was up to me. I decided to work through until Friday because I needed the money. I had left a full time job to begin employment with Eftpos Easy and suddenly I did not have a job. I was very upset. Fran then told me she realised she had said I would be on one months trial but she already knew then that I would not be right for the job. She explained to me that she was able to see very early on if someone was not going to work out. She used the example of the girl, Linda who had been answering the phones and said she had got rid of her after just 11/2 days because she knew by then that she was not right for the job. Fran said I might be suited for this sort of work but only at a junior level and she suggested that I do some courses. I felt so bad after she said this to me that I got up and went home.

- [29] The next day, Wednesday 30 January 2002, a woman called Galina arrived at 9am. She told Ms Burgess she was there to start a new job. Ms Burgess got the immediate impression Galina had been employed to take over her position.
- [30] For the final 3 days of her employment, Ms Burgess' duties were changed. She no longer answered the telephone or did clerical work. Instead, she worked at the rear of the premises doing cleaning and tidying work.
- [31] On Friday 1 February 2002 there was some difficulty with Ms Burgess' final pay. Late in the afternoon, Ms Reynolds gave Ms Burgess a cheque for the balance of her wages but not her holiday pay. She told Ms Burgess to come in the following Monday if she wanted her holiday pay. Ms Burgess duly went back to Eftpos Easy on Monday 4 February 2002 but was not paid her outstanding holiday pay. On 4 March 2002, Ms Burgess' solicitor wrote to Ms Reynolds asking for the outstanding holiday pay. Ms Reynolds did not respond. The holiday pay has never been paid.

- [32] The case for Ms Reynolds was largely contained in her evidence, supplemented to an extent by the evidence of Mr Foley. This was to the following effect.
- [33] In December 2001, the office manager at Eftpos Easy resigned. After discussing her replacement with Mr Foley, Ms Reynolds placed three advertisements in the Christchurch Press on 5 January 2002. One was for the full time position of personal assistant set out earlier in relation to the evidence of Ms Burgess. The other two advertisements were for part time positions as a "*DESPATCH PERSON*" and an "*ADMINISTRATION CLERK*". These other two advertisements invited a response by telephone rather than an application in writing as with the personal assistant position. Ms Reynolds said that she placed three advertisements for differently described positions "*in the hope of attracting interest from people having a wide variety of skills*".
- [34] Ms Reynolds received applications from more than 200 people for the position of personal assistant. Mr Foley reviewed the curricula vitae received and prepared a short list of candidates who were interviewed on 9 and 11 January 2002. Ms Burgess was not amongst the applicants short-listed or interviewed. On 11 January, Ms Reynolds and Mr Foley believed they had found one or possibly two applicants suitable for the personal assistant role.
- [35] On Sunday 13 January, Ms Reynolds telephoned Ms Burgess to say that she would not be considered for the personal assistant position and offering her "*a temporary position ... to do some general cleaning up for a few weeks*". Following several further telephone discussions, Ms Burgess accepted that offer and it was agreed she would start work on Monday 21 January 2002.
- [36] On Sunday 20 January 2002, Ms Burgess called into the office of Eftpos Easy where she asked Ms Reynolds questions about the telephone system. This had not been prearranged and Ms Reynolds was surprised to see her.
- [37] Ms Burgess began work on Monday 21 January 2002. That day, she signed a written employment agreement which provided that her employment would end on 1 February 2002.
- [38] Ms Burgess' hours of work were 9am to 5.30pm. She did some telephone answering and general administration work but her principle duties were to clean and tidy up the premises before the start of a new trading year.
- [39] Sometime after she began work at Eftpos Easy, Ms Burgess complained that she had not been given an interview for the position of personal assistant and asked to be considered for that position. Ms Reynolds replied that Ms Burgess should not feel bad about this and that there had been other very good candidates. In an effort to assist Ms Burgess, Ms Reynolds went through the topics and questions on the interview schedule with Ms Burgess "*on more than one occasion*." When Ms Burgess did not interview well Ms Reynolds coached her in interview technique and suggested courses she might take.
- [40] At Ms Burgess' insistence, Ms Reynolds attempted to contact her referees. One was unavailable. Another said she did not know Ms Burgess. The third, Glen Stevens, said that Ms Burgess had worked for him only briefly whereas she had said the period was 6 months. When Ms Reynolds told her of these responses, Ms Burgess was embarrassed and caused Ms Reynolds to have concerns about her "*integrity*."
- [41] Other staff were employed to work at Eftpos Easy during the time Ms Burgess was there. These included Amy Williams and Galina Evguenov but nobody called Linda.
- [42] On or about 29 January 2002, Ms Reynolds told Ms Burgess that there was not enough work available to justify extending her employment beyond the end of that week and that Ms Burgess was unconcerned about this. Ms Burgess' employment finished on Friday 1 February 2002 in accordance with the written employment agreement.
- [43] Ms Reynolds accepted that she did not pay Ms Burgess the holiday pay owing to her. She explained this by saying that she did not know at the time how to calculate holiday pay and that she subsequently overlooked it.
- [44] In support of Ms Reynolds' case, a significant amount of evidence was also given by Mr Foley. The substance of his evidence was as follows.
- [45] Mr Foley had considerable experience recruiting staff in the course of his employment over the last 15 years. For this reason, and because of his personal relationship with Ms Reynolds, he assisted her in finding staff for the Eftpos Easy business after the office manager left in December 2001. He advised Ms Reynolds to place the three advertisements in the newspaper which have previously been described.
- [46] Mr Foley did the initial screening of applicants for the position personal assistant. After identifying as what he described as the "*A candidates*" Mr Foley carried out an initial assessment of them by telephone, sometimes speaking to them more than once. He then prepared a short list of candidates who were interviewed by him and Ms Reynolds on 9 and 11 January 2002.
- [47] Mr Foley did this work for Ms Reynolds during a period of annual leave which concluded on 11 January 2002. He returned to work on Monday 14 January 2002.
- [48] Mr Foley had no recollection of interviewing Ms Burgess.

