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Van der Merwe v Rollerflex Limited (Auckland) [2017] NZERA 200; [2017] NZERA Auckland 200 (11 July 2017)

Last Updated: 19 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 200
5620398

BETWEEN THERESA VAN DER MERWE Applicant

A N D ROLLERFLEX LIMITED First Respondent

MICHAEL CIGANEK Second Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person

Paul Watson for Respondents

Investigation Meeting: 28 March 2017 at Auckland

Submissions Received: At the investigation meeting

And 6 and 11 April 2017 from Applicant

And 7 April 2017 from Respondent

Date of Determination: 11 July 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Within 14 days of the date of this determination Rollerflex is to pay Theresa van der Merwe the following sums:

- a. \$200.00 as reimbursement for cell phone top ups which were used for company business; and**
- b. \$243.75 gross as unpaid wages.**

B. The parties are to attempt to resolve the issue of commission between themselves. In the event that they are unable to, leave is given to return to the Authority on that issue.

C. Mrs van der Merwe's other claims are not successful.

D. Costs are reserved.

Employment relationship problem

[1] Rollerflex Limited (Rollerflex or the company) is a provider of made to measure blinds, screens and awnings. Michal Ciganek is the sole director of Rollerflex and manages the business.

[2] Theresa van der Merwe was appointed as a sales representative for Rollerflex in September 2015.

[3] Mrs van der Merwe was covered for some of her employment by an individual employment agreement which was for a fixed term expiring on 18 December 2015. The parties agreed that she would continue to be employed in the sales role after the expiry of the fixed term agreement.

[4] In early March 2016 the parties met to discuss Mrs van der Merwe's employment. Mrs van der Merwe's understanding from that meeting was that Mr Ciganek had terminated her employment and then said he wanted her to apply for the receptionist position which was being made vacant by the current receptionist leaving. Mr Ciganek's understanding was that he had raised the possibility of Mrs van der Merwe's position being potentially disestablished in the near future due to reduction in sales expected in the upcoming months.

[5] Mrs van der Merwe subsequently emailed Mr Ciganek and the parties then had a further meeting. It was agreed that Mrs van der Merwe would take the rest of the week off. She did not return to work at Rollerflex.

[6] Mrs van der Merwe claims that she was unjustifiably dismissed by Rollerflex, or alternatively, that she was subjected to an unjustified disadvantage by being told that her position was to be disestablished. She also claims she has not been paid by Rollerflex for all of her entitlements.

[7] Mrs van der Merwe filed this claim against Rollerflex Limited and Mr

Ciganek personally. At a case management conference Mrs van der Merwe accepted

she was employed by Rollerflex Limited but had joined Mr Ciganek so that he was involved in the proceeding. There was no objection on behalf of Rollerflex or Mr Ciganek to that situation.

[8] At the investigation meeting on 28 March 2016 I heard evidence from Mrs van der Merwe, her husband Kevin van der Merwe, Mr Ciganek and Fatima Zanolita (a shareholder and employee of Rollerflex).

[9] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The issues

[10] The issues for investigation and determination are:

i. Was Mrs van der Merwe unjustifiably dismissed by Rollerflex?

ii. Was Mrs van der Merwe subject to an unjustified disadvantage by Rollerflex telling her that her position was to be disestablished;

iii. If either of the grievance claims is successful, what remedies (if any) should Mrs van der Merwe receive?

iv. Does Rollerflex owe Mrs van der Merwe any commission, and, if so, how much?

v. Does Rollerflex owe Mrs van der Merwe any reimbursement for expenses, particularly regarding cell phone and petrol use for her own car, and, if so, how much is owing?

[11] There were other matters which Mrs van der Merwe was unhappy about during her employment. These included that she had to stand in for other staff who were away, particularly the receptionist. However, information on these matters were provided as background, rather than founding a particular claim.

[12] Mrs van der Merwe initially claimed that she was owed payment for statutory holidays taken over the December 2015 to January 2016 period. However, she later

received payment from Rollerflex for those holidays and therefore that claim did not need to be investigated.

Employment agreement

[13] There is a dispute between the parties regarding aspects of Mrs van der

Merwe's appointment, entitlements, and the related documentation.

[14] Mrs van der Merwe and Mr Ciganek disagree about the content of their initial discussions regarding the pay rate which Mrs van der Merwe was to receive from Rollerflex, with her alleging that she had initially been offered \$16 per hour. However, Mrs van der Merwe says that she did reluctantly agree to accept the rate of

\$15 gross per hour for the position.

[15] Mrs van der Merwe says that she responded to an advertisement on Trade Me for a full-time permanent sales role with Rollerflex. Neither party provided the Authority with the advertisement itself. Mrs van der Merwe says that she was given an employment agreement shortly after starting work which she read and signed. She says that agreement was not for a fixed term period. That reflected her understanding of the role as being permanent. She then says that Mr Ciganek later gave her an employment agreement which was for a fixed term period and asked her to sign that on the basis that the previous one had been provided in error. She says that, although reluctant, she signed the agreement. As requested, she returned the earlier agreement to Mr Ciganek and now does not have a copy of it. The two agreements were largely the same except for the fixed term issue.

[16] Mr Ciganek's position is that he only gave her one employment agreement in writing, shortly after she started with the company and it was for a fixed term to end on 18 December 2015. The reason for that fixed term was a seasonal peak period. Mr Ciganek produced a copy of this written employment agreement which was dated as commencing on 21 September 2015 and was on the face of it signed by Mrs van der Merwe and Mr Ciganek on 21 September 2015. Ms Zanoria identified only one employment agreement on the personnel file.

[17] Both parties accept that, after agreement that Mrs van der Merwe's employment continue after 18 December 2015, no further written employment agreement was created.

[18] Having continued Mrs van der Merwe's employment after the completion of the fixed term employment agreement I find that from 19 December 2015 Mrs van der Merwe was a permanent Rollerflex employee with her other terms and conditions being based on those in the fixed term agreement.

Lack of effective communications

[19] My clear impression is that the communications between Mr Ciganek and Mrs van der Merwe were not satisfactory. They had different impressions about various events but there was little evidence of the two of them actually discussing issues.

[20] Mr Ciganek has English as his second language, although his English was more than adequate for the purposes of the investigation meeting. He appeared to leave Mrs van der Merwe's induction to the company to others, without much direction or planning for that, and then assume that she knew what was happening. He assumed for example, that because Mrs van der Merwe was seated next to the other sales representative, she would see what he was doing and know that she had to do the same herself.

[21] Mrs van der Merwe, although experienced in the world of fabrics and home interiors, had not worked before as a sales representative who travelled to visit clients. She appeared reluctant to ask or question how things worked at Rollerflex, including what her entitlements were. She did not find Mr Ciganek easy to approach. From her witness statement, it appears that she had an extensive range of concerns about the workplace, and about Mr Ciganek, but she had not raised them at work until 3 March

2016.

[22] Neither party achieved the responsive and communicative behaviour on which the duty of good faith is based. This case is the result. I note that no penalty for breach of the duty of good faith was sought by either party.

Meeting on 2 March

[23] On Wednesday 2 March 2016 Mrs van der Merwe went in to see Mr Ciganek about a quote. She says that he accused her of making a mistake on a screen measurement. He then said "I am terminating you" or maybe she must take over the receptionist's job as the receptionist was leaving. There was some discussion about how much notice he had to give Mrs van der Merwe, and then Mr Ciganek said "we'll see". He asked her if she had another job to go to. She said no. After being stared at for some time, Mrs van der Merwe left the room.

[24] Mr Ciganek says that he wanted to talk to Mrs van der Merwe about the possibility of disestablishing her position. He saw this as a preliminary discussion before the start of a restructuring process.

[25] Mr Ciganek admits that he does not remember much about the meeting as from his perspective it was not an important meeting; it was just some discussion. He did not think that he had discussed the possibility of the receptionist's job.

[26] Mrs van der Merwe phoned her husband straight away. He describes her as being very, very upset. She told him that she had been fired. Mr van der Merwe suggested that his wife write down what Mr Ciganek had said to her and that the two of them would discuss it that evening and decide what to do.

[27] Mrs van der Merwe made a contemporaneous note of the conversation which includes reference to Mr Ciganek saying that he was terminating her employment. She continued to work somewhat in shock.

[28] Given Mr Ciganek's lack of recall about the meeting and the note made, I

prefer Mrs van der Merwe's account of the meeting.

[29] That evening at 9.09pm Mrs van der Merwe emailed Mr Ciganek. She recorded that she had been terminated at the meeting that morning and asked a list of questions. This included on what basis she was terminated, when is the effective date of her termination, and had she been suspended. Mr Ciganek was asked if he was willing to meet at mediation to resolve this problem.

[30] Mr Ciganek says he was shocked and surprised when he saw the email. He tried to phone Mrs van der Merwe the next morning just after 8am to discuss the

email. As she did not pick up, he sent a text at 8.09am saying "I have not terminated your employment". The same message was also sent by email. Mrs van der Merwe texted back saying that she would come in to meet with a support person. Mr Ciganek later texted again, reinforcing that her employment was not terminated "so you can come back to work".

Meeting on 3 March

[31] The parties met at 4pm on the afternoon of Thursday 3 March 2016. Mrs van der Merwe was accompanied by her husband. Mr Ciganek represented the company. At the investigation meeting Rollerflex supplied for the first time a transcript of the meeting made from a recording.

[32] All present heard the recording and had the opportunity to compare it to the transcript. Mr and Mrs van der Merwe did not accept that everything said at the meeting was in the transcript. On further exploration, there was acceptance that at least some of the things which they recalled were either in the transcript or may have been based on assumptions the couple made from what was said by Mr Ciganek.

[33] Mr Ciganek began the meeting by apologising for the misunderstanding the day before. Mrs van der Merwe was emphatic that there was not a misunderstanding as Mr Ciganek had told her that he was terminating her.

[34] Mr Ciganek denied having terminated Mrs van der Merwe. The transcript refers to him saying that he was thinking about "closing" her position.

[35] Mrs van der Merwe's impression was that Mr Ciganek said that after two weeks he was going to make her redundant, or retrench her, with the possibility of another role. However, looking at the transcript, Mr Ciganek is describing a range of possibilities coming from a consideration of her position, not saying that he was actually going to make her redundant in two weeks.

[36] The meeting became heated and Mr van der Merwe intervened, asking the other two to calm down and think about what to do from here. Mr Ciganek said that Mrs van der Merwe should take the rest of the week off work as he needed her for another position, without specifying what that was. Mrs van der Merwe agreed to have the rest of the week off. She and her husband had thought that this was on pay.

[37] After lengthy discussion with her husband that evening, Mrs van der Merwe decided not to return to Rollerflex. She emailed Mr Ciganek the next day saying that this was not an isolated incident but rather another in a series of what she as very disconcerting and irregular/illegal actions taken by Mr Ciganek since her appointment.

[38] The email details concerns about the appointment process, the employment agreement and unpaid statutory holidays from three months before. Even at this point Mrs van der Merwe refers to not being able to return to the job for these reasons "and others which I will disclose if needs be".

[39] Mrs van der Merwe accepts that the various concerns raised in the email had not been raised with Mr Ciganek before that time. While those matters may have assisted Mrs van der Merwe to establish a constructive dismissal, I consider that giving the employer a sense of her concerns and a chance to respond or rectify things should have happened before she took such drastic action as leaving her job.

[40] The email concludes with a request for an offer of compensation so both parties can go their separate ways. The parties subsequently exchanged emails but did not reach agreement. Mrs van der Merwe did not return to Rollerflex.

Was Mrs van der Merwe dismissed?

[41] I accept that on 2 March Mrs van der Merwe understood that she was being terminated and that she was very shocked at that. However, her finish date and the possibility of her moving to another position were not determined at the 2 March meeting.

[42] She then conveyed her understanding of having been dismissed to Mr Ciganek in the email of the evening of 2 March.

