

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Joanna Penny (Applicant)
AND Pro Labora Limited (Respondent)
REPRESENTATIVES Ian Thompson, Advocate for Applicant
Carl H van Zijll de Jong, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 23 December 2004
DATE OF DETERMINATION 28 February 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Joanna Penny, says that she was unjustifiably dismissed on 7 April 2004 from her employment with the respondent. She seeks compensation and lost earnings including one week's payment in lieu of notice.

[2] The application for penalties in the statement of problem was withdrawn on the day of the investigation meeting.

[3] The respondent Pro Lobora Limited, by its director and human resource manager Carl van Zijll de Jong, says that Ms Penny was not dismissed but that she resigned on 7 April 2004 of her own free will.

[4] The parties attended mediation however the matter was unable to be resolved.

Background

[5] Ms Penny commenced employment with Pro Labora Limited ("Pro Labora") on 18 February 2002. Her position was that of CAD pattern designer and machinist. She signed a casual employment agreement with Pro Labora dated 18 May 2002.

[6] Pro Labora was described in the agreement as a company which undertook negotiations with two other companies, Pattern Works Limited and Tailored Apparel Limited, to obtain a favourable employment position for Ms Penny. Pattern Works Limited was involved with the design and drafting of patterns and Tailored Apparel Limited with the creation of garments. All the companies operated out of the same building.

[7] Ms Penny's employment was consistent in some respects with casual employment. Ms Penny was generally advised each evening as to the availability of work the next day. Mr van Zijll de Jong and Ms Penny both confirmed that sheets would be filled in a week in advance as to days that Ms Penny was available the following week. Mr van Zijll de Jong said that the aim of Pro Labora was to make work possible and not impossible and that he wanted employees to be multi functional and to transfer them from one area to another. He also said the company would try to give employees if possible 40 hours per week and he wanted employees to have the freedom to come to work or not. If employees indicated that they were available on a particular day and changed their mind then they could stay away.

[8] I have considered the wage and time records that I was provided with. They show that up until November 2003 Ms Penny usually worked 40 hours most weeks and often longer. The records show overall there is consistent pattern of days and hours worked each week. There does not seem to be, as is common with casual relationships, any significant periods when work was not offered. The days and hours worked by Ms Penny were regular.

[9] The records do support that there were weeks between November 2003 and end of March 2004 when the hours offered fell below 40 hours per week. Even during that period the hours worked each week never fell below 32 hours except for Christmas week when statutory days were presumably taken. For some weeks during that period the hours were back up to 43 hours per week. Ms Penny said that for financial reasons she needed to work at least 40 hours per week. She felt that she had to look elsewhere if there was no guarantee about that. Ms Penny spoke to Mr van Zijll de Jong about her intentions I find between late November 2003 and January 2004. I accept that Ms Penny was considering and therefore raised with Mr van Zijll de Jong the possibility of doing training in early childcare and getting experience in childcare one day a week maintaining availability to work for Pro Labora the other days. I find as a matter of fact that Ms Penny never moved forward with that idea and I accept that she was not sure that was what she wanted to do. Consistent with those discussions, Mr van Zijll de Jong provided a reference to Ms Penny dated 23 January 2004.

[10] I accept Ms Penny's evidence that she did not find alternative work over that period. This is supported by the fact that after 7 April 2004 it took Ms Penny 2 months to find alternative employment and for this period she was in receipt of an unemployment benefit.

Relevant events leading to 7 April 2004

[11] Ms Penny had a discussion with Mr van Zijll de Jong in or about late March or early April 2004 about the description of her employment as casual. I find that she also requested of Mr van Zijll de Jong a guaranteed 40 or 32 hours per week. This is supported by a letter dated 2 February that Mr van Zijll de Jong made available to me during the investigation meeting. In the letter he said:

Dear Joanna,

After thorough consideration, agreement with your request for a guaranteed 40 or 32 hours workweek would prevent a standardised contract policy. Namely, for all employees to have an "On Call/Two Way" contract.

If you still wish to consider accepting the offered responsibility of Factory Manageress with Tailored Apparel Ltd. on the contract we already have with you, then we would change your remuneration on acceptance of this position from \$10.52 to \$12 per hour including PAYE. A

Job Description is enclosed, in addition to the one you already have with Pattern Works Ltd., for this position with Tailored Apparel Ltd.

With kind regards,

Yours faithfully,

*Carl H. van Zijll de Jong.
(Human Resources Officer)*

[12] Following this letter Ms Penny was handed a new employment agreement probably on or about 5 April 2004. There was some dispute about the reasons why the new agreement was provided to Ms Penny. I find that it was as a result of Ms Penny having raised some issues about her terms and conditions of employment including the description of her employment as casual. The new agreement was described as fixed term in nature.

[13] Ms Penny took the new agreement home and spoke to her parents about it. Her mother telephoned the Employment Relations infoline to get some advice as Ms Penny did not feel comfortable with the new agreement and was concerned about the description of the agreement as fixed term.

[14] Mr van Zijll de Jong asked Ms Penny on or about 6 April if she had signed the agreement. Ms Penny recalled Mr van Zijll de Jong saying that the new agreement was pretty much the same as the exiting agreement. Ms Penny responded that it was not. There was no further discussion about the agreement that day.

[15] On 7 April 2004 Mr van Zijll de Jong asked Ms Penny if she had read and signed the new agreement.

[16] There is a dispute as to what was said during the meeting. Ms Penny said that she made notes of the meeting that day at her parent's home. Ms Penny's mother, Maria Penny, told me that she had advised her daughter to write notes down about what was said when she arrived home from work in an upset state on 7 April 2004.

[17] It is helpful to set out the notes in full except the parts in brackets which were not matters spoken but reflected Ms Penny's understanding from the discussion.

8.15 approx 7 April 2004

Carl Have you had a chance to look at the contract?

Jo Yes & I have found out that you can't give me a fixed term contract

C Why

J Because you can only give it to someone when first employing them I don't know all the requirements of it so you had better ring the labour department so you are clear what you can & can't do.

C Contracts are for only when there is a dispute & it goes to court if I had my way I wouldn't have contracts but the law requires me to give them.

J Well I am trying to work this out now I'm not going to sign an illegal contract.

*C Well I think there is mistrust in our relationship and I think we should discontinue our relationship. I believe I am trying to do the right thing. I believe we were right with the --
-lady.*

J Well I don't want it to get to that stage, that why I am trying to work this out now.

- C *I think there is mistrust & I think we should end this relationship.*
 J *ok, when do you want me to leave?*
 C *It's up to you*
 J *ok, well then when I have finished this job I'll leave.*
 C *Ok, but that's your decision.*

[18] I put the notes to Mr van Zijll de Jong. He did not accept them in their entirety. He denied Ms Penny said words to the effect that she did not want it to get to that stage and that was why she was trying to work it out. He denied saying that there is mistrust and I think we should end the relationship. Mr van Zijll de Jong told me that he said *it is better not to stay here when you do not trust us any longer*. He said that he felt he was looking for the good for Ms Penny and not the bad and that he did not feel Ms Penny acted according to Christian concepts. He said that he would not dismiss an employee but was not surprised Ms Penny had left because she had been away for interviews and her interest in her work had diminished.

[19] Ms Penny said Mr van Zijll de Jong is a person with high principles and when he makes a decision that is that. She said there was no doubt in her mind that she was dismissed. Ms Penny said that she loved her job with the respondent and would still be there if Mr van Zijll de Jong had not been unreasonable with the new contract.

[20] Mr van Zijll de Jong sent a letter to Ms Penny dated 7 April 2005 in which he said:

Re end of employment

Dear Joanna Penny,

Confirming our discussion on Wednesday 07 April, Pro Labora Ltd. will respect your decision to terminate the work relationship as per this day at 08:30 a.m.

As it occurs from the increasing number of CAD work mistakes you have made, as well as the consequences they might have for Pattern Works Ltd., the work might not be of your highest interest anymore. We, therefore, welcome your decision to resign as the best option for us all.

However, we regret the way the matter has developed as such, but wish your intention to go into Early Childhood instead would give you more a fulfilling future.

With kind regards,

Yours faithfully,

*Carl H. van Zijll de Jong.
 (Human Resources Officer)*

[21] Ms Penny said that despite her efforts to obtain employment she was still unemployed for about two months. She eventually secured her current employment on 9 June as a design technician making patterns and cutting out samples.

The Issues

[22] The first issue for determination is whether Ms Penny was dismissed or whether she resigned of her own free will.

[23] If I find that Ms Penny was dismissed then the next issue is whether that dismissal was justified.

Analysis and Conclusions

[24] Ms Penny was clearly dissatisfied about some aspects of her employment and she raised her concerns with Mr van Zijll de Jong. Mr van Zijll de Jong provided a reference to Ms Penny in late January 2004 so that she could look for other employment. There were ongoing discussions about the nature of the employment arrangements. Mr van Zijll de Jong advised Ms Penny by letter dated 2 February 2004 that the respondent was not prepared to move to a permanent agreement whereby Ms Penny would be guaranteed either 40 or 32 hours of work per week. Shortly thereafter Mr van Zijll de Jong handed to Ms Penny a further employment agreement described as a fixed term agreement.

[25] It is unfortunate, given the early signs that there were issues about the employment relationship, that the parties gave no thought to involving a third party such as a mediator to see if some of the issues could be resolved. I am of the view that because of the regularity and continuity of the hours of work Ms Penny performed each week the true basis of the relationship had changed over time from casual to permanent.

[26] Ms Penny was not happy to sign the new agreement and matters came to a head on 7 April 2004. I find that the notes Ms Penny made at her parent's home following that meeting are the most reliable record of the discussion that took place between Ms Penny and Mr van Zijll de Jong on 7 April 2004 and I rely on them. I am of the view that Mr van Zijll de Jong was more probably than not somewhat firmer and clearer on 7 April 2004 than in his evidence to me. That is not to say that I did not find him a credible witness, but over time memories fade as does the emphasis placed on particular words spoken.

[27] The meeting on 7 April with Ms Penny was at the initiative of Mr van Zijll de Jong. I find the suggestion during the meeting that there was mistrust and that the employment relationship should discontinue came from Mr van Zijll de Jong. I accept that Ms Penny did not contemplate such a discussion taking place that day or an ending of the relationship and that she was willing to talk about the issues. There has to be a proper basis for an employer concluding there has been a breakdown in trust and confidence. An employee is entitled to raise concerns about an employment agreement. An unwillingness to sign an employment agreement is not sufficient justification to end an employment relationship. I do not find having carefully considered all the evidence I heard that, on the balance of probabilities, Ms Penny resigned of her own free will. I find the letter sent by Mr van Zijll de Jong on 7 April 2004 to Ms Penny largely self serving and I have therefore not relied on the letter in terms of what was said on 7 April 2004.

[28] I conclude on the balance of probabilities that the words used by Mr van Zijll de Jong were actually dismissive in nature and that it was reasonable for Ms Penny, in the absence of any reassurance from Mr van Zijll de Jong to the contrary, to conclude at the end of the meeting on 7 April 2004 that she had been dismissed.

[29] I find that Ms Penny was dismissed from her employment on 7 April 2004.

[30] I now turn to the question as to whether the dismissal was justified. Mr van Zijll de Jong had not previously raised any performance issues with Ms Penny although he referred to them in his letter of 7 April. Ms Penny was aware that she had made some mistakes but had not been warned

that non-performance could result in termination. Refusing to sign an employment agreement cannot be justification for dismissal. I do not find that there was any justification for the dismissal.

Determination

[31] I find that Ms Penny was dismissed from her employment on 7 April 2004 and that the dismissal was unjustified.

[32] Ms Penny has a personal grievance and she is entitled to remedies.

Remedies

Contribution

[33] I am required to consider if Ms Penny's actions contributed to the situation that gave rise to the personal grievance and if so, the remedies are to be reduced accordingly. I do not find that Ms Penny in this case contributed to the personal grievance.

Reimbursement of lost wages

[34] Ms Penny claims reimbursement of lost wages for an eight week period from 7 April 2004 until she was successful in early June 2004 in obtaining new employment. Ms Penny is entitled to reimbursement of a sum equal to the whole or any part of her wages lost by her as a result of the grievance although I do not find this includes a notice period. I am satisfied Ms Penny was without employment for an eight week period and that during that time she attempted to find alternative employment. I have assessed her average hours for the six week period preceding her dismissal from the supplied wage and time records. I am satisfied that the average hours worked over that period accord with Ms Penny's claim of 40 hours per week. Ms Penny's hourly rate was \$10.52 gross. The lost wages over that period of eight weeks is \$3366.40 gross. From that figure in his final submissions Mr Thompson deducted the unemployment benefit that Ms Penny received for a six week period in the sum of \$862.74. The Employment Court has stated in previous cases that it is not generally required to make any assumption about repayment of a benefit as that is a matter between the individual and the government department. I am unclear as to whether Ms Penny is required to repay her benefit so I will deal with the matter in this way.

[35] I have found Ms Penny's wages lost as a result of the grievance to be \$3366.40 gross. Whether there is an order with respect to payment of this amount or the lesser sum of \$2503.66 gross is dependent on whether the benefit was paid conditionally to Ms Penny on eventual repayment if she was successful in this case. If Ms Penny has to repay her benefit then she is entitled to lost wages in the sum of \$3366.40. If Ms Penny is not required to repay the benefit then she is entitled to lost wages in the sum of \$2503.66 gross for lost wages. I reserve leave for either party to come back to the Authority if there are any difficulties in that respect.

Compensation

[36] I am satisfied that Ms Penny was humiliated by her dismissal. I accept her evidence that she loved her job at Pro Labora. Her distress shortly after she was dismissed from her employment was supported by her mother's evidence. I have balanced this distress with the fact Ms Penny had contemplated leaving Pro Labora but obviously not in the manner in which she did and that Ms Penny appeared to me to have qualities of resilience and determination. I am of the view that an appropriate award in these circumstances would be the sum of \$3000.00.

[37] I order Pro Labora Limited to pay to Joanna Penny the sum of \$3000.00 without deduction under section 123 (1)(c)(i).

Costs

[38] I reserve the issue of costs. I would encourage the parties to attempt to reach agreement in the first instance. If agreement cannot be reached then the applicant has 14 days to file and serve submissions with respect to costs and the respondent has a further 14 days to file and serve its submissions in response.

Helen Doyle
Member of Employment Relations Authority