

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 104
5538931

BETWEEN

MEREWYN JOHNSTON
Applicant

A N D

SUSAN SMITH t/a ROSA
GIARDINO MONTESSORI
NURSERY SCHOOL
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Respondent in person

Investigation Meeting: 4 May 2015 at Christchurch
19 June 2015 via Skype

Date of Determination: 27 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Johnston) alleges that she was unjustifiably dismissed from her employment by the respondent (Ms Smith) and that she suffered disadvantage as a consequence of the unjustified actions of the employer in altering her employment agreement without her consent, changing her hours of work without her consent, and failing to pay her correctly until remonstrated with. Moreover, Ms Johnston alleges that Ms Smith failed to maintain her obligation of good faith toward her.

[2] It was initially difficult to engage with Ms Smith. Her response to the Statement of Problem being served on her was to say that the business had closed down and Ms Smith has subsequently left the jurisdiction for an extended period. However, I have been able to engage with Ms Smith via Skype and that contact has enabled me to conclude my investigation into this employment relationship problem.

[3] Ms Johnston was employed by Ms Smith as a teacher at the latter's school at Redcliffs, Christchurch. The employment commenced on 30 July 2012 and finished around 8 October 2012. Ms Smith alleges that Ms Johnston abandoned her employment, and that her employment came to an end within a 90 day trial period.

[4] Ms Johnston says she was dismissed in the context of Ms Smith, without warning, imposing a job share arrangement for her which would have resulted in a dramatic reduction in her working, and therefore, paid hours. This arrangement, if made, would have constituted a unilateral change to Ms Johnston's employment agreement without Ms Johnston's agreement, agreement which is required by the operative employment agreement, and thus would confer grounds for a personal grievance.

[5] There is a written employment agreement between the parties but Ms Johnston's evidence is that that agreement was not signed by her until after she commenced her employment.

[6] Towards the end of the employment, issues began to be raised by Ms Johnston concerning the provision of a copy of the executed employment agreement, and the appropriate rate of tax that Ms Johnston ought to be paying. The evidence for this assertion is the documentation before the Authority.

[7] Ms Johnston says that when Ms Smith proposed to her that she job-share with another staff member who was "*starting soon*", Ms Johnston was unhappy about that suggestion but did commit to thinking about it. Later that day, Ms Johnston says she attended at the workplace again with her partner to again ask for a copy of her contract and the relevant tax form.

[8] According to Ms Johnston, Ms Smith asked Ms Johnston to have her partner leave as she felt "*threatened and intimidated by him*". Based on what Ms Smith told me, I accept this exchange is likely to have happened as it is consistent with Ms Smith's evidence to me about her exchanges with Ms Johnston and her family.

[9] As that conversation continued, Ms Johnston's evidence is that Ms Smith told her that the presence of Ms Johnston's partner in the workplace was a breach of the employment agreement as she had previously told Ms Johnston that her partner was not to attend at the workplace.

[10] It is clearly not a breach of the employment agreement, if that is what was said. But what does have the ring of truth about it is the general contention that men, unless related to the children, are not allowed on the school premises for safety reasons. That, according to Ms Smith was the immutable rule. She gave me another example of this being a male photographer who sought to take photographs of the school and was prohibited, for the same reason.

[11] In any event, Ms Johnston maintains that Ms Smith indicated to her that she should come in again by herself at 9.30 the following morning when she would have a copy of the employment agreement and the tax form available.

[12] Ms Johnston says that when she returned as requested, Ms Smith did not have the information requested and that Ms Smith told her to see her again that afternoon. Before Ms Johnston returned, Ms Smith had texted her demanding to know where she was because she was supposed to be on duty.

[13] It is apparent on the evidence that the last day of employment was around 8 October 2012 but neither party is particularly clear on precisely what date it ended. The evidence I have discloses that 6.5 hours were worked in the week commencing on 8 October 2012. 8 October 2012 was a Monday and Ms Smith's evidence is that the employment lasted ten weeks only; ten weeks from the agreed start date would take us to Friday 5 October 2012.

[14] Looking at a document supplied by Ms Johnston, which is not disputed by Ms Smith, it seems that Ms Johnston worked an average of five hours per day, five days per week. Those hours are broadly consistent with the relevant provision in the employment agreement. All of that suggests that the employment must have ended on either Monday 8 or perhaps Tuesday 9 October because both parties seem to say that the employment came to a sudden end rather than a measured one, and it may be that Ms Johnston worked a normal span of hours on the Monday and that the relationship came to a sudden end on the following day. Conversely and equally plausibly, Ms Johnston may have worked a slightly longer day than usual on the Monday and not returned on the Tuesday as would have been expected.

[15] Neither outcome is certain; the parties simply did not remember when the employment concluded.

[16] In any event, Ms Johnston then proposed, by email dated 15 October 2012, that the parties attend mediation provided by the Ministry of Business, Innovation and Employment and followed that email up the following day with another email setting out the record of hours that she had worked and requesting payment of holiday pay.

[17] Another email was sent by Ms Johnston later that same day wherein Ms Johnston attached links to various resources provided by the Ministry of Business, Innovation and Employment designed to assist employers to calculate employee entitlements.

[18] Ms Smith responded by letter dated 17 October 2012 which she says attached information about the hours worked and wages earned. In fact that attachment was not provided then and had to be solicited again by Ms Johnston.

[19] A further handwritten letter from Ms Smith attached a cheque for the balance of wages and holiday pay owing to Ms Johnston. It is accepted by Ms Johnston that cheque completes the entitlement to wages and holiday pay that she has from the employment.

[20] Then, having left the employment, Ms Johnston sought to have Ms Smith endorse her application for registration with the Teachers Council and the Authority has before it extensive communication relating to Ms Smith's refusal to endorse Ms Johnston's application for registration. That correspondence has been going on for well over a year and the matter seems to still not be resolved.

[21] Ms Smith is adamant that she is entitled to exercise her judgement as to whether Ms Johnston is a fit and proper person to be a registered teacher and that she chose, on a proper basis, not to endorse Ms Johnston's registration.

[22] A personal grievance was raised by Ms Johnston against Ms Smith by letter dated 27 November 2012.

[23] Despite Ms Smith's absence from the jurisdiction, I determined to set the matter down for investigation on the basis that I wanted to progress the claim and deal with it so far as I was able. I determined that I wished to proceed to hear Ms Johnston's evidence and I have now done that.

[24] I engaged via Skype with Ms Smith who is in Sweden, and not returning to the jurisdiction until 2016. In my lengthy Skype discussion with Ms Smith, I put to her all the matters raised by Ms Johnston in my interview with her. Then, so as to give both parties a final opportunity to be heard, I prepared a Minute identifying the salient differences between the two women and invited comment on that.

[25] I am satisfied that I can now determine the matter.

Issues

[26] It will be convenient if the Authority considers the following questions:

- (a) Who was Ms Johnston's employer;
- (b) Was this a properly constituted trial period;
- (c) Does Ms Johnston have a personal grievance?

Who was Ms Johnston's employer?

[27] This matter was filed in the Authority as a claim against a company incorporated as Rosa Giardino Limited. There is such a company registered with the Companies Office. The sole director of that company is Ms Smith. The company's office discloses that the record is overdue for the filing of an annual return and that the Registrar of Companies has initiated action to remove the company from the Register and public notice of that intention has been given.

[28] While there is no question that there is a company incorporated as Rosa Giardino Limited and that Ms Smith is the director of that company, I have not been persuaded that that company employed Ms Johnston.

[29] The employment agreement signed by both Ms Johnston and Ms Smith makes no reference whatever to the company and indeed expresses itself to be between Ms Johnston on the one hand and Rosa Giardino Montessori Nursery School on the other. The execution clause of the agreement does not refer to the limited company and the execution by the employer is simply Ms Smith's signature without any suggestion that she is acting for the limited company.

[30] The law on this matter is clear; if a party wishes to have the benefit of limited liability when it enters into arrangements including employment agreements, it needs

to disclose its reliance on the benefits of limited liability by clearly identifying that the agreement is in the name of a company. There is no such intimation here that the employment is in the name of a company and accordingly I am satisfied that Ms Johnston was employed by Ms Smith in her personal capacity.

[31] That is the effect of the employment agreement that the parties entered into and there is no other document which suggests any other kind of relationship. There is nothing on the two wage slips that were provided to Ms Johnston during the employment which would indicate who the employer was and the direct credits made to Ms Johnston's bank account do not refer to the company at all.

[32] I am satisfied then that Ms Johnston was employed personally by Ms Smith.

Was there a viable trial period?

[33] In order for a trial period to comply with the law, it is required that the various stipulations made in the statute are all complied with to the letter. This is because the effect of the trial period provision is to deprive an employee of the right to bring a personal grievance for unjustified dismissal where a properly constituted trial period is in place.

[34] Here, there is no compliance with all of the requirements of the statute in respect to a trial period and as a consequence, there is no trial period in place.

[35] The provision relating to the trial period in the employment agreement does not comply with the statutory requirement to spell out to the employee that by virtue of the purported trial period, there is no right to personal grievance. The failure to include that important provision is fatal to the ability to rely on the trial period engagement.

[36] Moreover, the employment agreement was not signed until after the employment had actually commenced and on that footing as well, the parties have not met the terms of the law and therefore Ms Smith cannot rely on the trial period engagement.

[37] It follows from the foregoing that there was no trial period engagement, and that Ms Johnston can bring a personal grievance for unjustified dismissal.

Does Ms Johnston have a personal grievance?

[38] Ms Smith maintains that Ms Johnston abandoned her employment and that that abandonment brought the employment relationship to an end. Ms Johnston denies that she abandoned her employment and instead alleges that she was told by Ms Smith that she was about to start job-sharing, something that she neither agreed to nor contemplated, and that as a consequence of this fundamental change in the employment relationship, Ms Johnston was forced to seek employment elsewhere.

[39] It follows from Ms Johnston's position that in order for her to succeed, she needs to satisfy me, on the evidence, that she was required to contemplate a job share arrangement which she had not agreed to. This is because the whole basis of her claim rests on the conviction that she was asked to job share when she had no wish to.

[40] But when I asked Ms Smith about the suggested job share arrangement she was adamant that she neither proposed nor contemplated such an arrangement, and indeed that she regarded job sharing arrangements as antithetical to children's needs and would therefore never have proposed any such setup.

[41] For the avoidance of doubt, I prefer Ms Smith's evidence to Ms Johnston's on this point. Ms Smith was absolutely resolute in her conviction that job sharing was anathema to the interests of children and on that basis, if there was never a basis on which she might have contemplated a job share situation, it is difficult to see why she would have suggested one on this occasion.

[42] It follows from that finding that, in the absence of proof that a job share arrangement was in prospect, there can be no finding for Ms Johnston because her whole claim rests on the fact of a job share being the basis on which she had her personal grievance.

[43] Ms Johnston also maintains that Ms Smith was difficult to deal with, that Ms Smith refused over a lengthy period of time to engage appropriately and in a business-like fashion with Ms Johnston in relation to the provision of an employment agreement and the clarification of what tax rate she was having deducted from her wages and that Ms Smith refused to engage with Ms Johnston when Ms Johnston brought her partner and/or her father as a support person.

[44] I accept there may have been difficulties in the relationship but as I have already made clear, the issue of Ms Johnston involving her male relations in engagements with Ms Smith, caused challenges in itself, because of the immutable rule that only men related to the children could visit on the school premises. Moreover, when Ms Johnston tried to get some resolution of her issues with Ms Smith at the latter's home, again with the assistance of her male relations, this alarmed Ms Smith to such an extent that she laid an information with Police.

[45] While I have accepted there were difficulties in the relationship, Ms Johnston herself is very clear that the difficulties in getting correct payment of her entitlement to wages including holiday pay has now been resolved so there is no wages amount still owed.

[46] Ms Johnston's principal concern from the employment seemed to be that she could not get Ms Smith to endorse her application to be a registered teacher. As I have already noted, Ms Smith maintained she was entitled to exercise her judgement about whether or not to endorse that application and given her unhappiness with aspects of the employment relationship and issues that happened subsequent to the end of the relationship, she felt justified in not providing an endorsement.

Determination

[47] I have not been persuaded that Ms Johnston has a personal grievance for unjustified dismissal for reasons I have already enunciated, nor am I persuaded there is any other relief to which she is entitled. In particular I note that there is no legal basis on which I can direct Ms Smith to endorse Ms Johnston's application for teacher registration even if I was persuaded it was the proper thing to do.

Costs

[48] There is no issue as to costs as both parties have acted for themselves without a lawyer being involved.