

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 63
5410100**

BETWEEN HELEN SCOTT
Applicant

AND METHODE MEDIA LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Sir Edmund Thomas Q.C., Counsel for Applicant
Lorraine Thomas, Advocate for Respondent

Investigation Meeting: 22 January 2014 at Auckland

Submissions received: 22 & 29 January and 20 February 2014 from Applicant 22 &
29 January from Respondent

Determination: 24 February 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Helen Scott, claims that she has been unjustifiably constructively dismissed by the Respondent, Methode Media Limited (MML), as a result of a restructure of her position as a Graphic Designer.

[2] MML denies that Ms Scott was unjustifiably constructively dismissed on the basis that the proposed restructure did not proceed and Ms Scott was invited to return to work. However Ms Scott she had not returned to work and had voluntarily resigned from her employment with MML.

Issues

[3] The issues for determination are whether or not Ms Scott was:

- Employed subject to a trial period provision in accordance with ss 67A and 67B of the Employment Relations Act 2000 (the Act)

- Employed subject to a 12-month fixed term contract or for a 3 month fixed term contract
- Unjustifiably constructively dismissed by MML.

Background Facts

[4] MML is a small publishing company, publishing two magazines and employing approximately four employees.

[5] Ms Scott, who had previously been employed by MML during 2008 to 2010, said she had contacted Ms Lorraine Thomson, Publisher and owner of MML after seeing an advertisement placed by MML for a Graphic Designer.

[6] On 13 June 2012 Ms Thomson had emailed Ms Scott stating that MML: *“have a 12-month contract graphic design position coming up”*.

[7] Ms Scott said she had met with Ms Thomson and they had discussed the Graphic Designer position which was to be a part-time position. Ms Scott said that the part-time nature of the position and the 12 month duration were attractive to her as she was planning to enter into business on her own account within that time period.

[8] Following the meeting with Ms Thomson, Ms Scott received an email from Ms Thomson dated 17 June 2012 which set out the principle terms of the offer of employment and included the statement: *“And a trial three month period”*.

[9] Ms Scott had also received an individual employment agreement (the Employment Agreement) dated 20 June 2012 which she and Ms Thomson signed. Clause 7 of the Employment Agreement stated:

This is a trial contract position for three months, renewable at the end of this period. One month’s notice is required for termination.

[10] Ms Scott said she had not queried this clause with Ms Thomson as she believed it referred to the statutory three month trial period which she understood to be standard practice and which would take place at the commencement of the 12 month contract period.

[11] During her period of employment with MML Ms Scott said that she had suffered from a medical condition and in November 2012 she had been advised that the condition required urgent surgery.

[12] Ms Scott said she had met with Ms Thomson, informed her of the impending operation, and suggested that a free-lance graphic designer be employed for the period that she would be absent. On Friday 23 November 2012 which was her last working day prior to her operation, Ms Scott said she had been at work and had met her replacement to discuss her job with him.

Emails 6 December 2012

[13] Ms Scott initially expected to be absent from work for two weeks, however she suffered complications following the operation and required an additional week off work. On 6 December 2012 Ms Scott sent Ms Thomson an email informing her of this development and her requirement for an additional week of sickness absence to which Ms Thompson agreed.

[14] Ms Thomson said that prior to Ms Scott joining MML; there had been a full-time position which incorporated the graphic designer duties with a sales advertising role, and that during Ms Scott's absence she considered restructuring Ms Scott's Graphic Designer role into a full-time position incorporating sales advertising duties.

[15] On this basis Ms Thomson responded to Ms Scott's email request for additional sick leave stating:

Hi Helen,

Do take the extra week to get better. ...

We are looking at restructuring the graphic design position into a full time position with half of the time working on commission on advertising sales.

Let me know if you are interested in applying for this.

[16] Ms Scott said she had been upset to receive this email from Ms Thomson. During her employment at MML there had been no mention of the possibility of MML restructuring the Graphic Designer position, so it was a complete surprise to her, especially as she had been looking forward to returning to work following the surgical operation.

[17] Ms Scott said she did not consider applying for the restructured position which Ms Thomson mentioned in her email because (i) the sales advertising aspect of it was not suitable because she had no sales experience of any kind, and (ii) the full-time nature of the position was not suitable as it had been a part-time position she had originally sought and for which she had been employed by MML.

[18] Accordingly Ms Scott had responded to Ms Thomson:

Thank you for being understanding about me not being able to work this week as instructed by my surgeon. ...

I am very disappointed to hear that you are restructuring my role at Methode Media. The new role will not be suitable as my skill level and abilities do not fit the sales role side of the position.

I assume you intend this restructuring to happen at the end of my twelve month contract design role on 30 June 2013. ...

I look forward to returning to work on 17 December and discussing this further with you. I repeat again that I cannot say how disappointed I am that there will no longer be a role for me at Methode Media in the future. I am really sorry if my illness has triggered this development.

Emails 10 December 2012

[19] Ms Thomson said that she had replied by email to Ms Scott on 10 December 2012 stating:

... The reason why we appointed you to a three month part-time contract in mid-June was because we had previously had a full-time person working on advertising and graphic design – and we wanted to see if we could get by without the extra help in advertising. This has proved not to be the case

Your three month part-time contract rolled over into another three months, but now in order to keep Methode Media going, we need the extra help with advertising from the beginning of next year and it

works well if we have a person full time in the office that can do both graphic design and advertising.

So the restructure has nothing to do with your illness, just economic viability unfortunately, of keeping Methode Media operating.

We have put out the Dec/Jan issue of Travel Digest and the Dec/Jan issue of NZ Fitness, plus the Travel Digest desk pad and 2013 Media Packs, so do not have any graphic design work lined up for next week.

I did want to discuss this with you at the end of your contract but you have been away unfortunately for the past almost four weeks.

If we cannot find the right person for the job, we would like to come back to you after the office reopens on 7 January.

[20] Ms Scott said that she felt hurt, upset, and betrayed by this email from Ms Thomson. She had been in a fragile condition following her operation, and the news that her position had been restructured had affected her health further in that she had become depressed and unable to sleep.

Subsequent Correspondence

[21] Ms Scott responded to Ms Thomson's email on 11 December 2012 stating:

... You refer to my employment contract being a "three month part-time contract rolled over into another three months". This is not my recollection of the contract I signed. ...

[22] On 19 December 2012 Sir Thomas, Ms Scott's representative, wrote to Ms Thomson on behalf of Ms Scott raising concern about the restructuring proposal and also the contractual term of the employment agreement between the parties.

[23] Ms Thomson agreed at the Investigation Meeting that the letter from Sir Thomas had prompted the email which she had sent to Ms Scott on 21 December 2012 which stated:

...Have tried to ring you a few times now, but no answer.

Our office reopens on 7 January 2013. Have decided not to restructure the design position we were planning for 2013.

I look forward to seeing you back in the office on Monday 7 January as per your previous arrangement.

...

I am not going to be in the office from 10.15 am this morning. Back on 7 January. Will have limited email access while I am away.

[24] Sir Thomas replied to Ms Thomson on behalf of Ms Scott on 2 January 2013 advising that Ms Scott regarded her contract with MML as having been terminated as a result of the actions of MML thus that she would not be returning to work at MML.

[25] On 8 February 2013 Ms Scott filed a Statement of Problem with the Authority. The parties subsequently attended mediation; however this did not resolve the issues between the parties.

Determination

Was Ms Scott employed subject to a trial period provision in accordance with ss 67A and 67B of the Act?

[26] Ms Scott understood that she had been appointed to the advertised Graphic Designer position for a period of 12 months, and that the Employment Agreement set out that she was subject to a 3 month trial period in that position.

[27] The Act 2000 makes provision for trial periods at ss 67A and 67B which state:

*S 67A(2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that –*

(a) For a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and

(b) During that period the employer may dismiss the employee; and if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

*S 67B **effect of a trial provision under section 67A***

(1) This section applies if an employer terminates an employment agreement containing a trial provision under section section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.

[28] The Employment Agreement stated in clause 7 that:

This is a trial contract position for three months, renewable at the end of this period. One month's notice is required for termination.

[29] I find that this statement does not adhere to the statutory guidelines set out in s.67A(2) of the Act and on this basis I do not find it to be a valid trial period provision.

[30] I also observe that Ms Scott had been employed previously by MML during the period 2008 to 2010, and s. 67A (s) of the Act defines an employee who may be subject to a trial period as: “*Employee means an employee who has not been previously employed by the employer.*”

[31] Moreover even if the trial period provision had been valid which I have found it was not, Ms Scott was not issued with notice of dismissal before the end of the purported trial period on 2 October 2012 thus that the requirements of s 67B(1) of the Act were not fulfilled.

[32] I determine that Ms Scott was not employed subject to a valid trial period provision pursuant to ss 67A and 67B of the Act.

Was Ms Scott appointed subject to a fixed-term employment agreement of 3 or 12 months' duration?

[33] Ms Thomson stated that her understanding was that Ms Scott had been appointed for a fixed term position for 3 months, which expired on 2 October 2012 and claimed that because neither she nor Ms Scott had realised the expiry date had been reached, the Employment Agreement therefore ‘rolled on’ or continued for a further 3 month period.

[34] Ms Scott was employed by MML subject to the Employment Agreement, which was not specified to be of a fixed term nature, but which referred to it being: “*a trial contract position for three months, renewable at the end of this period*”.. To be valid, a fixed term employment agreement must comply with section 66 of the Act which states:

66 Fixed Term Employment

1. *An employee and an employer may agree that the employment of the employee will end –*
 - a. *At the close of a specified date or period; or*
 - b. *On the occurrence of a specified event; or*

- c. At the conclusion of a specified project.*
2. *Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must –*
 - a. *Have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
 - b. *Advise the employee of when and how his or her employment will end and the reasons for his and her employment ending in that way*

[35] Section 66(2)(a) of the Act provides that an employer must have genuine reasons based on reasonable grounds before the employer and employee can agree on the employment ending in a specific way. Section 66(2)(b) of the Act provides that an employer must advise an employee: “*of when or how his or her employment will end and the reasons for his or her employment ending in that way*”.

[36] Clause 7 of the Employment Agreement contains no explanation for the reason of the alleged fixed term nature of the Graphic Designer position. I am unable to conclude therefore that MML had genuine reasons based on reasonable grounds for specifying that Ms Scott’s employment would end after a three month period.

[37] I am further unable to find any statutory or contractual reason for Ms Thomson’s view that following the initial 3 month period, Ms Scott’s employment ‘rolled on’ for a further 3 month period only.

[38] On the same basis I find that Ms Scott was not employed subject to a valid fixed term agreement for either a 3 month or a 12 month period since I am unable to conclude that MML had genuine reasons based on reasonable grounds for specifying that Ms Scott’s employment would end after a fixed term period.

[39] I determine that Ms Scott was not employed subject to a fixed term employment agreement and was a permanent employee.

Was Ms Scott unjustifiably constructively dismissed by MML?

[40] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[41] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*¹ the Court of Appeal said regarding the correct approach to constructive dismissal:²

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[42] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. secondly if there was such a breach was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

Breach of duty on the part of the employer

[43] Ms Thomson said that the restructuring of the Graphic Designer position had been a proposal only, as had been indicated by her stating in the email of 6 December 2012: “*We are looking at restructuring ...*”.

[44] An employer who is proposing to enter into a restructuring exercise which may adversely affect the continuity of employment of an employee has a duty to behave in good faith towards the employee(s) so affected pursuant to s4(1A) of the Act.

[45] Section 4(1A)(c) is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

“(i) *access to information, relevant to the continuation of the employees’ employment, about the decision; and*

¹ [1994] 1 ERNZ 168

² Ibid At p 172

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[46] Ms Scott’s response email to Ms Thomson on 10 December 2012 indicated that she had understood the restructuring to be a *fait accompli*. I consider that the fair and reasonable employer, in circumstances in which Ms Scott’s email of 10 December 2012 clearly indicated that she had understood there to have been a firm decision rather than a proposal, would have taken immediate action to allay any misunderstanding on Ms Scott’s part if indeed the restructuring had been only a proposal.

[47] However Ms Thomson’s response had not allayed any misunderstanding. On the contrary it confirmed Ms Scott’s understanding that the proposal was a *fait accompli* by referring to a restructuring, rather than a ‘proposed’ restructuring, which it justified by providing the reasons for it as being:

- (a) The requirement for a full-time person to provide extra help with advertising;
and
- (b) Economic viability necessary to keep MML operating.

[48] MML was under a duty of good faith to provide Ms Scott with an opportunity to comment on the proposal before any firm decision was made. In her email dated 10 December 2012 Ms Scott had stated that she looked forward to discussing the situation with Ms Thomson when she returned to work on 17 December 2012.

[49] However there was no opportunity for her to do so since Ms Thomson made it clear in her email response that same day that she did not require Ms Scott to return to work on 17 December 2012 since there would be no graphic design work for her to do.

[50] Moreover the email sent to Ms Scott on 21 December 2012 which was sent at 10.09 a.m. and which stated: “*I am not going to be in the office from 10.15 am this morning. Back on 7 January. Will have limited email access while I am away*” I find to have also deprived Ms Scott of an opportunity to engage in any meaningful discussion with Ms Thomson before 7 January 2013.

[51] I find this to be the case even though I accept that Ms Thomson did make two telephone calls to Ms Scott’s number on 21 December 2012 at 9.45 a.m. and 9.59 a.m. but without leaving a message on those occasions. I consider that the fair and reasonable

employer who was anxious to correct a misunderstanding and to provide an employee with an opportunity to provide feedback would in those circumstances have left a message or sent a further email or letter.

[52] The email sent by Ms Thomson on 10 December 2012 further stated: *If we cannot find the right person for the job, we would like to come back to you after the office opens on 7 January.*

[53] I find this statement confirms that a firm decision had been made to proceed with the restructure and to start recruitment for the restructured full-time position, with Ms Scott only to be considered for future employment should ‘*the right person*’ not be found by MML.

[54] The employer proposing to make a decision that might adversely affect the continuity of employment for an employee must provide that employee with information relevant to that decision; however I observe that Ms Scott was not provided with any relevant information.

[55] Ms Scott was not provided with a job description for the full-time position or an explanation of the additional duties details, and despite the indication of economic viability, Ms Scott said that during the course of her employment with MML she had not been provided with any financial information, nor had there been any discussions with her about the economic viability of MML. Nor had she been provided with any financial information on 6 December 2012 or in the period thereafter.

[56] In addition I find that there were no opportunities provided to Ms Scott to discuss or comment on the proposed restructuring of her position.

[57] Having considered all the circumstances, I find that MML breached the duty of good faith which it owed to Ms Scott pursuant to s 4 of the Act.

Was the breach sufficiently serious so as to make a substantial risk of resignation on the part of the employee reasonably foreseeable by the employer?

[58] With the full knowledge and agreement of MML, Ms Scott had been away on sick leave following an operation, she had been expecting to return to work at MML after her absence, which I observe was of a short duration.

[59] Whilst still unwell, a fact made known to Ms Thomson, she had in effect been informed that her part-time Graphic Designer position had been restructured into a full-time position which entailed 50% of the duties being dedicated to sales advertising.

[60] Whilst Ms Thomson said she believed she had been offering Ms Scott a promotion, I consider that there is no reasonable basis for that view given that Ms Scott had originally applied for a part-time position, and that she had no previous sales experience.

[61] Ms Thomson had made no real attempt to correct any alleged misunderstanding on Ms Scott's part that the restructuring decision had been made, and as previously stated, I find that the email sent by Ms Thomson on 10 December 2012 clearly conveyed to Ms Scott the information that only if MML was unable to find: "*the right person*" for the restructured position would there be any further contact with Ms Scott following the reopening of the office on 7 January 2013.

[62] In these circumstances I find that the breaches in the good faith duty MML owed Ms Scott were sufficiently serious as to make it reasonably foreseeable to MML that Ms Scott would resign.

[63] I determine that Ms Scott was unjustifiably constructively dismissed by MML.

Remedies

[64] Ms Scott has been unjustifiably dismissed and is entitled to remedies.

Lost wages

[65] Ms Scott provided evidence to the Authority of her efforts to mitigate her loss together with details of her earnings during the period following the termination of her employment with MML when she obtained some part-time work on a contract basis.

[66] Although I have found that there was no legal basis for the fixed term agreement governing the duration of Ms Scott's employment, I find that Ms Scott had accepted the position on that basis and that she had an expectation that her employment with MML would continue until the end of the 12 month period i.e. until 2 July 2013 which accorded with her plans to set up her own business.

[67] In her evidence, Ms Thomson confirmed that Ms Scott resigned on 2 January 2013, and I accept this date as being the date of the termination of employment.

[68] I order that MML pay Ms Scott the sum of \$5,827.75 gross in respect of lost wages, (calculated as 6 months ordinary pay of \$9,600.00, less the sum of \$772.25 earned by Ms Scott in mitigation of her lost earnings during that 6 months period) pursuant to s 128(2) of the Act,

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[69] Ms Scott is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Ms Scott suffered significant distress, resulting in health effects including depression, and difficulty in sleeping.

[70] I order MML pay Ms Scott the sum of \$6,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i).

Contribution

[71] I am required under s 124 of the Act to consider the issue of any contribution that may influence the remedies awarded. I find no contributory behaviour on the part of Ms Scott. There is to be no reduction in remedies.

Costs

[72] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave of the Authority.

Eleanor Robinson
Member of the Employment Relations Authority