

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 155
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| BETWEEN | DANIELLE SPARK Applicant | ELIZABETH |
| A N D | QUEENSTOWN 2008 LIMITED Respondent | PHARMACY |

Member of Authority: James Crichton

Representatives: Ewen Spark, Advocate for Applicant
Werner van Harselaar, Counsel for Respondent

Investigation Meeting 26 August 2011 at Queenstown

Date of Determination: 10 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Spark) alleges that she was unjustifiably dismissed by the respondent (Queenstown Pharmacy) and that contention is denied by Queenstown Pharmacy.

[2] Ms Spark was engaged by Queenstown Pharmacy on and from 10 November 2008 as a retail assistant in a start up pharmacy in Queenstown. Ms Spark was especially attractive to Queenstown Pharmacy because of her recent qualifications by way of NZQA credits in make up and skincare. In addition, Ms Spark was attractive to Queenstown Pharmacy because she was living locally and committed to the area. A particular challenge for employers in the Queenstown area is maintaining continuity of employment with staff who are often transient because of the holiday destination nature of the region.

[3] Ms Spark told me that she understood she had been appointed to a full time position with no fixed hours; she said at the interview she was told the hours would be few to begin with but “then it would build up”. Queenstown Pharmacy says that all it offered Ms Spark (and indeed all it could offer her) was as many hours as possible. According to Ms Carmen Connell, who managed the retail staff at Queenstown Pharmacy at the relevant time, and who engaged Ms Spark for the Queenstown Pharmacy, all Ms Spark was promised was “*that the hours would be variable and would depend on the business growing*”.

[4] Ms Connell says that she spoke with Ms Spark on a number of occasions during the employment about the hours available to be worked and the effect on those hours of the success or otherwise of the business. I am satisfied that Ms Spark would have understood that the business was only able to employ her when there was work to be done.

[5] Ms Spark relies on the terms of the employment agreement that was given to her at or around her engagement on 10 November 2008. There is dispute between the parties as to the terms of this first agreement. Queenstown Pharmacy’s witnesses told me that the first employment agreement which Ms Spark received was a copy of Ms Connell’s employment agreement and therefore included provisions which were inappropriate to Ms Spark and the position that she held in Queenstown Pharmacy. Certainly, Ms Connell was clear when I spoke with her that that was what she had done.

[6] However, Ms Spark’s evidence on the point was less certain; she agreed that the copy of Ms Connell’s employment agreement put into evidence by Queenstown Pharmacy might have been the document that she signed as her first employment agreement, but she was not certain and I think it fair to say that the conclusion Ms Spark herself reached was that she was not sure whether the document put in front of her at the investigation meeting was the same as the one that she had signed.

[7] What is unchallenged evidence is that, although Ms Spark signed this first employment agreement, she was never given a copy of it and, for whatever reason, no copy of it seems to have been held by Queenstown Pharmacy. For its part, Queenstown Pharmacy is adamant that the agreement provided to Ms Spark first (and which it agreed Ms Spark signed and returned to it), was simply a copy of Ms Connell’s employment agreement. A contextual matter which encourages me to

conclude that that might have been the position is that Queenstown Pharmacy told me there were no other versions of employment agreements created for the purposes of retail staff at the Queenstown Pharmacy. It follows then that the document that Ms Spark signed first would be one or the other, that is, either the retail manager's employment agreement or the correct employment agreement for retail assistants. As everybody seems to agree that the first employment agreement Ms Spark signed was not the correct one (that is, not the one for a retail assistant), it seems to the Authority to follow that it was most likely that the agreement that Ms Spark signed first was, in truth, a copy of Ms Connell's own employment agreement.

[8] The document produced to the Authority as being most likely the document that Ms Spark was asked to sign initially (namely, a copy of Ms Connell's employment agreement) has various provisions in it which would have been inappropriate for a retail assistant. Most particularly, it has a provision in it in respect of hours of work but that provision requires somebody to fill in the hours that were actually contemplated. The hard copy provision simply says that the hours will be worked from 9am to 9pm, Monday to Sunday inclusive, but the provision does not, as written, specify a particular span of hours in any week.

[9] Ms Spark remembers a long telephone conversation with Ms Connell on a Sunday afternoon while she was at home and not on duty. She thinks this took place on November 28th and that Ms Connell told her to find another job if she could. In that conversation, Ms Spark recalled that Ms Connell went on to seek commitments from Ms Spark about her own willingness to work any span of hours but also Ms Connell emphasised that the pharmacy was not doing well. It seems that from that conversation onward (or at least from the beginning of December onward), Ms Spark's hours reduced even further. In the first week in December, for instance, Ms Spark's recollection is that her total weekly hours were 10, being two five hour shifts on two successive days. Later on, she was asked to work three days a week each for two hours only. Ms Connell does not remember the telephone discussion I have just referred to, but she does confirm that she had a number of conversations with Ms Spark about the performance of the business (or the lack of it) and the consequence for Ms Spark's hours. She was clear in what she told me that Ms Spark could not have been in any doubt about the difficulties of the position.

[10] Ms Connell says that when it became clear that she had supplied the wrong employment agreement to Ms Spark (and apparently to another staff member), Queenstown Pharmacy posted out duplicate pre-signed copies of the correct employment agreement to the affected staff. I am satisfied that this action took place on 7 December 2008. The second employment agreement records the commencement date as 10 November 2008 and the purported signing date of Queenstown Pharmacy is that same date, 10 November 2008, although that date seems highly unlikely to be accurate given the circumstances I have just recited. Ms Spark signed the agreement the day after it was posted, that is on 8 December 2008, and delivered it back to the workplace on 15 December 2008. As well as making plain that the work offered was, in effect, as and when required, the second employment agreement imposes a trial period of two months. I am satisfied that any reliance it places on the trial period is completely misplaced. Under the terms of the law, it is necessary for the parties to an employment agreement to agree in writing to the trial period before the employment commences. Plainly that did not happen in this case and therefore there can be no question of any reliance being placed on the trial period provision: Employment Relations Act 2000, s.67A applied.

[11] Having handed the second employment agreement back to Queenstown Pharmacy on 15 December 2008, Ms Spark was dismissed from her employment on 16 December 2008. Ms Spark's evidence is that this came as a terrible shock to her, that she had enjoyed working at Queenstown Pharmacy, and that there had been no warning about the imminence of the end of the employment. There was some contention in the evidence presented by Queenstown Pharmacy that there had been a staff meeting to discuss the firm's difficulties prior to Ms Spark's dismissal, but while Ms Connell agreed that there was a staff meeting, she was uncertain about whether Ms Spark was physically present and so I discount that suggestion as in any way relevant to Ms Spark's grievance. That aside, Ms Spark must have had some inkling that all was not well with the business. I accept Ms Connell's evidence that she had regular discussions with Ms Spark about the business's performance (and its effect on hours), and even if that evidence is set aside, Ms Spark's own evidence confirms that her hours reduced steadily in the first two weeks of December down to the point where on her own evidence, it was almost not worthwhile attending at work at all because of the short duration that she was required to be on duty and the transport costs of coming and going to the workplace.

[12] Ms Connell told me that she was instructed to dismiss Ms Spark by the principals of Queenstown Pharmacy and that, when she did so, she simply told Ms Spark that there was no work for her (that is, there were no hours that she was able to offer). She remembers also telling Ms Spark that if the latter could find temporary work for the short future, there would be a vacancy in May of 2009 when another staff member was definitely leaving and that would free up 30 hours a week. However, all of that was predicated on the basis that the business would survive that period. Ms Connell was very clear that she had not told Ms Spark that she was redundant but simply that she was unable to offer her any hours going forward.

[13] It is clear from the evidence of both parties that Ms Spark was significantly distressed by the dismissal and as a consequence Ms Connell, on behalf of Queenstown Pharmacy, did not require Ms Spark to work out her two week notice period.

[14] A personal grievance claim was promptly made after the dismissal and there have been attempts by the parties to settle the matter between themselves since the dismissal occurred.

Determination

[15] The issue is a straightforward one. On the facts available to the Authority, it is as plain as can be that Ms Spark was unjustifiably dismissed from her employment. This was a dismissal for redundancy (because simply there was no work), but none of the usual requirements of a redundancy dismissal are present. There was no consultation properly engaged with at all, although there was a desultory amount of information provided to Ms Spark during the course of the very short employment. At the very least, the employer would have had to engage with Ms Spark, tell her what needed to change in the business and seek her suggestions about how she might be able to contribute to the overall welfare of the business and its continuity. No such discussion ever took place (certainly in respect of Ms Spark). Nor was there any measured and reflective process around how individual staff members were to be dealt with as part of the shortening down process which the business plainly had to undertake. On the face of it, Queenstown Pharmacy seems to have decided to “*get rid of*” Ms Spark on the basis that she was the “*last on first off*”. But that is not a fair process if there were other possible alternatives which could have been scoped by some proper engagement between employer and employee.

[16] Because the business seems to have been run by remote control from afar, it is almost inevitable that problems of this sort would emerge. If, instead of redundancy, the dismissal is analysed on an alternative basis, the result seems to be much the same. This was a young woman in her first significant employment who worked for barely a month and with regularly declining weekly hours over that period, and then was dismissed on notice on the footing that no more hours could be offered. I have already rejected the applicability of the trial period because it does not conform to the statutory requirements. The second employment agreement provides that “*hours vary and are dependent on the time of the year*”. That provides no guarantee of hours at all, but, as I have already noted, there is no way of establishing what hours were promised (if any) in the first employment agreement.

[17] Even if it can be contemplated that a permanent employee working under an employment agreement which provides for no fixed hours (as arguably the second agreement does), there is still an obligation to treat an employee fairly and in accordance with the good faith principle. This was not a situation, on the facts, where the employee was told that the employer was unable to offer hours but wished to maintain the employment relationship; this was a sending away of the employee because, according to the statement in reply, Ms Spark was “*redundant*” notwithstanding that that word was never used by the retail sales manager, Ms Connell, in effecting the dismissal.

[18] In addition, it is clear that Queenstown Pharmacy has breached good faith in its failure to provide appropriate documentation of the employment agreement and the attempt to tidy that up after the event only served to further confuse the position.

[19] I am required by law to consider whether Ms Spark has contributed in any way to her dismissal; I am satisfied that nothing that she did contributed in any way to the circumstances giving rise to the dismissal. That said, the effect on her of the dismissal was plain to see; indeed, she had delayed bringing her grievance on for hearing because of the trauma of the dismissal and the subsequent effect that had on her life. I am satisfied this was an ill considered dismissal which caused Ms Spark great distress but balancing that, this was an employment of short duration at a lower rate of pay where the employee never worked a great many hours. Of necessity, those matters, must be weighed in determining compensation.

[20] Having found that Ms Spark has made out her claim of having been unjustifiably dismissed by Queenstown Pharmacy, I must now consider remedies. I am satisfied that the appropriate remedies for Queenstown Pharmacy to pay to Ms Spark are as follows:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$2,000;
- (b) A contribution to lost wages in the sum of \$1,000 gross ;
- (c) Reimbursement of the Authority's filing fee in the sum of \$71.56.

Costs

[21] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority