

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 459
5422146**

BETWEEN HASINA RAJKARNIKAR
Applicant
AND EMACS GROUP LTD
Respondent

Member of Authority: Eleanor Robinson
Representatives: David Prisk, Advocate for Applicant
Ragu Rangunathan Advocate/Counsel for Respondent
Investigation Meeting: 16 September 2013 at Auckland
Submissions received: 18 September 2013 from Applicant
19 September 2013 from Respondent
Determination: 3 October 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Hasina Rajkarnikar, claims that she has been unjustifiably dismissed by the Respondent, Emacs Group Limited (Emacs) as a result of Emacs not proceeding with an offer of employment which it made to her on 14 March 2013.

[2] Emacs denies that it unjustifiably dismissed Ms Rajkarnikar on the basis that it had not made a firm offer of employment to Ms Rajkarnikar.

Issues

[3] The issues for determination are whether Ms Rajkarnikar was:

- An employee of Emacs
- Unjustifiably dismissed by Emacs.

Background Facts

[4] Emacs is an engineering, planning and surveying company specialising in land development, land surveying and planning and based in Auckland.

[5] Ms Rajkarnikar had responded to an advertisement placed by Emacs for Architectural Designers by sending her CV and details, and had subsequently been interviewed online via Skype on 10 March 2013 by Mr Ragu Ragunathan, Managing Director of Emacs,.

[6] Ms Rajkarnikar said she had recorded the conversation with Mr Ragunathan to ensure she had a record of what had been discussed subsequently. Mr Ragunathan agreed at the Investigation Meeting that the transcript of the recorded conversation was accurate to the best of his recollection.

[7] During the Skype interview Ms Rajkarnikar, who was living in Piahia at that time, said she had discussed her skills and experience with Mr Ragunathan and had explained that she was working on a contract basis for a Piahia-based architectural firm, Fraser Thomas, for three days a week.

[8] Following the full discussion of her qualifications and experience, Ms Rajkarnikar said Mr Ragunathan had asked her to undertake a two day work trial in order for him to check her architectural design skill, and she had agreed to this request.

[9] Ms Rajkarnikar said she had understood that she would be paid for the two day work trial, however Mr Ragunathan stated that he had intended the 2 day work trial period to be paid only if Ms Rajkarnikar was selected for employment.

[10] The transcript of the recorded Skype interview states:

Ragu: ... Do like just two days for Thursday and Friday. We will pay you for time and everything but for Thursday and Friday just work for two days and see whether you are comfortable everything and then you can go back and then you can finalise everything settling here come back to Auckland.

[11] Prior to starting the employment trial, Ms Rajkarnikar said she had spoken to Fraser Thomas about the possibility of her being offered employment by Emacs and been informed

by it that in the event that her job application was successful, a one week notice period to provide a hand-over period would be acceptable.

[12] Ms Rajkarnikar worked on 13 and 14 March 2013 at Emacs office in Auckland, during which time she had carried out work on a drafting job during the first day; and had worked on a 3D drawing the following day, however as the computer software provided by Emacs had not been up to the required standard she had not been able to complete it.

[13] Ms Rajkarnikar said that at the conclusion of the second day of the work trial Mr Ragunathan had called her into his office and told her he was happy with her performance during the work trial and that he wanted her to commence employment with Emacs.

[14] Ms Rajkarnikar said Mr Ragunathan had given her an individual employment agreement (the Employment Agreement) which stated that:

- the position was ‘Architectural Designer’ at clause 2.1;
- the commencement date of employment was 13 March 2013 at clause 3.1;
- the employment was subject to a three month trial period at clause 3.2 ;
- the annual salary was \$46,000.00 at clause 7.1; and
- a job description had been attached.

[15] Ms Rajkarnikar said that she had been prepared to sign the Employment Agreement immediately; however Mr Ragunathan had told her to take it away with her and read it first.

[16] Mr Ragunathan explained that, although he had not been entirely happy with her work during the work trial, he had decided to include Ms Rajkarnikar in the final list of candidates for employment. As a result, he had provided her with the unsigned Employment Agreement which he said was a draft provided solely for the purpose of Ms Ragunathan being able to familiarise herself with Emacs standard terms and conditions of employment.

[17] Ms Rajkarnikar said that there had been discussion about a possible job opportunity for her husband, a Civil Engineer, and as Mr Ragunathan said Emacs had a vacancy for a Civil Engineer, it had been suggested that she and her husband met with Mr Ragunathan to discuss this the following day, 15 March 2013.

[18] During the meeting on 15 March 2013 Ms Rajkarnikar said there had also been discussion about the Employment Agreement and she had mentioned that she had thought the annual salary would be \$50,000.00 rather than \$46,000.00, and had explained that due to her

having to work a one week notice period with Fraser Thomas, she would like the commencement date to be altered to 25 March 2013.

[19] Ms Rajkarnikar said that Mr Ragunathan had noted in his diary that she could start work on 25 March 2013 and had agreed to confirm the commencement date during that weekend, on either 16 or 17 March 2013.

[20] In regards to her query about the salary level, Ms Rajkarnikar said Mr Ragunathan had said that he would have to discuss it with his wife, Ms Shiama Ragunathan, Emacs Office Manager, and he would respond to this also over the weekend.

[21] Following this discussion with Mr Ragunathan, Ms Rajkarnikar said that she and her husband had arranged for rental accommodation in Auckland and had paid rent in advance from 25 March 2013. They had then returned to Piahia on Sunday 17 March 2013 and arranged to enrol their young son in child care. Ms Rajkarnikar said she had also resigned from her contract work at Fraser Thomas.

[22] When she did not receive confirmation of the start date from Mr Ragunathan following the weekend, Ms Rajkarnikar said she had called him several times without making contact, and had then received a text message explaining that Emacs had a server problem but he would let her know about the start date on one or two days.

[23] On Tuesday 19 March 2013 Ms Rajkarnikar signed the Employment Agreement and returned it to Mr Ragunathan asking that he sign it and return a copy to her.

[24] On 20 March 2013 Ms Rajkarnikar received an email from Mr Ragunathan which stated:

Hi Hasina,

We will need more time to finalise this contract. This was due to unexpected problems we are facing at present such as no telephone connections for two days, server failure, etc. We need to fix these. Also due to this unexpected issue, which has delayed our project and caused our clients to be upset with us, I will inform you our decision at later sage.

I am sorry for this but I need to sort these out before we get more people on board.

[25] Ms Rajkarnikar responded by email that same day and stated:

Hello Ragu,

I am really sorry that you are not able to make a decision at this stage due to your server issues at office ...

As I mentioned in my last email, I have already arranged everything to start job from 25th March. It's neither easy to get place for kids at day care nor rent in Auckland, so both will continue since I have already confirmed them. However I have to pay extra cost for rent and daycare for one more week, I am happy to start work even after a week or anytime once the server problem is fixed.

[26] Mr Ragunathan confirmed that following 18 March 2013 Ms Rajkarnikar had telephoned the Emacs office frequently, and had called him on both the land line and his mobile phone.

[27] Ms Ragunathan also confirmed that Ms Rajkarnikar had telephoned the Emacs office frequently, and said she had spoken to her and been asked by Ms Rajkarnikar why a decision had not been made on the start date of her employment. Ms Ragunathan said she had explained that it was a decision for Mr Ragunathan to make.

[28] Ms Ragunathan said that on 26 March 2013 she had again telephoned Mr Ragunathan to find out when she could start and asked how many weeks she would have to wait until she received confirmation of the start date.

[29] Mr Ragunathan said that he had found Ms Rajkarnikar's attitude during that telephone conversation to have been aggressive and inappropriate.

[30] At the Investigation Meeting Ms Rajkarnikar agreed that she may have been loud during the conversation because she had been rather angry as her expectation had been that she would be starting work on 25 March 2013 however she was still waiting for a start date to be confirmed, however she did not accept that she had used inappropriate language during the telephone conversation.

[31] Mr Ragunathan explained that Emacs had had two concerns arising from Ms Rajkarnikar's employment trial: (i) excessive use of her mobile telephone, and (ii) the fact that she did not complete the allocated tasks.

[32] Following the telephone conversation with Mr Ragunathan on 26 March 2013, Ms Rajkarnikar said she had received an email from him which stated:

Hi Hasina,

I regret to advise you that we are not willing to proceed with your employment for two reasons:

- 1. Your experience and knowledge are reasonably good but we expect that to be higher level such as experience in lodging building consents.*
 - a. We have major issues with our server system and do not wish to proceed with any employment until we resolve this.*

We also have some concern on your approach with this employment: mainly type of language used to convince us. I am sorry for this late decision. It was not easy to make this decision.

[33] Ms Rajkarnikar said she had been shocked and upset at the email as Mr Ragunathan had seemed happy with the work she had carried out during the two day work trial.

[34] Ms Rajkarnikar had responded to the email, pointing out that as an experienced designer and qualified Architect overseas, the comments made about her experience in the email of 26 March 2013 did not make sense to her. However Mr Ragunathan had confirmed the decision not to proceed with the employment offer in a response email on 5 April 2013.

[35] On 29 March 2013 Ms Rajkarnikar had filed a Statement of Problem with the Authority; mediation had subsequently taken place, but had not resolved the issues between the parties.

Determination

Was Ms Rajkarnikar an employee of Emacs?

(i) The two day work trial

[36] The work which Ms Rajkarnikar had been asked to undertake during the two day work trial for Emacs had consisted of drafting work, and work on a 3D drawing, both of these tasks were part of the current work being undertaken by Emacs for the benefit of its clients.

[37] I find that this work was not merely a test of Ms Rajkarnikar's architectural abilities, but consistent with the Employment Court's finding in *The Salad Bowl Limited v Amberleigh Howe-Thornley*¹ it was legitimate work which benefitted Emacs's commercial enterprise.²

[38] I also find that Ms Rajkarnikar's expectation that she would be paid for this work to be a reasonable expectation based on her conversation with Mr Ragunathan during the Skype interview. I am supported in this conclusion by the fact that the Employment Agreement stated the commencement date of Ms Rajkarnikar's employment as 13 March 2013.

[39] On this basis I find that Ms Rajkarnikar was an employee in accordance with s 6 of the Employment Relations Act 2000 (the Act) which states:

*(1) In this Act, unless the context otherwise requires, **employee-***

(a) Means any person of any age employed by an employer to do any work for hire or reward under a contract of service;

[40] I now proceed to consider whether Ms Rajkarnikar was an employee on the alternate grounds of being a 'a person intending to work'.

(ii) Person intending to work

[41] The Act defines a person intending to work in s 5:

***Person intending to work** means a person who has been offered and accepted work as an employee;*

[42] In s 6 of the Act an employee is further defined in S 6 (b)(ii) as: "*a person intending to work*".

[43] I find that on 14 March 2013 Mr Ragunathan made Ms Rajkarnikar an oral offer of employment when he told her he was happy with her performance during the two day trial and wanted her to work for Emacs. At that time Mr Ragunathan provided Ms Rajkarnikar with the Employment Agreement.

[44] This is consistent with Mr Ragunathan's email dated 12 March 2013 in which he stated:

¹ [2013] NZEmpC 152 at para [51]

I hope everything is okay from your side to start tomorrow and work for two days. If both you and us are happy with engagement, we will make full time employment contract starting from Monday.

[45] Mr Ragunathan stated that the Employment Agreement had been a draft agreement and only provided to Ms Rajkarnikar for her to consider Emacs standard terms and conditions of employment.

[46] I do not consider the fact that the Employment Agreement had not been signed by Emacs to have indicated that it was intended to be draft only on the basis that:

- it had been provided to Ms Rajkarnikar during a discussion with Mr Ragunathan in which he had told her he was satisfied with her work during the two day trial and that he wished her to work for Emacs;
- it contained a declaration at clause 16 that stated: “*I, Ragu Ragunathan, EMACS GROUP LTD, offer this employment agreement to Hasina Rajkarnikar*” ;
- Mr Ragunathan did not inform Ms Rajkarnikar that it was a draft agreement only; and
- There was no indication on the face of it which indicated it was a draft.

[47] I have considered whether the subsequent discussion on 15 March 2013 in regards to the salary level and the commencement date had the effect of cancelling the offer of employment. I note that Ms Rajkarnikar said the comment about the salary level had been by way of an observation and query rather than a demand.

[48] I find that the discussion about salary level and commencement date were not factors which would have the effect of cancelling the offer of employment as neither were fundamental to the employment relationship which I have found to have been formed on 13 March 2013.

[49] By signing the Employment Agreement and returning it to Mr Ragunathan I find that Ms Rajkarnikar accepted the oral offer of employment made by Emacs and the terms and conditions of employment as set out in the Employment Agreement such that she was a person intending to work and consequently an employee in terms of s 6 (1)(b) of the Act.

[50] I determine that Ms Rajkarnikar was an employee of Emacs.

Was Ms Rajkarnikar unjustifiably dismissed by Emacs?

(i) *Effect of the trial period contained in the Employment Agreement*

[51] The Employment Agreement provided to Ms Rajkarnikar contained a trial period provision at clause 3.2 which stated:

3.2 Trial Periods

*A trial period will apply for a trial period of **three months** to assess and confirm suitability for the position.*

[52] The Act makes provision for trial periods at ss 67A and 67B. The Act states:

S 67A When employment agreement may contain provision for trial period for 90 days or less

(1) *An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3) and an employer*

(2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that –

(a) *For a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period, and*

(b) *During that period the employer may dismiss the employee; and*

(c) *If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*

(3) **Employee** means an employee who has not previously been employed by an employer

S 67B Effect of trial provision under section 67A

(1) *This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.*

[53] The effect of a valid trial period provision is that if the employee is given notice of dismissal during the trial period, he or she cannot raise a personal grievance for unjustified dismissal.

[54] I have found Ms Rajkarnikar to have been an employee during the two day trial period with Emacs which commenced on 13 March 2013, she was provided with the Employment Agreement on 14 March 2013, however did not sign it until 19 March 2013.

[55] Accordingly at the time Ms Rajkarnikar signed the Employment Agreement she was already an employee. In *Smith v Stokes Valley Pharmacy (2009) Limited*³ the Chief Judge stated:⁴

... It follows that when the written employment agreement was entered into, Ms Smith had been previously employed by the defendant, albeit for a short period. She was not, therefore, an "employee" as defined in s 67A. She was an existing employee and therefore one whose circumstances were not covered by s 67A. The trial period was therefore not one in compliance with s 67A.

[56] Accordingly I find that as Ms Rajkarnikar was already an employee at the time she signed the Employment Agreement, s 67A of the Act does not apply and that Emacs cannot rely upon the 90 day trial period in Ms Rajkarnikar's Employment Agreement and the exclusion of personal grievance rights in s 67B.

Was Ms Rajkarnikar unjustifiably dismissed by Emacs?

[57] Ms Rajkarnikar was informed by Emacs in an email on 26 March 2013 that it was withdrawing its offer of employment. In considering whether Ms Rajkarnikar was unjustifiably dismissed by Emacs I apply the test of justification in s103A Employment Relations Act 2000 (the Act) which states:

S103A Test of Justification

- i. 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 applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[58] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Emacs must establish that the dismissal was a decision

³ [2010] NZEmpC 111

⁴ Ibid at para[85]

that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[59] Mr Rangunathan stated that Emacs had two main concerns with Ms Rajkarnikar's performance during the work trial period, being her excessive use of the mobile telephone and non-completion of the allocated tasks.

[60] In regards to substantive justification, I find there is no evidence that Ms Rajkarnikar made use of her mobile telephone, apart from during her lunch break, and that the evidence is that Ms Rajkarnikar could not complete the 3D drawing due to limitations of the Emacs computer software.

[61] In regards to procedural fairness I do not find that Ms Rajkarnikar was provided with information about the allegations, she was not provided with an opportunity to provide explanations, nor was she advised of her right to have representation during a disciplinary process as no steps were taken in a disciplinary process prior to the dismissal.

[62] In regards to the suggestion that Ms Rajkarnikar's attitude had been unacceptable, I find this to have been based on the telephone conversation with Mr Rangunathan on 26 March 2013 when Ms Rajkarnikar admitted she may have been 'loud' but not that she had used inappropriate language to Mr Rangunathan.

[63] I consider that at this stage in the process Ms Rajkarnikar had been becoming frustrated by the lack of response from Emacs about the commencement date of her employment, noting that in reliance upon the offer of employment made by Emacs she had resigned from her contract with Fraser Thomas, paid rent on a property in Auckland and arranged and made payment for childcare for her son.

[64] When questioned at the Investigation Meeting, Mr Rangunathan accepted that Ms Rajkarnikar's frustration was understandable, but did not provide evidence of inappropriate behaviour, stating only that Ms Rajkarnikar had been "*pushing me on 26th*".

[65] Having regard to the evidence on this point, I do not find that Ms Rajkarnikar had used inappropriate language during the conversation on 26 March 2013, but rather that she had an openness to delay in her appointment provided Emacs communicated its position with an indication of her start date as exemplified by the statement in her email dated 20 March 2013 that:

... I am happy to start work even after a week or anytime once the server problem is fixed.

[66] I do not find that Emacs had substantive justification for, or that it acted in a procedurally fair manner when terminating Ms Rajkarnikar's employment.

[67] I determine that Ms Rajkarnikar has been unjustifiably dismissed.

Remedies

[68] Ms Rajkarnikar has been unjustifiably dismissed and is entitled to remedies.

Lost wages

[69] Ms Rajkarnikar is claiming a payment in lieu of a notice period being provided by Emacs in the sum of \$3,538.40.

[70] The Employment Agreement refers at clause 12.6 to a termination clause, but a termination clause has been omitted from the Employment Agreement.

[71] In these circumstances I consider 4 weeks to be an appropriate notice period and order Emacs to pay Ms Rajkarnikar the sum of \$3,538.40 gross (calculated as 4 weeks at a salary of \$46,000.00 per annum).

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[72] I accept that the termination of her employment with Emacs occasioned Ms Rajkarnikar hurt, humiliation and injury to feelings. Ms Rajkarnikar had entered into arrangements regarding renting of accommodation in Auckland and childcare in anticipation of her forthcoming employment with Emacs, and stated that she had been shocked to receive the email from Emacs on 26 March 2013.

[73] I order Emacs to pay Ms Rajkarnikar the sum of \$3,000.00, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[74] I have considered the matter of contribution as I am required to do under s124. Ms Rajkarnikar did not contribute to the situation which gave rise to the grievance. There is to be no reduction in remedies.

Costs

[75] Costs are reserved. I encourage the parties to resolve the issues of costs themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority