

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 311
5329612

BETWEEN MELANIE ZINK
 Applicant

AND WWW MEDIA LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: David Hayes, Counsel for Applicant
 Mark Hammond and Karina McLuskie, Counsel for
 Respondent

Investigation Meeting: 9 May 2011 at Hamilton

Submissions Received 13 May 2011 from Applicant
 23 May 2011 from Respondent
 07 June 2011 from Applicant
 16 June 2011 from Respondent
 17 June 2011 from Applicant

Determination: 15 July 2011

DETERMINATION OF THE AUTHORITY

A The Authority does not have jurisdiction to hear Ms Zink's claims because the parties were not in an employment relationship.

Employment relationship problem

[1] By consent, this matter was heard at the same time as *Martin Polzleitner v www Media Limited*¹. Mr Martin Polzleitner is Ms Melanie Zink's fiancée.

[2] Ms Zink claimed she was employed by WML as a receptionist from 5 July 2010 until 10 September 2010 on a salary of \$40,000 gross per annum. Ms Zink

¹ *Martin Polzleitner v www Media Limited* [2011] NZERA Auckland 310

alleged she had been constructively dismissed from her employment because she had not been paid any wages for the nine weeks she worked.

[3] Ms Zink sought:

- a. Nine week's unpaid wages;
- b. Unpaid annual holiday pay;
- c. Three months' salary in lieu of notice;
- d. \$8,500 compensation for hurt and humiliation for breach of contract;
- e. \$5,000 compensation for hurt and humiliation for breach of good faith.

Jurisdictional issues

[4] WML denied it had ever employed Ms Zink. It said there was never a contract between the parties and that it had never intended to enter into a contractual relationship with Ms Zink. WML disputed the Authority's jurisdiction to investigate Ms Zink's claims on the basis the parties were never in an employment relationship. WML's Statement in Reply was filed under protest to jurisdiction.

[5] There was no written employment agreement or any other such documentation which recorded what (if any) relationship or arrangement had allegedly been agreed between Ms Zink and WML. This meant that even if the parties had been in an employment relationship, the Authority did not have power to award Ms Zink pay in lieu of notice in the absence of a contractual term which stated she was entitled to pay in lieu of notice, because it does not have power to set terms of employment.²

[6] The Authority does not have jurisdiction to award compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 ("the Act") for humiliation, loss of dignity, and injury to feelings for a breach of contract.

[7] Compensation under section 123(1)(c)(i) of the Act may only be awarded to an employee for the hurt, loss of dignity, and injury to their feelings suffered as a result of a personal grievance.

² S.161(2)(b) ERA

[8] The Authority does not have power to award compensation under s.123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to feelings for a breach of good faith. It may only impose a penalty for certain breaches of good faith as per s.4A of the Act.

[9] By agreement, the jurisdiction issue was dealt with at the same time as the substantive investigation.

Issues

[10] The Authority has to determine the following issues:

- a. Did the parties intend to enter into a legally binding contract?
- b. If so, was the contract an employment relationship?
- c. If so, does Ms Zink have a wage arrears claim?
- d. If so, how much is she owed?
- e. If Ms Zink was an employee, was she constructively dismissed?
- f. If so, what (if any) remedies should be awarded.

Facts

[11] The facts applicable to Martin Polzleitner's matter provide relevant background to Ms Zink's claims, so that determination³ should be read together with this one.

[12] WML was developed by Ms Zink's fiancé's brother Matt Polzleitner who started the business from nothing on 1 December 2009. It is a family owned and operated business and Matt Polzleitner, his fiancée Natalie Ellis, and her parents Shiree and Chris Ellis have all put their own money into WML. They are all also WML shareholders.

[13] Matt Polzleitner and Natalie Ellis each have 30% shares in WML. Mr and Mrs Ellis have a combined 20% shareholding and Ms Zink's fiancé Martin Polzleitner has the remaining 20% shareholding.

³ Ibid 1

[14] Matt Polzleitner and Natalie Ellis have put around \$40,000 and Mr and Mrs Ellis' have put around \$60,000 in to WML. Martin Polzleitner is the only shareholder who has not financially contributed to the business.

[15] All of the shareholders have put varying amounts of unpaid time into WML. Matt Polzleitner has devoted himself fulltime to the business since 1 December 2009, but he has not been paid anything for his time.

[16] Ms Zink said in mid March 2010 her fiancé told her Matt Polzleitner wanted them both to move to New Zealand. Martin Polzleitner told Ms Zink that Matt Polzleitner wanted to employ him as General Manager of WML on a salary of \$100,000 and that he had also agreed to pay her a salary of \$40,000 per annum.

[17] Ms Zink said she spoke to Matt Polzleitner who confirmed there were many jobs she could do despite her English being poor, such as preparing a database and working as a receptionist. Matt Polzleitner denied any such conversation. He said he had not offered Ms Zink employment and had not agreed to employ her. He also said Ms Zink's English was not good enough for him to have had the conversation she alleged had occurred. The other witnesses I heard from backed up his evidence about Ms Zink's limited English skills.

[18] Ms Zink was unable to provide me with detail about this alleged conversation. She also changed her evidence about it. She initially said Matt Polzleitner had offered her employment during a skype conversation but then somewhat resiled from that when pressed about her ability to speak English. She then accepted the information about the WML job offer had been relayed to her by her fiance.

[19] Ms Zink accepted there had been no discussion or negotiation with Matt Polzleitner about key contractual terms such as remuneration, start date, days and hours of work, legal ability to work in New Zealand, or duties. Ms Zink explained that by saying she "*was not interested in details*". This suggests she did not consider herself to be entering into a legally binding relationship.

[20] When pressed to explain how and when she had been offered employment Ms Zink could only go so far as saying Matt Polzleitner had told her in the course of a skype discussion with Martin Polzleitner "*he had a good paying job*" for her and her fiance. I do not consider that discussion, if it occurred, amounted to an offer of employment which was capable of acceptance by Ms Zink.

[21] In support of her claim she was an employee, Ms Zink said she went to work at WML every day and worked all day. However, when questioned about this, Ms Zink accepted she had not worked normal business hours every day, and had sometimes she had left early because she was jet lagged or unwell.

[22] WML said Ms Zink only accompanied her fiance to WML's office because she had nothing else to do. Being at WML provided Ms Zink with company because she did not know anyone in New Zealand. It also gave her an opportunity to improve her limited English.

[23] WML said it let her sit at a desk in the reception area and gave her a computer so she could amuse herself. Matt Polzleitner said he did this because Ms Zink was viewed as a family member because she had been in a long term relationship with Martin Polzleitner and they were engaged to be married.

[24] Although Ms Zink's evidence was she had worked all day every day, she was unable to identify any work she had actually done. She accepted her English was not good enough to converse with customers, so when people came in to WML she said hello but then got someone else to attend to them. I consider it unlikely WML would contract with her to do reception work when she was unable to perform normal reception duties.

[25] Ms Zink did refer to a database which she said she had been developing at Matt Polzleitner's request, but did not give me details of what she had actually been doing. None of the witnesses I heard from saw her doing database work. They described her as playing on the computer, checking Facebook, or sleeping under her fiancé's desk. Ms Zink said she did this database work on her fiancé's laptop which she agreed was taken with her when they left. I accept Matt Polzleitner's evidence that he had never seen or been provided with Ms Zink's alleged database development work.

[26] If Ms Zink had been in a contractual relationship with WML the database work she alleged she had done was WML's property. Ms Zink would not have been legally entitled to take this work with her when she left and WML would most likely have taken steps to recover it from her, but that did not occur. The fact it did not lends credibility to Matt Polzleitner's evidence that he had no knowledge of the alleged database development.

[27] The fact WML did not know what Ms Zink was working on, that she removed whatever it was she said she had been working on, and WML has never been provided with a copy of it supports my view that the parties were not in a contractual relationship.

[28] Matt Polzleitner said Ms Zink was never given any work to do. Michaela Polzleitner (Martin and Matt's sister) was a full time WML employee and she confirmed Ms Zink was only at WML to keep Martin Polzleitner company and to improve her English, but did not do any actual work. Ms Polzleitner said Ms Zink would come and go throughout the day as she pleased, in contrast to other employees who kept regular hours.

[29] Another employee, Ms Aimee Preest, also confirmed Ms Zink would come in to WML at the same time as Martin and Matt Polzleitner but would go off for hours on end, sometimes for whole afternoons. Ms Preest said she never saw Ms Zink do any actual work and said it seemed Ms Zink was only around because she had nothing else to do.

[30] None of the WML witnesses could identify any work Ms Zink had done. If she had been contracted to work for WML it would have known what work she had been assigned to do and what work she had done. I accept WML's evidence that Ms Zink did not do any actual work for it.

[31] I consider the circumstances that existed also meant it was very unlikely WML had agreed to enter into a contractual relationship with Ms Zink. Her involvement with WML arose solely because of her family connection.

[32] Contrary to how it dealt with other employees, WML did not use its normal employment process for Ms Zink. She did not get a written offer of employment. She was not given an employment agreement. She did not complete an IR330 form and did not get an IRD number until 29 April 2011. Ms Zink did not get a KiwiSaver pack and she was not added on to the payroll. This suggests WML never intended to enter into a contract with her.

[33] I consider it significant there was no documentation to support her contention the parties had agreed to enter into a legally binding relationship.

[34] Ms Zink was also not legally entitled to work in New Zealand without a work permit. She entered New Zealand on 3 July 2010 with a visitor permit and was not issued with a work permit until 6 September 2010. WML could have faced a fine of up to \$50,000 if it had knowingly allowed her to work without a work permit.⁴

[35] I accept Matt Polzleitner's evidence that he obtained professional accountancy and legal advice about obligations to employees before WML employed anyone. I consider WML was unlikely to have put itself at risk of significant penalties by contracting Ms Zink to work for it when she was not legally entitled to work in New Zealand.

Outcome

[36] I find Ms Zink has not discharged the onus on her to establish the parties intended to enter into a legally binding contractual relationship. I consider it more likely Ms Zink attend WML's offices as a family member who was filling her days whilst the people she was living with (Matt Polzleitner, Martin Polzleitner and Natalie Ellis) were at work.

[37] Because there was no contract between the parties, Ms Zink cannot bring herself within the s6(1) definition of employee in the Act. The parties therefore cannot have been in an employment relationship, so the Authority does not have jurisdiction to hear Ms Zink's claims.

Costs

[38] The parties are encouraged to resolve costs by agreement. If that is not possible costs will be dealt with by exchange of memoranda. WML has 14 days within which to file its costs memorandum, Ms Zink 14 days there after within which to file her memorandum, with WML having a further 7 days within which to file its memorandum in reply (if any).

[39] Departure from this timetable requires the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority

⁴ S.357 Immigration Act 2009