

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 198
5432455

BETWEEN ROCHELLE WATSON
Applicant

A N D DSN LIMITED
(In Liquidation)
Respondent

Member of Authority: K J Anderson

Representatives: M Penny, Advocate for Applicant
D Grace, Advocate for Respondent

Investigation Meeting: 2 April 2014 at Hamilton

Submissions Received: 10 April 2014 from the Respondent
22 April 2014 from the Applicant

Date of Determination: 21 May 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Ms Rochelle Watson, claims that she was unjustifiably dismissed on or about 23 July 2013. Ms Watson also claims that she was disadvantaged in her employment by the unjustified actions of her cited employer, DSN Limited. However, as discussed at the investigation meeting on 2 April 2014, it is now accepted that the claims of unjustifiable disadvantage are, in fact, matters directly related to the claim of unjustifiable dismissal and the investigation of the Authority is focused on that particular matter alone.

[2] The respondent, DSN Limited (DSN) denies the claims of Ms Watson and says that because she was an independent contractor and not an employee, the Authority does not have jurisdiction to determine her claims. Alternatively, it is

argued, if the Authority should determine that an employment relationship existed, it is denied that Ms Watson was unjustifiably dismissed.

[3] The parties accept that there is a preliminary issue to be determined: Whether Ms Watson was in an employment relationship with DSN. It has also been accepted that the Authority should give consideration to all the available evidence in determining the preliminary matter, as it is not really possible (or practicable) to separate out the various evidential matters relevant to establishing the true nature of the relationship from that pertaining to the claim of unjustifiable dismissal.

Background

[4] The background to this matter is rather unusual but it is commonly accepted that the dispute about the nature of the relationship between Ms Watson and DSN emanated from circumstances that began with a friendship between Ms Watson and Ms Rochelle Sutton. At the material times Ms Sutton was the Office Manager for DSN and the partner of Mr Derek Grace, the Managing Director of the company.

[5] It is established that Ms Watson and Ms Sutton became friends as a result of both women meeting at a bus stop at Kihikihi, where their children caught a school bus.

[6] Sometime in March 2013, Ms Watson had an operation on her knee with the result she was unable to drive and pick up her children from school each day. As a result of the friendship that had developed between Ms Watson and Ms Sutton, the latter offered to collect Ms Watson's children from school until she was fit to drive again.

[7] Ms Sutton was the office manager for DSN and at some point in late May or early June 2013,¹ as an apparent result of Ms Sutton complaining to Ms Watson that she was too busy with her work, Ms Watson offered to come into the office, then located at Hamilton, and assist Ms Sutton. The evidence of Ms Sutton is that she initially declined Ms Watson's offer of help as the business was not in a financial position to be able to pay her. However, upon the insistence of Ms Watson that she wanted to help out, on a voluntary basis, and get some work experience, and following some discussion with Mr Grace, it was agreed that Ms Watson would come

¹ The evidence is inconclusive as to the precise date.

into the DSN premises and assist Ms Sutton. Nonetheless Mr Grace insisted that Ms Watson should be paid something for the fuel costs for her car and lunch should be paid for.

[8] It is commonly accepted that Ms Watson was paid \$100 in cash for the assistance that she gave to Ms Sutton during a period that has been identified as late May or early June 2013. It is also accepted that there was no suggestion of an employment relationship and that Ms Watson was simply giving some assistance to Ms Sutton as a friend, and possibly as a form of repayment for Ms Sutton taking care of Ms Watson's children.

The beginning of a paid relationship

[9] Sometime in June 2013, DSN moved the administration of the business from Hamilton to Kihikihi. The nature of DSN's business was² preparing grocery hampers. The business then engaged young people to market and sell the hampers on a house to house, cold calling basis. It is established that the young people selling the hampers were paid on a commission only basis, based on the hamper payment plan that was entered into with the customer.

[10] The common evidence is that Ms Watson was engaged, on an as required basis, to assist with the preparation of hampers and assisting with general administration work. While a dispute has arisen as to the nature of the relationship that the parties entered into, it is established that Ms Watson was paid \$15 per hour.

[11] From 6 June until the week ending 5 July 2013, Ms Watson worked a variable number of hours each day and there appears to be no dispute in regard to her being paid correctly.

[12] The evidence of Ms Watson is that on 19 June 2013, she was informed via a text that she should dress appropriately to attend "an impromptu training day". As the Authority understands it, from this point on Ms Watson was engaged to carry out the recruitment and training of young people to be hamper sales people for the *Youth Employment Hamper* (YEH) according to the *DSN Recruiters Goal Targets* document; signed by Ms Watson on 12 July 2013.

² The company went to liquidation status after the investigation meeting: 10 April 2014

[13] This document is in a rather odd format. It refers to Ms Watson being a *Full time Seminar Trainer Monday to Friday*. She was required to: *Find and Recruit 100 good YEH Promoters* and there was a weekly sales target of *100 plus SUPs* per week, with a future sales target of *1,500 plus SUPs* per week. The duties that Ms Watson was expected to perform are set out in some detail.

[14] The remuneration, although not specifically referred to as such, indicates that Ms Watson would be paid a *Personal Commission as normal \$10, \$15, \$25*. The Authority understands that the respective rates to be paid is per hamper and depends upon the payment plan (per week) that the purchaser of the hampers signed up to.

[15] The remuneration provisions also allow for an hourly rate to be paid when conducting *Training Seminars and hour of power morning team Training*, and travel is to be paid at the rate of \$80 per week, upon the production of receipts. Finally, Ms Watson was provided with a company telephone with *personal calls to be kept at a minimum*.

[16] Ms Watson also signed another document. The DSN logo features across the top of the first page. The title of the document is *NZ Legal Employment Obligations*. This document contains particular provisions pertaining to the obligations of the “*Employee*” to the “*Employer*”, including:

- *Confidential Information*
- *Copyright and other Intellectual Property*
- *Conflicts of Interest*
- *Use of Internet and Email*
- *Privacy Obligations*
- *Non-Competition*
- *Non-Solicitation of Clients*
- *Non-Solicitation of Employees*

[17] Finally, there is a *Severability* clause whereby it is envisaged that the Authority or the Employment Court may be involved in determining the enforceability of the above provisions, albeit this final clause is badly constructed.

[18] There is also a very oddly worded section pertaining to where the parties affix their respective signatures. Ms Watson signed the document as *DSN Representative*. Then under her signature are the words: *Agree and Except (sic) to Up Hold (sic) all the above clauses & NZ Employment Obligations*. And then under the above words,

there is: *Witness Full Name* and handwritten by him: “*Derek William Grace*”. Mr Grace affixed his signature underneath this.

[19] While the two aforementioned documents that Ms Watson signed do not comply with the requirements of the Employment Relations Act in regard to the essential requirements for individual employment agreements, I conclude that they can be taken to point substantially towards establishing that Ms Watson was an employee, and certain obligations were imposed upon her accordingly.

[20] There is an argument from DSN against the documents in question being substantial indicators of the existence of an employment relationship. DSN says that Ms Watson was mistakenly given the above documents to sign. And notwithstanding the signature of Mr Grace on the second document, DSN now says that Ms Watson should have been given an alternative document. This document was produced (for the first time) to the Authority at the investigation meeting. It has the title *INDEPENDENT SUB CONTRACTOR AGREEMENT*. Attached as *APPENDIX A – Definitions*, is what appears to be largely a definition of *Successful* sales targets along with reference to some payments, but most of this is very difficult to decipher, or make much sense of at all.

[21] Nonetheless, the argument advanced by DSN is that this is the document that other promotion/sales people operate under and some evidence has been produced accordingly. DSN says that this is the document that should have been given to Ms Watson, rather than the two documents that she signed.

[22] Perhaps it may be possible that DSN, in the form of Mr Grace, did make a mistake, but given that Mr Grace signed one of the documents in his role as the Managing Director of the company, and the fact that there has been no issue raised about the documents that Ms Watson signed, until the day of the investigation meeting, I have to say that the arguments advanced by DSN can only be seen as belatedly disingenuous, at best.

[23] However, there is other evidence that does support the contention of DSN that Ms Watson was an independent contractor. First, there are the time sheets that Ms Watson signed. It is accepted that these are what can be seen as a standard form (the Form) for DSN. The Form has provision for a *Contractor Number*, albeit there has not been a number inserted for Ms Watson. The Form provides for the hours worked each

day to be entered performing *Contract Duties*. And then, under the words: *I was offered and accepted these hours, and the hours worked are those stated above*; Ms Watson has signed each of the respective forms and following her signature is: *(Contractor)*.³

[24] And then there is another document: *Employee Information Form*. But this adds to the overall confusion because of its ambiguous content whereby in addition to its title, it refers to the *Date of employment*. The ambiguity is that under the term: *Type of Employment*, there are three classifications:

- *Full-Time*
- *Commission based*
- *Contractor*

In addition to providing some personal details, Ms Watson ticked the *Contractor* box.

Was Ms Watson an employee?

[25] It has to be said that the overall circumstances pertaining to Ms Watson's relationship with DSN are confusing and unusual. And while it may have been intended initially that Ms Watson would be an independent contractor, upon the consideration of all relevant matters,⁴ in particular the two documents that Ms Watson signed, I conclude that it is more probable than not, from at least 12 July 2013, an employment relationship existed between Ms Watson and DSN. It follows that I find that Ms Watson is entitled to bring her personal grievance claim to the Authority to be determined.

The personal grievance claim

[26] Ms Watson claims that she was unjustifiably dismissed on or about 23 July 2013. She says that the dismissal was implemented by a series of text messages on 23 July 2013 between her and Mr Grace. The Authority has heard some evidence about the background of these texts, and they have been produced. As with many factors regarding the relationship between Ms Watson and DSN, it is difficult to make any real sense out of some of the overall evidence. However, there is one particular text that makes it transparently clear that the relationship with Ms Watson was over.

³ The term "Contractor" is typed as a standard component of the Form.

⁴ Section 6(3) Employment Relations Act 2000

[27] Following a less than coherent text exchange between her and Mr Grace regarding whether Ms Watson was entitled to certain payments she claims were due; this text (as transmitted) was sent to her by Mr Grace:

Don't ever step foot on my property again you have committed theft by adjusting your hours and steeling sales ive told the girls about what u did for there safty and il tel everyone your a theft return my book the fozlied custom book put in my letterbox befor 6am or im reporting it stolen

[28] And then on 30 July 2013 there appears to be another exchange of emails between Ms Watson and Mr Grace, and he forwards a text informing that:

Hi I wish u the best but keep away from my daughter and wife im sending you a trespass notice.

[29] Upon the evidence available to the Authority, and notwithstanding the overall absurdity of the text exchanges between Ms Watson and Mr Grace, I conclude that Ms Watson was dismissed on 23 July 2013.

Was the dismissal unjustified?

[30] The dismissal of Ms Watson was not what a fair and reasonable employer could have done in all the circumstances, as even if Mr Grace had some issues pertaining to the various actions of Ms Watson he failed to discuss these in an appropriate manner and allow her the opportunity give an explanation then give proper consideration to this, before reaching a decision to terminate her employment.⁵

[31] It follows that I find that the dismissal of Ms Watson was unjustified and she has a personal grievance for which remedies may be available.

Remedies

[32] Ms Watson seeks reimbursement of lost wages for three months. But she has provided no evidence of any attempt to mitigate her loss, such as attempting to find new employment.

[33] Ms Watson says that she applied for jobs “through the internet sending emails”. Her explanation in regard to why she is unable to provide some evidence of

⁵ Section 103A(3) Employment Relations Act 2000 applies

applying for other positions is that her internet mail provider does not retain emails for more than three months. I do not find this explanation to be very convincing. The statement of problem for this matter was lodged with the Authority on 17 September 2013 and the investigation meeting was on 2 April 2014. Ms Watson had the services of an advocate during all of this time and it must be assumed that she would (or should) have been advised of the requirement to mitigate her losses.

[34] As Chief Judge Colgan stated in *Allen v. Transpacific Industries Group Limited (t/a Medismart Limited)*:⁶

Unions and other representing dismissed employees who intend taking personal grievances must keep good and complete records of their attempts to mitigate their losses or otherwise or such losses that they may wish to claim from the employer..... However, dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[35] As with the facts in *Allen*, the necessary details were noticeably absent in Ms Watson's case and she has not been able to provide a satisfactory explanation as to why this is so and it is not for the Authority to speculate or guess as to what Ms Watson may have done to mitigate her loss of income.⁷ Given the failure of Ms Watson to mitigate her losses and the total absence of any evidence to show any loss of income incurred, I decline to make any award of reimbursement of lost wages.

Compensation

[36] Ms Watson claims the sum of \$10,000 as compensation under s.123(1)(c)(i) of the Act for the hurt and humiliation incurred because of the circumstances applying to her dismissal. Ms Watson attests that she had a mental breakdown after her dismissal from the DSN. She attributes the breakdown to her perception of Mr Grace's "unpredictable behaviour" and she relates to obtaining a trespass notice against him. Ms Watson also says that Mr Grace informed her that he would make sure that she would never obtain work in the Waikato area again. Ms Watson also refers to a text

⁶ (2009) 6 NZELR 530 (EmpC)

⁷ See *Radius Residential Care Ltd v McLeay* [2010] NZEmpC 149.

from Mr Grace threatening her with a complaint to the Police and there is an allegation of theft of commissions that were apparently due to other sales people.

[37] Finally, Ms Watson refers to her marriage being put under “a lot of strain” due her to failure to cope with the accusations made by Mr Grace and the loss of her employment.

[38] While Ms Watson was probably affected by the manner of her dismissal and some of the actions of Mr Grace, there is no corroborative evidence, medical or otherwise to verify some of the things that Ms Watson has said. Further, there is credible evidence from Ms Sutton, who originally befriended Ms Watson. Ms Sutton refers to evidence of Ms Watson having an “emotional breakdown” in the office on what appears to be her last attendance there. Ms Sutton also attests to being absent from the office whilst on holiday and being told upon her return, that during her absence, Ms Watson had made an odd comment regarding Ms Sutton having been placed in the boot of a car by Mr Grace; the inference being that Ms Sutton had been a victim of foul play. Ms Sutton also says that Ms Watson used to complain to her, about her husband, who was often absent from home. It is the view of Ms Sutton that Ms Watson’s marriage “had been on the rocks” for some time.

[39] Unfortunately, I feel compelled to say that my observations of Ms Watson are that she is inclined towards some histrionic behaviour and much of her evidence about the nature of her role, in what was a less than viable business, and her departure from DSN, left me to ponder about Ms Watson’s relationship with reality.

[40] Nonetheless I am satisfied that she is entitled to award of distress compensation and I assess that the sum of \$4,000 is appropriate in the circumstances.

[41] In applying s.124 of the Act, I do not find any blameworthy behaviour by Ms Watson and hence there is no reduction to the remedy.

Other claims

[42] Ms Watson claims that she is entitled to be paid a total of \$315 as arrears of wages. The validity of the claims is rejected by DSN. However, I find that the evidence in regard to this claim is inconclusive and hence I decline to make any order. On the other hand, Ms Watson has produced a receipt for the amount of \$80 for fuel

that she purchased while carrying out her role with DSN, and I find that this is a valid claim under the terms of her engagement.

Determination

[43] For the reasons set out above, I find that the dismissal of Ms Watson was unjustified. Pursuant to s.123(1)(c)(i) of the Act, DSN Limited is ordered to pay to Ms Watson the sum of \$4,000.00, and a further \$80.00 as reimbursement for fuel.

Costs

[44] According to the summary provided by the advocate for Ms Watson, costs of \$3,442.16 (exclusive of GST) have been incurred in regard to preparing for the investigation meeting. This does not include the costs of advocacy at the meeting.

[45] The investigation meeting took 2.5 hours. DSN is ordered to pay to Ms Watson the sum of \$1,200 as a contribution towards her costs.

K J Anderson
Member of the Employment Relations Authority