

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 107
5329882

BETWEEN INGER PAULINE CULLING
 Applicant

AND VINE-TECH CONTRACTING
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Mary Flannery, Counsel for Applicant
 Don Rhodes, Advocate for Respondent

Investigation Meeting: 10 May 2011 at Cromwell

Submissions Received At the investigation

Determination: 22 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Inger Culling, claims that she was unjustifiably dismissed by the respondent, Vine-Tech Contracting Limited, on 5 February 2009.

[2] In the alternative, and in the event the dismissal is found to be justified, Ms Culling claims that she was unjustifiably disadvantaged in her employment. This claim is based on her contention that Vine-Tech unilaterally attempted to impose substantial variations to her employment agreement.

[3] Vine-Tech accepts that it dismissed Ms Culling but claims that her position was surplus to its requirements and that her dismissal was a justifiable redundancy.

Background

[4] Vine-Tech is a vineyard contracting business jointly owned by Ms Alison Patrick and Mr Geoffrey Moore. Ms Patrick and Mr Moore commenced business in September 2006 and, initially, provided mechanical equipment and its operators to various clients.

[5] It would appear that Vine-Tech was a success. Both its clientele and reputation grew and around mid-2008 a significant client suggested the company expand into the provision of contract labour.

[6] This suggestion was accepted and acted upon. Vine-Tech, at the suggestion of one of its employees, Mr Conal Wattam, suggested his then partner, Ms Culling, as a potential supervisor of the contracting workforce. The suggestion was acted upon.

[7] Ms Culling accepted Vine-Tech's approach and entered into an employment agreement with it in September 2008. The agreement entered into was a comprehensive one but contained, for the purposes of this dispute, the following key provisions:

- (a) It was for a fixed term commencing on 1 September 2008 and would expire at the end of the grape growing season in approximately 10 months' time;
- (b) Ms Culling would be paid at an hourly rate of \$16;
- (c) The nature of the industry was such that additional work may be required but conversely, it was also subject to vagaries such as weather, which meant that sometimes work could not be offered. In such event, and irrespective of the hours actually worked, Ms Culling was guaranteed payment for 18 hours per week;
- (d) The agreement contained a redundancy clause. It reads:

In this clause 'redundancy' means a situation where the employee's employment is liable to be terminated, wholly or mainly, owing to the fact the Employee's position is, or will become, superfluous to the needs of the employer. If the Employee's position is redundant there will be no redundancy payment made to the Employee. Where the Employer's organization or company is sold or transferred the Employer will not pay Redundancy compensation to the Employee.

[8] In November 2008, Vine-Tech employed a viticulturist, Ms Andrea Stephens. Ms Stephens' employment can be put down to a combination of factors but was primarily attributable to the success of the new venture and problems with Mr Wattam's performance (see [2011] NZERA Christchurch 106). Ms Stephens effectively became Ms Culling's manager.

[9] In either late December 2008 or early January 2009, Ms Stephens approached Ms Patrick with a concern she had about Ms Culling's performance. Ms Stephens was concerned that Ms Culling simply could not perform her duties due to two factors. The first was that her part time hours meant she was not at work when the staff she supervised both commenced and finished. Ms Stephens considered these crucial parts of the working day and felt Ms Culling's absence significant. The second concern related to Ms Culling's various, and numerous, absences during the month of December.

[10] At around the same time, there was an informal discussion in the vineyard between Ms Culling and Ms Stephens. Ms Culling says she asked if it would be possible for her to increase her hours, preferably to full time. She says that Ms Stephens answered by advising it would not be possible as her contractual arrangements had changed. Ms Culling says she responded to that by asking whether that meant she was no longer the supervisor to which the answer was yes. She says that she then asked to speak to Ms Patrick, one of the co-owners.

[11] Ms Stephens remembers the conversation, albeit vaguely. She described it as casual but confusing. She attributes the confusion to the fact that while Ms Culling was requesting an increase in hours, her absences meant that her hours were effectively reducing. Ms Stephens does not recollect discussing whether or not Ms Culling remained a supervisor.

[12] The requested meeting between Ms Culling and Ms Patrick occurred approximately a week later. Ms Culling states that she again sought an increase in hours. She says she was told no before being told once again that she was no longer the vineyard supervisor.

[13] Ms Patrick has a more detailed recollection of the meeting. She says that she felt it was productive and that they discussed the fact that Ms Culling was under pressure to have more time with her children. She claims that she was trying to make

things easier for Ms Culling and, having discussed her level of absence in December, suggested that Ms Culling consider becoming a casual labourer. Ms Patrick says that she advised that there would always be a chance of returning to a supervisor's position if one was available. Ms Patrick suggested that Ms Culling go away and consider the issues. Ms Culling, when asked whether or not her attendance was discussed at the meeting, advised that it could have been but she could not recall it.

[14] A second meeting occurred at Ms Patrick's home a week or two later. Ms Patrick states that she advised Ms Culling that the company's needs were changing and that they would have to make changes to the supervisor's job description. Whilst Ms Patrick portrays the changes as being to the job description and not the employment agreement, it would appear the emphasis was on altered hours and in particular an increased level of flexibility as to when the supervisor was present. She says that Ms Culling's response was *not positive* and that she was disappointed by that as Ms Culling was both an experienced and hard worker.

[15] Ms Culling's recollection of the meeting does not vary greatly from Ms Patrick's though she does add that as well as the emphasis on flexible hours, she felt the company was trying to extend her duties into areas in which she had no experience. The discussion ended with Ms Patrick undertaking to prepare a written job description which illustrated the company's needs.

[16] The written job description was presented at a meeting that occurred in the company's office the following Friday. Also present were Ms Stephens and a Mr Carl Wilson. Ms Patrick states that she handed over the job description and that Ms Culling, having read it, responded by advising that she felt it was a manager's job and not a supervisors, but that in any event she did not want to change her hours. Ms Patrick says that she responded by again suggesting that Ms Culling switch to a casual role as that would better suit both her needs and the company's.

[17] Ms Culling accepts that she refused to accept the proposed supervisors position. She had no desire to work flexible hours and also enunciated her concern that there were duties in the job description in which she had no previous experience. Ms Culling claims that when she raised her alleged skill deficiency, which pertained to frost fighting and one other item she can no longer recollect, she asked whether or not Vine-Tech would at least show her how to use the applicable machinery. She

claims Ms Patrick responded by advising that Vine-Tech was not a teaching organisation.

[18] The following Tuesday, 3 February, Ms Stephens phoned Ms Culling to ask whether or not she was willing to take the revised supervisor's role. Ms Culling answered no, given that she did not have the requisite experience. Ms Culling claims that Ms Stephens then asked if she was going to apply for the casual position to which the answer was also no. Ms Culling states that she then said that it looks like we're going to mediation before advising that she had already approached the Mediation Service in Dunedin.

[19] The following day Mr Moore telephoned Ms Culling and invited her to a meeting. He advised her that she was welcome to bring a representative with her but Ms Culling claims she was not told what the meeting was about.

[20] Vine-Tech was represented at the meeting by Mr Moore and Ms Patrick, and they were accompanied by a professional advocate, Mr Rhodes. Ms Culling was represented by a solicitor, Mr Tim Cadogan.

[21] Ms Culling says:

Alison describes that there was now a need for a supervisor who can start work early in the morning as well as able to do frost fighting ... She described when the company started it was a small operation and the company has grown and I now needed to make a decision regarding what role I would continue on with in the company. She said she had had discussions with me about whether I was able to do these tasks and if I couldn't then I would be offered another job that I may be able to fill. This other job was the one previously offered which was a vineyard worker's job on a when and if required basis with the reduction in the hourly rates.

I was advised at the meeting by employers I had to make a decision to accept the new supervisor's role which include on call hours and longer working hours which were impossible for me to complete because of my family commitments. The new role also referred to skills that I didn't have or I could accept the alternative role of vineyard worker. I asked at the meeting what the situation would be should I simply remain in my current role and Don Rhodes the employee representative advised that the current position was redundant and no longer existed. The employer never offered training to me to increase my skills to the new position. I couldn't accept the new role because I didn't have all the skills and the on call hours were a problem. I did not want to accept the vineyard worker's role as it paid less and there was no guarantee of work.

[22] Whilst Ms Patrick has different views about what exactly was said, and there is a major disagreement about whether or not Mr Wattam was present, she agrees with the general gist of Ms Culling's evidence. From her perspective, the current supervisor's role was no longer viable primarily due to the hours that Ms Culling worked. She had offered Ms Culling a choice of either accepting the new supervisor's role which required some flexibility with respect to the hours of work. The pay rate would remain the same and, from the company's perspective, the skills issues were irrelevant. They considered Ms Culling a good worker capable of performing any duties asked of her. The second option was to accept the role of casual vineyard worker. That had a lower rate of pay but Vine-Tech considered it more suited to Ms Culling's then current personal circumstances.

[23] Ms Culling was of the view that she had a fixed term contract whose terms, particularly the hours of work, were sacrosanct. She felt no need to agree to any alteration and rejected the possibility of both positions. The company, as had been indicated by Mr Rhodes, responded by advising her that her employment had come to an end. She was paid two weeks' in lieu of notice.

Determination

[24] The first issue I shall address is whether or not the arrangement between Vine-Tech and Ms Culling was truly fixed term and, in particular, whether there was valid reason for the specified expiry date. The parties replied in unison to my doubts and both expressed a strong belief that the arrangement was, for a variety of reasons, valid. I shall take the matter no further and, at the parties behest, accept the arrangement at face value.

[25] Returning to the dismissal claims. Vine-Tech accepts it dismissed Ms Culling but contends the dismissal was a justifiable redundancy. The fact Vine-Tech accepts it dismissed Ms Culling means it also accepts the onus of justifying the dismissal.

[26] Section 103A of the Employment Relations Act 2000 (the Act) provides that the question of whether a dismissal is justifiable

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[27] The test of justification referred to in [26] above is that which existed prior to an amended version coming into force on 1 April 2011. It is used as the dismissal being considered here occurred prior to the change coming into force. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Applying the new statutory test to this dismissal would be giving it retrospective effect without that being expressly or impliedly provided for in the Act (as amended). I conclude that justification must be assessed in accordance with the law prior to 1 April to the dismissal claim.

[28] It is well established that:

When reviewing an employer's decision to make employees redundant, the Authority or Court will generally look at two initial factors: the genuineness of the redundancy; and whether the dismissal was carried out in a procedurally fair manner.

Kevin Leary (ed) *Employment Law* (looseleaf ed, Brookers) at ER103.17

[29] As said earlier, Ms Culling's employment agreement provides that:

... 'redundancy' means a situation where the employee's employment is liable to be terminated, wholly or mainly, owing to the fact that the Employee's position is, or will become, superfluous to the needs of the employer.

[30] This is a fairly standard definition and means that the redundancy, or at least the substantive justification therefore, *is determined in relation to the position not the incumbent* [see *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 at para 22].

[31] I conclude that Vine-Tech has failed to substantively justify the redundancy. I reach this conclusion as a result of the forthright answers Ms Patrick gave when questioned about her decision-making processes. She accepted that:

- i. She engaged Ms Culling as a Vineyard Supervisor on a fixed term arrangement that specified the required hours.
- ii. That as a result of concerns raised by Ms Stephens she came to doubt whether or not Ms Culling was a suitable incumbent. The concerns emphasised two issues – the contracted hours were insufficient and there were concerns about Ms Culling's attendance record. This second concern can only be characterised as a performance issue.

- iii. Being what she described as a caring employer who respected Ms Culling's abilities Ms Patrick claims she sought a solution which would, in her view, meet the needs of both parties.
- iv. That solution was the effective demotion of Ms Culling to a casual labourer position.
- v. When Ms Culling rejected that proposition, Vine-Tech sought to revise Ms Culling's employment agreement in order to obtain the outcome it sought.

[32] Here, and as an aside, I quickly refer to the fact that Ms Patrick frequently referred to her view that the proposed changes were limited to the job description and not the employment agreement. I can not accept that proposition. Both of Vine-Tech's proposed changes would have seen an alteration to Ms Cullings hours and one would probably have seen are reduction in earnings. Hours and remuneration are integral ingredients in the employment agreement and not elements covered by a job or duties description.

[33] Given that Vine-Tech's actions are, according to Ms Patrick, a response to the concerns about Ms Culling's ability to perform the duties of vineyard supervisor and/or the content of her employment agreement, as opposed to doubts about whether or not the position fits the company's business and/or plans, I conclude that this is not a genuine redundancy.

[34] Even if the above conclusion is incorrect, I note Ms Patrick's acceptance that once Ms Culling rejected the option of a casual position, a key objective became the attainment of an alteration to her hours of wok. Those hours were freely agreed between the parties and it is, in my view, inappropriate to use a potential redundancy as a means of forcing change when there has been no attempt to first address the issue through bargaining. Such an approach is not one that would be adopted by a fair employer and for that reason I would also consider the dismissal to have been substantively unjustified.

[35] The fact that I have concluded Vine-Tech have failed to substantively justify the redundancy means that the procedural issues need not be examined. I also note that the disadvantage claim was made in the alternative and as a fall back should the

claim of dismissal fail. It need not be considered given the finding that Ms Culling was unjustifiably dismissed.

[36] By way of remedies Ms Culling seeks:

- (i) Lost wages from the date of dismissal through to the issuing of this determination;
- (ii) Compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act in an unspecified amount; and
- (iii) Costs.

[37] Ms Culling is entitled to wages lost as result of her unjustified dismissal, though here an issue arises. Normally an employee discharged from a fixed term arrangement could expect to be paid for the residual portion of that agreement (see *Williams v A-G* [1999] 2 ERNZ 457). That would be a date toward the end of June 2009.

[38] Such an award is, however, inappropriate. Ms Culling commenced a new job on 23 March 2009 and, for two reasons, I will not make an award beyond that date. First, an award under s.123(1)(b) is limited to a loss actually incurred as a result of the personal grievance (refer *Bilderbeck v Brighthouse Ltd* [1993] 2 ERNZ 74 (EmpC)). There is no loss after 23 March 2009. Second, Ms Culling had no intention of honouring the fixed term and was, as at the date of dismissal (5 February), already in possession of an offer in respect to the new job. All that remained to be agreed was a commencement date which was to be tied to the opening of her new employer's premises

[39] Ms Culling was also paid two weeks in lieu of notice, though at a reduced rate that only recognised the minimum contractual payment of 18 hours.

[40] The period from the end of the notice period until 23 March was four weeks and one day. At her contracted hours (8.30am to 3.00pm with half an hour for lunch) the loss would amount to \$2016. There is also the fact that only 18 hours a week was paid through the notice period. Bringing that payment up to the contracted level would require a further \$384 making a total wage loss of \$2400.

[41] Ms Culling offered little evidence in support of her claims for compensation and most of that proffered related to a failure to understand why she had been dismissed when there was no complaint about her work, the resulting financial pressure and the strain placed upon her relationship with Mr Wattam which resulted from both having been dismissed the same day.

[42] Whilst not great, the evidence Ms Culling gave about her hurt was not challenged though and it was clear from her demeanour that she felt aggrieved. In the circumstances and having considered the evidence I conclude an award of \$3,000.00 to be appropriate.

[43] The conclusion that remedies accrue means that the issue of contribution must be discussed. The dismissal was purportedly for redundancy. Redundancy is, by definition, a no fault situation to which the applicant could not have contributed.

Orders

[44] For the reasons given, the following orders are made:

- (i) The respondent, Vine-Tech Contracting Limited, is to pay to the applicant, Ms Inger Culling, the sum of \$2,400.00 (two thousand, four hundred dollars) as reimbursement of wages lost as a result of Ms Culling's unjustified dismissal; and
- (ii) The respondent is to pay to the applicant a further \$3,000.00 (three thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[45] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Ms Culling wishes to seek costs, she is required to lodge, and serve upon the respondent, an application within 28 days of this determination. The applicant is to file any response within 14 days of the application.