

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 23/10
5156902

BETWEEN GEMMA WHYTE
 Applicant

AND CREATIVE FORCE MEDIA
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: G Whyte, in person for applicant
 T Holland and A Morris, advocates for respondent

Investigation Meeting: 23 October 2009

Determination: 19 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Gemma Whyte says her former employer, Creative Force Media Limited (Creative Force) dismissed her unjustifiably by reason of redundancy. She also says she is owed outstanding wages and holiday pay, and redundancy compensation.

[2] Creative Force says the redundancy was genuine and justified. It says further that no payments are owed.

[3] Ms Whyte also seeks penalties for breach of the employment agreement and breach of good faith.

Background

[4] Ms Whyte is a graphic designer. She was formerly employed as a junior designer by North Shore Print Limited (NSPL), of which Thomas Holland was the

director and shareholder. NSPL was part of a group of companies, known as the Graphic Impact group, associated with Mr Holland and his interests. It was placed in receivership on 5 May 2008.

[5] At or about that time Mr Holland's friend, Adam Morris, was planning to launch an on-line business with a marketing focus. He was interested in using Mr Holland's expertise, and hoped that Mr Holland could bring some clients to the new venture. Creative Force was registered in the companies office on 12 May 2008. At the time Mr Morris was the sole director and shareholder. Mr Holland was employed as sales manager,¹ although Mr Morris' lack of experience in the industry meant that in practice Mr Holland had the role of a general manager.

[6] Being aware of the likely fate of the Graphic Impact group, Mr Holland believed some staff would be suitable for employment at Creative Force. Ms Whyte was one of them. He spoke to Ms Whyte and two others about the possibility, and later the potential employees met with Mr Morris.

[7] Ms Whyte commenced her employment with Creative Force on or about 21 May 2008. It was common ground employment was offered to Ms Whyte and her colleagues on the same terms and conditions as those applicable at NSPL. To that end all were provided with written employment agreements embodying those terms.

[8] However Ms Whyte sought to re-negotiate some of the terms, including hours of work, pay review, leave and redundancy provisions. She presented a written agreement incorporating the amendments she sought. The amendments were not raised or addressed at the time. However Ms Whyte's claim for redundancy compensation is based on a provision in the agreement she presented, and I turn to the issue of which agreement applied later in this determination.

[9] The day to day business of Creative Force included designing and printing business cards, letterhead stationery, business flyers and other marketing material. According to Mr Morris, during the second half of 2008 Creative Force was suffering because its competitors had lower overheads and were able to offer better prices. He

¹ Mention was made of Mr Holland's bankruptcy in connection with allegations about his real role at Creative Force, but he was not adjudicated bankrupt until 24 November 2008.

reduced staff numbers from 9 to 6. Over the Christmas break the sales representative was made redundant, and it became clear that the company's printing business could not continue. However, planning and preparation for the publication of a range of magazines to be used for marketing purposes had commenced in August. Mr Morris hoped the publishing activities could continue.

[10] Late in 2008 Mr Morris found the amended employment agreement Ms Whyte had given him. He raised the document with Ms Whyte, and the disagreement over which agreement applied began. At the time the immediate concern was about the differing hours of work in the two documents, and the discussion became heated.

[11] The terms of the employment agreement remained unresolved in January 2009. On or about 5 January there was another heated discussion about the failure to conduct a pay review, provision for which was also made in Ms Whyte's agreement.

[12] On 10 January Ms Whyte asked Mr Morris to meet again to discuss the agreement. A meeting for that purpose went ahead on the following Monday 12 January. No resolution was achieved.

[13] Afterwards Mr Morris had a meeting with the company's accountant, during which he said he was advised to make Ms Whyte's and another position redundant. Accordingly the next day, Tuesday 13 January, he met separately with Ms Whyte and the other employee to inform them of their redundancies. Ms Whyte was given two weeks' payment in lieu of notice and left immediately after the meeting.

[14] It was common ground that Mr Morris suggested to Ms Whyte that she work on a freelance basis, offering Creative Force's design clients to her as Creative Force would no longer be doing that work. He also offered to refer to her any client that approached Creative Force with design work. Ms Whyte did not accept these offers.

Whether dismissal for redundancy was justified

[15] Ms Whyte does not believe her redundancy was genuine, and says it was imposed because of the dispute over the terms of her employment agreement.

[16] There has been no suggestion that Creative Force continued to carry out its print business, and it was common ground that other redundancies were imposed in the December-January period. Further, by agreement with the parties Creative Force produced its statement of financial performance for the year ended 31 March 2009 on the basis that it was confidential to the Authority. The statement confirmed the company had significant expenses, the highest of which were wage and salary expenses, and that the March year ended with a relatively significant deficit.

[17] I am therefore satisfied the redundancy was imposed for genuine reasons. Even if Ms Whyte's proposed employment agreement was otherwise commented on in adverse terms at the time, it was not the substantial cause of the redundancy.

[18] Ms Whyte has also drawn attention to the lack of warning of the prospect of her redundancy, and the lack of consultation about it. I accept that the procedure followed here does not meet the standard usually expected of an employer. There was not enough information to show the company's circumstances were such that immediate action was necessary, or otherwise explaining the failure to meet these standards.

[19] For these reasons I find the dismissal unjustified.

[20] At the same time it is relevant that this was a small employer in a commercially vulnerable position, which had imposed a genuine redundancy. It attempted to assist Ms Whyte to maintain a workflow of her own, although she was dismissive of the attempts. Ms Whyte also indicated that she was not interested in participating in the company's publishing activities. Had a consultation process been embarked upon it is unlikely that the outcome would have been any different.

[21] Finally, there was no evidence of any injury to Ms Whyte's feelings as a result of the failure to meet the necessary procedural standard. Such upset as she described was associated with the dispute about her employment agreement and her view of how she had been treated in that respect.

[22] There will therefore be no order for the reimbursement of lost remuneration, or for compensation for injury to feelings caused by the personal grievance.

Holiday pay

1. Balance outstanding from NSPL

[23] Ms Whyte said that, when Mr Holland offered her employment at Creative Force, he also offered to transfer the balance of her holiday pay to Creative Force. She says Creative Force is obliged to make the payment.

[24] Accordingly she seeks payment in the sum of \$1,259.86.

[25] Mr Holland said he told the three NSPL employees being offered employment at Creative Force simply that he would make sure they were paid. He intended to take action on the matter while still involved with Graphic Impact.

[26] According to Ms Whyte, payment by Creative Force was referred to expressly, and the conversation occurred before the receivership. If she is correct about the timing, that is at least consistent with Mr Holland's further evidence that he was referring to his intention to find the money to pay Ms Whyte and the other two (but not the rest of the affected employees) from monies that might otherwise have been paid to NSPL creditors. When the company went into receivership he was unable to make good on his promise.

[27] Further, even if Mr Holland purported to make an express offer to transfer liability for the payment to Creative Force he had no authority to bind Creative Force to such an arrangement. On any view of them I do not accept that the exchanges amounted to the necessary agreement between Creative Force and Ms Whyte to the effect that Creative Force would meet NSPL's obligation to pay her outstanding holiday pay. Accordingly this claim is declined.

2. Balance outstanding from Creative Force

[28] Ms Whyte also seeks unpaid holiday pay owed by Creative Force itself, in the sum of \$565.34. On her calculation her total gross earnings to the date of termination (including the two days for which she also seeks payment) were \$26,298. She took 10

days' paid annual leave, and assessed her daily rate of pay as \$153.85. Accordingly her calculation was:

$$[8\% \times \$26,298] - [10 \times \$153.85] = \$565.34$$

[29] Creative Force said Ms Whyte's holiday pay had been overpaid. Its calculation to that effect was made on the basis that Ms Whyte took 15 days' paid annual leave in the relevant period.

[30] The issue of whether Ms Whyte took 10 or 15 days' leave centres on a five working day absence in August 2008, when she went to Australia. Ms Whyte said the absence was covered by time spent on extra work in the weekends before and after the absence and was not annual leave.

[31] The parties discussed the matter at the time. Mr Holland said the agreement was that the absence was to be on holiday pay. Elsewhere in evidence he commented that Ms Whyte was feeling unwell so claimed time off in lieu to go to Australia. Since the parties' relationship at the time was so friendly Ms Whyte was given a cash gift, and there was such preparedness to be flexible about hours of work, I consider it unlikely Mr Holland said to Ms Whyte at the time that the entire absence was to be treated as annual leave.

[32] Overall it is more likely that Mr Holland acquiesced in Ms Whyte's taking time off in lieu in August with reference to the work being done or to be done on the weekends each side of the absence. I do not accept that he went further and acquiesced in any further allocation to the absence of other accumulated time off in lieu. I therefore conclude that the work Ms Whyte performed on those weekends should be compensated for as time off in lieu.

[33] Secondly, it was common ground that extra time was worked on the weekends in question, although there was little information beyond assertion about how much time was worked. Mr Holland said two half-days were worked on the relevant Saturdays, and that he and Mr Morris worked on those days as well. He denied that the time worked amounted to 40 hours, believing it was more likely to be no more

than 8 hours. I did not understand Ms Whyte to be saying she worked 40 extra hours over the two weekends.

[34] I therefore treat one day of Ms Whyte's absence as time off in lieu. The holiday pay calculation is:

$$[8\% \times \$26,298] - [14 \times \$153.85] = (\$50.05)$$

[35] Ms Whyte has been overpaid holiday pay in the sum of \$50.06 (gross). Her claim for holiday pay is declined.

[36] Creative Force has not sought an order for the repayment of any overpayment. That matter will be for the parties to resolve.

Other payments sought

1. Two days' pay

[37] Creative Force accepted that Ms Whyte was owed two days' pay. It was not clear from the calculation it produced whether payment has been made, but I understood payment was not made pending a resolution of whether there was an overpayment of holiday pay.

[38] If payment has not been made, then I observe that the failure is a breach of the Wages Protection Act 1983. If there has been no payment, Creative Force is ordered to pay to Ms Whyte the sum of \$307.69 (gross).

2. Redundancy compensation

[39] Compensation for redundancy was sought, quantified as one month's pay in the sum of \$3,333.33 (gross). The claim is based Ms Whyte's proposed employment agreement, which contained the following provision:

“28.1 If the employee's position is made redundant the employee will be entitled to one month's salary, plus one week for every year or part thereof.”

[40] Mr Morris accepted that Ms Whyte gave him the document at or about the commencement of her employment, and in response to his request that the employment agreements be signed and returned. She did not tell him that changes to the original agreement were contained in the document she presented, although she should have.

[41] Mr Morris put the document away in a drawer without looking at it. He should have looked at it - if only to sign it and regardless of whether he was aware it contained changes. Had he done so, he would have seen that the changes were highlighted clearly.

[42] The changes amounted to Ms Whyte's counter-offer to the terms of the agreement that had been put to her. The counter offer was not responded to until later in the year, when the present issues began to arise. I conclude that the failure to respond to the counter offer when it was made, coupled with the period of some 5 months' employment without further comment, mean Creative Force acquiesced in the arrangement contained in Ms Whyte's counter offer. The failure to read the document is no defence.

[43] Creative Force is therefore ordered to pay to Ms Whyte the sum of \$3,333.33 (gross) as redundancy compensation.

Penalties

[44] The claims for penalties were formulated as set out at the beginning of this determination. They were too broadly-stated to address. I decline to make any orders in respect of them.

Summary of orders

[45] Creative Force is ordered to pay to Ms Whyte:

- a. \$307.69, (gross) as two days' pay; and
- b. \$3,333.33 (gross) as redundancy compensation.

[46] The order in (a) above will lapse if payment has already been made.

[47] Interest is payable on the above amounts calculated as 4.8% pa from 13 January 2009 to the date of payment.

Costs

[48] Costs are reserved.

[49] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority