

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Shannon Tindal (Applicant)
AND Elders New Zealand Ltd (Respondent)
REPRESENTATIVES Rowland Ingram - For the Applicant
James Gibson - For the Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 23 November 2004
DATE OF DETERMINATION 4 March 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] Ms Tindal claims that she was unjustifiably dismissed from her employment on 22 December 2003. She asks that the Authority find that she has a personal grievance and award her various remedies.
- [2] But, Elders New Zealand Limited (“Elders”) says that because the work performance of Ms Tindal was not up to an acceptable standard, dismissal was an option that was reasonably available to the company.

Background Facts and Evidence

- [3] Ms Tindal commenced her employment, in the position of Executive Assistant, on 22 September 2003. The parties entered into a written individual employment agreement that provided, at clause 17, for an initial probationary period of three months. The clause provides further that:
- “17.2 The purpose of this three months period is to provide an opportunity for the Employer and the Employee to assess the compatibility and performance of each other, and in particular to enable them to determine the suitability of the Employee for the stated position.
- 17.3 If at the conclusion of the three-month period either party is dissatisfied with the other, for whatever reason, the contract may be terminated forthwith by either party, without notice.”
- [4] The duties expected of Ms Tindal are set out clearly in the *Position Description* that is attached to the employment agreement. In summary, the role of Ms Tindal was to provide personal assistance to the Managing Director, Mr Stuart Chapman, the Finance Director, Mr Ian Wills, and the Chairman of the Board, Mr Eric Spencer, albeit the substance of her work

was for the two Directors, and it appears that Mr Wills was her manager at first instance.

- [5] During the first week of her employment, Ms Tindal had the benefit of working with the incumbent in the position and she was taken through a comprehensive induction check list. Ms Tindal was also provided with a quite detailed set of notes pertaining to the regular matters that could/would arise in regard to her position.
- [6] Also consistent with Elder's policy pertaining to employees subject to a probationary period, monthly feedback/performance review meetings were marked in the respective dairies for 23 October, 24 November and 22 December 2003.

The Evidence of Mr Wills

- [7] The evidence of Mr Wills is that it became apparent very early in Ms Tindal's employment, that she was having some problems coping with her duties. Mr Wills says that he discussed any issues that arose with Ms Tindal and offered his assistance albeit he was of the view that the problems that she was experiencing were [*"on a fairly basic level."*] Mr Wills also discovered that Mr Chapman was also of the view that Ms Tindal was having some basic problems adapting to her position.
- [8] On 23 October 2003, Ms Tindal had the first monthly review meeting with Mr Wills. It appears that after an initial enquiry from Mr Wills to Ms Tindal, as to how she was progressing in her role, Mr Wills conveyed to her that there were several areas of concern. The main areas of concern were:
- (a) The need to follow through and ensure that various tasks were completed;
 - (b) The need to be more organised and to have processes in place; and
 - (c) The requirement to screen mail and telephone calls.
- [9] Mr Wills says that he discussed these issues with Ms Tindal and then reiterated to her that an improvement in her performance was required if she was to successfully complete the probationary period of her employment with Elders.
- [10] The further evidence of Mr Wills is that following the review meeting, there was no noticeable improvement in the work performance of Ms Tindal and that he found himself having the same discussions with her on a regular basis. Mr Wills gave an example of the difficulty that Ms Tindal had with insurance renewals despite having the process explained to her.
- [11] The evidence of Mr Wills (and Mr Chapman) is that there continued to be problems on a daily basis, relating to the failure of Ms Tindal to fulfil her role in the manner expected. It was the view of both men, that all that was expected of Ms Tindal, should have simply been standard practice for an experienced personal assistant.
- [12] A second review meeting took place on 24 November 2003. Mr Wills says that he conveyed to Ms Tindal in some detail the problems that he and Mr Chapman were having with her performance, including the problem with the insurance renewal process. The evidence of Mr Wills is that the response of Ms Tindal was [*"rather vague and non-specific"*] but she did not dispute the thrust of what he was saying to her. Mr Wills says that he explained to Ms Tindal that if her performance did not improve, she would not be employed beyond the end of the probationary period.

- [13] Mr Wills met with Ms Tindal on 12 December 2003. The purpose of this meeting was to explain to her that as Elders pay their staff on a monthly basis, and as 15 December was pay day for that month, he had to advise her that she would only be paid to 22 December. Ms Tindal was informed that as there were still significant performance issues, if Ms Tindal could not meet Elder's expectations, then her employment would not continue beyond that date.
- [14] The evidence of Mr Wills is that Ms Tindal did not raise any issue about this and what he had said to her was consistent with what had been conveyed to her up to that point. However, Mr Wills says that to his surprise, Ms Tindal came to his office on 16 December 2003 and enquired as to why she had not been paid beyond 22 December. Mr Wills reminded Ms Tindal of what he had said to her on 12 December and confirmed that Elders had the right to terminate the employment relationship on 22 December if the dissatisfaction with Ms Tindal's performance remained. It was the view of Mr Wills, that: [*“it was looking increasingly unlikely”* that Ms Tindal's performance was going to improve before that date.
- [15] The further evidence of Mr Wills is that in response, Ms Tindal; [*“became quite testy and said words to the effect of “Well it works both ways and I have the right to leave at any time. I don't need the stress or the aggravation of this job either. There are better paid jobs available to me in the market with a lot less work involved.”*
- [16] Mr Wills also gave evidence relating to when he and Mr Chapman (and another Director), were in Australia on 18 and 19 December 2003. Mr Wills related to some important events that were occurring around that time. Mr Wills says that he gave explicit instructions to Ms Tindal that she was to be particularly aware that correspondence relating to certain legal proceedings and a prospectus were to be referred to him urgently upon their arrival. Mr Wills says that he contacted Ms Tindal several times from Australia and she made no mention of receiving anything relating to the legal proceedings and the prospectus. Upon contacting the company's solicitor, Mr Wills discovered that the material in question had been forwarded to Elders. Mr Wills says that when he conveyed this information to Ms Tindal, her response was to the effect that she only read things that are marked urgent. This was in marked contrast to the instructions that she had received. Mr Chapman also gave evidence pertaining to an urgent matter that was not dealt with appropriately by Ms Tindal.
- [17] On 22 December 2005, the third and final review meeting for Ms Tindal took place in the presence of Mr Wills and Mr Chapman. Ms Tindal had requested that the latter be present. Mr Wills says that he informed Ms Tindal that this was the last day of her probationary period and hence the purpose of the meeting was to review Ms Tindal's total performance over the probationary period. Both Ms Tindal and Mr Wills had available Ms Tindal's position description, this set out the key accountabilities for her position. It was mutually agreed that the key accountabilities were a convenient framework within which to discuss Ms Tindal's performance.
- [18] Mr Wills and Mr Chapman went through the various accountabilities pertaining to Ms Tindal's role and also related to her recent examples of inadequate performance in a number of key areas. Mr Wills says that their perception of Ms Tindal's overall performance and her perception, were quite at odds, and while Ms Tindal made reference to the job involving considerable work and pressure, she did not dispute the essence of what Mr Wills and Mr Chapman were saying about her lack of performance. Mr Wills says that Ms Tindal felt that if she was given six months probation rather than the three, she would meet the company's requirements. However, the two Directors found that they could not accept that proposition.
- [19] The outcome of the meeting was that it was conveyed to Ms Tindal that Elders regrettably would have to terminate her employment under the terms of the employment agreement.

The Evidence of Ms Tindal

- [20] Ms Tindal made no mention of the first review meeting that took place on 23 October 2003. Her evidence is that during the first month of her employment, there were continual problems with the phone system and her computer. The effect being that it made her work more difficult. Ms Tindal says that her computer had to be rebuilt. She also says that she was very busy and that because the Directors and Chairman had different diary systems, this created some problems for her.
- [21] Ms Tindal's evidence was that she had her second review meeting with Mr Wills during the middle of November but she now accepts that the date was 24 November 2003. The evidence of Ms Tindal is that Mr Wills did not identify any performance standards for her or offer any time or training to improve. Ms Tindal gave some evidence about her position being very busy but said very little else regarding the first two months of her employment.
- [22] Ms Tindal's recollection of the meeting that took place between her and Mr Wills on 12 December 2003, was that at the end of the working day, he called her to his office for a "five minute chat." Ms Tindal says that Mr Wills asked her if she had any concerns regarding her position and was there anything she wished to discuss prior to the meeting set down for 22 December. Ms Tindal's evidence is that Mr Wills never informed her that the meeting on 22 December was serious and could result in the termination of her employment.
- [23] Ms Tindal also says that she had been trying to find the time and a way to tell Mr Wills that she was unhappy in that she had found his behaviour towards her to be intimidating and humiliating. Ms Tindal gave examples of her view of Mr Will's attitude concerning the company's insurance renewals and an issue concerning security personnel. Ms Tindal says that she told Mr Wills that she found him to be disrespectful and that if he continued to behave in this manner towards her, that she may as well look for another position.
- [24] Ms Tindal appears to accept that Mr Wills did discuss with her on 12 December that she would only be paid until 22 December, albeit it seems that she may have thought at that time that Mr Wills was only referring to statutory holiday pay. However, Ms Tindal confirms that she raised the matter regarding being only paid to 22 December with Mr Wills on 16 December. Ms Tindal says that the response of Mr Wills was that: "*[it all depended on the outcome of my next feedback meeting and if it was not positive they would have to chase me for the money they had paid me after my feed-back date.]*"
- [25] In regard to the meeting that took place on 22 December 2003, the recollection of Ms Tindal is largely consistent with that of Mr Wills and Mr Chapman.

