

BETWEEN

KIM WILKINSON  
Applicant

AND

JAMARK PLUMBING LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Scott McKenna, Counsel for Applicant  
Prue Dawson, Counsel for Respondent

Investigation Meeting: 26 June 2018 at Hamilton

Submissions received: 26 June 2018 from Applicant and from Respondent

Determination: 13 July 2018

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Kim Wilkinson, claims that she was employed by the Respondent, Jamark Plumbing Limited (Jamark) and that she was unjustifiably dismissed.

[2] Jamark denies that it employed Ms Wilkinson and claims that she was voluntarily undertaking a 3 day show-casing of her skills.

**Issues**

[3] The issue for determination is whether or not Ms Wilkinson was an employee of Jamark.

**Background Facts**

[4] Jamark is a plumbing services company, providing plumbing services to residential and commercial premises throughout the Waikato region. It has a Housing New Zealand contract and is operated and managed by Mr Mark Hughes, sole director and shareholder. It employs approximately 23 plumbers and 3 administration employees.

[5] Ms Wilkinson applied for a position as an office administrator advertised by Jamark through the Seek website. The position advertised set out the duties and state that the hours of work were full-time between 7.30 a.m. and 5.00 p.m. per week.

[6] At the time Ms Wilkinson applied to Jamark she was actively seeking employment again after a long period which had been spent caring for her elderly and ailing parents, and had been in receipt of a job seekers WINZ benefit. Prior to the interview with Jamark she said she had attended at least one other job interview.

*Interview 19 January 2018*

[7] Ms Wilkinson was invited to attend an interview on Thursday 19 January 2018. She was interviewed by Ms Merrienne Northcott, Office Administrator and Ms Leah Cranston, Office/Project Manager and Mr Hughes' partner. When she arrived at Jamark she had been asked to sign the Visitors Book by Ms Northcott.

[8] Ms Northcott said that the normal process used to recruit administrators involved two interviews and a hand-writing and typing test before an offer of employment took place. Only Mr Hughes could make the final decision to employ. The hand writing test involved a short paragraph to ensure legibility, and the typing test consisted of a computer generated test example. Overall the handwriting and typing test took approximately 30 minutes.

[9] During the interview on 19 January 2018 Ms Wilkinson said that she was informed about the duties involved in the job role which she considered she was qualified and sufficiently experienced to fulfil, and was told the salary offered was between a range of \$20.00 to \$24.99 per hour.

[10] Ms Northcott said she had informed Ms Wilkinson there would be a further interview stage during the interview. Ms Wilkinson denied that during the interview there had been any mention of a further stage in the recruitment process.

[11] Ms Wilkinson had noticed that her C.V. contained a previous address and asked if she could alter it, which she did by handwriting the new address on it. She had not been informed there would be a second stage interview, that the handwriting of her new address on her CV was considered a handwriting test, or that there would be a typing test.

[12] Both Ms Northcott and Ms Cranston said Ms Wilkinson had offered to work for three days without payment in order to 'show-case' her skills in the role. Ms Northcott said she had telephoned Ms Wilkinson that evening to check she was still been interested in show-casing

her skills for three days during the next week, and Ms Wilkinson had said she would be delighted to do so.

[13] Ms Wilkinson denied this, and said that she had received a telephone call from Ms Northcott on the evening of 19 January 2018 during which Ms Northcott had informed her that she had been successful in her application for the administrator role, verbally offered her the position, and asked her to attend for work at 9.30 a.m. on Tuesday 23 January 2018.

[14] Ms Wilkinson said she had verbally accepted the offer of employment. Whilst she agreed that no rate of pay had been confirmed, she had known the salary range and believed that the actual point in the range at which she would be paid would be determined after she had commenced at Jamark. She had believed that an employment agreement would be provided once the pay rate had been confirmed.

*Tuesday 23 January 2018*

[15] Ms Wilkinson said that on her first day at Jamark she had been met by either Ms Northcott or Ms Cranston and asked to sign the Visitors Book, but there had been no mention of her needing to sign-out that evening or to sign-in and sign-out on succeeding days.

[16] Ms Cranston said she had overheard Ms Northcott telling Ms Wilkinson that she would need to sign-in and sign-out of the Visitors Book each day.

[17] Ms Cranston had shown her the computer systems associated with the Housing New Zealand programme, and what she would be expected to do in relation to any urgent matters received from Housing New Zealand which were to be highlighted and the message forwarded to a Jamark plumber for action.

[18] Ms Wilkinson said she had also been shown how to perform the invoicing and Ms Cranston had sat next to her whilst she did some invoicing herself.

[19] Ms Cranston said Ms Wilkinson had shadowed her on the first day while she showed her the duties she would be expected to fulfil. She confirmed Ms Wilkinson had answered the dedicated Housing New Zealand telephone and been shown by her how to carry out the Jamark filing.

[20] At the end of the first day Ms Wilkinson said she had been informed by Ms Northcott that she was to start work at 7.30 a.m. the next day. She had not signed out at the end of the first day in the Visitors Book as this procedure applied to visitors and she believed she was an employee.

[21] Ms Northcott and Ms Cranston said they had concerns about some aspects of Ms Wilkinson's behaviour during the day, but they had decided to allow her to continue with show-casing of her skills the following day.

*Wednesday 24 January 2018*

[22] Mr Hughes said that Jamark was an ACC Accredited Employer and the Visitors Book signing-in and signing-out procedures were an essential health and safety procedure.

[23] When he had arrived for work on Wednesday 24 January 2018 he noticed that Ms Wilkinson had neither signed-out on the previous evening or signed-in that morning in the Visitors Book, however he had not mentioned this to her or asked Ms Northcott to do so.

[24] Ms Northcott and Ms Cranston said they also noticed that Ms Wilkinson had not signed-in or signed-out of the Visitors Book after doing so on Tuesday morning, but they also had not mentioned this to her.

[25] During the initial part of the morning Ms Wilkinson said Ms Cranston had signed her into the Housing New Zealand computer system after which she had checked the emails, printed them off and checked the mobile telephone for any urgent jobs.

[26] She attended a Health and Safety meeting with Ms Cranston at which Ms Cranston took notes. Following the meeting she had been asked to type up the notes taken by Ms Cranston into a minute format.

[27] Ms Wilkinson said she understood that Jamark had not included Housing New Zealand in any previous minutes and she had been shown a template from which the minutes were to be constructed. The template had not been used previously and required adaptation. There had been some discussion about the layout of the minutes following which she had used a 3 column layout which she had based on the template layout provided to her.

[28] Whilst Ms Wilkinson was working on the minutes of the Health and Safety meeting Ms Cranston was working in the reception area of Jamark.

[29] During the day Ms Wilkinson had also assisted Ms Cranston to complete the weekly update of the whiteboard in the office on which Jamark maintained a record of current plumbing jobs. This was a job completed by two people, and normally took half an hour with Ms Northcott assisting Ms Cranston.

[30] Ms Northcott said she had sat at her desk and completed her own work duties because Ms Wilkinson was completing the task with Ms Cranston.

[31] Following completion of the whiteboard update with Ms Cranston, Ms Wilkinson said she had assisted Ms Northcott with her responsibilities which included updating the plumbing work other to that of Housing New Zealand jobs.

[32] Mr Hughes said that on the Wednesday he had observed aspects of Ms Wilkinson's behaviour that had "*rung alarm bells*" with him. Ms Northcott and Ms Cranston said they had shared concerns about Ms Wilkinson's behaviour and performance, which included Ms Cranston's view that Ms Wilkinson should have completed the Health and Safety meeting minutes in a faster timeframe.

[33] However nothing had been mentioned to Ms Wilkinson at the close of the day and they said it been decided to allow her to continue with the show-casing of her skills on the following day.

*Thursday 25 January 2018*

[34] Ms Wilkinson said that during the third day she had sat at Ms Cranston's desk, checked the emails and updated the urgent jobs for completion. She had noticed some jobs had been invoiced so had told Ms Northcott that she was deleting them from the whiteboard.

[35] She had continued completing that Health and Safety meeting minutes and had shown them to Mr Hughes for his comment.

[36] During Ms Wilkinson's lunch break Mr Hughes, Ms Northcott and Ms Cranston discussed her performance and decided that she was not suitable for the administrator position. It was agreed that Ms Northcott was to inform Ms Wilkinson of this during the afternoon.

[37] When she returned from lunch, Ms Wilkinson said she made an amendment to the Health and Safety minutes in light of a comment made by Mr Hughes, and before she left that evening had left a copy of the completed minutes on the computer keyboard in his office. Mr Hughes had not been present as he and Ms Cranston had left early that afternoon.

[38] She had also sent Mr Hughes an email at 4.51 p.m. on Thursday 25 January 2018 the subject of which was stated to be: ‘*Jamark Meeting Minutes*’ and attached to which was a document: ‘*Jamark Meeting Minutes HNZ RMLdocx*’. The email stated:

I will have a copy of this on your desk tomorrow so you can sign and I will scan your signed copy into the email that I will send to Renea.  
I will ask him to do the same so we have a copy with both signatures.

[39] Ms Northcott said she had been too busy during the afternoon to speak to Ms Wilkinson and so she telephoned her that evening.

[40] Ms Wilkinson said she had noticed a missed call from Ms Northcott and she telephoned her. Ms Northcott had told her that she was not a ‘*good fit*’ for the job. Ms Wilkinson said she had asked Ms Northcott who had made the decision, and Ms Northcott told her it had been a joint decision made by her, Mr Hughes and Ms Cranston.

[41] Ms Wilkinson said Ms Northcott had reassured her that she would be paid for the work she had done, but that payment would not be made until the following week.

[42] Ms Northcott denied she had offered to pay Ms Wilkinson and said that Ms Wilkinson had demanded payment. Ms Wilkinson had also made what she considered to be threats about having a friend who was a lawyer and referring to the Employment Court.

[43] Ms Wilkinson denied she had yelled at Ms Northcott, or demanded payment because she had believed she had been employed and therefore payment was due to her. However after the telephone call she had texted an employment law advocate for advice. She had subsequently emailed Ms Northcott at 8.03 p.m. on Thursday 25 January 2018 with her bank account details. The email stated:

I have also contacted my Lawyer who works for Employment Law. Even though I never signed a contract I am still covered by NZ employment law.

We will be sending a letter to you soon in regards to taking this further. A very disappointed ex employee

[44] Ms Northcott said she had spoken to Mr Hughes the following morning about her telephone conversation with Ms Wilkinson. He had agreed to pay Ms Wilkinson for the three days she had worked at a rate of \$20.00 per hour because that had been the lowest rate discussed.

[45] Payment was made in accordance with a timesheet completed by Ms Northcott and a payslip was emailed to Ms Wilkinson. The payslip contains an employee number, and detailed a payment in respect of holiday pay entitlement and a contribution made in respect of Kiwisaver.

## **Determination**

[46] Ms Wilkinson claims that she was an employee of Jamark.

[47] Section 6 of the Employment Relations Act 2000 (the Act) sets out the meaning of employee:

### **s.6 Meaning of employee:**

(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 and

(b) includes –

(i) ...

(ii) a person intending to work but

(c) excludes a volunteer who –

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer

(2) In deciding ... whether a person is employed by another person under a contract of service, the .... Authority-... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2)... or the Authority-

(a) must consider any relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[48] Section 5 of the Act defines a person intending to work:

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

[49] An employee is a person employed by an employer to do work for hire or reward. The job as advertised by Jamark for an office administrator contained the duties expected of the position holder and the hours of work. Ms Wilkinson's evidence was that she knew from

the job interview that the hourly rate pay range fell between \$20.00 and \$24.99 per hour and she expected to be paid at an hourly rate within that range.

[50] Ms Wilkinson's evidence was that she had been telephoned by Ms Northcott on the evening of 19 January 2018, the evening of the interview, and verbally offered the position of office administrator. On the basis of her knowledge of the terms of employment which had been communicated to her via the job advertisement and the interview, she had verbally accepted the offer of employment.

[51] Ms Northcott's evidence was that she had telephoned Ms Wilkinson to confirm that Jamark were willing to accept her offer to work three days on a voluntary basis. Ms Wilkinson refuted this.

[52] I observe that Ms Wilkinson's personal circumstances at the time she applied for the position at Jamark made it improbable that she would offer to work without expectation of reward, however I proceed to address the issue below.

*(i) Person intending to work or a volunteer?*

[53] A person employed to work for reward pursuant to s 6(1) of the Act includes: "*a person intending to work*".<sup>1</sup> However a person offering to work without expectation of reward, and who does not receive a reward, is excluded as an employee and would be a volunteer pursuant to s 6 (1) (c) of the Act.

[54] Examining the issue of whether or not Ms Wilkinson was a volunteer in light of s 6 (1)(b)(ii) and (c ) of the Act, I note Ms Wilkinson's evidence that (i) she had expected to be paid for the work, and that (ii) she did in fact receive payment for the period of time she worked.

[55] Ms Northcott denied that she had informed Ms Wilkinson that she would be paid, and stated that Ms Wilkinson had demanded payment. Even if this were the case, I would find that Ms Wilkinson asking for payment was consistent with her expectation of reward for the period in which she had worked at Jamark.

[56] I find that Ms Wilkinson was: "*a person intending to work*" at Jamark and not a volunteer.

*(ii) Trial period*

[57] I turn to consider Jamark's contention that Ms Wilkinson had offered to show-case her skills on a free basis in the position for three days. On that basis I conclude that Jamark

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<sup>1</sup> S 6 (1)9b(ii) of the Act

agreeing to such a suggestion from Ms Wilkinson was because it intended to assess her skills for suitability to fulfil the requirements of the advertised position.

[58] I observe that in the email Ms Wilkinson sent to Mr Hughes on third day, 25 January 2018, she writes with an expectation of being in the Jamark office on the following day, Friday 26 January 2018, in order to provide a finalised copy of the Health and Safety minutes to him, with ongoing subsidiary actions to be completed thereafter.

[59] I find this to indicate that Ms Wilkinson had no expectation that her employment might not be ongoing after a third day, or that her employment at Jamark was subject to any assessment, other than for setting the appropriate marker on the pay rate scale.

[60] If a trial period had been what was intended by Jamark, the Act makes provision for trial periods in s 67A and s 67B. Pursuant to a valid trial period as set out in a written employment agreement, an employee cannot raise a personal grievance in respect of the dismissal in accordance with s 67A and s 67B.

[61] However this provision applies to a written provision in an employment agreement, and Ms Wilkinson had not been provided with a written employment agreement by the time her engagement at Jamark ceased.

[62] I do not find that Jamark can rely on s 67A and S67B of the Act since there was no valid trial period pursuant to s 67A of the Act.

[63] Similarly, on the same basis that there was no written employment agreement, there was no valid probationary period in accordance with s 67 of the Act.

*(iii) Indications of employment status*

[64] During the three days at Jamark I find that Ms Wilkinson only signed-in in the Visitors Book on the morning of the first day, Tuesday 23 January 2018. Consistent with her understanding that she was an employee; she had not signed-in or signed-out after that occasion.

[65] Despite Mr Hughes' evidence that it was an essential health and safety procedure that non-employees signed-in and signed-out of the Visitors Book, I observe that neither he, nor Ms Northcott, nor Ms Cranston mentioned this omission to Ms Wilkinson despite their observations that it had not occurred after the first morning.

[66] I also regard it as significant that payment was confirmed to Ms Wilkinson by a Jamark payslip assigning her an employee code number and confirming that the payment included holiday pay entitlement and a contribution to Kiwisaver.

[67] I find this to be more consistent with Ms Wilkinson's belief that she was an employee during the three days she worked at Jamark, than Jamark's contention that she was merely present on a non-employee unpaid basis to show-case her skills.

*(iv) Work performed as indicia of employment*

[68] Examining the work performed by Ms Wilkinson whilst at Jamark, I find she:

- Answered telephone calls from Housing New Zealand;
- Checked emails;
- Assisted Ms Cranston to update the Jamark job white board which was a two person job; and
- Typed up the minutes from a Health and Safety meeting

[69] I also note Ms Wilkinson's evidence that she performed invoicing and carried out filing, although this is disputed by Ms Cranston.

[70] Jamark's evidence was that the work carried out by Ms Jamark was not to its satisfaction. In the absence of a valid trial period provision in a written employment agreement, I find that a concern as to work performance issues would need to be addressed as an issue in an appropriate manner by an employer and is not pertinent to the issue of whether or not Ms Wilkinson was an employee of Jamark.

[71] I find that Ms Wilkinson carried out work during which time Ms Cranston was able to work in the reception area which was normally unmanned and which she and Ms Northcott had to attend to between their usual duties.

[72] Ms Northcott usually assisted Ms Cranston to update the whiteboard but because Ms Wilkinson assisted Ms Cranston, she was able to carry out work duties that she was normally unable to do. In addition I find Ms Wilkinson performed work which left Ms Cranston free to perform other duties.

[73] I find that this work was not merely a show-casing of Ms Wilkinson's administrative skills, but consistent with the Employment Court's finding in *The Salad Bowl Limited v*

*Amberleigh Howe-Thornley*<sup>2</sup> it was legitimate work which benefitted Jamark's commercial enterprise and contributed to its business.<sup>3</sup>

[74] In these circumstances I find that Ms Wilkinson was an employee in accordance with s 6 of the Employment Relations Act 2000 (the Act).

[75] Pursuant to my finding that Ms Wilkinson was an employee I find that her dismissal was unjustifiable on the basis that Jamark did not adhere to the basic procedural requirements expected of a fair and reasonable employer in accordance with s 103 A of the Act. Specifically:

- Jamark did not raise any concerns with Ms Wilkinson prior to dismissal;
- provide Ms Wilkinson with a reasonable opportunity to respond to its concerns before dismissal; or
- genuinely considered Ms Wilkinson's explanation since she was given no opportunity to provide one.

[76] I have considered whether or not the defects in the process were minor and did not result in Ms Wilkinson being treated unfairly pursuant to s103A(5) of the Act, but I find that the defects were more than minor.

### **Remedies**

[77] Ms Wilkinson has been unjustifiably terminated and she is entitled to remedies.

### *Lost Wages*

[78] Ms Wilkinson has not currently obtained employment and is in receipt of a job seekers allowance.

[79] Ms Wilkinson said she suffered anxiety after the termination of her employment and had to seek professional help which has affected her confidence.

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<sup>2</sup> [2013] NZEmpC 152 at para [51]

[80] I order that Jamark to pay Ms Wilkinson the sum of \$11,568.96 including holiday pay and a contribution to Kiwisaver (calculated as salary of \$20.00 per hour x 40 hours x 13 weeks, holiday pay at 8%, and Kiwisaver contribution at 3%).

[81] From that amount is to be deducted any payments Ms Wilkinson received in the period as Job Seekers Allowance.

*Compensation for Hurt and Humiliation under s 123 (1) (c) (i) of the Act.*

[82] Ms Wilkinson said that she had suffered mental and physical adverse effects as a result of the dismissal, which came after a time when she had experienced personal stress due to her caring for her parents and the death of her mother.

[83] The termination of her employment had affected her self-confidence and she suffered depression and anxiety for which she had sought professional help..

[84] I accept that Ms Wilkinson suffered adverse effects from the dismissal but in reaching an appropriate level of compensation I also take into consideration the very short duration of her employment at Jamark..

[85] I order Jamark to pay Ms Wilkinson the sum of \$3,500.00, pursuant to s 123(1)(c)(i) of the Act.

*Contribution*

[86] I have considered the matter of contribution as I am required to do under s124 of the Act.

[87] Ms Wilkinson did not contribute to the situation which gave rise to the grievance. There is to be no reduction in remedies.

**Penalty**

[88] Ms Wilkinson is seeking a penalty for a breach of s 63A of the Act in respect of the non-provision of a written employment agreement.

[89] Jamark failed to provide Ms Wilkinson with a written employment agreement as required in accordance with the Act. The requirement to provide employees with an employment agreement is a long established part of the employment law of New Zealand. and employers in New Zealand are expected to know the minimum legal requirements in respect of their employees and adhere to them.

[90] However I accept that Jamark did not consider Ms Wilkinson to be an employee and therefore no employment agreement was necessary.

[91] Whilst I have determined that that understanding was false, I do not consider the non-provision of an employment agreement to have been deliberate and award no penalty for the breach.

### **Costs**

[92] Costs are reserved. The parties are encouraged to agree costs between 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.

[93] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**