

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Judith Hutchinson (Applicant)
AND Impex Personnel Ltd (Respondent)
REPRESENTATIVES Dylan Marriott, Advocate for Applicant
Gregory Walker, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 25 October 2005
DATE OF DETERMINATION 23 December 2005

DETERMINATION OF THE AUTHORITY

The problem

[1] Ms Judith Hutchinson (“Ms Hutchinson”) says she was unjustifiably dismissed by her former employer Impex Personnel Limited (“Impex”). Impex says Ms Hutchinson voluntarily resigned from the employment.

The facts

[2] Ms Hutchinson commenced employment with Impex on 15 November 2004 as a recruitment consultant.

[3] The terms of the employment were recorded in a written individual employment agreement dated 8 November 2004.

[4] On 4 February 2005 Ms Hutchinson asked to meet with her manager Mr Chris Blair (“Mr Blair”). I find that Ms Hutchinson told Mr Blair she was not happy or coping with her role as recruitment consultant. I find that Ms Hutchinson resigned from that employment and she and Mr Blair agreed her employment would cease on 28 February 2005.

[5] Ms Hutchinson then asked Mr Blair to discuss establishing a new role for her in the form of a transport and logistics industry training course, the industry where Ms Hutchinson’s work experience came. These discussions proceeded both in general terms and specifically as to programme content. Mr Blair explained to Ms Hutchinson that such a venture would not involve her engagement as an employee principally because of the need to acknowledge her own intellectual property in the programme and further, because Impex was not in a position to fund it. He further explained the venture would require the approval of Impex’s Australian management.

[6] Mr Blair followed up that discussion by a confirmatory email of the same date. I find it corroborates the substance of the discussion between him and Ms Hutchinson, as follows:-

Dear Judith

Further to our numerous discussions about your desire to move away from the recruitment side of ImpEx in favour of establishing industry training courses. I can confirm our intention to pursue the industry training and our preference is for you to take a lead role in this venture.

In order for us to move ahead we need to formalise a couple of points.

- 1. You agree that your current consultant contract with ImpEx will cease by mutual agreement on the 28th of February 2005.*
- 2. A replacement staff member will start on the 9th of February 2005 and you may be required to perform a hand over up to and including the 11th of February 2005.*
- 3. You will use the time between the 11th and 28th of February to prepare a detailed business plan for the proposed training courses.*
- 4. If both parties agree to pursue this business opportunity it will be formalised by way of a written agreement and it is likely a separate company will be established.*

Once you have prepared and presented your business plan (on or about 1st of March 2005) along with outlining remuneration/profit split suggestions we will present the detail to Jim Peters (ImpEx Chairman) for his consideration.

Please confirm by return that you agree to the items list above.

*Kind regards
Chris Blair*

[7] Ms Hutchinson responded in unequivocal terms by way of acceptance:-

*Thank you for this. I accept these conditions and thank you for the opportunity.
Kind regards
Judith*

[8] However, on 7 February 2005, Ms Hutchinson sought clarity about her status in the event the training role was not pursued by Impex. She emailed Mr Blair that day as follows:-

*Dear Chris in point 4 you say IF. On the basis that you/we decided not too(sic) go ahead I presume I would no longer be employed by ImpEx. Can we discuss this at your convenience
Regards Judith*

[9] Mr Blair responded:-

No problem. Lets discuss this today (this afternoon)

[10] When Ms Hutchinson and Mr Blair met, Mr Blair repeated that the new training programme required approval and irrespective of that approval, her employment would end on 28 February 2005.

[11] Ms Hutchinson was paid to work on a business plan and budget for the period from 11 February 2005 until 28 February 2005.

[12] Ms Hutchinson provided the business plan, budget, and training module to Mr Blair on 28 February 2005. Mr Blair submitted the documents to the Australian management. That

management subsequently advised it did not approve of the venture. A revised plan was not approved either.

[13] Ms Hutchinson was not paid after 28 February 2005. When she went to her bank on 17 March 2005, she found she had not been paid. She contacted Mr Blair and asked where her pay was. Mr Blair told her “*You’ve resigned*”. She said “*Excuse me?*”. Mr Blair reminded Ms Hutchinson of the discussion that took place on 4 February 2005. He said “*You resigned, you were to do the proposal.*” Ms Hutchinson said “*I think we have a miscommunication.*”

[14] When they met to discuss matters on 21 March 2005, they could not agree.

The issues

[15] A number of issues fall to be determined. These are:-

- (i) Whether Ms Hutchinson was dismissed, and if so;
- (ii) Whether the dismissal was justifiable; and if not;
- (iii) What orders are appropriate to resolve the problem.

These issues are dealt with in turn.

Was there a dismissal?

[16] Ms Hutchinson says that when she sought clarity from Mr Blair, he told her “*don’t worry about that you’re at home on full pay*”. She says she took from that her role as recruitment consultant would end but her ongoing employment was continuous. She does not give evidence of any further discussion of her continuing role. Perhaps she took for granted the training venture would be approved.

[17] I prefer Mr Blair’s evidence that he told Ms Hutchinson again that the new training programme required approval and irrespective of that approval, her employment as recruitment consultant would end on 28 February 2005.

[18] I find that Ms Hutchinson resigned from her employment. I find that she understood the new training programme was a proposal only which required management approval. She appreciated that risk. She was aware that if the proposal was not approved, there was no further continuing role for her at Impex.

[19] It is submitted that any resignation by Ms Hutchinson could only be effective if given by notice in writing. It is correct that clause 22.1(a) requires such written notice as does clause 10.1. However, I find that Ms Hutchinson and Mr Blair impliedly waived the requirements for one month’s notice in writing, by the agreements that arose from the discussions between them on 4 February 2005.

[20] Accordingly, I determine the first issue by concluding that Ms Hutchinson was not dismissed.

[21] The remaining issues do not fall to be determined.

Determination

[22] As I have found that Ms Hutchinson was not dismissed, **I find that she does not have a personal grievance. There will be no formal orders.**

[23] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Walker is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Mariott is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority