**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 269/07
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| | BETWEEN | MARTYN WILLIAMS<br>Applicant |
| | AND | CAMIRA FURNITURE LTD<br>Respondent |

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| Member of Authority: | Yvonne Oldfield |
| Representatives: | Clive Bennett for Applicant<br>Jennifer Wickes for Respondent |
| Investigation Meeting: | 5 June 2007 |
| Submissions received: | 4 July 2007 from Applicant<br>11 July 2007 from Respondent |
| Determination: | 30 August 2007 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Towards the end of 2004 Mr Williams returned to Christchurch after a period of "OE". He spent several months searching for just the right job and in March 2005, he thought he had found it. The respondent was seeking a salesperson who could eventually take a senior role within the company, and offered the position to Mr Williams. Mr Williams moved to Auckland and started work on 1 April 2005. No formal written employment agreement was executed.

[2] Unfortunately Mr Barmes, director of the respondent, did not find that Mr Williams lived up to the promise he saw in him at interview. He was concerned that Mr Williams did not behave in a professional way, was not fostering good relationships with clients and was failing to generate business for the company. In addition Mr Williams had cost the company at least $4,500.00 in personal internet use

(through downloading music) in May 2005. He had not repaid this, and nor had he repaid a further $135.00 of other personal work charged to an account held by the respondent. Finally he had crashed a company car, causing it to be impounded by the Police.

[3] Mr Barmes met with Mr Williams twice, on 11 July and on 11 August, to discuss the perceived shortcomings in his behaviour and performance. Mr Barmes did explain his concerns to Mr Williams, but (as he conceded to me) he did not explicitly tell Mr Williams that his job was in jeopardy. Mr Barmes thought that was an obvious inference to be drawn from the nature of the issues. For his part, Mr Williams told me that he had no idea that his employment was at risk. He viewed Mr Barmes's feedback as a part of the induction and training process.

[4] It was Mr Barmes's understanding that the parties had agreed that the employment would be on a six month trial basis. Partly in reliance on this, when he saw no improvement after the meeting of 11 August, he decided to dismiss Mr Williams and did so, on one week's notice, on 25 August 2005.

[5] Mr Williams claims $12,000.00 compensation for hurt and humiliation as well as lost earnings and a penalty for the respondent's failure to provide a written employment agreement. The respondent counter claims for the personal expenditure by the applicant.

[6] The issues for determination are:

i. What were the terms of employment and is a penalty against the respondent appropriate for its failure to supply a written agreement;
ii. Whether the dismissal was procedurally fair and substantively justified;
iii. If not, what remedies Mr Williams should receive and whether they should be reduced for contributory conduct;
iv. What if anything Mr Williams owes the respondent.

**(i) What were the terms of employment?**

[7] Both parties agree that the terms of employment are outlined in two communications from Mr Barmes to Mr Williams, dated 21 and 22 March 2005 respectively. The first of these contained two references to something happening at the end of the first six months of employment. These were:

*"Review,*
*After 6 month period we will review your performance…*

[and]

*After the six month trial period I want you to lead the corporate sales…"*

[8] In the second Mr Barmes offered a base salary of $45,000.00 plus a car and commission. He again referred to the six month period, saying:

*"In my offer yesterday, I stated a review period of 6 months to appraise your progress. This is standard in a work contract. A review period of 6 months will remain, being the end of September."*

[9] Mr Barmes had asked Mr Williams to come back to him if any detail had been missed or required clarifying. A week later, without further discussion, Mr Williams started work.

[10] Ms Wickes argues that the proposal and the email constitute the employment agreement and that there was compliance with the requirements of s67 (1)(a) of the Act. Mr Bennett argues that since the proposal was never inserted into a written employment agreement 67(1) (a) has not been complied with. He says this is a failure on the part of the respondent and that pursuant to s.67 (3) it is therefore prohibited from claiming that the employment was on a trial basis.

[11] Section 67 provides:

***"Probationary arrangements***

*(1) Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation or trial after the commencement of the employment,-*

*(a) the fact of the probation or trial period must be in writing in the employment agreement;"*

…

*(2) failure to comply with subsection (1) (a) does not affect the validity of the employment agreement between the parties.*

*(3) However, if the employer does not comply with subsection (1)(a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation or trial if the employee elects, at any time, to treat that term as ineffective."*

[12] The respondent, through Mr Barmes, made an offer on terms contained in his communications of 21 and 22 March. This was accepted. Oral acceptance of a written offer, or acceptance of such an offer by conduct, creates a valid agreement between the parties but does not amount to the formation of a written employment agreement. Even if Mr Barmes and Mr Williams had agreed to a probation or trial period it is not "*in writing in the employment agreement*" because there is no written agreement. Section 67(3) applies.

[13] **The respondent cannot rely on the existence of a trial period in relation to the termination of Mr Williams's employment.**

[14] Turning to the claim for penalty for the failure to provide a written agreement, I note that Section 65 of the Employment Relations Act provides that:

"(1) *The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer –*

*(a) must be in writing."*

[15] However, Section 135 (5) provides:

*"An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of-*

*(a) the date when the cause of action first became known to the person bringing the action; or*

*(b) the date when the cause of action should reasonably have become known to the person bringing the action."*

[16] This matter was lodged with the Authority in November 2006, over a year after Mr Williams employment ended. He knew from the outset of that employment that he lacked an employment agreement.

