

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 101
5354090

BETWEEN

JOAN PARKER
Applicant

AND

CONSULTANCY
ADVOCACY AND
RESEARCH TRUST
Respondent

Member of Authority: P R Stapp

Representatives: Applicant in person, Joan Parker
Paul Muller, Counsel for the Respondent

Investigation Meeting: 19 June 2012 at Wellington

Further information by 27 June 2012

Submissions Received by: 26 July 2012

Determination: 14 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem is about how the applicant's employment ended and at whose initiative. During discussions held between both parties an issue emerged about whether or not the Consultancy Advocacy and Research Trust (CART) required Ms Parker to resign and if so what was the context of that demand.

[2] CART claims that Ms Parker abandoned her employment. It has denied all her claims and the remedies she has requested.

Issues

[3] The issues in this matter are as follows:

- What were the circumstances in which the employment ended?
- How did Ms Parker's employment end?
- If there was a dismissal, (that has to be initiated by the employer), was there any cause?
- If so, was the dismissal justified?
- Both parties are seeking costs.

The facts

[4] Ms Parker was employed as a personal assistant on a purported fixed term individual employment agreement with Consultancy Advocacy and Research Trust (CART). In February 2011 (February, May and June minutes) the Trust's General Manager, Mr Laurence O'Reilly raised issues concerning the need to restructure the organisation because of funding arrangements that were to potentially change and that he had given notice of his intention to leave. Mr O'Reilly had been asked by the Trust to put in place employment arrangements in regard to the Trust's structure for any incoming new manager.

[5] He wrote to Ms Parker on 7 June 2011 to clarify a number of matters that she had raised earlier when the Trust's receptionist decided to leave. One of the issues was about some of the receptionist's duties being included in her personal assistant role. Mr O'Reilly's letter informed Ms Parker that there was an issue of less Government funding being available, a likely merge with another provider in regard to administrative matters and his intention not to replace the receptionist and remain with one person in the personal assistant role. He confirmed to Ms Parker that there was no need for a new contract, that there was no need to change Ms Parker's job description and that her contract would end as planned on 7 December 2011.

[6] On 17 June 2011 Ms Parker was handed a notice proposing a change to the organisational structure meaning that the position of personal assistant would be made redundant. On 21 June Ms Parker, her support person Warren Doughty, and

Mr O'Reilly had a meeting about the options in regard to making the personal assistant position redundant. This involved a discussion about the possibility of the negotiation of a redundancy clause in her employment agreement. This led to discussions about an exit arrangement. Underpinning that discussion there is a dispute as to the context in which Mr O'Reilly used the words "*resign*" and/or "*resignation*". He says that if he used the words they would have related in context to any agreement reached in regard to redundancy since Ms Parker's employment agreement had no provision for redundancy.

[7] Ms Parker says that she was shocked and hurt when Mr O'Reilly allegedly told her to resign. Mr Doughty took the notes of the meeting and Ms Parker relies on the notes to support her contention that Mr O'Reilly wanted her to resign. She says that she was asked by Mr O'Reilly to leave straight after the meeting and to take two weeks garden leave. She had pre-arranged to take annual leave from 5 July to 19 July 2011. Her first day back at work was 19 July 2011 after the garden leave and her annual leave. Mr O'Reilly denies such claims.

[8] In the meantime a new person started work at CART. That person was Katrina Moar, whom Ms Parker says was doing her job. Ms Parker's evidence was not challenged that Ms Moar had started work on 27 June 2011 and that she was doing Ms Parker's duties from then.

[9] On 20 July Ms Parker, Mr Doughty and Mr O'Reilly met again, and Ms Parker says that at this meeting her employment effectively was terminated and she was asked to leave. Mr O'Reilly denies that he required Ms Parker to leave and claims that she has confused their discussions in regard to a redundancy and resignation. She had received legal advice in regard to such matters and decided to pursue a personal grievance.

[10] Ms Parker did not accept any proposal for redundancy. She did not return to work after 20 July, but telephoned Mr O'Reilly because she thought that he required her to work out any notice. Ms Parker says Mr O'Reilly said that he had no work for her to do. She claims that her position has been filled by Ms Moar who is now the Office Manager. Mr O'Reilly denies that there was no work for Ms Parker. Mr O'Reilly confirmed that Ms Moar was contracted to undertake administrative roles in the organisation, first to job size the position and then later she was found to be competent to fill the position, but as a contractor.

Credibility between Mr O'Reilly and Ms Parker

[11] There are two major credibility issues. The first is whether or not Mr O'Reilly told Ms Parker to resign. I hold there was no such demand in that way. This is because:

- a. The discussions were about redundancy compensation.
- b. Mr O'Reilly had previously confirmed that Ms Parker's position would remain until 7 December 2011.
- c. There was no settlement.
- d. There was still work to be done.
- e. Ms Moar was contracted to undertake administrative roles in the organisation that involved job sizing the position and she was considered by Mr O'Reilly to be competent to fill the position as a contractor.

[12] I hold that it is more likely than not that Mr O'Reilly did say the words "resign" and/or "resignation", but in the context of their discussion about a redundancy arrangement for Ms Parker. This is more likely than not because Mr O'Reilly had decided to change Ms Parker's role to expand the role at least as early as 7 June. In support of this his letter can only be interpreted in such a way. His wording in that letter dated 7 June was unfortunate if as he says now that he did not mean what he said then. My conclusion is supported by his subsequent actions of engaging Ms Moar on contract to size the job and employ her before Ms Parker's employment ended.

[13] The second issue involving credibility is about whether or not Mr O'Reilly informed Ms Parker that there was no work for her during a telephone conversation, as she has alleged. Ms Parker has a tape, but the transcript has not been able to be produced, apparently because of technical difficulties. During the Authority's investigation it became clear that there was common ground that there was work

available. I hold that Mr O'Reilly did not say to Ms Parker there was no work for her. It is more likely than not that Ms Parker genuinely believes that he did say this to her, but she has not been able to sufficiently prove it given Mr O'Reilly challenged it and had an explanation that I hold was plausible. Also it emerged during the Authority's investigation that there was common ground that there was work to be done.

How did Ms Parker's employment end?

[14] Ms Parker did not abandon her employment. I am supported in this finding by the following:

- (i) That Mr O'Reilly accepted that he did nothing after 22 July 2012 to find out where and what Ms Parker was doing and to endeavour to contact Ms Parker again.
- (ii) That CART knew that Ms Parker had a number of issues in regard to her employment. One of those was about a redundancy compensation provision and another was about her role.
- (iii) That the parties were in discussions about redundancy.
- (iv) That Ms Parker had been given a written assurance about her work. She reasonably understood that her role under the contract would continue until expiry.
- (v) That Ms Parker knew that another person had been engaged during her employment.
- (vi) That Ms Parker came to a reasonable understanding that she was no longer needed and that there was no work for her beyond any notice.

[15] Therefore, I hold that Ms Parker did not abandon her employment.

A dismissal initiated by the employer

[16] The linkage between Mr O'Reilly's approach and discussion with Ms Parker and her leaving is enough for the employer to be held accountable for Ms Parker's confusion about what was happening and her decision not to return to work. This is supported by:

- i. Ms Parker being adamant that she was asked by Mr O'Reilly to leave.
- ii. Ms Parker being given garden leave to get advice.
- iii. CART's action to implement garden leave when there was no provision for garden leave in the employment agreement. No agreement was reached on garden leave except that from her action Ms Parker accepted it.
- iv. CART's breach of the agreement in restructuring Ms Parker's role when there was no provision for redundancy that meant the agreement had to continue.
- v. The inclusion of a precondition to resign upon discussing redundancy compensation.
- vi. Ms Moar was contracted to work during Ms Parker's employment and this involved doing the same work undertaken by Ms Parker.
- vii. There was no further contact made with Ms Parker after 22 June to find out what she was doing. This means the employer failed to meet the proper requirements to manage an abandonment of employment defence raised in the statement in reply.

[17] I hold that Ms Parker has a personal grievance because:

- a. CART through Mr O'Reilly initiated an exit discussion on redundancy compensation without success and with Ms Parker becoming confused about what was happening with her job.
- b. The exit discussion involved a suggestion that Ms Parker would need to resign if she received redundancy compensation. Given the way it was being discussed made it reasonable for Ms Parker to understand she was being asked to resign.

