

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 148/09
5137558

BETWEEN DIANE CROZIER
Applicant

AND OFFICE FURNITURE & EQUIPMENT
(2006) LIMITED t/a DESIGN 4 WORK
Respondent

Member of Helen Doyle
Authority:

Representatives: Diane Crozier in person
Marshall Wright for Respondent

Interviews: Dunedin, 10/6/09
Christchurch, 17/6/09

Determination: September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] There is a dispute between Diane Crozier and Office Furniture & Equipment (2006) Limited trading as Design 4 Work (Design 4 Work) as to whether the correct notice period was provided to Ms Crozier when the respondent's business was sold to a new owner on 1 September 2008.

[2] Ms Crozier says that she is owed one week's pay in lieu of notice by Design 4 Work because she was only given three weeks notice of termination of her employment and not four weeks notice as required under her employment agreement. Design 4 Work do not accept that a further weeks notice is required. In its statement in reply Design 4 Work referred to issues that it had with Ms Crozier in the last few weeks of her employment with the company. Mr Wright said that the company was

not going to pursue the matter as a counterclaim but the matters were simply raised to support the company's position.

The investigation process

[3] I held a telephone conference with Ms Crozier and Mr Wright on 27 March 2009. It was agreed during that telephone conference that it would be more cost effective for the Authority to deal with the matter by interviewing Ms Crozier in Dunedin and then the sole director of Design 4 Work Stephen Parr, represented by Mr Wright, in Christchurch.

[4] To assist in that process both parties provided to the Authority and to each other a timeline.

Background to the sale of Design 4 Work

[5] Ms Crozier commenced her employment as Branch/Sales Manager with Design 4 Work in April 2007. She was party to a written individual employment agreement with Design 4 Work expressed to come into force on 16 April 2007. Both parties in their respective timelines made specific reference to the provision in clause 2.1 of that employment agreement that there would be a review in May 2008 as to whether it would be desirable to replace the agreement with a franchising agreement for the business with the employee. In any event, no such agreement was entered into.

[6] On 1 September 2008 Design 4 Work transferred its business to a company called Metalon (2008) Limited (Metalon) and Ms Crozier duly commenced employment with that company on that date.

[7] The employee's protection provision in the employment agreement is set out in clause 31. I do not intend to set that clause out in full but two subclauses of that clause are relevant, and I will set those out:

In the event that the Other Party, does offer you employment on terms and conditions which are the same or no less favourable, including recognition of your previous service, then you will not be entitled to any redundancy compensation from the employer, whether or not you accept that offer.

However, if you are not offered employment, or are offered employment on terms and conditions which are less favourable and/or without recognition of your previous service, then the

Employer will consult with you regarding whether there are any suitable alternative positions available to you. If none can be identified, then you will be given notice of termination.

[8] Clause 35 of the individual employment agreement is concerned with termination of employment. Clause 35.0 provides that either party may terminate this agreement on not less than four weeks notice in writing to the other party.

[9] On 8 August 2008 Ms Crozier was provided with a letter giving her notice in terms of her employment. The letter provided, amongst other matters –

In accordance with your Employment Agreement we now find it necessary to give you notice that your employment with Design4Work in Dunedin will be terminated on the grounds of redundancy for the reason that the position you hold with Design4 Work will no longer exist. The effective date is Friday 29 August 2008. This will be your last day of employment with the Company. Your formal notice period is four weeks.

[10] Ms Crozier had not accepted an offer of employment with Metalon when she received the letter of 8 August 2008.

[11] On 15 August 2008 Ms Crozier accepted employment with Metalon, but says that this was on less favourable terms than she had enjoyed with Design 4 Work. She asked Design 4 Work for a further week's notice and holiday pay on that sum. She was advised that there would be no such payment forthcoming for reasons set out in a letter dated 30 September 2008 from a solicitor Paul Currie principle at Currie Lawyers.

Discussion and analysis

[12] Design 4 Work raises several reasons why Ms Crozier should not receive a further week's notice. I shall set these out.

[13] The first reason was that Ms Crozier had plenty of verbal notice that the sale of the business was proceeding. Clause 35 of the employment agreement makes it clear that a notice of termination is required to be given in writing and that no less than four weeks is required. Design 4 Work seemed to appreciate that in the letter of 8 August 2008. Ms Crozier's employment was to be terminated as at 29 August 2008 on the grounds of redundancy as her position was going to simply cease to exist.

[14] I accept Ms Crozier was aware that the business was for sale but I accept that she was not aware of the firm offer for sale and purchase as set out in the letter of 8 August 2008 and the settlement date of 1 September 2008. I am strengthened in my view on that by the part in the letter of 8 August 2008 from Design 4 Work that provides:

You are aware that for some time the Dunedin Branch of Design 4 Work has been for sale. There have been a number of inquiries however until recently none came to fruition, even though in one earlier case, it was understood that an offer to purchase would be made. The sale process has been commercially sensitive and in view of this and the uncertainty of it all Design 4 Work have not been in a position to have detailed discussions with staff.

A firm offer for sale and purchase has now been received and due diligence is underway. The contract provides for a settlement date of 01 September 2008.

[15] The second reason put forward by Design 4 Work as to why a week's notice should not be paid is that Ms Crozier was responsible in part, together with Metalon, for the delay in the provision of written notice because she was negotiating her new employment with Metalon.

[16] Design 4 Work is required to give notice of termination in the event that the business is sold, the terms and conditions offered less favourable and/or there is no recognition of Ms Crozier's previous service. Ms Crozier's actions leading up to the giving of written notice do not change those obligations and neither do the actions of Metalon.

[17] The third reason put forward by Design 4 Work was that Ms Crozier suffered no loss as a result of only having three weeks notice in writing because she started work immediately after employment was terminated with Design 4 Work with the new company. Ms Crozier in fact lost her position with Design 4 Work. Even if, and I am not satisfied this is the case, I was to accept there was no loss that does not affect the contractual obligations for the employer to give four weeks notice in writing.

[18] The fourth reason was that Ms Crozier's actions during the last period of employment should in some way impact on her right to be paid an additional one week's notice. I do not find that the actions which are disputed are relevant in terms of the contractual obligations of Design 4 Work under the employee transfer provision

in clause 31 to give notice of termination which, as set out in clause 35, is not to be less than four weeks.

[19] The fifth reason put forward was that Ms Crozier was offered employment which was the same or no less favourable. Ms Crozier provided a copy of her employment agreement with Metalon. Her annual salary was \$10,000 less than that at Design 4 Work but in addition to that she was paid a commission. Ms Crozier's position was described as a sales person in her employment agreement with Metalon whereas she had held a management role with Design 4 Work. Mr Wright has suggested in subsequent communication that that commission would have put her in no less favourable a position in terms of her income.

[20] I find that the commission component of the Metalon agreement is less favourable because it is an at risk component of remuneration. When the Metalon employment agreement is considered it is clear that Ms Crozier's previous service was not recognised in terms of sick leave or holiday pay. Clause 6 requires the completion of 12 months of continuous employment before Ms Crozier would become entitled to four weeks annual holiday and the sick leave provision in clause 8 requires six months continuous employment before the sick leave entitlement becomes available to Ms Crozier. That is enough on its own under clause 31 for notice of termination to be required.

[21] I am not satisfied that there is any basis on which Design 4 Work can resist the claim for one week's salary in lieu of notice by Ms Crozier. Ms Crozier was only given three week's notice and is entitled to four weeks notice in accordance with her employment agreement.

Determination

[22] Ms Crozier was entitled when her employment ended with Design 4 Work to receive four weeks written notice in terms of her employment agreement. Ms Crozier received three weeks notice and is therefore owed one week's pay in lieu of four weeks and holiday pay on that amount. Ms Crozier is also entitled to be reimbursed for her filing fee. Ms Crozier received a salary with Design 4 Work of \$65,000.

[23] I make the following orders:

I order Office Furniture & Equipment (2006) Limited trading as Design 4 Work to pay to Ms Crozier the sum of \$1,250 gross being one weeks salary.

I order Office Furniture & Equipment (2006) Limited trading as Design 4 Work to pay to Ms Crozier the sum of \$100 being holiday pay on one weeks salary calculated at 8%.

I order Office Furniture & Equipment (2006) Limited trading as Design 4 Work to pay to Ms Crozier the sum of \$70 being reimbursement of her filing fee.

Helen Doyle
Member of the Employment Relations Authority