

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kathryn Anne Phillips (Applicant)
AND 646 Victoria (Hamilton) Limited (Respondent)
REPRESENTATIVES Simon Scott, Counsel for Applicant
Raymond Roussell, Advocate for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 11 April 2006
DATE OF DETERMINATION 6 July 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant claims that she was an employee of the respondent. She alleges she was unjustifiably dismissed from her employment on 2 June 2005. To remedy her alleged grievance the applicant seeks lost remuneration and compensation pursuant to s.123 (1) (c) (i).

Originally it was the respondent's position that the applicant was not an employee. However, in its legal submissions the respondent conceded the applicant was an employee and that the dismissal of the employee was "procedurally flawed". It is however, submitted, that if the applicant is entitled to any compensation for lost earnings and/or hurt and humiliation then at best such entitlement should be minimal and once the issue of the employee's fault is taken into account, then such entitlement should be reduced to zero.

Note: The background to this matter has been prepared in reliance on the evidence given at the investigation meeting held on 11 April 2006. At the close of the meeting counsel for the applicant sought to introduce new evidence that would show that the respondent dismissed the applicant from a new job she planned to commence in June 2005 and that therefore the applicant was entitled to several months of lost remuneration. Such an award would require me to find first that the respondent was acting as the director of the company that Ms Phillips had an agreement to work for in the future. I said I would consider the matter after receiving submissions from counsel for the applicant on this point.

In the event, this triggered a flurry of submissions and uninvited briefs from both parties to this matter – much of which contradicted the evidence given by witnesses under oath at the investigation meeting. I have advised the parties I would not reconvene the investigation meeting. I find that the evidence given at the investigation meeting is the more reliable account of the facts in this matter.

Background

The respondent 646 Victoria (Hamilton) Ltd (646) is in the business of owning and operating a building which is set up as serviced offices which are rented by business tenants on a month by month basis or for longer periods by agreement.

In April 2005 the respondent had the need for a receptionist. Ms Phillips was asked at short notice by a friend of hers, Jim Findlay (who provided accounting services to 646 Victoria (Hamilton) Ltd), if she could help out on a temporary basis. On 13 February she went to see Mr Hunt (Director and Manager of 646). She was shown around the offices and the job was explained to her. The position involved reception and other duties for the respondent company and the incumbent was to act as a receptionist for the clients who leased offices in the building. The position was offered to Ms Phillips and she accepted it. The evidence reveals that the terms of engagement were unclear to say the least. The parties did not even agree on a rate of pay.

However, later that week there was a discussion between Ms Phillips, Mr Hunt and Mr Findlay and it was agreed Ms Phillips would be paid \$700 per week and that she would pay her own tax. The evidence discloses Ms Phillips worked Monday to Friday for an average of 9 -10 hours per day. She had no business interests outside of her job and was not registered for GST. The respondent had invoices prepared showing Ms Phillips invoicing her employer. They were prepared by the respondent for internal accounting reasons only (without input from Ms Phillips). Ms Phillips remuneration was direct credited to her bank account.

I find too, that within a week or two the parties had agreed that Ms Phillips would undertake the reception role on a permanent basis.

There is a plot within a plot with this story. The subplot involves a business called GDR Holdings Ltd. This was a business set up to sell franchises in a real estate business called Green Door. The Manager of this business was John Drake and the company ran from a small office at the premises of 646. The evidence discloses however that the relationship between GDR Holdings Ltd and 646 was much closer than that of landlord and tenant and in effect it seems that 646 was funding the start up of GDR Holdings Ltd on a “*promise*”¹ that 646 would reap rentals from providing the business premises for new franchises sold and/or share in the profits of the sales of the franchises. In her role as receptionist with 646 Ms Phillips provided some services to Mr Drake. It is also the case that in May 2005 a Ms Mowat was employed by Mr Drake to undertake accounting work for GDR Holdings Ltd.

On April 30 2005 Ms Phillips saw an advertisement for the position of Office Manager, Morrinsville with GDR Holdings Ltd. By this time, it would be fair to say, Ms Phillips was disillusioned with Mr Hunt. She went to see Mr Drake and asked if she could apply for the Office Manager’s position. Mr Drake said he would consult with Mr Hunt. (Mr Hunt was funding Green Door). Mr Drake came back to Ms Phillips and advised her she could have the job when the Morrinsville office of Green Door Real Estate opened. It was expected to open at the end of June. An agreement was reached between Mr Drake and Ms Phillips that she would continue to work with 646 until Green Door opened its Morrinsville office and she would then take the Office Manager’s job there.

Mindful of Ms Phillips arrangements with Mr Drake, Mr Hunt became concerned that the relationship between 646 and Ms Phillips had never been formalised. It was Mr Hunt’s position that

¹ No written business agreement was executed between the two companies.

he does not employ people. He engages people on contracts for services. Mr Hunt made arrangements for Ms Phillips to be presented with a contract document in the nature of a contract for services. Ms Phillips said she was not keen to sign this contract but was told she would have to. She did not seek advice on it and said she thought it was an employment contract. Ms Phillips signed this document on 27 May 2005.

I note, however, that earlier in the relationship Ms Phillips had been looking for a mortgage. She sought to obtain confirmation of her employment from 646 to present in support of her application for a mortgage. She prepared a letter to that effect. That letter, on 646 letterhead, was signed by Mr Drake for Mr Hunt. It confirmed Ms Phillips employment with 646 with effect from 13 April 2005.

On the morning of 2 June a series of events led to Ms Phillips relationship with 646 being terminated by Mr Hunt. That morning there was a meeting between Mr Hunt, Ms Phillips, Ms Mowat and Mr Findlay (who arrived sometime after the meeting started). At around lunchtime Mr Hunt said something that annoyed Ms Phillips and she said she'd had enough and she left the meeting and left the office. As Ms Phillips left the office Ms Mowat joined her. She had apparently walked out of the meeting with Mr Hunt as well.

The two women had lunch and decided (about 3pm) to return to work. They had, in the interim, been in touch with Mr Drake who advised that they should take the remainder of the day off and return the next day. However, they decided to return to work.

After they returned to work they were advised by another employee, Sharon that Mr Hunt wished to see them individually. They advised that if Mr Hunt wanted to see them he had to see them together. They went to the Board Room and met with Mr Hunt. Ms Phillips and Mr Hunt gave widely different evidence about what was said at that meeting but the end result was that Ms Phillips' employment (and that of Ms Mowat) was at an end.

Before she left the premises Ms Phillips went to see John Drake, the Manager of GDR Holdings Ltd. She asked him if Mr Hunt could fire her from the Green Door job as well. Mr Drake told her "yes he can because he is paying". Ms Phillips evidence is that she went back to Mr Hunt and asked him when he wanted them to leave and he said "now". He told her "collect your things and leave".

Issues to be decided

Was applicant an employee?

Was the applicant dismissed? And;

If the applicant was dismissed was that dismissal justified having regard to the test for justification found in s.103A of the Act?

103A Test of justification

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

Discussion and Findings

The respondent has in its closing submissions conceded that the applicant was an employee. Nevertheless for the sake of certainty I find, applying the statutory tests and applicable case law (see *Bryson v Three Foot Six Ltd* WC 31/03 and SCCIV 24/04/05), that Ms Phillips was unquestionably an employee of the respondent 646 Victoria (Hamilton) Ltd. The tests, which now apply in determining the nature of the relationship between principals and persons who provide services, call for an examination of the *real* nature of the relationship and were designed to address situations such as this where employers seek to circumvent their obligations as employers to persons providing services where the circumstances of the engagement point to a contract of service in all but name. An examination and determination of the real nature of the relationship also has implications for the deduction of PAYE from income earned and payment of those monies to IRD. The evidence shows that avoiding this obligation is itself a motivation for Mr Hunt in his practise of not engaging persons on contracts of service.

In his written evidence Mr Hunt stated that he had not been happy that Ms Phillips and Ms Mowat had walked out of the meeting on 2 June. He said that as he was unhappy with her conduct he told her, after her return to the office in the afternoon, that he no longer required her assistance.

In his oral evidence Mr Hunt submitted he never used words of dismissal to Ms Phillips but that he took the view that it was obvious she did not want to be there and that he explored this with her (at the meeting that afternoon) and that it was Ms Phillips who demanded to know if she was dismissed.

I find this suggestion that Ms Phillips found herself out of a job and on the footpath of her own volition to be ludicrous and I find Ms Phillips was summarily dismissed by Mr Hunt without any attempt by him to put to her any concerns he had about her conduct in leaving the meeting that morning (or any of the other concerns he alluded to at the investigation meeting)² or to hear her out in response.

This dismissal falls well short of the conduct an employer is required to show to meet the objective standard of justification set out in s. 103A of the Act

Determination

Ms Phillips was an employee of 646 Victoria (Hamilton) Ltd. She was summarily dismissed from her employment on 2 June 2005. The dismissal was unjustified and she has a personal grievance against her former employer.

Remedies

Ms Phillips is entitled to remedies in the matter

Lost Remuneration

Setting remedies under this head has been somewhat complicated by the fact that Ms Phillips was both an employee of 646 at the time of her dismissal and an person intending to work in relation to the agreement reached with John Drake, the manager of an GDR Holdings, that she would take up a position with that company when it opened in Morrinsville. When she was dismissed from her

² Including the fact Ms Phillips had an annoying cough and that he had seen her and Ms Mowat having a coffee that morning and wondered why he was paying her \$700 per week.

position with 646 Victoria Hamilton Ltd she also lost her prospective position with GDR Holdings Ltd.

It is submitted for the applicant, that I should find that Mr Hunt was acting in the capacity of a director of GDR Holdings Ltd and he dismissed her from her prospective position with that company at the same time as he dismissed her from her position with 646.

Were I to make such a finding it would be at odds with the facts. In the first place Mr Hunt is not and was not a director of GDR Holdings Ltd. Further it was not Mr Hunt that dismissed Ms Phillips from her position with GDR Holdings Ltd. It was Mr Drake. I find, that after Ms Phillips was dismissed by Mr Hunt, she went to Mr Drake and asked if this meant she was dismissed from her job with Green Door (the trading name of GDR Holdings). Mr Drake confirmed she was dismissed from the Green Door job because it was Mr Hunt who was paying the bills. The fact that Mr Hunt was paying the bills undoubtedly meant he had a significant influence over the operations of GDR Holdings Ltd but that did not make him a director of that company and he had neither actual nor apparent authority to act for that company. I am confirmed in this finding by the fact that Ms Phillips entered into the relationship with GDR Holdings as a result of discussions and agreement reached with Mr Drake and it was Mr Drake that she turned to for advice as to the standing of her employment contract with GDR Holdings Ltd after she was dismissed from her employment with 646.

It was also submitted for the applicant that, at the time the applicant was dismissed from 646, there was no confirmed employment agreement with GDR Holdings Ltd. This submission too is at odds with the facts. While I accept the terms had not been finalised there had been an offer and acceptance of a position with Green Door with sufficient certainty as to terms - the role, the location and the range of remuneration expected - to constitute the making of a contract of service. Ms Phillips was from the time she reached agreement with Mr Drake early in May 2005 a "person intending to work" with Green Door. The parties were only waiting for the Morrinsville office of Green Door to open and Ms Phillips would have taken up employment with that company. Unfortunately the parties did not settle on the exact start date for the new position albeit both parties knew the commencement of Green Door's operations in Morrinsville was imminent.

The respondent submits that the Morrinsville office of Green Door was expected to open from 24 June and that therefore Ms Phillips has only lost 22 days pay as a result of her grievance.

The evidence also shows that by the time Green Door commenced its operations the position in question had evolved into a position in Te Aroha. An employment agreement with another person was signed on 16 June with a commencement date of 7 July 2005.

The best I can make of the evidence is that Ms Phillips, had her employment continued with 646, would have left that employment to take up her position with Green Door sometime between 24 June and 7 July 2006.

For the purposes of setting lost remuneration in this matter I find that Ms Phillips employment with 646 would have finished on or about 30 June 2005 and lost remuneration in this matter is set on this basis. If Ms Phillips has any cause of action beyond that date it lies with GDR Holdings Ltd.

Prior to setting lost remuneration I have given thought to the employer's submissions the applicant contributed to the events that gave rise to her grievance and that as a result lost remuneration should be reduced to zero (s.124).

The facts of this case show Ms Phillips was subject to a summary dismissal without a vestige of a fair inquiry or reasonable treatment. The respondent has not established there was any basis to dismiss Ms Phillips and neither on the facts of the matter could her sudden departure from the meeting on 2 June have justified dismissal (if that was the real reason for the dismissal).

In all the circumstances of this case I find there are no grounds to reduce the remedies to which Ms Phillips is entitled by reason of contribution on her part.

I therefore direct the respondent 646 Victoria (Hamilton) Ltd to pay to Ms Phillips 4 weeks pay in the sum of \$2800 gross to reimburse her for remuneration lost as a result of her grievance.

Any adjustments to be made arising from the fact that Ms Phillips obtained a benefit after her dismissal is a matter to be addressed between Ms Phillips and the social agency involved.

Compensation under s.123 (1) (c) (i)

The employment was for a short period and this would never have been a long term relationship. In the end however Ms Phillips was subjected to a cynical and summary dismissal. The applicant gave evidence that it “knocked the stuffing out of her”.

In all the circumstances I direct the respondent to pay to the applicant the sum of \$5000 net under this head.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott
Member of the Employment Relations Authority