

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 216/10
5276600

BETWEEN LORRAINE MARY NEILL
Applicant

AND FRANK AND PETER
BUILDERS LIMITED t/a
THE BATHROOM STORE
Respondent

Member of Authority: K J Anderson

Representatives: The Applicant in Person
P Marshall, Counsel for Respondent

Investigation Meeting: 10 February 2010 at Whakatane

Determination: 7 May 2010

DETERMINATION OF THE AUTHORITY

Preliminary Issue

[1] The applicant cited Mr Ferenc Schmidt and Ms Rachel Paul as the respondents to this matter and claims that they were her employer and hence responsible for any liability that may arise from these proceedings. But the evidence before the Authority conclusively shows, that the true or legal identity of the employer is; Frank and Peter Builders Limited. The entitling of this determination reflects this and the records of the Authority will also be changed accordingly.

Employment Relationship Problem

[2] The applicant, Mrs Neill, claims that she was unjustifiably dismissed, on the grounds of redundancy, effective from 22nd May 2009. Mrs Neill claims that the redundancy was not genuine and that she was not properly consulted. Mrs Neill seeks

that the Authority finds that she has a personal grievance and award her various remedies. Mrs Neill also asks that a penalty be awarded to her for the failure of her employer to provide an employment agreement.

Background Facts and Evidence

[3] The Bathroom Store in Whakatane was established by Mr Ferenc (Frank) Schmidt in April 2008. Mr Schmidt employed Ms Lisa Handricks and her mother, Ms Vicki Handricks, as part time workers. As Lisa Handricks wished to take maternity leave, Mr Schmidt advertised in the local newspaper for a part time shop assistant. The advertisement informs that the job is for two days a week for four months. Mrs Neill applied for and was appointed to the role, commencing her employment on or about 29th September 2009, working three days a week rather than the two days as advertised. The role was effectively a sole charge, job share arrangement, with Mrs Neill working Monday to Wednesday inclusive, with Vicki Handricks working Thursday and Friday.

[4] The evidence of Mr Schmidt is that in 2008 business was good with many bathroom renovations. However, because of the downturn in the economy, by April 2009, business had deteriorated to such an extent that it became clear that he would not be in a financial position to meet his outgoings, in particular, the wages for his two part time employees, Vicki Handricks and Mrs Neill. Mr Schmidt sought the advice of the Baywide Community Law Centre who advised him to call a meeting of his employees, explain the position and inform that he could no longer afford to employ them.

[5] On Friday 22nd May 2009, Mr Schmidt met with Vicki Handricks and Mrs Neill. Lisa Handricks remained on maternity leave but because she was in the shop for a lunch appointment with her mother, she also attended the meeting. The evidence of Mrs Neill is that when she arrived, both Lisa and Vicki Handricks were already present and it appeared that there had been some discussion in her absence. Mr Schmidt acknowledges that he had some brief discussion with Lisa and Vicki Handricks about the financial problems the business was facing but there is no evidence that anything improper arises from this.

[6] The evidence of the discussion that took place between Mr Schmidt and the three employees is reasonably consistent. Mr Schmidt says, and I accept, that he explained that soon there would be no income coming into the shop and that he would have to run the shop himself until work “*picked up*.” This meant that unfortunately, he could no longer afford to employ any staff and as of that day, there would be no further work for anyone.¹ The evidence of Lisa Handricks is that she asked, on behalf of the three employees, that if Mr Schmidt obtained further work, would he call them in on a part time basis and Mr Schmidt indicated he could do this. Mrs Neill also offered to work for five days and only be paid for two as it wouldn’t affect her student allowance. Mr Schmidt says that he couldn’t accept this offer as he was not in a financial position to pay anyone or to make any promises to anyone.

[7] The evidence of Mrs Neill is that Mr Schmidt “*dismissed*” her in front of Lisa and Vicki Handricks but this is clearly not a correct version of events at all. Rather, I conclude that the three employees were treated in exactly the same way and that Mr Schmidt fairly and frankly explained the reality of the position his business was in and that he could no longer afford to employ anyone.

[8] The last day of paid employment for Mrs Neill was Wednesday 20th May 2009.

The arguments advanced by Mrs Neill

(a) Consultation

[9] Mrs Neill says that she was not properly consulted before her employment was terminated and that she was just suddenly asked to attend a meeting on 22nd May 2009. I accept that the termination of the employment of Mrs Neill (and the other two employees), was sudden and possibly unexpected, although there is some evidence that there were signs that the business was not buoyant. Generally, it would be expected that an employer should consult with employees before finalising redundancy plans. However, in the circumstances of this case, it is difficult to see what else Mr Schmidt could have done. The business could no longer afford to employ anyone. It is not a situation where some employees were selected to be made redundant while others continued in employment, or that another alternative existed.

¹ Mr Schmidt also told the Authority that in April and May 2009, he had been putting put his own money into keeping the business going.

Furthermore, the evidence is that Mrs Neill did have some input in that she proffered a suggestion, but Mr Schmidt was not in any position to give any consideration to any other alternative other than termination the employment of the three employees. Mrs Neill was not treated any differently than the other two women. However, I accept that the termination of the employment of Mrs Neill was sudden and most probably unexpected and I will address this in due course.

(b) *The redundancy was not genuine*

[10] Firstly, Mrs Neill says that Mr Schmidt changed her employment from a permanent part time position to a flexible “*on-call*” arrangement and she says that this change did not “*necessitate redundancy.*” Mrs Neill says further that her position was altered but it was never redundant.

[11] As I understand it, Mrs Neill is claiming that because her appointment to replace Lisa Handricks, whilst on maternity leave, was for a period of four months and subsequently at the time of the termination of her employment, she had been employed for about seven months, the role had become a permanent part time role. While Mr Schmidt was obliged to provide an employment agreement, and as there was a fixed term of employment which s.66 of the Employment Relations Act 2000 had application to, the practical reality of the situation is that, due to Lisa Handricks remaining on maternity leave for longer than originally indicated, Mrs Neill gained an extra three months’ employment. But that did not make Mrs Neill’s position permanent as Lisa Handricks was entitled to have her position held open. But in any event, this is an academic argument and there is no real substance in what Mrs Neill advances, as at the time she had her employment terminated, she was in a temporary part time position and this did not change to an on-call role as she claims. Quite simply, all Mr Schmidt was saying is that if business improved, he could possibly have some work available, but as he said; he was not in a position to make any “*promises*” to anyone.

[12] Mrs Neill also says that as Mr Schmidt provided work to Lisa Handricks and also to another unnamed person, he could have provided her with work too. Mr Timothy Neill (the husband of Mrs Neill) gave evidence of seeing Mr Schmidt working at someone’s residence for two weeks and of Mr Schmidt’s business van “*parked*” around about town but this evidence can be given no weight at all. Mrs

Neill believes that there was sufficient work available and hence her redundancy was not genuine. Regrettably, this view is erroneous and lacking in validity. While it appears that Mr Schmidt did give some work “*here and there*” to Lisa Handricks, and a friend once assisted Mr Schmidt (unpaid), the overwhelming evidence is that there was no consistent work available. Furthermore, Mrs Neill appears unable to acknowledge the fact that both Lisa and Vicki Handricks were employed before her in permanent part time roles, and it seems entirely logical that Mr Schmidt would offer any limited work that might have become available to one of them, before Mrs Neill. It follows that I have no hesitation in concluding that the redundancy of Mrs Neill’s position was genuine and unavoidable.

Determination

[13] While I have found that the redundancy was genuine, I accept that the termination of Mrs Neill’s employment was sudden and without notice and hence the dismissal of Mrs Neill was not the action of a fair and reasonable employer in all the circumstances.² It follows that the dismissal of Mrs Neill on the grounds of redundancy was unjustified and she has a personal grievance. However, I also take into account that the business circumstances of Mr Schmidt were such that he was required to take urgent action, as had he not done so, he would have been unable to pay wages to the affected employees, hence there was no intention on his part to act unfairly and I take this into account in regard to remedies.

[14] I conclude that Mr Schmidt was in a position to give Mrs Neill reasonable notice of the termination of her employment which he failed to do. I find that even though Mrs Neill was a part time worker, she was entitled to fair and reasonable notice of the termination of her employment, as clearly she relied on the income from this part time role. In all the circumstances I conclude that two weeks’ notice would have been reasonable.

I understand that Mrs Neill was paid \$15.00 per hour for 18 hours per week. Frank and Peter Builders Limited must pay to Mrs Neill two weeks’ pay as notice of the termination of her employment, being the gross sum of \$540.00 (\$15 x 36 hours).

² Section 103A, Employment Relations Act 2000 (the Act).

[15] Having determined that Mrs Neill has a personal grievance, the Authority may, in settling the grievance, provide for remedies.³ Mrs Neill seeks to be awarded compensation in the sum of \$10,000 but this claim is out of all proportion taking into account all the circumstances, including the parlous financial position of the business. I accept that Mrs Neill was affected, as contemplated by s.123(1)(c)(i) of the Act, by the sudden termination of her employment, albeit I cannot help but conclude that most of this affect was brought about by an erroneous view as to the genuineness of the redundancy. Also, Mrs Neill was well aware that her job was only temporary and entirely conditional on Lisa Handricks remaining on maternity leave. In all the circumstances, including the financial position of the business, I conclude that an award of \$750 is appropriate.

Summary

(a) Frank and Peter Builders Limited is ordered to pay to Mrs Neill the gross sum of \$540.00 as two weeks' notice of the termination of her employment on the grounds of redundancy.

(b) Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, Frank and Peter Builders Limited is ordered to pay Mrs Neill the net sum of \$750.00 as compensation for hurt and humiliation.

(c) While Mrs Neill has sought that a penalty be awarded for the failure to provide an employment agreement, there is no evidence that this was an issue during the employment, albeit Mr Schmidt was obliged to provide an agreement;⁴ and he now acknowledges this. I conclude that it is not appropriate to award a penalty in the circumstances.

(d) Mrs Neill claims costs in the sum of \$1,073.00 but has provided no evidence as to how this purported cost was incurred. Mrs Neill was her own advocate and I decline to make any order for costs, except for the application fee paid to the Authority. Frank and Peter Builders Limited is ordered to pay to Mrs Neill the application fee of \$70.00

K J Anderson
Member of the Employment Relations Authority

³ Section 123(1) of the Act.

⁴ Section 65 of the Act.