IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 311
5407124

	BETWEEN	BOBBIANNE HUGHES Applicant
	AND	WILDLAND CONSULTANTS LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	Stan Austin, Advocate for Applicant Fraser Wood, Counsel for Respondent
Investigation Meeting:	13 March 2014 at Whakatane
Submissions Received:	By 27 June 2014
Date of Determination:	17 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The claims from Ms Hughes are:

(a) That her employer has breached the terms of employment by not paying her from 25 January 2012 until 15 March 2013 and that it failed to provide full time work to her. She is claiming arrears of pay for the balance of her claim to full time work, but she has accepted that the first variation was by consent when she returned from maternity leave.

(b) That the respondent failed to pay her and provide any work upon requesting her to sign an inferior (casual) employment agreement. She is claiming compensation.

(c) That Ms Hughes was unjustifiably dismissed (15 March 2013). She is claiming compensation, wages and benefits plus holiday pay she lost.

(d) That the respondent did not pay Ms Hughes in lieu of notice. This is a claim for eight weeks pay.

[2] Wildland Consultants Limited (Wildland) denies all Ms Hughes' claims.

The issues

[3] There is an issue about who initiated the arrangement for fewer hours upon Ms Hughes return to work after her maternity leave. Was there an agreement on the arrangement?

[4] What were the terms of any arrangement?

[5] There is an issue about whether or not Ms Hughes requested to work full time hours, or any variation of that.

[6] What was the reason for the employment ending and how did the employment end?

[7] Did the respondent require Ms Hughes to sign a new employment agreement and was that employment agreement inferior to such an extent that the employer's offer was an unjustified action and was Ms Hughes disadvantaged? Has the employer breached any obligations under the terms of employment and/or the Employment Relations Act 2000?

The facts

[8] Ms Hughes had full time employment as the Eastern BOP field supervisor with Wildland. There was an individual employment agreement signed off between the parties (the 2006 agreement). Ms Hughes went on maternity leave, and returned at her request early in October 2011. Her return to work involved an agreement to work less hours, in part time work for two days per week (the unwritten variation and absence by agreement). Both parties agreed to the terms, albeit they have a dispute about the duration and terms of the arrangement. The unwritten variation to the 2006 agreement was not put in writing as required under the terms of the 2006 agreement, but remains enforceable by virtue of the parties' application of the new arrangement.

[9] Ms Hughes agreed to work fewer hours upon returning after her maternity leave, effectively changing her employment to work regularly less hours on two days per week. The next arrangement occurred around January 2012 upon a review of work programmes and priorities when there was a reduction in funding occurring. There is an argument about whether there was any agreement after January 2012; however, the practice is a clue about what did happen. In effect arrangement continued until Ms Hughes was offered a guaranteed 16 hours per week and to work more hours when the work was available by Mr Garrick. Ms Hughes says that she was available for more hours of work. This indeed happened and the schedule of hours of work proves it. There was no objection and the parties performed the arrangement by their conduct over time.

[10] Ms Hughes says she asked to return to her full time work during her employment and says that she was available to work five days per week. Wildland says that Ms Hughes accepted that there was less work available in the same time, but that she only discussed being available for an extra day and this was confirmed by Messrs Garrick and Shaw and with an email between them. Ms Hughes denies discussing the extra day when she had asked to work five days. She has not been able to prove this was the case. In any event a draft employment agreement was prepared and given to Ms Hughes on 7 March 2012. Ms Hughes did not sign it, but work continued through to 9 September 2012 when there was a drop off of work.

[11] Ms Hughes consulted her representative, Mr Austin, for advice and he sent Wildland a letter raising a number of legal causes of action based on his knowledge of what Ms Hughes had told him. Wildland sought advice because of the nature of Mr Austin's letter and in a letter, Wildland's representative requested Ms Hughes to respond as to her availability to work. Mr Austin replied refuting Wildland's position. Mediation followed, and afterwards Wildland considered it had to properly close off its requirements for Ms Hughes's final pay because she was saying that she believed she was still employed. Wildland decided to do this because Ms Hughes had not been working and had not replied.

[12] The next issue is how the employment ended. Ms Hughes says that she was dismissed and that she found out about this first when the statement in reply was received, which her representative received before Ms Hughes received an email letter dated 15 March 2013 informing her that she had been paid her final pay and holiday

pay, although the money was paid in to her bank without any details. The employer claims she did not return to work despite her being repeatedly informed that there was work for her and she made no response to a request and to indicate that she would agree to new terms. It was considered that she had abandoned her employment.

Determination

[13] The employment agreement required any variation of the terms of employment to be put in writing. This did not occur upon Ms Hughes returning from maternity leave, but there was mutual agreement for the change. The omission was not intentional, I hold. It was an oversight in that both parties were relying on good faith to operate the new terms for hours and two days' work per week. The arrangement evolved with the parties' agreement as Ms Hughes worked fewer hours consistently before she says that she sought to have changes made to the arrangement for more work later, I hold. The disagreement over whether or not the changes would apply to Ms Hughes's gradual return to work is not material, and certainly was not proved by Ms Hughes given the performance of the terms that were agreed to.

[14] The agreement to work less hours two days per week was arranged between both parties at least initially, and inferred by the voluntary arrangement between them, I hold. Ms Hughes did not work the hours she now claims as wage arrears which includes the hours that initially she agreed not to work. By consent as the first arrangement was agreed there is no entitlement to arrears for the balance of full time work. Thus, Ms Hughes is not entitled to any wages for that portion of time. As such I reject that the agreement was entirely extant, or in other words that the arrangements did not apply and were not enforceable.

[15] Ms Hughes was not required to sign an inferior agreement and I accept that the first draft was put up for negotiation based on Mr Garrick's belief that the law required a signed off agreement and that he had not obtained one from Ms Hughes. The right to renegotiate can involve offers being made including new terms that may be different from the original terms and the law makes provision for the employer to keep an agreement even where an intended employment agreement exists and where one of the parties has not signed off. However, any failure to agree means that the original terms continue to apply, and in that regard what had evolved was the agreement for the new post maternity leave arrangements and Ms Hughes was provided with more work as it became available. The parties could not then get

agreement on terms to apply for the future, which explains first the offer from Wildland for 16 guaranteed hours, and second casual terms for work as when and required, and Ms Hughes's claim that she asked for full time work to be returned.

[16] Ms Hughes did not sign off on the proposed employment agreement and casual arrangements offered, which was her right because she appears to have wanted full time work to be returned. That was not agreed to either by her employer, and it did not have the work available.

[17] Ms Hughes says that she was prevented by her employer working the hours she wanted because another person was appointed to do her role. However, it is more probable that Ms Hughes agreed and/or accepted less hours. Also, I accept that Wildland did not appoint someone else to do her job given the explanation from Mr Garrick because:

(a) There is an explanation from Wildland about the other person's role and an advertisement for casuals.

(b) The explanation was backed up with documents.

[18] However, the demand for Ms Hughes to sign up and respond, and unless she did so, she would not be provided with work from October-November 2012, was unjustified, I hold. Ms Hughes reasonably understood that was a demand I hold. This is because:

a. The language of Mr Garrick's letter was clear. It said:

"…*Until such time as we have signed a contract I am unable to involve you with these or any other projects. I will have to proceed with both…whether you are involved or not."*

b. There was no more work provided when it should have been under the existing arrangement.

[19] Wildland's decision to activate the abandonment of employment clause under the 2006 employment agreement, and effectively end the employment on 15 March 2013, was unjustified and unfair, albeit I understand that the decision was made because Ms Hughes considered she was still employed. My reasons for the finding are:

a. That the procedure followed did not include an investigation on the abandonment matter, Ms Hughes was not informed of the employer's concerns about abandonment issues to enable her to respond, and thus, Wildland could not have genuinely considered her input before making a decision, or better still, to even make a tentative decision for her to comment on it before the decision was finalised.

b. That there was no advance indication of the proposal to use the abandonment provision under the employment agreement put to Ms Hughes.

c. That a fair and reasonable employer could not activate such provision when: (i) it knew where Ms Hughes was; (ii) Wildland had contact details for her; (iii) Wildland was aware that there were legal issues being pursued by Ms Hughes's representative on her behalf; (iv) Ms Hughes had previously been working and worked the available hours she had been given; and (v) there was the ultimatum for her to sign up or face the prospect of not getting further work with the attempt to get Ms Hughes to sign off the employment agreement on Wildland's terms, which were I hold open to negotiation.

d. That a fair and reasonable employer could be expected to apply the "Change of Hours Clause" in the 2006 agreement first, particularly where Wildland wanted to retain Ms Hughes's services. Second, Wildland had another option available and that was that it could have put in place a redundancy proposal. Neither of these were issues at the time.

[20] Unfortunately the parties lost sight of the real issue in the on-going employment relationship about Ms Hughes's responding as requested by her employer, including what she wanted to do. The matter became consumed with legal issues. The agreed attendance at mediation accounts for Wildland failing to reply further in the matter until after the mediation. Mr Austin's letter on Ms Hughes's behalf failed to address the immediate concern that should have been about arrangements to return to work, and for which other options were available. Instead the focus became a legal one based on the causes of action raised by Mr Austin instead of focussing on an employment relationship problem involving a planned arrangement about returning to work at least to maintain the status quo until any disputes could be resolved.

[21] In summary Wildland could not terminate the employment agreement as it was related to Ms Hughes returning to work, including the legal issues, and when she was still available for work and the parties were trying to negotiate terms.

[22] I now turn to remedies. Ms Hughes is entitled to lost wages because of her unjustified dismissal and the unilateral decision made for her to agree to the terms offered or otherwise there would be no work. The lost wages are from 4 November 2012 until 15 March 2013 and this would have been for a period she would have expected to work. Next there is 9 weeks lost wages from 15 March 2013 until 20 May 2013 (when she got a new job). She was paid $20.50 per hour. Her average fortnightly hours from the 2 February 2012 was equivalent to 20 hours per week. The first amount of lost wages is 18 weeks in the sum of $7,380 as a lost benefit. She is entitled to $3,690 gross lost wages for 9 weeks from the date the employment actually ceased on 15 March 2013. The claim for a payment in lieu of notice is incorporated in the total since the action of the employer and dismissal were not justified and if employment had ended properly contractual notice would have been required.

[23] Ms Hughes is entitled to compensation globally for hurt and humiliation in the sum of $8,000 for the unsatisfactory way in which the employment ended which was tantamount to actual dismissal when it became apparent the impasse on the terms and conditions meant that Ms Hughes would not be returning to work (15 March 2013).

[24] The remedies are to be reduced by 30% to account for Ms Hughes' failure to be responsive and communicative with information about returning to work as requested and to properly respond when requested in writing as it should have been. Unfortunately a proper position on the employment relationship problem was lost in translation. It was put into a legal context too early when the parties should have been focussing on resolving an employment relationship problem about Ms Hughes' availability to return and to sort out the terms and follow up any compliance and enforcement as an alternative to what actually happened.

[25] For completeness the claim for arrears of wages under s 131 of the Act for the period 25 January 2012 to 15 March 2013 for full time work is dismissed. The claim for holiday pay on the arrears is dismissed. The claim for interest on the same amount is dismissed. The claim for compensation for unjustified action on refusing Ms Hughes work unless she signed an agreement and the dismissal recognises she has lost wages and I have made an award for this, and treated compensation globally.

Summary

[26] Wildland Consultants Limited is to pay Bobbianne Hughes:

a. $7,749 total lost wages;

b. $619.92 holiday pay as claimed on the above amount[1];

c. $5,600 compensation under s 123 (1) (c) (i) of the Act.

Costs

[27] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority

[1] Howell v MSG Investments Ltd (formerly known as Zee Tags Limited) [2014] NZEmpC 68.