[17] **The claim for penalty is out of time.**

**(ii) Was the dismissal procedurally and substantively justified?**

[18] It was never explicitly put to Mr Williams that the meetings of 11 July and 11 August were disciplinary in nature. They did not therefore amount to a proper opportunity to be heard on his alleged poor performance. The respondent also failed to give Mr Williams clear and specific warnings. All of this renders the dismissal procedurally unfair and in turn means that some elements of the substantive justification fail. It was not established (at the time) that Mr Williams's behaviour to clients was as bad as alleged. Nor are we able to say whether he might have rectified it had there been unequivocal warnings, clear feedback about the respondent's requirements, and adequate time for improvement.

[19] The other matter of great concern to Mr Barmes was the applicant's failure to repay what he owed for personal expenditure. Mr Barmes accepted that the applicant did not anticipate the cost of his internet use but requested that the applicant make regular monthly payments of $500.00 in reimbursement. Mr Williams refused, arguing that he should have been advised that his personal internet use was not unlimited. He said he was prepared to negotiate some repayment on a without prejudice basis however nothing had come of this by the end of August. He also failed to repay a further $135.00 personal expenditure charged to an account of the respondent.

[20] It was reasonable for Mr Barmes to expect that Mr Williams would make arrangements for payment (and in a timely fashion.) However, while Mr Barmes had put Mr Williams on notice of specific requirements regarding repayment he did not advise Mr Williams that his employment was in jeopardy unless they were met. Once again this matter does not justify dismissal.

[21] In short, the dismissal has not been justified.

**(iii) What remedies should Mr Williams receive and should they be reduced for contributory conduct?**

[22] In his witness statement Mr Williams told the Authority:

*"When I was fired I virtually went into exile for the next four months. I had moved my whole life to Auckland for this role and when it came to this end in this way I was so hurt, shocked and embarrassed by being dismissed that it left me in a huge quandary.*

*I finally got back on my feet at the end of that year on 19 December when I managed to get full time employment….*

*I was largely unemployed until December 19th 2005 apart from a few temporary jobs I managed to get."*

[23] Initially Mr Williams claimed to have lost a gross amount of $15,000.00 wages. This did not appear to take account of post dismissal earnings. I asked him to tell me how much he had earned from the temporary jobs he had referred to. His answer was that as best he could recall he earned $3,200.00 from a part time job at an art gallery from mid September to late October.

[24] Mr Barmes expressed some scepticism about this evidence. He told me that he believed Mr Williams got work at the art gallery even before he left the respondent and stayed there until nearly Christmas.

[25] I asked Mr Williams to provide independent confirmation of both the period of employment at the art gallery and the total earnings. On 21 June, Mr Bennett supplied the Authority with a copy of the executed employment agreement between Mr Williams and the gallery. It showed that Mr Williams entered into it on 20 August 2005 for a fixed term until 20 November 2005. There were to be no minimum hours of work but Mr Williams would take all reasonable steps to be available when required to work at the gallery or at any other reasonable location as directed by the employer.

[26] Mr Bennett also told me that he had spoken to the gallery's owner and administration manager and both had confirmed that Mr Williams's first actual day of work was 25 August 2005 and that over the entire fixed term he earned $6,120.00 net at an hourly rate of $28.30 per hour.

[27] I consider the representations Mr Bennett has made to be more consistent with Mr Barmes's understanding of what Mr Williams did after his dismissal than with Mr Williams's original account. For this reason, I have accepted those representations without requiring evidence from the gallery owner and administration manager.

[28] Clearly Mr Williams did take on the job at the gallery before he had been dismissed from the respondent. Although the job was not full time, the level of earnings would indicate that Mr Williams worked approximately 20 hours per week. This work was (as the contract indicates) to be performed at the gallery, and because of the fixed term nature of the agreement, Mr Williams was locked in to it. These obligations do not seem consistent with completing the requirements of Mr Williams's job with Camira Furniture Ltd.

[29] In short, at the time of the dismissal Mr Williams had already entered into a new fixed term contract the terms of which appear to make it impossible for him to have continued to work for the respondent. I am satisfied that he elected to take on a new job at a reduced level of earnings. For this reason no loss flows from the dismissal. There can be no award for lost earnings.

[30] Turning to the claim for compensation for hurt and humiliation I am satisfied that Mr Williams experienced embarrassment because his employment was

terminated at his employer's choice and not at his own, and unjustifiably. I consider an award of $5,000.00 would have compensated him for this. However I also consider that he has contributed to the situation that gave rise to the grievance in failing to repay or at least start to repay his excessive personal internet use. I set his contribution at 30%. Taking this into consideration I conclude that a reasonable level of compensation is $3,500.00.

[31] **Camira Furniture is ordered to pay to Mr Williams the sum of $3,500.00 compensation pursuant to s.123 of the Employment Relations Act.**

**(iv) What if anything does Mr Williams owe the respondent?**

[32] For the reasons explained under the heading of substantive justification I am satisfied that Mr Williams owes the respondent $4,635.00.

[33] **Mr Williams is therefore ordered to pay $4,635.00 to Camira Furniture Ltd.**

**Costs**

[34] This issue is reserved. Given the nature of the determination, this appears to be a case where it might be appropriate for costs to lie where they fall. However, I have not heard the parties on the question of costs. Should either party wish to pursue a claim for costs they should do so within 28 days of the date of this decision.

Yvonne Oldfield
Member of the Employment Relations Authority