

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 126/08
5075061

BETWEEN VIVIENNE O'CONNELL
Applicant

AND TRILITH HOLDINGS LTD
(FORMERLY REDPATHS
FURNITURE LTD)
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Sheila McCabe for Applicant
No appearance for Respondent

Investigation Meeting: 17 December 2007

Further information received: 3 January 2008 from Applicant

Determination: 1 April 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Between March 2002 and November 2005 Ms O'Connell was a Fabric Buyer and Customer Services Administrator for the respondent company ("*Redpaths*".) In that period the O'Connell Family Trust, of which she was a trustee, was a major shareholder in the company and her husband, David O'Connell, was managing director. Ms O'Connell was not a director and did not have any decision making role in the company. She describes herself as having been "*for all intents and purposes a normal employee of the company.*"

[2] In November 2005 the shareholding of the O'Connell Family Trust was bought out and David O'Connell ceased to be a director. On his last day in that role (28 November 2005) he told his wife that he had been instructed by the new

management to tell her that her employment was terminated and she was to leave the premises at the end of the day.

[3] Ms O'Connell told me that she was given no reasons for the termination of her employment, no notice and no salary in lieu of notice. She says she does not believe her position became redundant as she understands that she was immediately replaced. Ms O'Connell claims that the termination of her employment was an unjustified dismissal and that she was discriminated against on the grounds of family status. She seeks:

- i. Three months pay in lieu of notice and/or reimbursement of lost remuneration, plus interest;
- ii. Compensation of \$25,000.00 pursuant to section 123 (c) (1) of the Employment Relations Act, and
- iii. Costs.

[4] This matter was first lodged with the Authority in December 2006. It was the subject of a preliminary determination (AA133/07 1 May 2007) which rejected the assertion that the grievance had been the subject of an accord and satisfaction.

[5] The respondent has not lodged a statement in reply and has not appeared before or communicated with the Authority since its solicitors wrote in February 2007 saying that their client "*does not intend to take any steps in relation to this matter.*" I have been advised that the notice of the investigation meeting in this matter was served on the registered office of the respondent in the usual way. I now therefore determine the employment relationship problem without the benefit of hearing from the respondent.

Issues

[6] I do not propose to deal separately with the claim of discrimination on the ground of family status since the dismissal itself is the alleged discriminatory action and remedies cannot be awarded twice in relation to the same material facts.

[7] The issues for determination in this case are therefore whether there was an unjustified dismissal and if so, what remedies should be awarded.

Was the dismissal justified?

[8] David O'Connell told me that he had employed his wife whilst he was managing director of the respondent. Her job had not been advertised but her employment had been agreed with the other "partners" in the business. He said that during her employment she was treated like any other employee and performed her duties diligently and efficiently. He confirmed that she had no involvement at all in the discussion relating to the buying out of the proprietary interest held in the business by the O'Connell Family Trust.

[9] Ms O'Connell told me that she believed she had been a loyal employee of the respondent and did not expect to lose her job when the O'Connell Family Trust ceased to hold a proprietary interest in the company. She sought but has never received a statement of reasons for her dismissal, although she said that subsequent to her dismissal she was told by the new directors that she had not been qualified for the role she had held and "*had not earned the money she was paid.*" She refutes this, saying she was paid on an hourly basis (at \$30.00 per hour) and worked only as required (on average 25-30 hours per week.) She also told me that the new directors had never really spoken to her about her role and would not have been in a position to know what she actually did or how well she did it.

[10] Mrs O'Connell reported directly to her husband as did nine or ten other senior staff. Mr O'Connell said that other staff had written employment agreements but he had never documented his wife's terms and conditions.

[11] Although the respondent did not supply a statement in reply, the assertion that the grievance was disposed of by means of an accord and satisfaction indicates that the respondent accepted that Mrs O'Connell had been employed by Redpaths and that she had been dismissed from that employment. There is nothing before me to cause me to doubt that Mrs O'Connell was employed on the terms she has stated and that she was dismissed in the way she has described.

[12] Once it has been established that there was an employment relationship and that the employer terminated that relationship the onus falls on the employer to justify that termination. The respondent has not attempted to do so. In the absence of any justification having been put forward I must conclude that the dismissal was unjustified.

Remedies

[13] Mrs O'Connell told me that she had been very committed to the business and felt extremely hurt and angry about the manner in which she was dismissed and the fact that she did not have any sort of farewell. These feelings were compounded by the comments she received about her work after she had left. She told me that for some time afterwards she was so devastated that she found it difficult to look for work.

[14] In response to my request for evidence about what she did to mitigate her losses, Mrs O'Connell told me about the time and effort it took for her and her husband to find a new business to replace the interests they had had (through their Trust) in Redpaths. In the meantime Ms O'Connell did not consider looking for a job and did not apply for any positions. After many months they finally bought a new business and she went to work there.

[15] I am not satisfied that Mrs O'Connell made sufficient effort to mitigate her losses, or that the dismissal can be said to be the primary cause of her lengthy period of unemployment. I make no award for lost earnings.

[16] However since Mrs O'Connell did not receive notice of her dismissal an award of pay in lieu of notice is in order. Mrs O'Connell did not have an agreed notice period. It falls to me therefore to determine what would be reasonable in all the circumstances. Given the relative seniority of her position I set reasonable notice at one month and pay in lieu of notice at \$4,000.00 gross. Interest is to be paid on this sum also.

[17] Finally I note the embarrassment the dismissal caused Mrs O'Connell. In all the circumstances I consider an award of \$5,000.00 to be an appropriate level of

compensation for the distress she has suffered as a result of the termination of her employment.

Costs

[18] As the successful party, the applicant is entitled to a contribution to the cost of professional representation.

[19] I have not been advised of Mrs O'Connell's actual costs. However given that the respondent has not defended the matter it has required minimal preparation. Each of the two investigation meetings (to deal with the preliminary and substantive matters respectively) has taken less than a half day. In all the circumstances and consistent with prevailing levels of award, I consider a total contribution to costs of \$2,000.00 to be appropriate.

Summary of orders

[20] **The respondent is ordered to pay to Mrs O'Connell the following sums:**

- i. \$4,000.00 gross pay in lieu of notice, plus interest from the date of this determination until the date of payment, at a rate of 9% per annum pursuant to clause 11 of the second schedule to the Employment Relations Act 2000;**
- ii. \$5,000.00 in terms of s. 123 (c) (1) of the Employment Relations Act 2000, and**
- iii. \$2,000.00 as contribution to costs.**

Yvonne Oldfield

Member of the Employment Relations Authority

