

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Tania Faithfull (Applicant)
AND Morris and Morris Limited (Respondent)
REPRESENTATIVES Ken Nicholson, Counsel for Applicant
Andrew Clemow, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 21 November 2005
SUBMISSIONS RECEIVED 29 November and 7 December 2005
DATE OF DETERMINATION 5 January 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tania Faithfull says she was unjustifiably dismissed by her former employer, Morris & Morris Limited (“Morris & Morris”). Morris & Morris says Ms Faithfull was a contractor and not an employee, or alternatively that she was engaged on a fixed term arrangement and has suffered no loss as a result of its termination.

[2] Morris & Morris has counterclaimed in respect of damage it says Ms Faithfull caused to a door on its premises.

[3] This determination addresses all of these issues.

Background to the parties’ agreement

[4] Ms Faithfull placed the following advertisement in the January 2004 issue of ‘griefcare news’, the newsletter of the Funeral Directors’ Association of New Zealand Inc:

“Registered and experienced funeral director looking to purchase own business. Willing to consider any location.”

[5] Lloyd Morris, the managing director of Morris & Morris saw the advertisement. Morris & Morris owns and operates funeral directors’ businesses in Northland. One of its smaller businesses was experiencing difficulties so, when he saw Ms Faithfull’s advertisement, Mr Morris and his brother Brian Morris decided to pursue with her the possibility of a sale of that business. When Lloyd Morris contacted Ms Faithfull about the matter she indicated she would not be interested in the smaller business, but would be interested in pursuing a purchase of Morris & Morris itself.

[6] Although Morris & Morris was not for sale, for various reasons the Morrises decided to consider selling. Ms Faithfull and her partner visited the company's premises in Whangarei to discuss the matter further. During the discussions the parties identified that Ms Faithfull would be interested in purchasing the trading arm of the company's business, but not the land and buildings, and that she would need a lead in time to familiarise herself with the business. Ms Faithfull followed up with a letter dated 8 March 2004, in which she confirmed her interest in pursuing a purchase, commented on the need for a suitable valuation, and made a suggestion about a possible approach to restructuring the company's shareholding to accommodate a separation of the trading arm from the land and buildings.

[7] The parties met again on 12 May 2004, together with Ms Faithfull's father and the Morrises' accountant Peter Byers. The most recent management accounts were tabled, those and other financial matters were discussed, and an asking price was identified.

[8] The parties agreed Ms Faithfull would work in the business for a period prior to the purchase, so that she could learn about the business and both parties could assess whether their business relationship would be satisfactory. Either party could walk away if the relationship was not satisfactory. This was the resolution of the parties' earlier discussions about the need for a lead in time. The agreed lead in period was four months, commencing 1 September 2004.

[9] The parties further discussed the way in which the lead in time would be treated. They agreed Ms Faithfull would be paid and there was also agreement that the arrangement be treated as an employment relationship.

[10] Other aspects of the proposed transaction included:

- . on 1 January 2005, if the parties were compatible, Ms Faithfull would be offered a shareholding in Morris & Morris of up to 49% (the actual percentage was not finalised) and would be appointed as a director;
- . the balance of the Morrises' shares would be subject to a put option at any time during the next 5 years of Ms Faithfull becoming a shareholder; and
- . there would be changes in the corporate structure to accommodate the separation of the business and the ownership of the land and buildings.

[11] A letter of intent dated 2 June 2004 confirmed these matters. Among other things it recorded that Ms Faithfull would be employed for a fixed term from 1 September 2004 to 31 December 2004, and went on to say:

"The four month employment period is for a fixed term as it is to be regarded as a probationary period and, at any time during this four months, either party may terminate this agreement without any reason being given."

[12] Two proposed written employment agreements were attached. Ms Faithfull did not sign either of them because she wanted to work on amalgamating the two, and create a template for employment agreements to be used in the business.

[13] Ms Faithfull duly commenced her employment on 1 September 2004. Subsequently there were delays with the preparation of documentation needed to implement the proposed corporate restructuring and the sale of shares. Accordingly the parties agreed on or about 10 December that Ms Faithfull's employment would continue until 31 January 2005 to allow completion of the documentation. Lloyd Morris said in evidence that, at that stage 'things were still on track' although he had 'a lot of misgivings'. He was concerned in particular about the lack of legal documentation and the 'feeling at work'.

[14] The 'feeling at work' was a reference to the way the arrangement with Ms Faithful was proceeding. Morris family members gave evidence of a number of incidents involving Ms Faithfull, and which caused them concern. Without making any finding about who was right and who was wrong regarding those incidents, I accept the Morris concerns were genuinely held.

[15] I consider the incidents to be illustrative of a problem Lloyd Morris identified in evidence as involving an expectation on his part that Ms Faithfull would use the time to: get to know the business' systems, staff and ethos; observe, advise, and suggest options for change based on her experience; and suggest ways of running the business in a better way. He felt she did this aggressively and 'head on'. He saw these characteristics in her approach to staff and to the company's systems and procedures, and with clients and in the way she used her time. It became an increasing concern to him. Unfortunately he made Ms Faithfull aware of little, if any of this.