According to the principles set out in *New*

*Zealand Cards Limited v Ramsay*¹ Mr Ciganek, having not intended to dismiss her,

1 [\[2012\] NZEmpC 51](#)

must then correct the wrong impression, or face the adverse consequences of letting

Rollerflex's employee think that a dismissal had taken place.

[43] Mr Ciganek did take prompt steps to correct the understanding which Mrs van der Merwe had. As soon as he was made aware that Mrs van der Merwe thought she had been dismissed, he made it clear that he did not mean to terminate her employment. This was done by text and email, after an attempt at phone contact had failed. It was reiterated at the meeting which the parties had on 3 March.

[44] I appreciate that Mrs van der Merwe was not feeling optimistic about her prospects of staying on in her current role at Rollerflex when Mr Ciganek was looking at making her position redundant. However, it is clear at the end of the 3 March meeting that she did have the choice of staying to see what happened with the redundancy process.

[45] Mrs van der Merwe says that she chose, on principle, not to return. She says that this was because she felt that Mr Ciganek was disagreeing with everything that she believed had happened at the 2 March meeting. However, at the investigation meeting Mrs van der Merwe accepted that Mr Ciganek may not have meant to have said that he was terminating her on 2 March. It seems that she subsequently realised or accepted this, whereas at the time she could not accept that Mr Ciganek may not have meant to dismiss her.

[46] In conclusion, Mrs van der Merwe was not dismissed by Rollerflex. Mr Ciganek told her that there was a possibility that her position might be made redundant but his actions on 3 March reinforce that he did not mean to dismiss her at that time. It was Mrs van der Merwe who chose to go, due to Mr Ciganek not accepting her view about what had happened at the 2 March meeting.

Was there an unjustified disadvantage?

[47] Mrs van der Merwe claims that she was subject to an unjustified disadvantage

due to Rollerflex's action in telling her that her position was to be disestablished.

[48] I have already found that there was a misunderstanding at the meeting on 2

March 2016 and that was subsequently clarified when Mr Ciganek repeatedly made it

clear that he was not terminating her employment. The position at the end of the 3

March 2016 meeting was that Mrs van der Merwe was to consider her stance on continuing with Rollerflex, but that her position was being considered for possible redundancy. There was a prospect of another role being available. Mrs van der Merwe chose to go and not see out the process. There was no unjustified disadvantage.

Unpaid wages

[49] Mrs van der Merwe claims that she was not paid wages for three days of her last week at work, that is, Wednesday 2 to Friday 4 March 2016. This was the period when the two meetings with Mr Ciganek occurred. She says that she was told to take the rest of the week off after the Thursday 3 March meeting finished.

[50] Mr Ciganek accepts that he told Mrs van der Merwe to have the rest of the week off, although at that point the only working day left was Friday. He says that he did not mention that the time off was on pay. I am satisfied that having been told to have the time off Mrs van der Merwe should have been paid for her that week. She did not go return to Rollerflex after the 3 March meeting.

[51] Although the evidence is not entirely clear, it appears that Mrs van der Merwe was very belatedly paid on 18 April 2016 for part of her last week of work. Rollerflex says the delay was due to waiting to see if Mrs van der Merwe returned to work. On

18 April she was paid for 23.75 hours of work. Her normal hours of work, according to the employment agreement were 40 per week. Mrs van der Merwe is therefore owed for 16.25 hours at \$15.00 gross. I order Rollerflex to pay her the sum of

\$243.75 gross as unpaid wages within 14 days of the date of this determination.

The commission arrangements

[52] Mrs van der Merwe claims that she was not paid all the commission which she was entitled to for sales which she made for Rollerflex. At her interview with Mr Ciganek on 14 September 2015 she was offered commission as part of her

employment package. She accepts that Mr Ciganek was not specific about the percentage of a sale that was paid as commission.

[53] The other sales representative, who had been with Rollerflex for some time, told Mrs van der Merwe that the commission payments were quite good and usually would amount to several hundred dollars per week and be more than the basic wages paid by way of hourly rate. At one point, she was told that commission could sometimes be \$900 per week. She understood that amount to be about the maximum which could be earned.

[54] Mrs van der Merwe's employment agreement does not include provision regarding commission. It simply sets out the hourly rate of \$15 per hour. There was no company policy provided to the Authority regarding the commission structure.

[55] Whilst at Rollerflex Mrs van der Merwe did not fill out any forms specifically about commission, but had received some commission payments whilst she was at Rollerflex.

[56] Documents filed with the Authority show that commission was paid at two different rates. The majority were paid at four percent of the sale price but if two sales staff were involved they would get two percent each.

[57] Mr Ciganek's written statement referred to having paid some ex-gratia bonuses at his discretion based on sales making profit and referred to "bonus commission". However, at the investigation meeting he accepted that if the product sold was the right product and was measured correctly, the sales representative would get commission. Where, however, a wrong measurement was made, or a customer had been sold the wrong product resulting in Rollerflex losing money, no commission would be paid on the sale. His impression was that any payment was not made until after completion of the project, including installation.

[58] Mr Ciganek thought that Mrs van der Merwe must have been filling out commission forms as she had been paid some commission by Rollerflex but accepted that it was possible that accounts people filled them out for her.

[59] Ms Zanoria, who was in charge of accounts, says that her practice was to pay the commission once the deposit was paid. If a sale ended up not making money for the business, because of incorrect measurement or the like, then a deduction would be

made from later commission payments. Mr Ciganek accepted that although this was not how he thought the system should work, that was what had been put in place by accounts.

[60] I am satisfied that the commission system was not completely discretionary in the sense that Mr Ciganek claims. Payments were regularly made for commission based on a set rate for each sale made by each sales representative. Mrs van der Merwe is entitled to be paid for commission on sales which she made.

Is there any unpaid commission?

[61] Mrs van der Merwe's concern that she may not have been fully paid for her commission is understandable. Rollerflex did not have a written policy on commission and nothing else was provided to her setting out how the system worked. She did not fill out commission claim forms due to not being aware that she was supposed to do so.

[62] There is no specific figure claimed for commission owing. Mrs van der Merwe was unable to identify any particular sales which she had not been paid for. Having seen commission sheets filed by the company during the Authority process, Mrs van der Merwe could still not tell if all the work that she had done was captured there, not being able to remember the details of all clients.

[63] My impression was that Mrs van der Merwe's claim was at least partly based on a sense that she did not receive as much as had originally been indicated. Rollerflex's failure to provide her with written breakdowns of the amounts paid for commission, no doubt exacerbated her sense of dissatisfaction with what she was receiving as commission.

[64] Mrs van der Merwe accepted that she had not raised the issue of whether she was getting the right commission with Rollerflex while she was still working there. The company therefore was not alerted to her uncertainty.

[65] Rollerflex denied that there was any commission owing. However, it had earlier denied that there were other payments due, and then reversed its position. At the investigation meeting it became apparent that there were no records of any commission being calculated for the last two weeks of Mrs van der Merwe's time at Rollerflex. I directed that the company investigate this and calculate whether anything was owed to her for that period.

[66] Both parties filed material after the investigation meeting regarding commission, which has not yet been tested. I am unable at this point to determine whether there is commission owing to Mrs van der Merwe. I invite the parties to attempt to

resolve this issue. In the event that they are unable to do so, leave is granted for them to return to the Authority.

Reimbursement of expenses

[67] Mrs van der Merwe claims that she was not fully reimbursed for expenses which she incurred on the company's behalf, particularly for the use of her personal cell phone and her personal car on work business.

Cell phone

[68] Mrs van der Merwe says that at one point she was told to go and buy airtime for her own prepay phone and give the docket to the accounts person. She did this on a few occasions. She was later given a work cell phone but there were difficulties in getting it to work.

[69] Rollerflex says that Mrs van der Merwe was at some point offered a company phone to use. But she turned down the opportunity to get a company phone as she had just got a new phone from her son and did not want to have to learn how the company's phone worked nor carry two phones in her pocket.

[70] Mr Ciganek accepted that there were some difficulties getting the company's cell phone working. He appears to have been unaware at the time that Mrs van der Merwe had been paid for amounts spent on her own phone, but accepted that that could have occurred.

[71] Mrs van der Merwe spent at least \$200.00 on top ups for her own phone so that she could use it for Rollerflex business. This was in addition to the amounts

which she was already paid for. I accept that she was entitled to claim for these amounts and order that Rollerflex reimburse Mrs van der Merwe \$200.00 within 14 days of the date of this determination.

Use of a car

[72] Mrs van der Merwe says that the company car was mentioned at her interview and she assumed that she would have personal use of the car as well as use for company business.

[73] The employment agreement specified that Rollerflex would allocate Mrs van der Merwe a car for work purposes only which shall be parked at the employer's premises during non-work time. Mrs van der Merwe's claim is that she often used her own car for work purposes.

[74] Mrs van der Merwe says that sometime after she started she was told to use the car but thought that she had to bring it back every night. As she would go and see customers on route to and from work for efficiency, using her own car, but would usually only use the company car once she arrived at work. She says that she was told to submit a claim (for fuel, wear and tear or maintenance expenses) if she went "to and from work and home or on weekends" but that she never did that.

[75] Mr Ciganek said that Mrs van der Merwe was offered a company vehicle to use and that he did not encourage her to use her own car.

[76] Both parties agreed that on occasions Mr Ciganek specifically mentioned that Mrs van der Merwe should take the work car home, for example, if she was away from the office late in the day and her home was closer than the office. Also, on one occasion Mrs van der Merwe said that the company car was not safe at her house and would rather not take it.

[77] Mrs van der Merwe suggested that the male sales representative had private use of a company car, including to and from work, whereas Mrs van der Merwe, as a woman, did not. Mr Ciganek's position was that both representatives were treated in the same way. Mrs van der Merwe accepted that she had not talked to anyone at

Rollerflex regarding the difficulty with the company car as she was not prepared to say anything.

[78] This situation appears to be one where the parties were thinking at cross purposes, but neither raised the issue to allow resolution whilst the employment relationship was still in place.

[79] Mrs van der Merwe did not claim any particular amount of reimbursement for her own use, nor was she able to specify, or even estimate, how many kilometres she travelled on work business. Given this lack of evidence I am unable to make her any award.

Different treatment

[80] With regards to various issues, Mrs van der Merwe had a sense that she was being treated differently from the other sales representative who was male. Nothing explicit appears to have been said to her indicating different treatment on the basis for her and the other sales representative's different sexes. The other sales representative had been at Rollerflex for some time longer than Mrs van der Merwe.

[81] Mrs van der Merwe made little attempt to clarify various entitlement issues during her time at Rollerflex, feeling that it was not her place to enquire, even regarding her own entitlements. My impression is that this meant that she had little basis for understanding whether the other representative did, in fact, have different entitlements and, if so, what the reason was for that.

[82] Mr Ciganek says that the entitlements of the two sales representatives were the same. Neither party called the other sales representative to give evidence.

[83] The burden is on Mrs van der Merwe to establish that there was different treatment². I am not satisfied that she has established that the two sales representatives received different entitlements and therefore do not consider the discrimination issue further.

Union v Telecom (Wellington) Ltd [1989] 3 NZILR 527 (LC)

Costs

[84] The issue of costs is reserved.

[85] Mrs van der Merwe has had some success in this case with her claims for unpaid entitlements. She represented herself with some assistance from her husband. It is unlikely that she could establish a basis to claim costs in this proceeding, other than for the Authority's filing fee, as she does not appear to have incurred other costs in bringing the claim.

[86] The Respondents were assisted at the investigation meeting by Paul Watson. I am unclear whether this was on paid basis or not. In the event that it was, then the Respondents may wish to put in a claim for costs.

[87] However, both parties have had partial success in this case and it may be an appropriate case to let costs lie where they fall. If the parties are not able to resolve the costs issue between themselves, either party may file a memorandum on the matter within 28 days of the date of this determination. The other party shall then have 14 days in which to file and serve a memorandum in reply.

Nicola Craig

Member of the Employment Relations Authority

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