

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 336/09  
5160600

BETWEEN                      ALYSSE CLAIRE CURTIS  
Applicant

AND                              LANCOM TECHNOLOGY  
LIMITED  
Respondent

Member of Authority:        Yvonne Oldfield

Representatives:             John Hancock, Counsel for Applicant  
Warwick Eade, Director, for Respondent

Investigation Meeting:      8 September 2009

Determination:                16 September 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The employment relationship problem in this case concerns allegations of unjustified dismissal. There is also a preliminary issue as to whether a grievance was raised within the 90 day limit set by s.114 of the Employment Relations Act 2000.

[2]     In a letter dated 11 June 2008 Ms Curtis's solicitor, Mr Hancock, raised a grievance "*relating to the termination of her employment.*" Mr Eade is of the view that the "*action alleged to amount to a personal grievance*" occurred on 14 March when (as he sees it) Ms Curtis resigned. Counting from that date he says it was 91 days until the grievance was raised.

[3]     As yet Ms Curtis seeks only that the Authority resolve the "90 day issue" either by a declaration that the grievance was raised within the 90 day period or, if not, by a grant of leave to raise it out of time. To address the substantive issues she requests a direction to mediation.

[4] For a period of just over sixteen months Ms Curtis, a full time student, worked for the respondent company as an office junior. For most of her employment she worked 12 hours a week, with additional hours during breaks in her study programme. In the period immediately before her employment ended she worked six hours on Monday and six on Friday. The parties never entered into a written employment agreement.

[5] On 14 March 2008 office manager Mr Robin Oliver met with Ms Curtis and told her that the respondent no longer had 12 hours a week work for her. He said it was proposed that her hours be changed to 3 per week, on different days to what she had previously worked. Ms Curtis told him she was not happy about this proposal.

[6] 17 March, a Monday, was Ms Curtis's next scheduled work day but she was away sick. That day, without having spoken to Ms Curtis again, Mr Oliver emailed Mr Eade as follows:

*"After a discussion with Alysse regarding her amended hours and duty roster, she has declined the revised working hours and will not continue her casual duties, with immediate effect. She has sited [sic] that the cost of travelling from the shore to Mt Eden, for 3 hr's [sic] a week, does not justify her continued employment."*

[7] Ms Curtis does not dispute that she declined the revised hours of work but disagrees that she said anything to suggest that she was resigning. She told me that at the end of meeting with Mr Oliver she had expected him to relay her concerns with Mr Eade and expected to be called to another discussion after that.

[8] Friday 21 March and Monday 24 March were Good Friday and Easter Monday respectively. On Friday 28 March Ms Curtis came in and worked as usual, without further discussion with Mr Oliver. Mr Eade was not present at the office that day, but accepts that Ms Curtis was at work. He also told me that he understood that she intended to come in to work on 31 March. On that day he sent her an email with the following subject line:

*"Part time position at LANcom- Please read before starting today."*

[9] After outlining the background and outcome of his review of the respondent's requirements for a part time office junior, he went on:

*"The needs of the company are to have the office cleaned on Tuesday afternoon and Thursday afternoon and work from 4.00pm on both days has been offered.*

*Robin's understanding is that you declined the revised hours.*

*We have had not further feedback from you directly.*

*You have had well over two weeks to sort out arrangements. For today, I would like you to do the following:*

- *Please confirm today whether you are accepting the work offered on Tuesday and Thursday afternoons. (There is no other work being offered at this time.)*
- *If you are not taking up the offer then please leave any keys or other LANcom property with Robin before you leave today.*
- *Before you start any work today please confirm by email to me that you have read this email and understand it.*
- *For today, after reading this email, please follow the attached job description which Robin showed you two weeks ago.*
- *When all these tasks are complete you will have completed your day."*

[10] Neither party provided the Authority with the attachment mentioned in the email but both confirmed to me that it set out the proposed new terms and duties of employment and had been presented to Ms Curtis at the 14 March meeting.

[11] Mr Eade told me that the fourth bullet point was intended to apply only if Ms Curtis accepted what he describes as the offer of a new job. He told me his expectation was that Ms Curtis would turn up at work, read the email, and decide whether to accept the offer. If she did, he expected her to commence on her new terms that day. If not, he expected her to leave her keys and depart.

[12] As things transpired, Ms Curtis rang in sick to Mr Oliver that day and did not go in to the office. The email was forwarded to her at her personal email address. She responded immediately (by email) saying that she did not agree to accept the reduced hours, that she had not been consulted about the change, and that:

*“you have put it to me that if I do not accept the terms set out in your email that my employment will be terminated. I consider that this constitutes constructive dismissal and grounds for a personal grievance claim.”*

[13] There is some dispute between the parties as to what pay Ms Curtis received after 14 March however they are agreed that she did not receive holiday pay at any time prior to 4 April.

[14] On 4 April, Ms Curtis and a support person met with Mr Eade, but there was no resolution of the issues between them. Ms Curtis returned her keys, and on 11 June Mr Hancock wrote to Mr Eade to raise the grievance. Mr Eade replied to the raising of the grievance in an email on 18 June 2008 in which he stated his view that the relevant event occurred on 14 March when he says Ms Curtis resigned.

### **Issues**

[15] On Ms Curtis’s behalf Mr Hancock has asserted that the action alleged to amount to a personal grievance occurred on 4 April, because that was when it was confirmed by the respondent that Ms Curtis’s employment was at an end. Mr Hancock’s submission is that the grievance was raised 70 days later and so well within the statutory timeframe.

[16] In the alternative Mr Hancock submits on behalf of Ms Curtis that at no stage during the employment did the respondent provide her with information regarding the dispute resolution process and therefore that exceptional circumstances exist pursuant to sections 114(4) and 115(c) of the Employment Relations Act 2000.

[17] Mr Eade, as we have seen, says that the time runs from 14 March and therefore that the grievance was raised 91 days after the event. In relation to the alternative argument, Mr Eade has confirmed that he does not consent to the grievance being raised out of time and does not accept that exceptional circumstances exist such that the Authority should permit the grievance to be raised out of time.

[18] The issues for determination are therefore:

- i. what constituted the event which gave rise to the grievance, and whether the grievance was raised within 90 days of that event, and
- ii. whether the Authority should grant leave for the grievance to be raised out of time.

### **Was the grievance raised in time?**

[19] Mr Eade says that Ms Curtis's old hours of work were to cease on 14 March. He concedes that she was given no prior notice of this but points out that she was already aware that her role was under review. He says that 14 March was both her last day of work and of employment, but (in reliance on Mr Oliver's email to him) says that she resigned.

[20] Ms Curtis told me that she believed her last day of work was 31 March, and on legal advice she understood her last day of employment to be 4 April.

[21] Mr Eade did not arrange for Mr Oliver to give evidence to support the assertion that Ms Curtis resigned on 14 March. On the evidence I do have I am not persuaded that she did. Her subsequent conduct (in working the 28 March) and her email communication of 31 March were not consistent with having resigned. Nor did the respondent take any steps, as of 14 or even 17 March, to pay out holiday pay or otherwise treat the employment as being at an end.

[22] I do not therefore accept the respondent's assertion that the employment ended on 14 March. However, neither am I persuaded that the employment continued until 4 April. It was already over prior to that. I consider that it was unequivocally ended at Mr Eade's initiative through the email of 31 March.

[23] 31 March was therefore the day of the event giving rise to the grievance over the termination of the employment. It follows that the grievance was raised well within the 90 day statutory time frame.

**Should leave be granted to raise the grievance out of time?**

[24] For completeness, and in case there should remain any doubt over the first issue, I note that Mr Hancock's second submission also succeeds. Section 114(4)(a) of the Employment Relations Act 2000 provides that the Authority may grant leave to raise a grievance out of time if it:

*“Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and*

*(b) considers it just to do so.”*

[25] Section 115 (c) provides:

*“where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65 as the case may be;”*

[26] Section 65 of the Employment Relations Act 2000 is applicable in this case since it sets out the requirements relating to terms and conditions of individual employment agreements, including the requirement to provide a *“plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a grievance must be raised.”*

[27] There is no dispute that there was no written employment agreement in this case and hence, no compliance with section 65. It follows that if had been a delay, it would have been open to the Authority to consider whether the failure to comply with that section was a cause of the delay.

[28] At the time of these events, Ms Curtis was 20 years old. I am satisfied that the lack of a plain language explanation of the dispute resolution process would be likely to have contributed to any delay in pursuing her grievance. I am also satisfied that in

all the circumstances of this case, including the fact that even by the respondent's reckoning it was raised only one day late, it would be just to permit it to be raised out of time if it were necessary to do so. Even if my conclusion in relation to the first issue is wrong, I am satisfied that Ms Curtis should be given leave to raise her grievance out of time.

### **Mediation**

[29] Mr Eade told me that if the outcome of this preliminary issue was in Ms Curtis's favour, he accepted that it would be appropriate for the parties to attend mediation. I agree.

[30] **The parties are directed to attend mediation within six weeks of the date of this determination.**

### **Costs**

[31] This issue is reserved pending the mediation of the substantive issues between the parties.

Yvonne Oldfield

Member of the Employment Relations Authority