- c. Ms Parker went on garden leave at Mr O'Reilly's suggestion, albeit he provided the leave for her to get advice.
- d. Another person was brought in during Ms Parker's employment under a new arrangement and for the job sizing reason at the time.

[18] Ms Parker reasonably understood that her employment had ceased. This was caused at the initiative of the employer.

Redundancy in the fixed term employment agreement

[19] The redundancy matter was initiated by the employer where no redundancy provision existed in the purported fixed term employment agreement. First there has been no merger involving CART and any other provider to enable the restructuring and transfer provisions in the employment agreement to apply. Second there is no information about the funding arrangements and timing to support any expiry of the contract prior to 7 December 2011. Indeed Mr O'Reilly asserted there remained work for Ms Parker. Without redundancy provisions for termination during the currency of the purported fixed term employment agreement the agreement could not be terminated under such a ground.

Garden leave in the fixed term employment agreement

[20] There was no provision in the employment agreement for any garden leave. Also there is no common ground that the garden leave was taken by mutual agreement, except that Ms Parker did not complain about that leave at the time. She did take the opportunity to get legal advice from a Community Law Centre during her leave and before taking prearranged annual leave.

The role of redundancy in the dismissal

[21] There has been no information provided to support the changes in funding and that funding was timed to happen earlier or any later than the agreement to end the contract on 7 December 2011. However, I am satisfied that as Mr O'Reilly said that the matter was supported by documentation if it was requested, and I accept what he says. This was not challenged by Ms Parker. The situation has been complicated by the discussions to include a redundancy compensation provision but linked to Ms Parker not being required after that if the negotiations were concluded. I hold that this

was misunderstood by Ms Parker at the time because of the explanation now provided by Mr O'Reilly and the ambiguity in the minutes produced, which were qualified at the time by Mr O'Reilly when he signed the minutes but stating they were not a full accurate record.

[22] The situation is also problematic because Mr O'Reilly engaged Ms Moar during Ms Parker's employment without Ms Parker being properly informed of the reasons for that.

[23] The reason for redundancy cannot be justified in circumstances where there was still work available for Ms Parker, Ms Moar had been employed, funding had not actually ceased and Mr O'Reilly had confirmed that Ms Parker's contract could still run to 7 December 2011.

Conclusion

[24] It is clear that change based on funding and that Mr O'Reilly had been requested to manage any change to restructure the organisation before he too left and discussions about redundancy compensation were the causal factors for Ms Parker's employment ending. The discussion meant that Mr O'Reilly's earlier reassurance that Ms Parker's agreement would run until 7 December 2011 and that there remained work available for her were lost sight of. The employer's actions were unjustified in the approach taken to discuss what amounted to an exist and not to endeavour to make further contact with Ms Parker after 22 June to make proper arrangements for her to work affected her employment to her disadvantage I hold.

Remedies for personal grievance

[25] I hold that Ms Parker has a personal grievance. Ms Parker was entitled to give instructions to pursue a personal grievance in regard to what happened, but her failure to return to work meant that she lost an opportunity to continue to work. Since this was caused by a misunderstanding and CART never contacted her further she can not be blamed for the situation and as such there is no contributory conduct on her part. Given that she was replaced, but that there was work for her to do she is entitled to lost wages under the terms of the contract as if it ran until its expiry and or the date she agreed to leave which she says would have been 1 December 2011. Ms Parker was paid \$45,000 per year (\$21.63 per hour/\$865.38 per week) and to work 40 hours per week. Her employment ceased on 20 July 2011 and the purported fixed term

employment agreement would have ended on 1 December 2011 (19 weeks). She has attempted to mitigate her lost wages. She is entitled to \$16,442.22.

[26] Ms Parker is also entitled to compensation for hurt and humiliation. Given her evidence of the impact of the matter on her I award her \$5,000 compensation for hurt and humiliation under s 123 (1) (c) (i) of the Act.

[27] Costs are reserved.

The Authority's orders

[28] The Consultancy Advocacy and Research Trust (CART) is to pay Joan Parker

a) \$16,442.22 wages for the period from her employment ceasing (21 July) until the purported fixed term employment agreement would have ended (1 December).

b) \$5,000 compensation under s 123 (1) (c) (i) of the Act.

[28] Costs are reserved

P R Stapp
Member of the Employment Relations Authority