- [49] The other witness who gave oral evidence for Ms Reynolds was Amy Williams. She was employed at Eftpos Easy from 21 January 2002 until some time in February 2002. Although she did not say the date on which she finished, it was some time after Ms Burgess left.
- [50] Ms Williams did not recall being given a written employment agreement by Eftpos Easy or signing such a document. When shown a document in the form of an employment agreement between her and Shelton Holdings Ltd, she said she did not recognise it. When asked to look at a signature on the document, however, she said that she believed that it was hers.
- [51] Ms Williams said that she worked alongside Ms Burgess and Galina and that the work that they did consisted principally of cleaning, tidying and filing.
- [52] Ms Williams did not recall anyone called Linda being employed at Eftpos Easy while she was there.

Other witnesses

- [53] In response to an aspect of Ms Reynolds' evidence, Glen Stevens was called as a witness on behalf of Ms Burgess. He said that he did not recall Ms Reynolds telephoning him early in 2002 and that, had she made the call she described in her evidence, he was certain that he would have remembered it. It was common ground that Ms Reynolds had telephoned Mr Stevens on 20 July 2004, shortly before the Authority's investigation meeting. Mr Stevens said he believed that was the only conversation he ever had with Ms Reynolds.
- [54] Prior to the hearing, Ms Reynolds had provided briefs of evidence of two further witnesses. When Mr Slevin indicated that he did not wish to cross-examine either of them, those briefs were accepted in evidence by consent.
- [55] The first of those two briefs was from Sue Stephens. She applied for the position of personal assistant at Eftpos Easy advertised in January 2002 and was interviewed by Ms Reynolds and Mr Foley. She said that, after the interview, she was told that she was one of two candidates on a final short list but later found out that she was unsuccessful.
- [56] The other brief of evidence was from James Hawkey, the warehouse manager for Coates Industries. He said that, in January 2002, he did not have occasion to let Ms Burgess into the Eftpos Easy premises. He also said that he did not recall any employees being locked out of the Eftpos Easy premises in the morning or employees waiting for Ms Reynolds to arrive at 9am.

Expert evidence

- [57] A key issue in this case, and a major point of difference between the parties, was whether Ms Burgess had entered into a written fixed term employment agreement. Ms Reynolds' case relied heavily on the proposition that such an agreement had been concluded and she produced a document which she said was that agreement. Ms Burgess denied signing such an agreement or even being offered one to consider.
- [58] This issue became central to the investigation of the Authority who took the unusual, but in my view entirely appropriate, step of commissioning a report from a forensic document examiner and handwriting expert, Linda Morrell.
- [59] Ms Morrell was asked by the Authority to give an opinion on the validity of the signatures on both the employment agreement purportedly signed by Ms Burgess and that in the name of Ms Williams. To assist in that process, Ms Morrell was provided with numerous reference documents containing the signature and other handwriting of Ms Burgess, including her letter of application to Eftpos Easy dated 9 January 2002 and the tax code declaration she provided to Eftpos Easy on 21 January 2002. In respect of Ms Williams, only one reference document was provided to Ms Morrell, being a statement made by Ms Williams in July 2004.
- [60] In respect of the employment agreement in Ms Burgess' name, Ms Morrell concluded:

In my opinion, based on my various findings and observations I consider that the evidence points away from the questioned blue ink entries on document B [the employment agreement] as being completed by D. Stevens and consider that another writer(s) has completed them probably using documents 'D' [Ms Burgess' application letter] and 'C' [Ms Burgess' tax declaration] as models for the writing and signature of D. Stevens.

- [61] To put this report into context, it is necessary to understand that Ms Burgess' original family name was Stevens. She took the name Burgess when she married in November 2001. As at January 2002, some official records relating to Ms Burgess, such as those held by Inland Revenue, were still in the name of Stevens and she used that name when dealing with them. The document Ms Reynolds claimed to be an employment agreement between Ms Burgess and Shelton Holdings Ltd had the name Burgess printed on the first page but the signature was in the name of Stevens.
- [62] With respect to the employment agreement in the name of Ms Williams, Ms Morrell said:

As I have only one reference signature for A. Williams, my examination with regard to this Agreement is very restricted. From the very limited comparisons that I have been able to make I find a number of differences between the reference and questioned signatures. I find the questioned signature to be unfluent and hesitantly written, contain blunt line endings and beginnings, and differences in baseline relationship and size relationships. In my opinion the evidence points away from the signature on the Agreement F [the employment agreement in Ms Williams' name] as being by the writer of the reference A. William's signature. To take this matter further I strongly recommend that more genuine A. Williams signatures, ideally from 2002 be submitted for further comparison work.

[63] Ms Morrell's report was an important factor in the Authority's conclusion that Ms Burgess did not sign the employment agreement relied on by Ms Reynolds.

[64] After filing her challenge to the Authority's determination, Ms Reynolds sought access to the documents provided to Ms Morrell for the purpose of obtaining a further expert opinion about the genuineness of the signature on the employment agreement in Ms Burgess' name. It was agreed that the documents should be provided directly to an expert nominated by Ms Reynolds and this was eventually done in May 2006. The expert retained by Ms Reynolds was Delwynne Walsh, who is a senior document examiner for the New Zealand Police attached to the Office of the Commissioner in Wellington.

[65] Ms Walsh provided a brief of evidence to the Court. In it, she began by setting out her qualifications and experience which I am satisfied qualify her as an expert witness. She then described the documents she had received for examination. These were the same as those examined by Ms Morrell with the exception of the reference document relating to Ms Williams. In addition, Ms Walsh received some documents from Ms Reynolds. These were a fax header sheet dated at 21 January 2002 signed by Ms Burgess and a number of documents containing Ms Reynolds' handwriting and signature.

[66] With respect to the employment agreement in Ms Burgess' name relied on by Ms Reynolds, Ms Walsh concluded:

Based on the nature of the similarities and differences observed, it is my opinion the questioned STEVENS signature and associated handwritten entries are simulations/copies of the handwriting and signature styles seen in the specimens attributed to Deborah BURGESS/STEVENS.

[67] Ms Walsh went on to say that, because she was not provided with any reference documents written or signed by Ms Williams, she was unable to express an opinion about the signature on the employment agreement in her name.

[68] Mr Slevin had made arrangements for Ms Walsh to present her evidence in person but, shortly before that was to happen, Ms Reynolds agreed that both Ms Walsh's brief and Ms Morrell's opinion should be admitted in evidence by consent. I received them on that basis.

[69] Although Ms Reynolds consented to the evidence of the two expert witnesses being received in their absence and effectively waived her right to challenge that evidence through cross-examination, she gave a substantial amount of evidence by way of "explanation". None of this evidence however related to the critical issue of whether Ms Burgess had signed the employment contract relied on by Ms Reynolds. It therefore did not assist me.

Issues

[70] It is common ground that Ms Burgess was employed to work in the business known as Eftpos Easy and that she did so from 21 January to 1 February 2002. It is also common ground that the offer of that employment came from Ms Reynolds. In her evidence, Ms Reynolds conceded that there were no grounds for dismissing Ms Burgess. It was unchallenged and I accept that, in offering employment to Ms Burgess, Ms Reynolds intended that offer to be on behalf of Shelton Holdings Ltd. It follows that the essential issues I must decide are:

- (a) Whether Ms Burgess' employment was open ended as she said or for a fixed term of 2 weeks as claimed by Ms Reynolds.
- (b) Whether Ms Burgess knew or ought to have known that the offer of employment she received from Ms Reynolds was on behalf of Shelton Holdings Ltd.
- (c) If those issues are resolved in Ms Burgess' favour, what remedies are appropriate.