Analysis and Conclusions

- [26] It appears that Ms Tindal is claiming that the termination of her employment was unjustified largely on procedural grounds. Essentially, Ms Tindal says that her dismissal was unjustified because:
- (a) She did not receive any warning that her continued employment was in jeopardy;
 - (b) She was not advised to obtain representation before the meeting that took place on 22 December 2003;
 - (c) There was no record kept of the first two review meetings and nothing was presented to her in writing as to the expectations of her employer; and
 - (d) Her dismissal was predetermined.

- [27] Overall, I find that I prefer the evidence of Mr Wills and Mr Chapman to that of Ms Tindal. Consequently, I have no doubts that Ms Tindal was fully aware that there were problems with her general performance. Furthermore, I find that she was also fully aware of what the problems were and what was required to rectify those problems. Indeed, the overall evidence is that Ms Tindal acknowledged that there were problems, but that given time, she would be able to meet the requirements of the position.
- [28] I also find that Mr Wills made it clear to Ms Tindal, on several occasions, that if her performance did not improve, then she would not remain employed beyond the three month probationary period. While ideally, it would have been prudent for Mr Wills to have recorded Elder's concerns and possible outcomes in writing, the fact remains that Ms Tindal was fully aware of what was required of her and the consequences if she did not meet those requirements.
- [29] It is not the role of the Authority to put itself in the shoes of the employer as to deciding what is considered to be reasonable performance on the part of an employee. Nonetheless, I accept the evidence of Mr Wills, that all that was being asked of Ms Tindal, fell reasonably within her position description and that she presented herself as someone with sufficient experience to carry out the role. I also accept that it was reasonable for her employer to expect that she would be fully capable of carrying out her duties within the three month probationary period.
- [30] I also conclude that if Ms Tindal had wished to obtain representation she had ample opportunity to do so as the review meetings were scheduled at the beginning of her employment, hence she had three month's notice of the 22 December meeting and also sufficient notice of the possible consequences.
- [31] The matter of predetermination has been raised by Ms Tindal. It has been argued that because Ms Tindal was advised on 12 December 2003 that she would not be paid beyond 22 December, then as at the earlier date, Elders had decided that they were going to terminate Ms Tindal's employment and hence there was little that she could have done to persuade her employer to retain her.
- [32] At first glance, there is some merit in that argument. However, the reality is that there only remained a further six working days for Ms Tindal to turn around her performance and the overall evidence reveals, that as at 12 December, Ms Tindal had shown little improvement despite being given every opportunity to do so. Therefore, it is not difficult to understand, and accept, why Elders were reluctant to pay Ms Tindal for the full month of December (bearing in mind that employees were paid in advance mid-month), when the evidence pertaining to her overall performance, strongly pointed to the distinct possibility that she would not survive the probationary period.
- [33] While there may have been some element of predetermination in the decision to terminate the employment of Ms Tindal, I find that given the overall circumstances, the conclusion reached by Elders as at 12 December, was not unfair or unreasonable, particularly given the practice that existed of paying employees in advance and the difficulty of obtaining recovery.

Determination

- [34] I find that the express provisions of the employment agreement entered into between Ms Tindal and Elders, relating to a probationary period, comply with section 67 of the Employment Relations Act 2000. At sub-clause 17.3 of the agreement, provision is made for termination of the agreement by either party.

[35] I find that the dismissal of Ms Tindal was justified on the grounds that she was unable to meet the performance requirements of her employment within the three month probationary period agreed to in the employment agreement, hence, Ms Tindal does not have a personal grievance and I am unable to grant the remedies sought.

Costs

[36] Costs are reserved. The parties are invited to attempt to reach a resolution of this matter. In the event that a resolution is not achieved, submissions can be made to the Authority for an order.

Ken Anderson
Member
Employment Relations Authority