[16] Even more unfortunately, within a few days of being party to the agreement with Ms Faithfull to extend her term of employment, Lloyd Morris turned his mind to whether the proposed commercial transaction should proceed at all. He consulted with his family and with Mr Byers. His state of stress and dissatisfaction meant a decision was made not to proceed, and to terminate the employment agreement early. In making that decision Mr Morris and his advisers relied in part on their understanding that they were entitled to terminate the employment agreement 'without any reason being given.'

[17] On 21 December 2004 the parties met, and Mr Byers handed Ms Faithfull a letter dated 23 December 2004 stating: "The Directors have unanimously resolved to terminate the agreement with you." They paid Ms Faithfull the balance of the salary owed to 31 January 2005 and did not require her to return to work. This was a major shock to Ms Faithfull, who had no warning of what was to happen, and I accept she was extremely distressed.

Contractor or employee

[18] There was no dispute that the parties agreed their relationship would be one of employment. While the agreement may have been ancillary to the commercial sale and purchase under negotiation, that does not detract from the fact of the agreement.

[19] In support of its position that, in reality the relationship was not one of employer and employee Morris & Morris pointed to the way the relationship operated in practice and in particular to the way in which Ms Faithfull carried out her work.

[20] Even if I assume the incidents raised by the Morris family occurred as described, I do not regard them as supporting a freedom from control and lack of integration into the business indicative of a principal and contractor relationship for example. I take a different view of them, and regard them as an effect of the lack of proper consideration at the outset of what entry into an employment relationship would mean. They are a result of Lloyd Morris' decision not to provide any form of job description for Ms Faithfull, but instead to refrain from placing restrictions on her and observing the outcome. Such freedom is indeed unusual in an employment relationship, but it was deliberate and had a purpose. That Ms Faithfull sought to exercise that freedom cannot be used against her to change the nature of the parties' agreement.

[21] It may be that employment was not the best vehicle for giving effect to the parties' intentions, but nevertheless it was the chosen vehicle. I am not persuaded the Authority should change that.

[22] A second argument on behalf of Morris & Morris concerned Ms Faithfull's request in or about October 2004 to have part of her salary paid on invoice to a family trust, so that she could

reduce her personal income for family support purposes. The request did not reflect well on her, and her representative's submission that the arrangement was a sham did not assist her. However I do not regard the arrangement as evidence that Ms Faithfull was not an employee. Instead it is a matter the Inland Revenue Department or her former spouse may wish to take up with her.

[23] Accordingly I conclude that Ms Faithfull was an employee.

The termination of Ms Faithfull's employment

[24] Ms Faithfull's personal grievance, and the remedies she seeks as a result, rest on the position that she was an employee on a probationary arrangement of the kind contemplated by s 67 of the Employment Relations Act 2000. That argument must rely to a significant degree on Morris & Morris' use of the term 'probationary period' in the letter of intent of 2 June since it is not otherwise supported by the evidence.

[25] Ms Faithfull's position was supernumerary. At the time they made their arrangements neither party was in any doubt that the element of 'probation' or trial was not about whether an ongoing employment relationship would prove satisfactory, but whether the co-ownership of the business would prove satisfactory. Neither party turned its mind to whether any form of employment relationship would commence or continue once any sale and purchase had been completed, let alone the terms and conditions associated with such a relationship. It was not discussed at all. In short the possibility of any ongoing employment relationship after December 2004 was outside the contemplation of the parties when they made their arrangements in May and June 2004. Although it might have become a matter for discussion if the sale and purchase proceeded, it was unrelated to the arrangement extant prior to any decision to proceed.

[26] For these reasons I do not accept that the employment relationship was of the kind contemplated by s 67. Its true nature was that it was a fixed term employment agreement.

[27] Section 66 of the Act refers to fixed term employment agreements. With reference to s 66(1) I am satisfied both parties agreed that the employment relationship would end on a specified date, and that the employer had genuine reasons based on reasonable grounds for its position. As I have said, the purpose of the fixed term was not to establish Ms Faithfull's suitability for permanent or even continuing employment. Its purpose was to allow Ms Faithfull to learn about the business, and both parties to assess whether they wished to proceed with a sale and purchase of shares in it. Ms Faithfull was aware of the reason for the fixed term, and of why the employment relationship was to end on 31 December. She also understood the reason for the extension to 31 January 2005, which was a valid reason and consistent with the basis for the fixed term nature of the employment agreement. The agreement did not contravene s 66.

[28] However despite the agreement to extend Ms Faithfull's employment for another month, within a few days it was terminated summarily. It was not terminated on the agreed date and in accordance with its tenor. It was terminated early and without warning.

[29] Ms Faithfull has the right to raise a personal grievance in respect of that termination, and the law of unjustified dismissal applies.

[30] That law includes the obligation to follow a fair procedure when effecting a dismissal. The fundamentals are set out in a decision of the Labour Court in **New Zealand (with exceptions) Food Processing, etc, IUOW v Unilever New Zealand Limited** [ERNZ Sel Cas 582]. They require that an employee be given notice of the allegations against the employee together with an opportunity to

address those allegations, and that unbiased consideration be given to the employee's response. The employee must also be told in advance if dismissal is a possibility.

[31] Ms Faithfull should have been given an opportunity to respond to the concerns about the parties' relationship before any decision was made about her continuing employment, and at least to comment on whether the employment relationship should be terminated early. Mr Morris' state of mind suggests that the prospect of the commercial transaction proceeding was remote and that Ms Faithfull would not be employed beyond 31 January 2005 in any event. Nevertheless it was not fair to her to terminate the employment agreement early and without discussion or warning.

[32] For those reasons I conclude her dismissal was unjustified. Ms Faithfull has a personal grievance.

Remedies

1. Reimbursement of lost remuneration

[33] Ms Faithfull seeks reimbursement of the remuneration she lost in the first three months after the end of her employment. Although she attempted to suggest in evidence that her employment would continue beyond the end of the fixed term agreement I found the suggestion speculative and unsupported by any evidence. Ms Faithfull knew that, if the sale and purchase of shares did not proceed, there would be no ongoing employment. She has no entitlement to the reimbursement of any loss of remuneration after the date on which her employment was to end, namely 31 January 2005.

[34] Ms Faithfull is entitled to reimbursement of any remuneration lost in respect of the period between the date of termination and the agreed date of termination. She was paid for that period and no further remuneration is payable.

2. Reimbursement of costs of removal

[35] In anticipation of the sale and purchase proceeding, Ms Faithfull took steps to move her household to Whangarei. She moved to a rental property and planned to purchase her own home. She asserted that her costs of removal were \$5,000 and the costs of cancelling the agreement to purchase a property were \$250.

[36] Those claims should have been supported by evidence in the form of invoices indicating the amounts of any costs incurred, and on what they were incurred. Instead the claims were supported by no more than mere assertion, which is not adequate. However I make no order in any event, because I do not accept that the losses flow from the personal grievance. It was inevitable that Ms Faithfull would need to make such arrangements as she saw fit for her accommodation during the period of her fixed term employment. There was a risk that the proposed commercial transaction would not proceed, and for reasons within the contemplation of the parties it did not proceed. The loss claimed here flows from that rather than from the personal grievance.

3. Compensation for injury to feelings

[37] Similarly, part of the injury to Ms Faithfull's feelings flowed from the fact that the transaction did not proceed. No doubt that was a severe blow to her, but it cannot be compensated for as part of her personal grievance.

[38] However Ms Faithfull is entitled to compensation for the effect on her of the sudden, unexpected and unexplained early termination of her employment. At the same time the nature of the parties' association means a high award is not warranted. Morris & Morris is therefore ordered to compensate Ms Faithfull for injury to her feelings in the sum of \$3,000.

Damage to door

[39] Colleen Morris, Lloyd Morris' wife and an employee of Morris & Morris, observed the incident in which Ms Faithfull kicked open a set of wood veneer doors as she left the premises on 21 December. I accept her evidence, as well as the evidence that the kick left damage which has not been repaired since. I viewed the damage, and there was no real dispute that it was caused by Ms Faithfull's kick.

[40] Morris & Morris obtained three quotes for the repairs, two of which it put to counsel for Ms Faithfull for response after the investigation meeting. The quote presented to the investigation meeting was for \$1,133.64 '(include GST)'. The other two were for \$1,176.32 '(excl)' and \$1,147.50 '(include GST)'. Counsel for Ms Faithfull has not commented on them.

[41] I was not addressed on the jurisdiction of the Authority in respect of such a claim. However if I treat the matter as resting on an allegation that Ms Faithfull breached her contractual obligations to Morris & Morris, thereby causing it loss, then an order for the payment of damages is appropriate.

[42] The cheapest of the quotes was the one for \$1,133.64 (incl GST). Ms Faithfull is ordered to pay to Morris & Morris a sum not exceeding that amount on completion of the necessary repair and immediately on presentation to her of a supporting invoice.

Summary of orders

[43] I summarise the orders of the Authority as follows:

- (a) Morris & Morris is ordered to pay to Ms Faithfull \$3,000 as compensation for injury to her feelings caused by her unjustified dismissal; and
- (b) Ms Faithfull is ordered to pay to Morris & Morris a sum not exceeding \$1,133.64 (incl GST) on completion of the repair to its doors and immediately upon presentation to her of a supporting invoice.

Costs

[44] Costs are reserved.

[45] The parties are invited to agree on the matter. If they seek a determination of the Authority they should file and serve memoranda within 28 days of the date of this determination.

R A Monaghan
Member, Employment Relations Authority