Conflict of evidence

[71] In their account of events, there was a substantial conflict of evidence between the witnesses. This was principally between what was said by Ms Reynolds and Ms Burgess but, to a lesser extent, also involved the evidence of Mr Foley and Ms Williams.

[72] To the extent it is necessary to do so, I prefer the evidence of Ms Burgess where it is in conflict with the

evidence of other witnesses. I do so partly for reasons supporting the reliability of Ms Burgess' evidence and partly for reasons suggesting the unreliability of other witnesses. I have also had regard to the submissions made by Ms Reynolds and Mr Slevin and to the logic of certain aspects of the parties' cases.

- [73] In her evidence, Ms Burgess said that, during the weekend of 2 and 3 February 2002, she made notes of the events relating to her employment at Eftpos Easy. She gave those notes to her solicitor when she saw him for the first time the following week and they have formed the basis of her evidence both before the Authority and the Court. This evidence was not challenged in cross-examination and I accept it. Evidence based in this way on a contemporary record of events is likely to be more reliable than evidence based on recollection or reconstruction several years after the event.
- [74] In contrast, it was not suggested that the evidence of any other witness was based on notes made at the time for that purpose. Although the evidence of Ms Reynolds and Mr Foley was based to a significant extent on contemporary documents, it was noticeable that the construction they placed on those documents and the inferences they drew from them varied and changed in the course of their evidence. Most of their evidence consisted of reconstruction and rationalisation rather than recollection.
- [75] The second factor which indicated to me the reliability of Ms Burgess' evidence was that it remained largely unaltered by cross-examination. In response to extensive, and at times confrontational, cross-examination by Ms Reynolds, Ms Burgess made some appropriate concessions but the substance and tenor of her evidence did not change. It was noticeable also that Ms Burgess answered Ms Reynolds' wide ranging questions promptly and directly where possible. This suggested to me that her answers were more likely to be prompted by recollection than by rationalisation.
- [76] In contrast, Ms Reynolds was compelled to make numerous concessions in cross-examination which substantially and significantly changed the impression given by her evidence-in-chief. Her answers were often long and discursive leading on occasions to questions being repeated or necessitating a direction from me to answer the question asked.
- [77] Another significant factor affecting my assessment of credibility as between Ms Burgess and Ms Reynolds was the expert evidence of the document examiners. The evidence given by Ms Burgess and Ms Reynolds about whether a written fixed term employment agreement had been presented to Ms Burgess and signed by her was in stark contrast. The evidence of the document examiners clearly supported Ms Burgess' evidence and cast doubt on the evidence of Ms Reynolds.
- [78] A further factor causing me to doubt the accuracy of the evidence given by Ms Reynolds, Mr Foley and Ms Williams was that they clearly had little or no actual recollection of the events in question. Ms Reynolds conceded that, when she received the proceedings from the Authority in early February 2004, she could not recall Ms Burgess having ever been employed in her business. When answering questions about specific events, Ms Reynolds frequently replied that she could not remember.
- [79] In his evidence, Mr Foley was careful to avoid categorical statements. Rather, he spoke in terms of what he thought would have happened, what was likely or said that he did not recall a particular event. On one of the few issues about which Mr Foley said he was "*certain*", he was later compelled to admit that he was wrong. This was in relation to candidates for the personal assistant position. Mr Foley said with some emphasis that Sue Stephens and Galina Evguenov were "*definitely*" the two top scoring candidates at interview. The interview schedules, which Mr Foley confirmed were in his handwriting, showed that Ms Stephens was the top scorer but that Ms Evguenov was the equal bottom scorer.
- [80] As to Ms Williams, it was clear from her answers to oral questions that she had very little if any recollection of the relevant events. In response to most of the questions which required her to go outside the scope of her written brief, Ms Williams replied that she could not remember. Notably, this included the significant issue of whether she had signed a written fixed term employment agreement. Ms Williams said that she could not recall being presented with such an agreement or signing one.

Ms Reynolds' submissions

- [81] In reaching my conclusions about the credibility of witnesses, I have also had careful regard to the submissions made by Ms Reynolds. She sought to persuade me that, as a matter of logic, Ms Burgess' evidence was improbable and ought not to be given weight.
- [82] Ms Reynolds dealt firstly with the interview records. She referred to the list made by Mr Foley of candidates interviewed on 9 and 11 January 2002 and noted the absence of Ms Burgess' name on that list. She also referred to the evidence of Mr Foley that he was back at work on 15 January 2002 when Ms Burgess said he and Ms Reynolds had interviewed her. She submitted that this evidence favoured the conclusion that Ms Burgess had not been interviewed.
- [83] That submission overlooks a good deal of other evidence. It is not surprising that Ms Burgess was not on Mr Foley's list of candidates for interview on 9 and 11 January 2002. Mr Foley said that he compiled that list after initial discussions with the candidates by telephone and then arranged times for interviews. The implication

of this evidence is that Mr Foley must have compiled the list prior to 9 January 2002. Ms Burgess' letter of application was dated 9 January 2002 and would not have been received by Ms Reynolds and Mr Foley until the following day at the earliest.

- [84] As to Mr Foley's availability for an interview with Ms Burgess on 15 January 2002, he conceded in cross examination that he would have been available after work at the time Ms Burgess said the interview took place.
- [85] A key piece of evidence suggesting that Ms Burgess was interviewed for a permanent position was the detailed interview schedule in Ms Burgess' name which Ms Reynolds conceded had been completed by her. Ms Reynolds attempted to explain this document by saying it was made during a series of mock interviews conducted after Ms Burgess was employed. I reject that explanation for three reasons. Firstly, I doubt that Ms Reynolds would have devoted a significant amount of her time and effort to coaching a temporary employee. She said in her evidence that her business was demanding and that she was always busy. Secondly, Ms Reynolds said that, as part of this coaching exercise, she contacted Ms Burgess' referees. Doing so would not assist Ms Burgess in developing interview skills and makes no sense other than in the context of considering Ms Burgess for employment. Thirdly, Ms Reynolds said in her evidence that Ms Burgess had performed poorly in the interviews she conducted with her in that she was unable to answer half of the questions. That is inconsistent with the interview schedule itself which records Ms Burgess' response to 20 out of the 22 questions. By comparison, the interview schedule for Galina Evgenov records answers to only 16 of those same questions yet she was described by Mr Foley as a capable candidate and was subsequently employed.
- [86] The inference I draw from all the relevant evidence is that Ms Reynolds was dissatisfied with some aspect of the best candidates interviewed on 9 and 11 January 2002 and, on receiving Ms Burgess' relatively late application, decided to see if she might be a suitable alternative. The difficulty with other candidates may well have been the rate of wages they expected. Ms Stephens, who was identified as the leading candidate on 11 January 2002, was seeking \$15-16 per hour. Ms Burgess was prepared to begin on \$9.50 per hour. Ms Stephens said in her evidence that she was one of two candidates being finally considered for the position of personal assistant but was told she was unsuccessful. If Ms Stephens was the best candidate in terms of skills and experience, it follows that she must have been rejected for some other reason, such as the wage rate she expected.
- [87] Ms Reynolds' second submission was that the work actually done by Ms Burgess while she was working at Eftpos Easy was not that of a personal assistant and that this cast doubt on Ms Burgess' evidence that she was appointed to that position. In making this submission, Ms Reynolds relied on her own evidence and that of Ms Williams.
- [88] I am unable to place any significant weight on Ms Williams' evidence. As I have noted earlier, it was apparent that she had little recollection of the relevant events. An example of this was that she said in her evidence-in-chief that she often worked alongside Ms Burgess and Galina while she was at Eftpos Easy. The evidence is clear that Galina Evgenov did not start work until Wednesday 30 January, 3 days prior to Ms Burgess leaving.
- [89] As to Ms Reynolds' evidence of Ms Burgess' duties, it was noticeable that this changed in the course of cross-examination. Whereas the initial impression she gave was that Ms Burgess was engaged solely in cleaning and tidying work, she later conceded that Ms Burgess had answered telephones, responded to customers, dispatched orders, done filing and some accounting work.
- [90] In any event, Ms Burgess' evidence was that she was engaged on the basis that she would be provided with training and would take up to 9 months to become proficient in the job. It was therefore not to be expected that she would be doing a full range of duties immediately. Overall, I do not find that the evidence about the work Ms Burgess did was inconsistent with her evidence about the position in which she was employed.
- [91] Ms Reynolds' third submission related to Ms Burgess' evidence about her hours of work and access to the Eftpos Easy premises in the morning.
- [92] Ms Reynolds submitted that it was not credible that Ms Burgess would be employed to work from 8.30 am to 5.30 pm when she did not start until 9 am and when the hours of work of other staff were 9 am to 5.30 pm. On this point, Ms Reynolds relied on the evidence of herself, Ms Williams and Mr Hawkey.
- [93] The evidence of the other two witnesses did not support Ms Reynolds' contention. Ms Williams said that she thought her hours of work were from 9 am to 4 pm or 4.30 pm. Mr Hawkey's evidence was that he could not remember anyone waiting for an hour every morning for staff of Eftpos Easy to arrive at 9 am.
- [94] As between the parties, there was some support for Ms Burgess' evidence in a note made by Ms Reynolds on the interview schedule. On the last page, Ms Reynolds recorded "*8.30 40 hour week*".
- [95] It does not seem to me at all unlikely that Ms Reynolds would want a member of staff to be at work from 8.30 am to answer the telephone and take messages for staff who started later. The customers of the business were shops and other trading organisations who were likely to be working from 8.30 am or earlier.
- [96] Ms Reynolds also submitted that it was inherently unlikely that the premises of Eftpos Easy would be

unlocked at 8.15 am when Ms Burgess said she arrived at work. I agree that it would not be prudent to leave the premises unlocked overnight and Ms Burgess readily agreed with that proposition when it was put to her in cross-examination. Curiously, however, Ms Burgess' evidence that the premises were in fact unlocked gained some oblique support from Mr Hawkey's evidence that he did not let her in to the premises of Eftpos Easy in the morning and that no one was waiting around until 9am. On balance, I am able to accept Ms Burgess' evidence on this issue.

- [97] Ms Reynolds' fourth submission was that Ms Burgess' own description of her dismissal and of her reaction to it was illogical and therefore unlikely to be accurate. Specifically, Ms Reynolds referred to Ms Burgess' evidence that, following her dismissal, she was very upset but remained at work for the rest of the day and worked until the end of the week. She also referred to Ms Williams's evidence that she did not recall any "unpleasantness" while Ms Burgess was employed.
- [98] I do not accept this submission. While dismissal may be an intensely distressing experience, it is not uncommon for employees who have been dismissed to hide their feelings from others in order to preserve their privacy and their pride. I also find Ms Burgess' explanation that she carried on working for the rest of the week because she needed the money entirely credible.
- [99] In the course of her evidence, Ms Reynolds described how she dealt with performance issues involving a previous employee. She said that she did so according to law. Mr Foley said that he also believed this to be so. On this basis, Ms Reynolds invited me to infer that she would not have dealt with Ms Burgess inappropriately by unjustifiably dismissing her and, on that basis, to reject Ms Burgess' evidence. It is not appropriate to draw such an inference. Even accepting the evidence about the previous matter at face value, there are many possible reasons why Ms Reynolds may have felt constrained to handle that situation as she did. There may or may not have been similar considerations in this case.

Other evidence

- [100] In addition to the aspects of the evidence to which Ms Reynolds referred me in her submissions, there were other particular aspects of the evidence I took into account in my assessment of credibility and in making findings of fact.
- [101] After moving to Christchurch, Ms Burgess and her husband were under some financial pressure. She needed to work. The job she had at Raeward Fresh had variable hours but was ongoing. It is most unlikely that she would have given up that job to take a temporary position for two weeks.
- [102] Ms Burgess gave evidence that she spent \$440 on new clothes in anticipation of beginning work at Eftpos Easy. This evidence was not challenged. It is unlikely that she would have spent a significant amount of money in this way if the job was to be a temporary one doing principally cleaning and tidying work. This is especially so given the financial pressure on the household.
- [103] Ms Reynolds gave evidence that, at their meeting on 29 January 2002, she told Ms Burgess that there was insufficient work for her after the end of that week. Ms Reynolds agreed, however, that Galina Evguenov was employed to start work the following day and remained employed by Eftpos Easy for some months until she resigned. Ms Reynolds also agreed that she extended Ms Williams' employment beyond the end of that week when it was otherwise due to finish.
- [104] In answer to questions from me, Ms Reynolds agreed that she did not tell Ms Burgess that the business of Eftpos Easy was operated by Shelton Holdings Ltd and that she never explicitly told Ms Burgess that the offer of employment had been made on behalf of that company. Ms Reynolds said that there were signs and other indications in the premises suggesting that Eftpos Easy was the trading name of a company but there was no evidence of anything specific. Two documents to the contrary were produced. One was a fax message written by Ms Burgess on her first day of work. The header was simply in the name of Eftpos Easy with no indication that this was the trading name of a company. The other document was a letter from Ms Reynolds to Ms Burgess on the business letter head. This was in similar form with the name Eftpos Easy and contact details but no indication that the business was operated by a company.

Decision

- [105] Based on my assessment of the credibility of the witnesses and having regard to all of the evidence adduced, I make the following findings of fact:

On 15 January 2002, Ms Reynolds made an oral offer of employment to Ms Burgess. That offer was immediately accepted by Ms Burgess.

The employment agreement concluded by that offer and acceptance was for ongoing employment as a personal assistant with training to be provided. The hours of work were to be 40 per week and the initial rate of pay to be \$9.50 per hour.

Ms Reynolds did not disclose to Ms Burgess that she was entering into that employment agreement as

agent for a company and Ms Burgess had no reason to believe that she was doing so.
Ms Burgess never signed a written employment agreement or otherwise agreed to her employment being for a fixed term.
On 29 January 2002, Ms Reynolds gave Ms Burgess notice of dismissal.
That dismissal was given effect on 1 February 2002.
That dismissal was unjustifiable.

[106] Where the Authority or the Court finds that an employee has a valid personal grievance, it is obliged by [s124](#) of the [Employment Relations Act 2000](#) to consider the extent to which the employee may have contributed to the situation that gave rise to the personal grievance. I find that Ms Burgess did not contribute to the situation giving rise to her unjustifiable dismissal.

Remedies

- [107] As this matter was the subject of a hearing de novo, all issues were at large, including remedies. In his final submissions, Mr Slevin sought confirmation of the remedies awarded by the Authority as to reimbursement of wages and compensation for distress.
- [108] I have no difficulty in confirming the order of the Authority that Ms Reynolds pay Ms Burgess the sum of \$4,940.00 gross by way of reimbursement of lost wages pursuant to [s123\(1\)\(b\)](#) of the [Employment Relations Act 2000](#). I also confirm the Authority's order that Ms Reynolds pay Ms Burgess outstanding holiday pay of \$45.60 together with interest on that sum at the rate of 7 percent per annum from 1 February 2002 until the date on which payment is made in accordance with this judgment.
- [109] As to compensation for distress, the amount sought by Ms Burgess in the Authority was only \$2,000 and the Authority accepted that claim was appropriate. In my view, that award was inadequate to properly compensate Ms Burgess in all the circumstances of this case. Accordingly, I set aside the determination of the Authority in this respect and award instead the sum of \$4,000.
- [110] By way of cross-challenge, Ms Burgess sought an award of interest on the remedies awarded by the Authority from 22 March 2002 down to the date of judgment. The Court's jurisdiction to award interest is conferred by clause 14 of Schedule 3 to the [Employment Relations Act 2000](#) which provides:

14 Power to award interest

(1) Subject to subclause (2), in any proceedings for the recovery of any money, the Court may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at such rate not exceeding the 90-day bill rate (as at the date of the order), plus 2%, as the Court thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.

(2) Subclause (1) does not authorise the giving of interest upon interest.

[111] In *Salt v Fell* unreported, 2 June [2006, AC 31/06](#), I considered the scope of the jurisdiction conferred on the Court by this clause. The relevant part of my judgment was:

[126] The plaintiff sought an award of interest on all monetary amounts payable to him including reimbursement of wages and compensation for distress This claim was made in reliance on clause 14 of Schedule 3 to the [Employment Relations Act](#). There is a jurisdictional difficulty with this claim.

[127] The difficulty arises from the opening words of clause 14 which confer the jurisdiction to award interest "... in any proceedings for the recovery of any money ..." In other courts, this form of words is used to describe proceedings relating to sums of money already owing prior to their commencement. Some proceedings in the employment jurisdiction also fit readily into this category. Examples include recovery of arrears of wages under [s131](#) of the [Employment Relations Act](#) and recovery of holiday pay under s77 of the [Holidays Act](#).

[128] When personal grievance proceedings are commenced, no sums of money are owing on account of the grievance. It is only if the grievance is sustained and the discretion to award monetary remedies is exercised that money becomes payable. On a strict construction, therefore, it might be said that clause 14 does not confer jurisdiction to award interest on personal grievance remedies.

[129] I think that is too narrow a view of the matter. I am guided by s5(1) of the [Interpretation Act 1999](#) which provides:

The meaning of an [enactment](#) must be ascertained from its text and in the light of its purpose.

[130] The strict construction indicated above focuses almost entirely on the text of the clause at the expense of the purpose of the statute. The [Employment Relations Act](#) emphasises equity and substantial justice administered according to the merits. It is therefore a statute whose provisions ought to be interpreted liberally rather than strictly.

Such interpretation must remain within the accepted bounds of statutory construction but, where the words used may reasonably be given a range of meanings, it is the meaning which best reflects the spirit and objects of the statute which should be preferred.

[131] Applying this approach to clause 14, the meaning of the expression "proceedings for recovery of any money" is wide enough to encompass not only money owed at the time the proceedings are commenced but also remedies reflecting money which the employee would or might have had but for the action constituting a valid personal grievance.

[132] I therefore conclude that clause 14 confers jurisdiction to order the payment of interest on sums awarded by way of reimbursement under [s123\(1\)\(b\)](#) and compensation under [s123\(1\)\(c\)\(ii\)](#) for monetary benefits lost.

[133] By the same token, I conclude that interest may not be awarded under clause 14 on compensation awarded under [s123\(1\)\(c\)\(i\)](#) or compensation under [s123\(1\)\(c\)\(ii\)](#) for loss of benefits which are not of a monetary kind.

[134] It follows that the plaintiff's claim for interest on the compensation awarded to him for humiliation, loss of dignity and injury to his feelings must be dismissed for lack of jurisdiction but that it is open to me to order the payment of interest on the sum awarded as reimbursement of lost remuneration if I decide it is merited.

[112] Mr Slevin sought to persuade me to resile from the conclusion I reached in *Salt v Fell* regarding interest on awards of compensation for distress. In doing so, he referred me to the decision of Colgan J in *Gilbert v Attorney General in respect of the Chief Executive Officer of the Department of Corrections* unreported, 4 December 2003, AC 63/03. In that decision, Colgan J awarded interest on remedies including damages for distress and Mr Slevin relied on that to make the submission that it is open to the Court in all cases to award interest on compensation for distress.

[113] I do not accept that submission. In his decision in *Gilbert*, Colgan J was exercising the jurisdiction of the Employment Court under the [Employment Contracts Act 1991](#). That statute did not confer express jurisdiction on the Court to award interest and, to the extent that it did order payment of interest, the Court relied on s104(1)(h) which related to the making of orders that the High Court might make under rules of law or enactments relating to contracts. The claim in *Gilbert* was one of breach of contract and Colgan J accepted a submission that interest might be awarded on part of the damages awarded for distress by analogy from common law cases concerning damages for personal injury.

[114] This case must be decided under the [Employment Relations Act 2000](#). Parliament having enacted clause 14 of Schedule 3 conferring express jurisdiction on the Court to award interest in specific circumstances, it is not open to the Court to attempt to extend that jurisdiction by inference from other provisions of the Act. I therefore dismiss Ms Burgess' claim for interest on compensation awarded to her under [s123\(1\)\(c\)](#) of the [Employment Relations Act 2000](#) for the reasons set out in my decision in *Salt v Fell*.

[115] As to the claim for interest on reimbursement of lost wages, the merits are relatively straightforward. The sum awarded as reimbursement is calculated on the basis of what Ms Burgess would have earned had her employment by Ms Reynolds continued for 3 months after her dismissal on 1 February 2002. It therefore reflects the loss of payment which would have been made to her at that time. Having been kept out of that money since then, the plaintiff has been deprived of a real part of its value to her. That can and should be remedied by an award of interest. I direct that interest be paid on the sum of \$4,940.00 at the rate of 7 percent per annum for the period from 22 March 2002 until the date on which payment is made in accordance with this judgment. The starting date for interest of 22 March 2002 is the middle of the 3-month period in respect of which reimbursement has been ordered.

Conclusion

[116] In summary, my conclusions are:

the plaintiff's challenge is dismissed;

the plaintiff is ordered to pay the defendant \$4,000 compensation pursuant to [s123\(1\)\(c\)](#) of the [Employment Relations Act 2000](#);

the plaintiff is ordered to pay the defendant \$4,940.00 pursuant to [s123\(1\)\(b\)](#) of the [Employment Relations Act 2000](#);

the plaintiff is ordered to pay the defendant interest on \$4,940.00 at the rate of 7 percent per annum from 22 March 2002 to the date on which payment is made;

the plaintiff is ordered to pay the defendant \$45.60 pursuant to [s131](#) of the [Employment Relations Act 2000](#);

the plaintiff is ordered to pay the defendant interest on \$45.40 at the rate of 7 percent per annum from 1 February 2002 to the date on which payment is made.

Costs

[117] The Authority's order as to costs and disbursements associated with its investigation stands.

[118] The defendant is entitled to a proper contribution to her costs and disbursements associated with the proceedings in the Court. Mr Slevin is to file and serve a memorandum within 21 days of the date of this judgment. Ms Reynolds shall then have 21 days to file and serve a memorandum in reply.

A A Couch
Judge

Judgment signed at 3.00 pm on Friday, 2 March 2007

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