Determination Number: 373/06
File Number: 5037640

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Orchid Ottulugia (Applicant)
AND	Roy Morgan New Zealand Limited(Respondent)
REPRESENTATIVES	Christopher Lennon, for the applicant Peter Elder, for the respondent
MEMBER OF AUTHORITY	Marija Urlich
INVESTIGATION MEETING	20 November 2006
SUBMISSIONS RECEIVED	30 November and 6 December 2006
DATE OF DETERMINATION	7 December 2006

DETERMINATION OF THE AUTHORITY

[1] Orchid Ottulugia was employed as a call centre interviewer with Roy Morgan New Zealand Limited from early 2004 until her dismissal on 11 April 2006. She says her dismissal was unjustified and seeks remedies to reimburse wages lost as a consequence of her dismissal and compensation for hurt feelings.

[2] Roy Morgan conducts market research from the call centre at which Ms Ottulugia was employed by randomly calling telephone numbers and interviewing the respondents. As an interviewer Ms Ottulugia worked at a key board with a screen and telephone headset. Roy Morgan says Ms Ottulugia was justifiably dismissed for serious misconduct. It says that if the Authority finds that Ms Ottulugia has grounds for a personal grievance that she should be denied any remedy because she was employed on succeeding fixed term agreements and her contribution to the circumstances giving rise to her personal grievance amount to 100%.

[3] To determine this employment relationship problem the Authority must consider:

(i) whether Ms Ottulugia was a fixed term worker; and
(ii) whether her dismissal was justified following an assessment of the relevant objectively verifiable circumstances.

Fixed term or part time?

[4] Ms Ottulugia's terms of employment were set out in the Roy Morgan International Limited Collective Employment Agreement 2004 (1 May 2004 – 30 April 2005). Though the name of the employer party to this document is different to that of the respondent in this employment relationship problem the parties agree this is the relevant cea. The cea provides the following definitions of fixed term and part time workers:

> **10. FIXED TERM WORKERS**
>
> 10.1 Workers are employed on a fixed term basis as and when required, with each engagement being a separate period of employment.
>
> The hours of work relating to each engagement shall be notified to the worker in advance, and the worker shall note their availability for work by contacting the company each Thursday morning by 11am. The worker however shall be under no obligation to make

him/herself available for any work that the company may offer.

Upon notifying their availability, the employee shall be engaged for a fixed term for a shift as noted above for each engagement.

In allocating shifts to employees who have notified their availability for work, the employer shall take into account on a first come first served basis, the following factors;

- The employee's skill levels relevant and the employee's suitability for the assignment and
- The employee's experience and prior service with the company and
- Any particular training requirements the company may have from time to time.

Where changes to the weekly rostered shifts allocated, become unavoidable, a minimum of 48 hours notice of cancellation of such shift shall be provided by the company.

In the case of major equipment breakdown or other unprecedented interruption to work, any shift may be cancelled with no less than 4 hours notice.

The employer may from time to time, depending on business requirements, contact workers directly at any time to determine their availability for work and may introduce other methods for contact, utilizing technology such as short messaging texting.

For those employees whom (sic) have been allocated work on a same day basis, a minimum of 4 hours notice of cancellation of the work shall be provided by the company.

11 PART TIME WORKERS

11.1 Means, a worker, other than a fixed term worker, who has an agreed regular roster with specific days and hours that do not vary and are consistent from month to month. A part-time worker shall be employed for no less than two hours per day unless the employee agrees otherwise. A part-time worker does not have the right to reject work within the agreed roster.

[5] Ms Ottulugia said she worked regular hours and always made herself available for work. She confirmed that every Wednesday she would ring Rose Jackson, Roy Morgan's New Zealand National Field Coordinator, to advise what days she was available to work and that Ms Jackson would confirm her roster to begin the Monday of the following week. Ms Ottulugia said the roster was posted in the staff room. She said that she was only not offered work when there was not enough available and that this hardly ever occurred.

[6] Ms Jackson gave evidence on behalf of Roy Morgan. She said it was necessary to employ interviewers on succeeding fixed term agreements because the work performed by Roy Morgan for it's clients is on an assignment basis. Ms Jackson described the pattern of work performed during the year; that from March to October interviewers were conducting the "UK Omnibus" research and from October to March the "UK Omnibus" continued plus other assignments. She said during this latter period interviewers would work on a maximum of five scripts in any one shift. The script sets out the questions asked by an interviewer of the respondent for the purposes of fulfilling the research assignment.

[7] Section 66 of the Employment Relations Act 2000 provides:

66. Fixed-term employment—

(1) An employee and an employer may agree that the employment of the employee will end—
(a) at the close of a specified date or period; or
(b) on the occurrence of a specified event; or
(c) at the conclusion of a specified project.

(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—
(a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
(b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.

(3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):
(a) to exclude or limit the rights of the employee under this Act:
(b) to establish the suitability of the employee for permanent employment.
[(c) to exclude or limit the rights of an employee under the Holidays Act 2003.]

> *(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—*
> *(a) the way in which the employment will end; and*
> *(b) the reasons for ending the employment in that way.*
>
> *(5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.*
>
> *(6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—*
> *(a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or*
> *(b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.*

[8] Subsections (4) to (6) were inserted, as from 1 December 2004, by section 27 of the *Employment Relations Amendment Act (No 2) 2004*.

[9] There is no evidence that Roy Morgan discharged its obligations to Ms Ottulugia under subsections 66(2)(b) and 66(4) of the Act to advise her prior to entering a fixed term agreement why her employment would end at the conclusion of the weekly roster and to record those reasons in writing. The cea is silent as to the reasons for interviewers being employed on fixed term agreements. The roster Ms Ottulugia worked at the time of her dismissal provides no information which would satisfy these section 66 obligations. There was no evidence that the nature of the assignment/s or their anticipated duration was discussed with Ms Ottulugia when she telephoned Ms Jackson to advise of her availability to work in any given week. As I understand the evidence of the respondent it is the fixed term nature of the work it performs for its clients which requires interviewers to be employed on a fixed term basis. There was no evidence that the duration of the research assignments correlated with the fixed terms that Ms Ottulugia was employed on. The obligations to communicate the grounds for her fixed term employment were not advised to Ms Ottulugia before she entered the assignments with Roy Morgan.

[10] Roy Morgan has not meet its section 66(2)(b) or section 66(4) obligations to Ms Ottulugia. In such circumstances her employment cannot be characterised as fixed term[1]. She was a permanent employee.

Unjustified dismissal

[11] Ms Ottulugia was dismissed on 11 April 2006. Her letter of dismissal, dated the same day, states she was dismissed because during the previous evenings shift she had:

(i) hung up on respondents at least four times after they had answered her call;
(ii) hung up on a respondent after she had introduced herself as a representative of Roy Morgan; and
(iii) called back a respondent and asked why they had hung up on her.

[12] At the conclusion of the 11 April evening shift briefing Ms Jackson asked Ms Ottulugia to meet with her. Ms Ottulugia said she was embarrassed to be called out of the meeting in front of her team mates. Ms Jackson said she asked Ms Ottulugia if she wanted to bring a friend with her and Ms Ottulugia said she did not. Ms Ottulugia said Ms Jackson did not ask her if she wanted a representative present. I think it is likely that Ms Jackson believed this issue had been dealt with during her telephone call to Ms Ottulugia earlier in the day and that she did not raise the matter again.

[13] There is another dispute as to whether Ms Jackson had agreed to defer the meeting until Ms Ottulugia had found a representative during that earlier telephone call. Ms Ottulugia had worked the evening shift and had just woken up when she received Ms Jackson's call. I do not believe this would have been a very clear conversation. Given the circumstances it would have

[1] Section 66(6)(b) Employment Relations Act 2000

been fairer to put the request for the meeting in writing along with a reminder of the right to representation and how that might be accommodated.

[14] Once the meeting began Ms Jackson said she told Ms Ottulugia that her calls had been monitored by two supervisors during the previous shift and that she had hung up on a respondent. She then handed Ms Ottulugia the dismissal letter. Ms Jackson said Ms Ottulugia did not say anything before she handed her the dismissal letter. Ms Jackson's oral evidence of the meeting is somewhat different to that contained in the witness statement filed on her behalf with the Authority. She struck me as a truthful and sincere witness and I believe she accurately stated her recollection of events.

[15] Ms Ottulugia says she was called into the meeting, handed the dismissal letter by Ms Jackson, who then left her to read it, returned and asked her for her comments.

[16] By either account this dismissal fails to meet the accepted standards of a fair dismissal.

[17] Ms Ottulugia did not have a fair opportunity to answer the allegations against her; she did not have a fair chance to have a representative present, she was not advised prior to the meeting of its purpose and she was not told what the allegations were or the factual basis of those allegations (for example, she was not given copies of the monitoring sheets and asked to comment).

[18] Roy Morgan cannot demonstrate that it gave Ms Ottulugia a fair opportunity to provide an explanation for the allegations she was facing. Ms Jackson had preprepared the dismissal letter before the disciplinary meeting, in consultation with HR support in Sydney. A file note of that discussion, made by the Sydney HR support, records that the decision to dismiss Ms Ottulugia was made during that discussion and prior to the disciplinary meeting.

[19] For these reasons I find Ms Ottulugia's dismissal was unjustified.

Remedies

[20] Ms Ottulugia has established grounds for a personal grievance and she is entitled to a consideration of the remedies she has sought.

[21] Ms Ottulugia says she felt really ashamed by her dismissal; that she was embarrassed to be called out of the meeting in front of her team mates, that she was too shocked to assert her right to a representative, that she does not understand elements of the grounds for her dismissal and was unfairly denied the opportunity to clarify the respondent's concerns about her behaviour or provide an explanation.

[22] Ms Ottulugia has claimed remedies for hurt and humiliation consequent to her dismissal but has provided minimal evidence to support that claim despite the question being put directly to her. An applicant must provide evidence to prove a claim of loss. It is from this basis that an award can then be assessed.

[23] **Ms Ottulugia is entitled to an award of $2000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

[24] Ms Ottulugia has claimed reimbursement of lost wages from the date of dismissal, 11 April 2005, until she commenced new employment in late August 2006. Ms Ottulugia's evidence was that during this four month period she applied for about six positions and that it was not until she took Roy Morgan off her CV that she had any success.

[25] While I acknowledge Ms Ottulugia made some effort to find another position following her dismissal her efforts could not be described as reasonable given her experience and the current labour market. She had an obligation to mitigate her loss and, on the information provided, she has not made much of an effort to do so.

[26] **Ms Ottulugia is entitled to be reimbursed for two months lost wages pursuant to section 123(1)(b) to be calculated on her average weekly hours worked at her usual hourly rate of $12.**

Contribution

[27] Section 124 of the Act requires that I must consider whether Ms Ottulugia has contributed to the situation which gave rise to her personal grievance.

[28] The dismissal letter lists conduct of Ms Ottulugia's which Roy Morgan says amounts to serious misconduct. The details of that conduct are listed above. Roy Morgan says these actions amount to serious misconduct because Ms Ottulugia had been instructed that hanging up on or ringing back a respondent was contrary to the work she was engaged to perform and had the potential to damage Roy Morgan's reputation.

[29] Ms Ottulugia does not deny that she rang a respondent back and asked why they hung up on her. She said she did this because they were very rude to her and no respondent had been that rude before. She accepted that she had received training on how to deal with rude respondents and that she did not tell her supervisor about the rude respondent.

[30] Ms Ottulugia accepted that there were no circumstances when an interviewer would end a call with a respondent without authorisation.

[31] Ms Ottulugia accepted that she knew her calls could be monitored by a supervisor at any time. The monitoring sheet records the conduct in question occurred. I have no reason to believe it did not.

[32] There is no doubt that Ms Ottulugia engaged in blameworthy conduct which contributed to the situation which gave rise to her personal grievance. However, she did not contribute to the serious flaws in the dismissal process which denied her an opportunity to provide an explanation which may have mitigated the very serious penalty she received.

[33] **Taking all these factors into account it is appropriate that the remedies awarded Ms Ottulugia are reduced due to her contributing behaviour and I set that reduction at 50%.**

Costs

[34] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to memoranda should be filed and exchanged within 28 days of the date of determination with any replies being filed within a further 14 days.

Marija Urlich
Member of Employment Relations Authority