

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 193/08
5094941

BETWEEN

GLADYS ROMERO
Applicant

AND

THE CHANGE GROUP
AUSTRALIA PTY LIMITED
Respondent

Member of Authority: Marija Urlich
Representatives: David Collins, for Applicant
Geordie Wilson, for Respondent
Investigation Meeting: 15 May 2008
Determination: 28 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mrs Romero was employed as a foreign exchange sales consultant by the respondent from 15 June 2007 until 18 June 2007 when she resigned. Mrs Romero says her resignation amounted to an unjustified constructive dismissal. She says further that she was re-employed by the respondent on 25 June 2007 and that she was unjustifiably dismissed from that fresh employment later that same day. Mrs Romero seeks remedies in relation to these events.

[2] The respondent says Mrs Romero resigned her employment on 18 June 2007, that discussions were entered on 25 June 2007 regarding re-employment but were not concluded and Mrs Romero was advised later that day that she would not be offered employment.

[3] At the investigation meeting I received evidence from Mrs Romero and Geordie Wilson, the respondent's New Zealand Operations Manager.

Mrs Romero's resignation

[4] Mrs Romero worked for Interforex Pty Ltd for eight years until that business was sold to the respondent in June 2007. On 7 June 2007 Mrs Romero received a written offer of employment from the respondent. The offer confirmed all existing terms and conditions would remain the same. She indicated her acceptance of the offer by signing and returning it that same day.

[5] The relevant existing terms of employment are:

1. *POSITION*

...

The work is to be performed at the employer's premises at Ferry Building, 99 Quay Street, Auckland and at such other locations as is necessary for the appropriate performance of the work.

2. *HOURS OF WORK*

The Company by the nature of tourism business operates on every day of the year save Christmas Day. The normal hours of business at the Company's Auckland Branch are from 8am to 8pm daily from November to March, and 8am to 7.30pm daily from April to October.

Your normal hours of work will be:

<i>Monday</i>	<i>8:00am to 5:30pm</i>
<i>Tuesday</i>	<i>8:00am to 5:00pm</i>
<i>Wednesday</i>	<i>8:00am/pm to 5.30pm</i>
<i>Thursday</i>	<i>8:00am/pm to 3:00pm</i>
<i>Friday</i>	<i>8:00/pm to 3:00pm</i>

...

These hours may be changed from time to time to meet business requirements, and in the case of a Manager may be unpredictable and variable.

[6] The respondent took over the business on 15 June 2007.

[7] On 18 June 2007 Mrs Romero telephoned Mr Wilson with concerns about:

- (i) the training she was required to undertake;
- (ii) whether her hours of work would change; and
- (iii) her personal safety at the Britomart branch¹.

¹ The Britomart branch is a small kiosk located on a busy city street corner.

[8] Mrs Romero says Mr Wilson told her her hours would change, that he needed to be able to roster her at any branch and that she would lose her entitlement to public holidays. She told him he was forcing her to resign and verbally resigned.

[9] Mr Wilson says he told Mrs Romero that initially her hours would remain unchanged, that any changes would be looked at in the future and he did not believe there were any real safety concerns about the Britomart because it had been there for six years without incident.

[10] Mrs Romero confirmed her resignation in an email later that same day:

Dear Mr Bailey [the Australasian General Manager]

I notify I am taking a personal grievance against the (sic) The Change Group Company for unjust constructive dismissal.

Please advise within 7 days if you agree to mediation (sic) relevant to these issues.

[11] Mr Bailey emailed Mrs Romero that afternoon:

Dear Mrs Romero

I understand from today's events you offered a verbal resignation.

Should you wish to discuss this in any detail or at mediation, a representative of The Change Group Australia will be made available.

Please provide detail of a (mutually agreeable) time and place.

[12] Mrs Romero did not return to work.

[13] Mrs Romero told me at the point she resigned her employment with the respondent she had not been rostered to work at Britomart or rostered hours outside her normal hours of work.

[14] Mr Wilson said he was trying to make it clear to Mrs Romero that there would be no immediate changes to her hours but that there may be changes in the future. He said these changes were enabled under the existing terms of her agreement. This is correct to the degree such changes are enabled under the existing terms of employment.

[15] In resigning Mrs Romero acted before any changes to her terms of employment had been made and before any changes to her hours had been proposed. Notwithstanding, the terms of the written agreement, which form part of her terms of employment with the respondent, provide that those hours made be changed from time to time. Mr Wilson's refusal to guarantee her hours, as Mrs Romero put it in oral her evidence to the Authority, was correct given the terms of the employment agreement.

[16] Mrs Romero's resignation does not amount to an unjustified constructive dismissal. There is no evidence the respondent breached any duty owed to her that could give rise to a serious risk of resignation².

Was Mrs Romero re-employed?

[17] On 20 June 2007 Mrs Romero had a telephone conversation with Mr Bailey. She says he told her there would be no change in her hours of work and he would arrange a meeting with Mrs Romero and Mr Wilson to discuss her concerns about working at Britomart.

[18] The meeting proceeded on 25 June 2007 at a café in central Auckland. Mrs Romero said Mr Wilson confirmed she would be working the same hours, that she agreed to cover breaks at Britomart and confirmed she could start work as soon as possible. She said Mr Wilson asked her if she would resign again without any reason and she said that happened because the respondent had started to change what it had promised (ie, that her terms of employment would remain the same). Mrs Romero said Mr Wilson then apologised and said that had happened because he did not have her employment agreement. She said he then said he would speak with Mr Bailey and the team leader and get back to her.

[19] Mr Wilson telephoned Mrs Romero later that day and advised she would no longer be working for the respondent.

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW* [1994] 1 ERNZ 168

[20] Mr Wilson said the purpose of the meeting was to discuss Mrs Romero's resignation. He said that following the meeting the decision was made not to offer Mrs Romero employment with the respondent because she had refused to work a full day at Britomart and had raised objections to the training.

[21] There is no dispute between the parties that Mrs Romero was not an employee of the respondent immediately prior to this meeting; Mrs Romero says she was constructively dismissed on 18 June 2007 and the respondent says it accepted her resignation with immediate effect. The question is whether a new employment agreement was entered by the parties during the 25 June 2007 meeting. Was Mrs Romero a person intending to work³?

[22] Mrs Romero and Mr Wilson agree the meeting ended with Mr Wilson's advice that he would speak with Mr Bailey and the team leader and get back to Mrs Romero. Mrs Romero said she understood he was getting back to her to confirm her start time. This is unlikely given the degree of agreement Mrs Romero says was reached – why would Mr Wilson need to speak with the Australasian general manager about Mrs Romero's start time if an offer of employment had been made and accepted during the meeting?

[23] I find it is more likely that these re-employment discussions had progressed to a point where Mrs Romero made it clear she wanted her hours of work guaranteed and she would not work at Britomart other than to relieve for breaks, that Mr Wilson could not offer employment on those terms and this was confirmed later in the day following discussion with the general manager and team leader.

[24] For these reasons I find Mrs Romero was not a person intending to work for the purposes of section 5 of the Employment Relations Act 2000.

³ Means a person who has been offered and accepted work as an employee, section 5 Employment Relations Act 2000

Determination

[25] For the foregoing reasons I find Mrs Romero was not unjustifiably constructively dismissed on 18 June 2007 and was not unjustifiably dismissed on 25 June 2007.

Costs

[26] Costs are reserved.

Marija Urlich

Member of the Employment Relations Authority