

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 11A/10  
5126876

BETWEEN                      CHRISTINA JOHNSON  
   Applicant

AND                              NEW ZEALAND HEALTH  
   INSURANCE              BROKERS  
   LIMITED  
   First Respondent

AND                              GEOFF KLOOGH  
   Second Respondent

Member of Authority:        R A Monaghan

Representatives:            Jenny Beck, counsel for Applicant  
   Werner van Harselaar, counsel for Respondents

Investigation Meeting:      17 June 2010 in Dunedin

Determination:                1 July 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Christina Johnson says she was dismissed unjustifiably by either or both of New Zealand Health Insurance Brokers Limited (NZHIBL) and Geoff Kloogh. She also seeks orders for the payment of unpaid wages and holiday pay.

[2]     Mr Kloogh was the director and shareholder of NZHIBL. He says that neither he nor NZHIBL was Ms Johnson's employer. Both respondents say that the employer was Community Insurance and Investment Group Limited (CII Group) and sought an order for the joinder of CII Group as a respondent to the employment relationship

problem for that reason. Both Ms Johnson and CII Group resisted the application. After hearing argument the Authority declined to make the order for joinder.<sup>1</sup>

[3] I proceed accordingly. I record further that John Campbell, the director and shareholder of CII Group, gave evidence at the investigation meeting.

### **Background**

[4] Ms Johnson began her association with Mr Kloogh in June 2006, when she entered into an employment agreement with McLaggan Management Limited (MML). MML provided management services for NZHIBL and another company whose business was operated by Mr Kloogh's brother. The businesses shared premises. Through MML, Ms Johnson worked as an administrator/personal assistant with her services being shared by both brothers.

[5] Later in 2006 Mr Kloogh's brother required the sole use of the business premises. Mr Kloogh intended to move to Alexandra and work from there. He also intended to retain his clients in Dunedin and did not wish Ms Johnson to lose her employment. Accordingly he made an arrangement with Mr Campbell under which his Dunedin-based business would share Mr Campbell's premises, and the cost of Ms Johnson's services as an administrator/personal assistant would again be shared. This time, however, no separate management company was available as a vehicle for those and other management services.

[6] Mr Kloogh explained his intentions to Ms Johnson at a meeting in or about November 2006. Ms Johnson's role would include servicing the Dunedin clients - which to Mr Kloogh involved answering queries, following up on arrears, and obtaining premium details. As Ms Johnson was keen to advance her career, and Mr Kloogh's expected departure for Alexandra meant his availability for personal contact with Dunedin clients would be relatively low, Ms Johnson and Mr Kloogh discussed the possibility of Ms Johnson taking an insurance advisor's role. This would be a new role for Ms Johnson, involving advising on new policies rather than carrying out the clerical duties involved in supporting or maintaining existing policies. It would also

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<sup>1</sup> **Johnson v New Zealand Health Insurance Brokers Limited & Anor** H Doyle, 21 January 2010, CA 11/10.

require accreditation from the insurers concerned. It was common ground that the discussion concerned only the possibility of such a change, and did not go any further at the time.

[7] Ms Johnson was given a new employment agreement dated December 2006 and citing NZHIBL as the employer party. The agreement was silent on the arrangement with CII Group, and did not include any reference to Mr Campbell or CII Group, although Ms Johnson understood and agreed that her services were to be shared. The document comprised the original MML agreement with minor amendments. It contained a job description which was all but identical to the description in the MML agreement, and again made no mention of Mr Campbell or the CII Group. The description listed a number of essentially clerical support duties associated with clients and their insurance policies. Ms Johnson signed the agreement.

[8] It was common ground that NZHIBL was to be directly responsible to Ms Johnson for the full amount of her remuneration, with CII Group to reimburse NZHIBL for half of the relevant sum. Ms Johnson was aware of this.

[9] In February 2007 NZHIBL and Ms Johnson moved to CII Group's premises.

[10] The month of June was treated as the anniversary of the commencement of Ms Johnson's employment, and the first annual review was duly held in or about the second week of June 2007. According to Ms Johnson, the matters discussed included: a plan to amalgamate the NZHIBL and CII Group brands; Ms Johnson's wish to undertake training to become a 'salaried advisor' (or insurance advisor); and Mr Kloogh's offer of an increase in her rate of pay.

[11] Also in June 2007 there was an agreement that Ms Johnson's salary be paid in full from CII Group's account rather than from the NZHIBL account, with NZHIBL reimbursing CII Group. This was at the initiative of Ms Johnson, or Ms Johnson together with Mr Campbell. One payment to Ms Johnson from NZHIBL had 'bounced' in December 2006 and as Ms Johnson had also been fielding approaches from creditors she had no faith that such a problem would not occur again. Further, there was a concern that if NZHIBL and CII Group paid their respective shares to her

directly, the arrangement would not be tax-effective for Ms Johnson. Finally, the timing was affected by a wish to have the new arrangement in place before the commencement of the Kiwisaver scheme.

[12] Mr Kloogh says this was when Ms Johnson's employment relationship with him (or NZHIBL) ended. It was common ground that, at or about the same time, Mr Campbell said he would 'take over' Ms Johnson. Mr Kloogh said this was a reference to the employment relationship, and while he acknowledged that he continued to pay his share of Ms Johnson's salary he said he did so only because he continued to use her services. Mr Campbell said he was referring only to the new method of payment when he made the comment, and not to the employment relationship.

[13] Mr Kloogh said on different occasions during the investigation meeting that Mr Campbell said he would 'take over' Ms Johnson when the change in payment arrangements was being discussed, and in association with discussions about Ms Johnson's wish to become a salaried advisor. No-one gave accurate evidence about conversations occurring in or about June 2007, and in particular about the timing of conversations about Ms Johnson's becoming a salaried advisor. Mr Kloogh said he became aware of them before the review meeting, and that Mr Campbell said at that time he would 'take over' Ms Johnson. Otherwise he denied being party to the discussions, and denied that they occurred during the annual review.

[14] It was at least clear Ms Johnson and Mr Campbell continued to pursue Ms Johnson's wish to take a salaried advisor's role. Mr Campbell was willing to support Ms Johnson, although Mr Kloogh had made no further plans for Ms Johnson to take an advisor's role in the NZHIBL business. That was in large part because Mr Kloogh's planned move to Alexandra had been delayed, and he did not need Ms Johnson's services as an advisor. However Mr Campbell paid for Ms Johnson to attend some seminars which allowed her to gain accreditation for certain products.

[15] Later in 2007 there was a move to incorporating the activities of both NZHIBL and CII Group under a CII brand. The Group had a website, which at least initially listed Mr Kloogh (acknowledging the inclusion of his business in the group) and Ms Johnson. Office stationery was also printed in the name of the Group. When Ms

Johnson obtained accreditation she became a 'salaried advisor' and was pictured on the website with that title.

### **Events leading to the termination of employment**

[16] By about April 2008 for personal reasons Mr Kloogh had still not moved to Alexandra, and he and Mr Campbell were disputing various payments under their arrangement. There were also tensions between Ms Johnson and Mr Kloogh. Mr Kloogh had ceased working from the business premises, and Ms Johnson said there was a series of miscommunications between herself and Mr Kloogh.

[17] To Mr Kloogh the last straw in respect of the overall dysfunction occurred on or about 17 April 2008 when he sought to use Mr Campbell's office – which he had been sharing – only to have Ms Johnson tell him not to use it. According to Ms Johnson she suggested he use another room as he had not booked the office and someone else needed it. Mr Kloogh reacted by 'losing the plot' and ceasing to make payments due in respect of Ms Johnson's salary.

[18] Ms Johnson hoped mediation might resolve matters, so Mr Campbell suggested mediation on her behalf in a message dated 21 April 2008. There was no reply.

[19] A series of emailed exchanges on the afternoon of 23 April began with Mr Campbell seeking a meeting with Mr Kloogh to discuss some of the issues between them, including Ms Johnson's position, and saying: "it is becoming a bad reason to get up in the morning". Mr Kloogh replied saying: "Yeah: I think I will disconnect from you guys...too hard mate." Mr Campbell asked how Ms Johnson's wages were to be dealt with, with Mr Kloogh replying: "Im not paying for a salaried advisor was nothing to do with me." Mr Campbell reminded him the arrangement was that they would share the payments of Ms Johnson's salary, and said he had noted that Ms Johnson was spending over half her time on NZHIBL's work. Later he asked Mr Kloogh what his plans were, and said he would have to lay Ms Johnson off 'based on the emails'. Mr Kloogh responded angrily, referring to aspects of the disputes about payment, and saying he was not going to pay for services he was not getting.

[20] The next day, 24 April, Mr Campbell told Ms Johnson that Mr Kloogh refused to continue making the payments of his half of her salary. He also told her that he did not have a full-time position to offer her himself.

[21] Ms Johnson left the office and sought advice. She raised her personal grievance in a letter to Mr Kloogh dated 30 April 2008. Mr Kloogh replied by suggesting that Ms Johnson speak with Mr Campbell “as he is your employer.”

### **The identity of the employer**

[22] Ms Johnson’s argument that Mr Kloogh was her employer in his personal capacity relied principally on matters such as her carrying out of personal errands for him from time to time, and to a lesser extent on her assertion that Mr Kloogh and his wife used a company bank account for personal transactions. She has not alleged that Mr Kloogh held himself out to be her employer, rather has argued in effect that I should construe certain actions as meaning Mr Kloogh was the true employer.

[23] Otherwise Ms Johnson was aware of the existence and significance of the corporate entities with which she became involved during her employment, understood their business and acknowledged that NZHIBL was named as her employer in the employment agreement. She also knew that Mr Kloogh was not paying her from his personal funds. This was not, for example, a case where she had entered into an employment agreement ostensibly with Mr Kloogh and was unaware that a relevant corporate entity existed or that Mr Kloogh had any association with it, and that the entity in turn was to be treated as her employer. Moreover the background as I have set it out makes it clear that the substantial part of the work Ms Johnson carried out was the work of NZHIBL and CII Group.

[24] Overall, the evidence fell short of establishing that Mr Kloogh was the employer in his personal capacity. I find that he was not.

[25] The facts fall equally short of establishing that CII Group was the sole employer. I did not find persuasive the argument that CII Group took over the role of sole employer when it took over direct responsibility for paying Ms Johnson’s salary,

or when Mr Campbell supported Ms Johnson's attempts to gain the accreditation needed to act as a salaried advisor.

[26] The essential nature of the arrangement between all three parties regarding the use of Ms Johnson's services - namely that they would be shared as would payment for them - did not change. I do not accept that the conversations in June 2007 amounted to a substitution of CII Group as the employer party, rather they amounted to no more than a change in the arrangements for paying Ms Johnson and an indication from Mr Campbell that he would support her ambitions in respect of advisory work.

[27] To the extent that there was a dispute about the extent of Ms Johnson's activities as an advisor, according to Ms Johnson the tensions between Mr Kloogh and Mr Campbell meant she spent relatively little time on those activities. However the mere fact that Ms Johnson sought to pursue them does not mean CII Group was the sole employer - only that the share of her services for which CII Group was paying included those activities. Even if there was a dispute about the proportion of time Ms Johnson was allocating to NZHIBL and CII Group respectively - and I accept this was a matter of concern to Mr Kloogh - the evidence did not satisfy me that any differential was so substantial that CII Group had become the sole employer.

[28] Accordingly I reject the submission that NZHIBL was not the employer. At the same time, and having the benefit of the evidence of Mr Campbell, I would have said that NZHIBL and CII Group were joint employers of Ms Johnson. Since CII Group is not a party to this employment relationship problem, I can make no order against it.

### **The personal grievance**

[29] Ms Johnson's employment ended because NZHIBL decided to cease contributing its share of her salary, and CII Group did not have a full time position to offer her.

[30] Inevitably, since Mr Kloogh and Mr Campbell both assert that the other was Ms Johnson's employer, no management or disciplinary process was ever commenced

in respect of the difficulties which began to arise between Mr Kloogh and Ms Johnson in particular. Most unfortunately, these difficulties gathered momentum along with the difficulties between Mr Kloogh and Mr Campbell so that there was a breakdown in Mr Kloogh's relationship with his business associate as well as with his employee. This culminated in his decision to cease paying Ms Johnson's salary, for which there was no justification. His action effectively terminated Ms Johnson's employment, since Ms Johnson did not seek part time employment with CII Group.

[31] The dismissal was unjustified.

[32] Ms Johnson is entitled to the reimbursement of remuneration lost as a result of her personal grievance. She obtained temporary work 9 weeks after her employment ended, at \$562.50 (gross) per week. Her previous earnings were \$660 (gross) per week shared between NZHIBL and CII Group.

[33] NZHIBL and CII Group are jointly responsible for the termination of Ms Johnson's employment. Since I can make an order only against the party to this problem, NZHIBL is ordered to reimburse Ms Johnson for the remuneration lost as a result of her personal grievance in the sum of \$6,330, calculated as:  $[9 \times \$660] + [4 \times (\$660 - \$562.50)] = \$6,330$ .

[34] There will be no reduction for contributory fault.

[35] Ms Johnson also seeks compensation for the injury to her feelings caused by her personal grievance. I accept that the circumstances led to Ms Johnson suffering a loss of confidence in herself and in employers in general, although I have reservations about the extent to which she fairly took into account the effect of certain of Mr Kloogh's personal circumstances of which she was aware. Nevertheless she is entitled to compensation for the injury she sustained. NZHIBL is ordered to compensate her for the injury in the sum of \$5,000.

### **Wages and holiday pay**

[36] Ms Johnson seeks an order for payment of the share of 8 days' pay she says Mr Kloogh failed to pay in the period 14 – 23 April 2008. The sum is \$528. That

amount was not disputed. The sum is owed by NZHIBL solely, and payment is ordered accordingly.

[37] Ms Johnson also seeks an order for the payment of \$2,617.37 as annual leave outstanding. She commenced the last part year of her employment with 9 days' leave accrued and outstanding, and took that 9 days' leave during the last part-year of her employment. The effect is neutral for the purposes of calculating payment in respect that part-year. Ms Johnson's calculation is based earnings for a full year, includes provision for a 4-week notice period, and deducts the period between the end of the notice period and the completion of a full year of employment. It is:

$$8\% \times [52 \times [40 \times \$16.50]] - [12 \text{ days' pay}] = \$2,617.37.$$

[38] Payment is ordered accordingly.

### **Summary of orders**

[39] NZHIBL is ordered to pay to Ms Johnson:

- a. \$6,330 as reimbursement of remuneration lost as a result of her personal grievance;
- b. \$5,000 as compensation for injury to feelings caused by the grievance;
- c. \$528 as unpaid wages; and
- d. \$2,617.37 as unpaid holiday pay.

### **Costs**

[40] Costs are reserved. The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority