

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 111
5343222

BETWEEN JENNY FERGUSON
 Applicant

A N D CRAYONS EDUCATIONAL
 SERVICES LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Jenny Ferguson on her own behalf
 Glenn Hart on behalf of the respondent

Investigation meeting: 5 June 2012 at Alexandra

Submissions Received: At the investigation meeting

Date of Determination: 11 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Jenny Ferguson, claims to have been unjustifiably dismissed by the respondent, Crayons Educational Services Limited (Crayons), on or about 9 December 2009.

[2] Crayons accepts it dismissed Ms Ferguson but contends its actions justified by reason of redundancy.

Background

[3] Crayons is owned by its sole director, Ms Sally Hart, though her husband, Glenn, is also active in the business. It was incorporated in 2009 to operate a home-based early childhood education service. This was initially offered in Auckland but quickly spread to both Canterbury and Otago/Southland. Unfortunately all three

services have since ceased to operate, though for different reasons which, with the exception of the Otago/Southland operation, need not be discussed here.

[4] Client interface was through a home-based educator who provides an educational programme to the children in his or her care. These providers were generally not employees of Crayons. The programme was devised by a teacher employed by Crayons, which also provided required materials and resources. The teacher also monitored the programmes delivery and that was the position filled by Ms Ferguson in the Otago/Southland region.

[5] Ms Ferguson commenced on 5 August 2009. The parties agree they intended the relationship be an ongoing one, though the hours worked could vary (though not exceed 30 per week) depending on the size of the client base Crayons may have at any given time. The agreement reflects that intent.

[6] Services such as these must be licensed by the Ministry of Education. Initial licenses are provisional and last a year. Toward the end of that first year the operation is reviewed with a view to the award of a full license. The Otago/Southland operation was scheduled for its review late September or early October 2010. Ms Ferguson was integral to the process but had reservations about it. On 20 September she telephoned Mr Hart and voiced those reservations.

[7] In the interim, and as an adjunct to the business, Crayons had purchased and refurbished a vacant kindergarten in Alexandra. Since June 2010, and as a result of the departure of a couple of staff and another's ill health, Ms Ferguson had been assisting by working at the Alexandra kindergarten. The nature of her duties with the home-based service required significant mobility and as a result Crayons had provided a car. She used this to travel from her Dunedin residence to Alexandra and stayed in rented accommodation also occupied by Mr and Ms Hart.

[8] Returning to the discussion of 20 September. Mr Hart and Ms Ferguson agree that after discussing Ms Ferguson's reservations they concluded Crayons would no longer seek a full licence. They agreed the Otago/Southland home-based service would close upon expiry of the provisional license on 18 October. Ms Ferguson also accepts that had the discussion not developed as it then did, this would have meant her redundancy (and justifiably so) either then or upon completion or any residual administrative tasks soon thereafter. They disagree on what occurred next.

[9] Mr Hart says that the conversation was to discuss winding-up the home-based operation and Ms Ferguson's imminent redundancy. He says that during the course of the conversation he remembered that one of the Alexandra employees was soon to commence maternity leave. He says that as a result of the strong relationship Crayons had with Ms Ferguson and the fact he and his wife enjoyed her company, he saw an opportunity retain her – at least for a while. He says he made an offer whereby Ms Ferguson would remain to cover the other employee's absence which was scheduled to last until 31 January 2011; that he said Ms Ferguson could keep the vehicle until it was disposed of as part of winding-up the home-base operation and that he reminded her that there were forthcoming issues with the accommodation (a reference to the fact he and his wife would have to vacate their rental over the Christmas period).

[10] Ms Ferguson has a different view. She is adamant she was being offered a permanent part-time position and states that she would not have accepted had she known it was of finite tenure. She agrees she was told retention of the car was temporary and states she was not concerned about the accommodation issue as she had other options in Central Otago and Mr Hart knew that.

[11] Whatever the agreement, it is clear that on 20 October Ms Ferguson commenced working regular hours at the Alexandra kindergarten on Wednesdays, Thursdays and Fridays.

[12] During the last quarter of 2010 various issues arose with the Hart's business interests, including Crayons. Financial reports confirmed that Crayons was making a loss and its financial adviser recommended a staff reduction, especially as client numbers would be low over the December / January period.

[13] Mr Hart, having received that advice, weighed his options and concluded that Ms Ferguson would go. He reached that conclusion for a variety of reasons, including the fact that in his view Ms Ferguson did not have security of tenure; she was about to lose the vehicle and her ability to travel to Alexandra and the forthcoming issues with accommodation.

[14] On Thursday 9 December he called Ms Ferguson to a meeting which he claims was for the purpose of raising the issue and consulting with her.

[15] Ms Ferguson has a very different view. She says the meeting commenced with discussion about a couple of administrative points (and Mr Hart agrees). She

says Mr Hart then advised that he had to let her go and he then explained that this was due to the removal of the car and the loss of accommodation.

[16] She says Mr Hart said he would write something up following the meeting to confirm what we had discussed. Ms Ferguson says she responded by expressing her view that the arrangement was permanent and that she would not have taken it had she known otherwise.

[17] From there the meeting degenerated. Mr Hart says Ms Ferguson raised a number of ancillary issues, complaints and accusations but refused to discuss either them or her possible redundancy until she had obtained a support person.

[18] Ms Ferguson says that she saw no benefit or reason to discuss the redundancy. She says it was presented to her as a fait accompli and claims colleagues had already been told (and advised her) of her departure. She accepts she raised other issues but claims to have done so in order to seek closure given her imminent dismissal.

[19] Both parties agreed that the conversation became heated and that it effectively ended with a demand from Mr Hart that if Ms Ferguson wished to raise other issues and have them discussed in the presence of a support person she needed to advise those issues in writing.

[20] Shortly after the meeting Ms Hart, who had been present for the later portion of afternoon's discussions, handed Ms Ferguson a letter. It had the previous days date (8 December) and reads:

As previously discussed with you, the position of Homebased Visiting Co-ordinator and area contact person with Crayons Educational Services was made redundant due to the closure of the Crayons Homebased Services in Otago on Friday the 15th October 2010.

Thank you for agreeing to fill in as a part-time relieving teacher at the kindergarten in Alexandra,... to assist us with meeting our qualified teaching ratios for three days a week.

We can now finalise the home based closure ... and require the return of the home based vehicle to return to Auckland for sale. We are also now back to fully qualified staffing levels at the kindergarten and as you are aware we have no accommodation available for ourselves or for you on your visits, so will no longer require your services as a relieving teacher on Wednesday, Thursdays, and Fridays.

Therefore we are formally confirming our discussion today, that we are giving you 30 days notice effective from Wednesday 8th

December 2010 and that your last day of employment with Crayons Educational Services Limited will be Friday 7th January 2001 (sic)...

[21] The letter goes on to discuss cessation arrangements, a farewell function and final pay before thanking Ms Ferguson for her professionalism and dedication.

[22] It would appear the tension that already existed from the meeting remained and this led to Ms Hart suggesting that Ms Ferguson return to Dunedin that day and have the Friday as a paid day off.

[23] It would appear Ms Hart thought about the situation that evening. She conveyed her thoughts in a letter allegedly sent that evening (the 9th) but dated 10 December. Contained therein is advice that:

The purpose of today's meeting was to inform you of the business decision that has had to be made in regard to your employment as per your letter. However, during today's meeting you made it clear that she had issues in regard to your roster and daily communications at work. Unfortunately you also stated that you were not prepared to discuss these issues at this point in time, other than you briefly mentioning a few instances where you felt you were unaware of some of the activities and events that were happening at the centre on the days of the week that you do not work.

As you do not feel comfortable to talk about your concerns in person with me as your manager, I would like to confirm that this afternoon we requested that you put any issues in writing, so we can discuss all misunderstandings in regard to staff communications, including invitation to the Crayons Kindergarten birthday party (which happens to fall on a Tuesday), greetings of staff in the mornings, and your need to console another staff member who was apparently crying in the office. I would like to remind you that staff communications happen on a daily basis, with regular staff meetings held, and followed up with a comprehensive monthly staff memo, which covers all the main items of discussion. ...

You stated you have been sitting on your issues for several weeks now, and I am aware from our meeting today that you have been discussing your concerns with other staff (during paid work time) rather than bringing them to the attention of management. ...

I have asked you to return home to Dunedin in the company vehicle this afternoon, and to take tomorrow off (Friday 11th December) as a paid working day. You are not required to come into the kindergarten tomorrow, and I would like to request you spend part of the day tomorrow putting your concerns in writing and sending them through to me by email please.

I have attached a copy of the complaints policy (as filed in the staff handbook) for your reference.

I look forward to hearing from you.

[24] That was essentially that – Ms Ferguson did not return. E-mails were traded for a while including one advising she was not required to work the week commencing 13 December and a similar one regarding the week commencing 20 December. She was paid for the period of her notice and approached the Department of Labour with concerns about her pay. The Department did not pursue these, concluding there were no irregularities.

Issues for determination

[25] There are, possibly, two issues for determination. They are:

- (a) What was the nature of the relationship between Ms Ferguson and Crayons as at the time of termination (December 2009); and
- (b) If the relationship was other than casual or fixed term, can Crayons justify its decision to dismiss.

Determination

[26] As just said, the first issue to be determined is the nature of the relationship between the parties. Ms Ferguson is of the view she was engaged at the Kindergarten on a permanent part time basis. Crayons claims she was employed as a reliever covering the absence of an employee on maternity leave.

[27] I conclude the arrangement was, as claimed by Ms Ferguson, permanent part time. I do so for the following reasons:

- a. Ms Ferguson is adamant that was the arrangement entered into. While Mr Hart is equally adamant, his evidence is undermined by his acceptance that during the discussion of 20 September he was looking for something which would see the relationship continue and *just ran it off the top of [his] head*. I prefer Ms Ferguson's adamant and consistent evidence over something more ethereal, especially given (b) below;
- b. The original employment agreement had a clause entitled *Individual Agreement of Ongoing and Indefinite Duration* which provided that the agreement would continue until either party terminates in accordance with the agreements provisions. As Mr Hart readily conceded, the new arrangement was never documented. As Ms Ferguson's employment

was not actually terminated upon the closure of the home-based operation, I must conclude the agreement continued to apply. It specifies on-going tenure; and

- c. Crayons approach must mean that Ms Ferguson became either a casual or fixed term employee. I conclude the arrangement can not be considered casual. Whilst the line between casual and fixed term is ill-defined, a casual arrangement requires the absence of predictability and regularity (see *Muldoon v Nelson Marlborough District Health Board* [2011] NZEmpC 103). That is not the case here – there were fixed hours and days. Similarly I conclude the arrangement could not be fixed term given the failure to document the changes along with s.66 of the Act and, in particular, subsections (4) and (6). In any event, termination occurred nearly two months before the date Crayons purport to have been the agreed expiry. The conclusion this could be neither casual nor fixed term leaves only one possibility - an ongoing relationship as provided for in the employment agreement that remained operational.

[28] Having concluded that the relationship was on-going, and there being no dispute that Crayons brought it to an end, Crayons must justify the termination. Their justification is redundancy.

[29] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, 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.

[30] That test is used as Mr Duffy was dismissed before the now current test came into force on 1 April 2011. 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. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[31] 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.

In [Coutts Cars Ltd v Baguley \[2001\] 1 ERNZ 660](#); [2002] 2 NZLR 533 (CA), the Court of Appeal in reviewing the approach of the Employment Court decision ([Baguley v Coutts Cars Ltd \[2000\] 2 ERNZ 409](#)) emphasised the need to consider the two factors (genuineness and process) separately ...

Kevin Leary (ed) [Employment Law](#) (looseleaf ed, Brookers) at ER103.17

[32] In respect to substantive justification, I note Mr Hart's evidence went totally unchallenged. Given that evidence I conclude Crayons had valid reasons for reducing its staffing.

[33] The issue here is procedural. Section 4 of the Employment Relations Act 2000 (the Act) requires parties to an employment relationship deal with each other in good faith. Section 4(1A) requires the parties be responsive and communicative and, in particular, demands that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employees employment give the employee access to relevant information and an opportunity to comment before the decision is made (ie: there must be consultation).

[34] While Mr Hart commented that the meeting of 9 December was for the purpose of raising the issue and consulting, subsequent comments made it clear the consultation related to the question of how to implement a decision already made. That the decision Ms Ferguson's services would cease had already been made was confirmed by the content of the initial statement in reply which emphasises Crayons had little choice; Mr Hart's comment (made more than once) that final confirmation of the decision had only occurred that morning (prior to the meeting) and the apparent preparation of the confirmation letter the day before.

[35] In other words, Crayons failed to consult prior to making its decision. The failure to comply with the requirements of s.4(1A) renders the dismissal unjustified.

[36] The conclusion the dismissal was unjustified raises the issue of remedies. Ms Ferguson seeks 13 week lost wages at \$424.88 net per week and \$5,000 as compensation pursuant to s.123(1)(c)(i) of the Act.

[37] With respect to the wage claim I note case law which suggests monies must be lost for recompense to occur. If the redundancy is substantively justified and

termination would have occurred regardless, there is no loss (refer for example *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601; [1998] 3 NZLR 276 (CA)).

[38] I conclude that approach can not be applied here. The procedural deficiencies are so great. There were other employees who might have been chosen had Crayons not approached this with the view its only option was Ms Ferguson due to her lack of tenure along with other reasons. A proper consolation process may have led to the consideration of other possibilities and there can be no guarantee Ms Ferguson would ultimately have been chosen had it occurred.

[39] Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration.

[40] Ms Ferguson gave evidence of her efforts to attain new work and a general lack of success. While Mr Hart questions Ms Ferguson's lack of success, I accept her evidence and note it could well have supported a greater claim.

[41] That said, Ms Ferguson did have a couple of short term relief engagements. She was, however, unable to be exact about the hours actually worked but it is clear they totalled less than the hours she would have worked in a week with Crayons. Given this factor, and the uncertainty it raises, I will reduce the award accordingly and order the payment of 12 weeks wages.

[42] Ms Ferguson sought \$5,000. That is a reasonable claim given the supporting evidence which illustrated a feeling of worthlessness, loss of self esteem and an (albeit short) period of effective hibernation during which Ms Ferguson felt unable to address what had occurred. This evidence went unchallenged and Ms Ferguson's demeanour during the investigation meeting made it clear she still feels some hurt about what occurred. In the circumstances I see no reason why the claim should not be granted in full.

[43] Finally the conclusion remedies accrue means I must, in accordance with s.124, address whether not Ms Ferguson contributed to her demise in any significant way. The defence was redundancy. Redundancy implies no fault, therefore the answer must be no.

Orders

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

- (i) The respondent, Crayons Educational Services Limited, is to pay to the applicant, Ms Jenny Ferguson, the sum of \$5,098.56 (five thousand and ninety eight dollars and fifty six cents) net as reimbursement of wages lost as a result of the unjustified dismissal.
- (ii) In addition and given the above is a net sum, Crayons Educational Services Limited is to also ensure that an appropriate PAYE payment is made to the Inland Revenue; and
- (iii) Crayons Educational Services Limited is to pay Ms Ferguson a further \$5,000.00 (five 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] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority