

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Alana Pegram (Applicant)
AND Heritage Productions Ltd (Respondent)
REPRESENTATIVES Paul Troon, Advocate for the Applicant
Raewyn Gibson, Advocate for the Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 28 November 2006 and 15 December 2006
DATE OF DETERMINATION 12 April 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Alana Pegram worked for Heritage Productions Limited from 13 February 2006 until she was dismissed on 7 April 2006. Ms Pegram says that she was unjustifiably dismissed but the company says that Ms Pegram's employment was justifiably terminated at the conclusion of a probationary period.

[2] Heritage Productions operates a photography business, primarily taking school photos. Stephen Keegan is the general manager and the photographer so is mostly absent from the office taking photographs. Linda Cassidy is the office manager, having worked for Heritage Productions for more than 20 years. Ms Cassidy normally oversees the business on a day-to-day basis but she was off work from January 2006 until 27 March 2006. It was Ms Cassidy who communicated the dismissal to Ms Pegram. Kerry Geayley is another employee who works for Heritage Production starting shortly after Ms Pegram commenced work. Kate Tovey has worked at Heritage Productions for about three years. Initially she and Ms Pegram got on well, but then they started to argue with one another at work. For the most part, it was Ms Tovey who reported to Mr Keegan the work mistakes attributed to Ms Pegram which caused the dismissal.

[3] To resolve the grievance, it is first necessary to determine what was agreed about a probationary period when Ms Pegram was employed. Mr Keegan gave Ms Pegram a letter dated 29 March 2006 extending the *trial work period* until 7 April 2006 so it is necessary to outline why and how this was done and its contractual effect. On 7 April 2006, Ms Cassidy told Ms Pegram that no further employment was being offered following the end of the *extended trial period* and gave her a letter to that effect. It is necessary to describe what happened on 7 April as well as explain how this decision was made between Ms Cassidy and Mr Keegan. The test for justification is set out in s.103A of the Employment Relations Act 2000 which must be applied in the present case. To the extent necessary at that point, I will return to the evidence about Ms Pegram's work mistakes.

Employment arrangements

[4] The Employment Relations Act 2000 provides that where the parties agree that the employee will serve a period of probation or trial after the employment commences, that fact must be specified in writing in the employment agreement: see s.67(1)(a).

[5] Mr Keegan interviewed Ms Pegram on 30 January 2006. Ms Pegram says that she was told there would be a trial period but its duration was not specified. Mr Keegan says that it was made very clear to Ms Pegram that if successful she would be employed on a one month trial initially. Ms Tovey was present at the interview. Her evidence is that Ms Pegram was told there would be a trial period and that she told Ms Pegram the trial period would be four weeks. Ms Pegram says that she was told by Ms Tovey that the trial period is usually a month. From all of that, I find that Ms Pegram knew before she started that there would be a trial period of up to a month.

[6] On 1 February 2006, Ms Tovey phoned Ms Pegram to tell her that she had the job and to start at 8am on 13 February 2006. Nothing more was said at that point about the trial period. It is now common ground that Ms Pegram was not given any proposed written employment agreement or anything else in writing setting out the terms of the employment. Mr Keegan's evidence, which I accept, is that Heritage Productions does have written employment agreements but he understood that they did not need to be provided to staff until confirmed as permanent at the conclusion of a trial period. That explains why nothing was put in writing.

[7] Ms Pegram started work as agreed on 13 February. Ms Geayley started work a week later. Ms Tovey showed Ms Pegram (and later Ms Geayley) around and gave her a run down on what the job required. Ms Tovey and Ms Pegram had known one another from school. They initially got on well at work and also started socialising outside work. However, Ms Tovey started to see a friend of Ms Pegram's partner. Next, Ms Pegram started to hear reported back things apparently said about her and her partner by Ms Tovey. Tension developed at work and there were arguments between the two young women. Ms Tovey also came to the view that Ms Pegram was making mistakes in her work, spending work time on non-work matters and was resistant to instructions or advice. Ms Tovey reported these things to Mr Keegan.

[8] Prior to 27 March 2006, Ms Cassidy generally only came into the office on Friday mornings to prepare the wages. She noticed the friction between Ms Tovey and Ms Pegram. She also knew from Mr Keegan that he was concerned about mistakes in the office work that were causing calls and complaints from clients. Despite Mr Keegan's and Ms Cassidy's knowledge of various difficulties, the end of Ms Pegram's trial period was reached without anything being said or done by the employer to mark that occasion.

An extended trial

[9] Ms Pegram and Ms Geayley came into work as usual on 29 March 2006. They each found on their desk an envelope, inside which was a letter from Mr Keegan. Ms Pegram's letter reads:

Dear Alana,

This letter is to inform you that your trial work period has been extended until April 7th.

This has been a necessary adjustment, as there has been no management or system in place to monitor your progress etc.

Now that Linda is back, she is the office manager, and what she asks of you must be adhered to. In her absence, Danny and Kate will be listened to for work matters.

Thank you

[S Keegan]

[10] Ms Pegram and Ms Geayley showed one another their letters which conveyed the same message. Ms Geayley's evidence, which I accept, is that they were both quite worried about the letters and they talked about how their jobs were on the line. It follows that I do not accept Ms Pegram's evidence that she was not aware that she might be dismissed.

[11] The other point which should be made is that by this time, Mr Keegan had left on a whiteboard a list of work rules. They were: no using cellphones during work time; a morning tea break of 10 minutes taken at 10.30am; a lunch break of 30 minutes taken between 12 and 2 with no eating at desks outside this time. The list was put up before Ms Cassidy's return.

The decision to terminate the employment

[12] The evidence of Mr Keegan and Ms Cassidy, which I accept, is that they jointly made the decision to end Ms Pegram's employment. There is a letter dated 7 April 2006 written by Ms Cassidy but signed by Mr Keegan. Mr Keegan believes he signed the letter the day before it was given to Ms Pegram. By the time the letter had been signed, Ms Cassidy and Mr Keegan must have discussed between them the reasons for their decision.

[13] These reasons are partly expressed in the letter. It says:

We have found that too many mistakes have been made with several unpleasant feedbacks from schools which have proved to be costly to us.

[14] Obviously, Mr Keegan and Ms Cassidy attributed those mistakes to Ms Pegram. In part, this is a reference to mistakes that pre-dated Ms Cassidy's return to the office, but I also accept her evidence that she directly observed mistakes being made by Ms Pegram on and after 27 March 2006. These observations confirmed for Mr Keegan and Ms Cassidy their belief, based largely on Ms Tovey's reports, that Ms Pegram was responsible for all the mistakes.

[15] The letter also refers to production levels being lower than anticipated. This is partly an oblique reference to Mr Keegan's and Ms Cassidy's belief that Ms Pegram was guilty of time wasting such as taking frequent and long breaks and sending and receiving personal text messages and phone calls. It also refers to their view that Ms Pegram worked slowly and in an inefficient manner. These views partly rely on Ms Cassidy's observations and partly the earlier reports from Ms Tovey.

[16] Mr Keegan gave evidence, which I accept, that he was upset to find a fax on which there was comment by Ms Pegram and her friend bragging about how much time they were able to waste while at work. This pre-dated Ms Cassidy's return to work and I accept their evidence that Mr Keegan showed the fax to Ms Cassidy. It follows that I do not accept Ms Pegram's evidence that there was not a fax referring to time wasting. It also is unlikely that Ms Pegram's sending of personal faxes was limited to her break times. In any event, Mr Keegan's reaction when finding the fax certainly influenced the subsequent decision to dismiss Ms Pegram.

[17] On Friday, 7 April, after Ms Tovey and Ms Geayley had left the office at lunch time, Ms Cassidy took Ms Pegram into a private area adjacent to the office and gave her the letter of that date to read. Ms Cassidy told Ms Pegram that it was nothing personal but related to her unsuitability for the position. When Ms Pegram read the letter she became upset. There was some discussion about what Ms Pegram had been doing that was wrong. Ms Cassidy asked if Ms Pegram wanted her to speak with Mr Keegan about a further opportunity to prove herself but (understandably) Ms Pegram did not want that. The private discussion continued for some time. It ended when Ms Cassidy told Ms Pegram that she did not have to stay at work for the rest of the day and could leave early if she wanted to. Ms Pegram then went back into the office and packed up her things to leave. Ms Geayley asked what she was doing and Ms Pegram said she was going home. Ms Cassidy gave Ms Pegram an envelope with her final pay, including holiday pay, already made up. Ms Pegram then left.

[18] Ms Pegram's evidence is that she was later told by a friend that Ms Tovey knew of the intended dismissal before Ms Pegram was told. Ms Tovey's evidence, which I accept, is that she had no prior knowledge about the dismissal and was told of it by Ms Cassidy after Ms Pegram left on 7 April.

Justification for dismissal

[19] Justification for a dismissal must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[20] The first point for consideration concerns the status of Ms Pegram's employment at the relevant time. It is common ground that the purported initial trial or probationary period of no more than a month had ended without anything more being said or done. It follows that Ms Pegram must be regarded as a permanent employee from about 13 March 2006. The letter dated 29 March 2006 must be seen as an unilateral attempt to vary the settled contractual position, and ineffective for that purpose. The analysis does not rely on Heritage Productions' failure to comply with the statutory requirement of writing for a probationary term or the statutory consequences of that failure. At the time of the dismissal, Ms Pegram was a permanent employee.

[21] It is common ground that Ms Pegram had not received any formal warnings that her employer was dissatisfied with her performance and that she was at risk of dismissal if she did not improve. I refer to the principles expressed in cases such as *Bedford Investments Ltd v. Northern Hotel etc IUOW* [1990] 3 NZILR 487.

[22] Even if the 29 March 2006 letter could be construed as a warning, it did not identify for Ms Pegram the basis of any dissatisfaction on the part of the employer. The nature of Heritage Productions' concerns did not amount to grounds of serious misconduct and the situation very much called for adequate identification of the concerns, clear warning that dismissal might ensue if the problems were not remedied and a reasonable opportunity to improve. By failing to properly warn Ms Pegram about these things, Heritage Productions fell well short of what a fair and reasonable employer would have done in the circumstances.

[23] It is undisputed that none of Heritage Productions' concerns were raised with Ms Pegram before the joint decision was made that she be dismissed. Ms Cassidy simply delivered the message, which I accept was done in a reasonably sensitive manner. Heritage Productions' failings again were well short of the standard set in cases such as *NZ (with exceptions) Food Processing etc IUOW v. Unilever NZ Ltd* [1990] 1 NZILR 35 which requires notice of the specific allegations and the possible consequences, a real opportunity to explain and an unbiased consideration of any explanation.

[24] The final point to be made is that Ms Pegram was dismissed without notice or pay in lieu of notice. That approach is only ever likely to be adopted by a fair and reasonable employer in circumstances of proven serious misconduct, which is not the present case.

[25] Heritage Productions' approach to the dismissal followed from its view that it was simply not offering permanent employment at the end of an unsatisfactory probationary period but that reflects a misrepresentation of both the contractual and the legal position. It follows that the dismissal was unjustified and that Ms Pegram has a personal grievance.

Remedies

[26] It is necessary to assess the extent to which Ms Pegram contributed to the circumstances giving rise to the grievance. In part, the grievance arose because of Heritage Productions' failure to comply with its legal obligations regarding employment, probationary terms and dealing with poor performance. None of this can be attributed to Ms Pegram. However, the

circumstances giving rise to the grievance also include Heritage Productions' reasons for forming the view that Ms Pegram's work performance was unsatisfactory.

[27] There is a significant conflict of evidence between Ms Pegram on the one hand and Ms Tovey, Ms Geayley and Ms Cassidy on the other about Ms Pegram's work performance. Ms Pegram attributes any mistakes made by her to inadequate training and support. However, I do not accept that point. Ms Tovey is experienced in the work requirements and I accept her evidence that she attempted to assist Ms Pegram. What happened was that Ms Pegram developed an antagonism towards Ms Tovey and a resistance to accepting her assistance or supervision. There was a lack of effective supervision until Ms Cassidy's return and Ms Pegram took advantage of that in her poor work habits. Ms Pegram accuses Ms Tovey and Ms Geayley of similar poor work habits, but she must bear her own share of responsibility for how her conduct contributed to the dismissal. I also accept the thrust of the evidence for Heritage Productions that the clerical and processing mistakes made by Ms Pegram were more extensive than she has been prepared to acknowledge. To some extent, that might reflect Heritage Productions' failure to raise these issues with her during the employment. From all this, I conclude that any remedies awarded to Ms Pegram should be reduced by 50% to reflect her contribution.

[28] Ms Pegram immediately started looking for other work but lost wages from 10 April 2006 until she commenced new employment on 31 May 2006, a total of about seven weeks. That amounted to a loss of approximately \$2,887 in ordinary time earnings. Heritage Productions Limited is to pay Ms Pegram \$1,443.75 to reimburse her for that loss.

[29] The evidence of distress is limited although I accept that Ms Pegram did burst into tears and was shocked when told of her dismissal. Other relevant points are the short duration of Ms Pegram's employment and the relevant speed with which replacement employment was obtained. In these circumstances, and taking account of the contribution point, I order Heritage Productions Limited to pay Ms Pegram \$1,500 compensation.

Summary

[30] Heritage Productions Limited is to pay Ms Pegram \$1,443.75 reimbursement of lost earnings.

[31] Heritage Productions Limited is to pay Ms Pegram \$1,500 compensation for distress.

[32] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority