

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 182
5327871

BETWEEN AMY MICHELE HESTER
 CARTER
 Applicant

A N D DOORS 2U LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Vanushi Walters with Manawa Pomare Counsel for
 Applicant
 No appearance for Respondent

Investigation meeting: 28 May 2012 at Auckland

Date of Determination: 31 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Carter) alleges that she was unjustifiably dismissed from her employment on 2 September 2010. The respondent (Doors 2U) resists that claim and also contends that Ms Carter did not raise her grievance within time. More recently, Doors 2U contended that Ms Carter's employment relationship problem had been resolved in mediation.

[2] Ms Carter commenced employment with Doors 2U as the personal assistant to the managing director. She told the Authority that the managing director (Mr Bourke) was frequently absent from the business and that she had very little tuition or guidance. She was employed in terms of a Work and Income New Zealand Jobs Ops scheme and although she had understood that her primary responsibilities were in reception and the like, she found herself spending a significant amount of time ordering parts for the doors that were made by the business. Initially, this work was

checked by Mr Bourke but not latterly. There were many mistakes and it is common ground that Mr Bourke was concerned about those mistakes. For her part, Ms Carter said that Mr Bourke never gave her sufficient training, never had time to assist her, and that the expectations of her generally were unreasonable.

[3] On 30 August 2010, there was a disciplinary meeting involving Ms Carter, Mr Bourke and Ms Carter's work broker from Work and Income New Zealand (WINZ). By common consent, that meeting was called to deal with problems with Ms Carter's performance. Ms Carter says that an outcome of the meeting was that Mr Bourke undertook to help her more and the work broker's contribution was, according to Ms Carter, to confirm that Ms Carter was "*trying her best*".

[4] That disciplinary meeting took place at the WINZ office. When Ms Carter returned to her workplace after that meeting, she was telephoned by WINZ and asked to attend an interview for an alternative job. Ms Carter asked Mr Bourke for time off to attend the interview the following morning and that was granted. Ms Carter also indicated to Mr Bourke that if she got the new job she would need to start almost immediately and on that footing, Mr Bourke asked Ms Carter to get WINZ to readvertise her job. Ms Carter did that. WINZ asked Ms Carter how sure she was of getting the new job and her evidence is that she told WINZ that she was not sure at all, but she was doing as Mr Bourke had asked and letting WINZ have the opportunity to fill her position if she was successful.

[5] The following day, Ms Carter attended the interview for the new role and was unsuccessful. Her evidence is that she promptly told Mr Bourke that she had not been successful. Later that afternoon, there was an altercation between Mr Bourke and Ms Carter because Ms Carter had got another order wrong. Mr Bourke said words to the effect that if Ms Carter could not get things right she should not come in at all. Later that same afternoon, Mr Bourke appeared to relent and indicated to Ms Carter that notwithstanding his earlier observations, she was to attend and Ms Carter agreed to continue working. Then, Ms Carter says, there was a text exchange between the two protagonists in which she indicated to Mr Bourke that she was feeling bullied and he responded by denying that she should feel that way.

[6] It is critical to Doors 2U's position that it maintain that Mr Bourke was not present on 31 August 2010 and was not told that Ms Carter had been unsuccessful in her job interview. This of course is inconsistent with Ms Carter's evidence which is

that Mr Bourke was there, she did tell him that she was unsuccessful, and she subsequently had an argument with him onsite about another mistake that she had made.

[7] The following day, 1 September 2010, Ms Carter returned to work as normal. Mr Bourke was only present for part of the day and while he was there Ms Carter asked for time off the following day to care for a brother-in-law who had suffered an accident. That was agreed to.

[8] During her day off (2 September 2010), Ms Carter was encouraged to text Mr Bourke to remind him that she was unsuccessful with the job interview and that she wished to continue in the employment. Mr Bourke responded, again by text message, to indicate that he had already found a replacement for Ms Carter and that as a consequence, she was no longer required.

[9] There were various meetings between the principal protagonists to try to resolve matters. Amongst other things, Ms Carter's evidence is that she gave a letter dated 4 September 2010 raising a personal grievance to Mr Bourke on that same date and that he opened the letter in front of her. Mr Bourke denied receipt of that letter in the statement in reply filed in the Authority on 20 December 2010.

[10] Notwithstanding that contention, the matter eventually proceeded to mediation in the normal way and so far as the Authority can tell, there was an attempt made to settle matters. Certainly it is true that Mr Bourke advised the Authority by email prior to the investigation meeting that he was surprised the matter was still proceeding as it had been settled. In fact, it would be more accurate to say that Mr Bourke claimed that he had paid the settlement proceeds to Ms Carter but there is no evidence that that happened. There was also no evidence of a completed mediation agreement. The mediator has used her best endeavours to complete settlement, but without success.

Issues

[11] The investigation meeting proceeded in the absence of a representative of the employer. On the basis of the evidence before it, the Authority made a conscious decision to proceed without the respondent, believing on reasonable grounds that the respondent had chosen not to be involved in the Authority's process. It was clear to the Authority that all proper steps had been taken by the support staff to engage with Mr Bourke for Doors 2U, that Mr Bourke was aware of the date and time for the

meeting, but notwithstanding that, had determined not to participate. Amongst other things, a Notice of Investigation Meeting and associated documentation was served on Mr Bourke by a process server on 17 May 2012.

[12] During the Authority's engagement with Mr Bourke prior to the investigation meeting, he offered a variety of different explanations for his failure to engage appropriately.

[13] The first of these was contained in his statement in reply which alleged that the raising of the personal grievance was outside the statutory 90 day requirement. Next, in email traffic with the Authority's support staff, Mr Bourke maintained that the respondent was in liquidation. It was not. The Authority established that another company beneficially owned by Mr Bourke was in liquidation but Doors 2U Limited was not.

[14] Then, Mr Bourke maintained that there had been a settlement with Ms Carter at mediation and that he regarded the matter as closed.

[15] Mr Bourke also alleged in the statement in reply that Ms Carter was employed pursuant to a probationary or trial period of employment and by implication she could have been dismissed within the terms of that probationary period.

[16] It will be appropriate if the Authority considers each of the following questions:

- (a) Did Ms Carter resign her position;
- (b) Was Ms Carter's personal grievance raised within time;
- (c) Was the employment relationship problem settled;
- (d) Is there a probationary or trial period;
- (e) Was Ms Carter unjustifiably dismissed?

Did Ms Carter resign?

[17] The significance of this question will be apparent. Mr Bourke maintained in one of his mutually contradictory responses to the claim brought by Ms Carter that she had resigned her employment on 30 August 2010 in anticipation of obtaining a

new position. Mr Bourke did not attend at the Authority to give evidence in person and accordingly the Authority was unable to test his evidence by questioning him. Conversely, Ms Carter did attend and gave her evidence on oath. She was adamant that she had not resigned her position and had simply indicated to Mr Bourke, as a courtesy, that if she were successful in the new role (for which she was seeking time off for interview), she had been told that she would need to start promptly. Quite clearly, she was providing that information to Mr Bourke in order that he could make appropriate arrangements to replace her **should she be successful**.

[18] The Authority is not persuaded that Ms Carter was making her evidence up on this point. She struck the Authority as an honest young woman. On general principles, the Authority would be perplexed at any person resigning their employment in the present job market before they were actually offered and accepted a new role.

[19] There is nothing to support Mr Bourke's contention that Ms Carter resigned. There is no writing from Ms Carter to that effect, no text message or email or any other supporting evidence which could lead a reasonable outsider to conclude that there had been a resignation.

[20] Similarly, there is ample evidence to support Ms Carter's claim that she told Mr Bourke promptly that she had been unsuccessful in her application. His position, of course, was that she had first told him she was resigning and then some time later revealed that she had been unsuccessful, by which time he had a new staff member.

[21] But Mr Bourke's claims on the point are inherently improbable. Ms Carter asked for time off to go for a job interview on 30 August. The following day she had the interview, was unsuccessful and returned to work where she said she told Mr Bourke. He claimed not to have been at work that day but that evidence is flatly contradicted by Ms Carter who said she had another argument with him about her work standard that very day. It seems unlikely that Ms Carter would have withheld information about the fate of her job application if Mr Bourke was present in the office, as the Authority is satisfied he was.

[22] Accordingly, the Authority prefers the evidence of Ms Carter and prefers the conclusion on the balance of probabilities that Ms Carter did not resign her position in anticipation of getting a new position but simply told Mr Bourke that if she were

successful, she would be asked to start promptly. Further, the Authority thinks it more likely than not that Ms Carter promptly told Mr Bourke that she was unsuccessful in her new role but that even at that early stage, he had already agreed to hire someone to replace her.

Was the personal grievance lodged within time?

[23] Mr Bourke, in his next alternative response to Ms Carter's claim, alleges that the personal grievance was not raised within time. There is a letter on the Authority's file dated 4 September 2010 written by Ms Carter and addressed to Mr Bourke in which she raises her personal grievance, tells Mr Bourke what it is about, and spells out for Mr Bourke the relief which she seeks to put matters right. The letter follows the dismissal by two days.

[24] Mr Bourke claims in his statement in reply not to have received this letter. Ms Carter told the Authority on oath that she had handed the letter personally to Mr Bourke when they met on 4 September 2010 and that Mr Bourke opened it and read it in her presence. It is common ground that there was a meeting between the principal protagonists on 4 September 2010. Ms Carter's evidence to the Authority on the point was clear and unambiguous. There is no evidence to support Mr Bourke's view. Mr Bourke did not take the opportunity to give evidence on his own behalf and there is no supporting documentation which would encourage the Authority to reach a conclusion different from the obvious one, that Ms Carter did in fact give her personal grievance letter to Mr Bourke at their meeting on 4 September 2010 and that in doing so, she has complied with requirements of the law by notifying him as the representative of the employer of the personal grievance, within the statutory timeframe.

Was the employment relationship problem settled?

[25] In yet another of Mr Bourke's alternative responses to the claim brought by Ms Carter, he contended in email exchanges with the Authority's support officer that he was surprised that the matter was proceeding because it had been settled in mediation. That suggestion put the Authority on inquiry. The evidence is that there was a mediation between the parties but that there was no settled agreement. The Authority has seen the email traffic with the Department of Labour mediator who

presided at the mediation. She says that she attempted to conclude a resolution and that a settlement agreement was drafted but never executed.

[26] For her part, Ms Carter's evidence (supported by evidence of her bank account details) is that the payment which Mr Bourke would have made to her if the settlement between the parties was perfected, was never made so, in truth, there was no settlement at all.

[27] The Authority is satisfied with the evidence it heard that both parties may have wished for settlement in mediation but that there was no concluded arrangement between them nor any performance of the terms of a proposed arrangement between them.

Was there a probationary or trial period in the employment agreement?

[28] Mr Bourke obliquely raises the question of whether the employment was characterised by what he refers to in the statement in reply as both a probationary period and a trial period. In fact, that duplication of terminology is repeated in the employment agreement itself. Pursuant to clause 3.2, there is a probationary period for the first three months of the employment "*to assess and confirm suitability for the position*". Then, at clause 13.1, the employer is given power to terminate the "*trial period*" by providing one week's notice to the employee within the trial period. Clearly, those provisions have been inelegantly drafted. If the employment agreement is supposed to provide for a probationary period of employment, then s.67 of the Employment Relations Act 2000 (the Act) applies. Amongst other things, that allows normal access to personal grievance by an aggrieved employee. In the alternative, if the provision is actually a trial period, then s.67A of the Act applies and an aggrieved employee has no access to personal grievance rights. The use of both terms in the employment agreement make it impossible to discern which is part of the agreement and which not.

[29] But nothing turns on that difficulty. There is nothing in the factual matrix which would suggest that Doors 2U sought to rely on the provision or provisions to effect Ms Carter's dismissal. Indeed, it is by no means clear why there is a reference to it in the statement in reply except that it appears to be yet another attempt by Doors 2U to deflect Ms Carter's claim and not deal with it squarely.

Was Ms Carter unjustifiably dismissed?

[30] The Authority concludes that Ms Carter was unjustifiably dismissed from her employment because a fair and reasonable employer would not have reached a decision to dismiss her from her employment in the particular circumstances of this case: s.103A (old version) of the Act applied. The Authority reaches this conclusion broadly because it prefers the evidence provided by Ms Carter and conversely is puzzled by the various mutually contradictory arguments resisting Ms Carter's claim, from Doors 2U. The latter argues variously that Ms Carter resigned, failed to lodge her personal grievance within time, then had her employment relationship problem (which was not raised in time) settled in mediation and, in any event, allegedly could have been dismissed pursuant to either a probationary or a trial period, except that there is no evidence before the Authority to support either conclusion nor anything to assist the Authority to resolve the ambiguity in the employment agreement itself as to whether a trial period or a probationary period is meant.

[31] The Authority's conclusion is that Ms Carter did not resign her employment in anticipation of getting a new role and that she simply conveyed to Mr Bourke that if she were successful, she would need to start promptly. Having had that conversation and then having been unsuccessful with the new role, Ms Carter's expectation was that she would simply continue in the employment.

[32] But Mr Bourke had acted precipitately on her early advice and already replaced her with another employee. Mr Bourke dismissed Ms Carter by a text message with a complete absence of any proper process and his subsequent behaviour failed absolutely to fulfil the obligations that a good and fair employer has in dealing with a recently dismissed employee. If Mr Bourke had taken proper steps to mitigate Ms Carter's loss, then she might well have been better able to recover from the blow caused by the sudden loss of her employment. As it was, Mr Bourke failed in those obligations as well. Although Mr Bourke did offer Ms Carter an alternative role, and thus went some way to trying to make good his default, it was not a role that, for practical reasons, Ms Carter was in a position to accept.

Determination

[33] The Authority is satisfied Ms Carter has suffered a personal grievance by reason of having been unjustifiably dismissed from her employment, the Authority

being satisfied that a good and fair employer would not have dismissed Ms Carter in the particular circumstances of this case. The Authority is satisfied that Ms Carter did nothing whatever to contribute to the circumstances giving rise to her personal grievance. Indeed, the facts before the Authority suggest that Ms Carter was dismissed because she sought to provide her employer with a “heads up” that she might be leaving the employment, and the employer, acting in haste and without waiting for confirmation that the position was indeed vacant, filled the role thus depriving Ms Carter of continued employment.

[34] It follows from the foregoing that Ms Carter is entitled to remedies. Compensation, a contribution to wages and reimbursement of the Authority’s filing fee are sought. As to the wages lost, Ms Carter told the Authority that she was unemployed from 2 September 2010 down to 11 November 2010 and that during that period she was without a benefit of any kind to support her. Ms Carter was unemployed for around two months. Based on her hourly rate during the subject employment of \$12.75, an appropriate contribution to lost wages would be \$5,000 gross.

[35] Accordingly, the Authority directs that Doors 2U Limited is to pay to Ms Carter the following sums to remedy her personal grievance:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$2,000;
- (b) A contribution to lost wages in the sum of \$5,000 gross;
- (c) The Employment Relations Authority’s filing fee of \$71.56.

Costs

[36] Costs are reserved.

James Crichton
Member of the Employment Relations Authority