

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 196
5532699

BETWEEN PENELOPE ANN JONES
Applicant

A N D KAURI POINT FARM PARK
LIMITED
First Respondent

A N D OHAEAWAI NURSERY
LIMITED
Second Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
G E Milne, Advocate for Respondent

Investigation Meeting: 18 April and 14 June 2016 at Kerikeri

Submissions Received: 14 June 2016 from Applicant
14 June 2016 from Respondent

Date of Oral Determination: 14 June 2016

Date of Determination: 16 June 2016

DETERMINATION OF THE AUTHORITY

- A. Penelope Jones was employed by Ohaeawai Nursery Limited.**
- B. The applications for personal grievances are dismissed.**
- C. The application for payment of wage arrears is dismissed.**
- D. Costs are reserved. The respondents are to have their submissions as to costs filed by 21 June 2016 at 3pm. Any reply must be filed by Ms Jones by 28 June 2016 at 3pm.**

Employment relationship problem

[1] Penelope Ann Jones alleges that one of the respondent employers unjustifiably disadvantaged her by reprimanding her for giving employees IR330 forms and by way of racial or general harassment. She also alleges her employer unjustifiably dismissed her either by terminating her for redundancy on 1 August 2014 or later dismissing her on 25 August 2014.

Issues

[2] The issues that I have to determine were identified at an earlier teleconference.¹ The issues were:

- (a) Who was Ms Jones' employer;
- (b) Whether Ms Jones was unjustifiably disadvantaged by:
 - (i) Being reprimanded for giving out IR330 forms; and
 - (ii) Racial harassment or general harassment in the workplace by slurs, for example '\$5 Pom';
- (c) Whether Ms Jones was constructively and/or unjustifiably dismissed;
- (d) What wage arrears are owed for holiday pay and wages as a consequence of the above?

Who is Ms Jones' employer?

[3] The first issue for me to determine is who was Ms Jones' employer? Both the respondents are alleged to be her possible employers. The onus of proving who an employer is lies with the applicant employee. It must be proved to the standard of proof of the balance of probabilities, that is that it is more probable than not that the employer was one or other respondent or both. The question to be answered is, who would an independent but knowledgeable observer say was the employer?²

¹ Minute dated 8 December 2015.

² *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451 at [22]; *Colosimo v Parker* (2007) 8 NZELC 98,622 (EmpC).

[4] A useful starting point is the documentation evidencing any written agreement between the parties.³ If a written employment agreement exists, is not a sham and has express terms which name an employer, that must point towards a decision by the parties to choose that named person as the employer.⁴

[5] There is an enforceable employment agreement that names the second respondent, Ohaeawai Nursery Limited (ONL), as the chosen employer. The balance of probabilities favours the employer being ONL.

[6] There is an issue about who paid the applicant's wages. The payroll was managed by the first respondent, Kauri Point Farm Park Limited (KPFPP). KPFPP was also the named employer on her IRD records.

[7] The payment of wages by a particular entity is not conclusive of the existence of an employment relationship.⁵ This is particularly where payment of wages and taxes are being dealt with by a different entity for administrative convenience. That certainly was the evidence here. The payroll was being run through the KPFPP for administrative convenience on behalf of ONL as well as several other entities.

[8] Both parties confirmed they did not intend KPFPP to be the employer.

[9] Given the evidence, Penelope Jones was employed by Ohaeawai Nursery Limited.

Was Ms Jones unjustifiably disadvantaged?

Being reprimanded for giving out IR330 forms

[10] The second issue for me to determine is the unjustifiable disadvantages. First, was Penelope Jones unjustifiably disadvantaged by the reprimand for giving out the IR330 forms?

[11] Ms Jones must show on the balance of probabilities that a term of her employment was affected to her disadvantage by the employer's action.⁶ Although no specific term of employment was cited as being affected to her disadvantage, Ms Jones appears to allege that she was bullied by the respondent and/or its representative

³ *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223 at [40].

⁴ *Hutton v Provencocadmus Ltd (in Rec)* [2012] ERNZ 566 at [82] and [86].

⁵ See above at [96].

⁶ Section 103(1)(b) of the Employment Relations Act 2000 (Act).

around the IR330 forms. The IR330 form was a signed declaration of a worker's tax code.

[12] Bullying is about behaviours that are repeated and carried out with a desire to exert dominance and an intention to cause fear and distress.⁷

[13] The evidence was that IR330 forms were to be used for permanent employees only. There were only two permanent employees working in or around the ONL business - Ms Jones and another co-worker employed by a different company. Casual agricultural workers were usually taxed using the code CAE.

[14] Ms Jones, for reasons unknown, chose to give IR330 forms to various casual employees. She was not instructed by the respondent or Graeme Milne who was its sole director, to do so. Several of the casual employees filled the forms in and sought to change their tax codes from CAE to M. This created problems. One casual worker ended up somewhat worse off because the change in code increased his taxes by a substantial amount and created personal issues. Others tax codes were simply wrong. Mr Milne was not impressed by Ms Jones' actions and criticised her for doing so.

[15] Employers are able to comment or critique an employee's performance. That is not bullying. An employee undertaking action which he or she has not been instructed by her employer to do, must expect to some extent to be criticised for that especially in circumstances where it results in problems for other employees.

[16] It cannot be a disadvantage for the respondent to negatively comment about Ms Jones' actions in these circumstances. She was not instructed to do this and as a result one particular casual worker ended up substantially worse off. In my view there was not an unjustified disadvantage.

Racial harassment or general harassment in the workplace

[17] The second unjustified disadvantage arises from an alleged comment about her being a '\$5 Pom'. Ms Jones must show on the balance of probabilities that a term of her employment was affected to her disadvantage.

⁷ *Isaac v Chief Executive of the Ministry of Social Development* ERA Auckland AA200/08 at [54]-[55].

[18] Workers are entitled to have a safe workplace free of harassment or bullying behaviour.

[19] Racial harassment occurs where “employer uses language ... that directly or indirectly ... expresses hostility against, or brings into contempt or ridicule, the employee on the ground of the race ...” and the employee finds this offensive or hurtful and “has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance, or job satisfaction.”⁸

[20] I have considered the transcript of the conversation on 21 August 2014 when this alleged slur was made. It is clear to me that Mr Milne made the comment but specifically disavowed that it was about Ms Jones. I accept Ms Jones’ concerns as to why it was being made at all but her evidence was of confusion as opposed to hurt or detriment to her employment. I have some doubt about the extent of her concern about the comment. It is made in the context of a covert lengthy recording. If Mr Milne had been made aware that his comments were being recorded, I doubt that he would have said anything along these lines. Even then the comment was not repeated nor directed at her or her employment. No issue was made about it at the time. The comment has been plucked out of several wide-ranging conversations that same day.

[21] Although the comment is inappropriate, it does not meet the tests required for racial harassment or general harassment.

Was Ms Jones unjustifiably dismissed?

[22] The next issue is whether Ms Jones was unjustifiably dismissed. Where, as is the case here, a dismissal is not accepted, the onus is upon Ms Jones to prove on the balance of probabilities that she was dismissed. Once dismissal has been proved, the onus then reverts to ONL to prove that the dismissal occurred in accordance with the tests for justification set out in the Employment Relations Act 2000 (the Act).

[23] In order to determine whether a dismissal has occurred requires consideration of the events leading up to 25 August 2014.

[24] Penelope Jones was employed as a Nursery Coordinator by ONL which was the largest supplier of kiwifruit rootstock to various growers within New Zealand and

⁸ Section 109 of the Act.

presumably overseas. Graham Milne was the sole director of ONL and Ms Jones' direct report manager.

[25] The parties signed an employment agreement. It provided either party could terminate the employment agreement by giving the other seven days' notice in writing.⁹

[26] On 11 July 2014, Ms Jones advised Mr Milne by email that she had some problems with her visa flagging that after 2 August 2014, she may be unable to work for ONL. She had allowed her Police certification to lapse and could not obtain further certification in time to process the renewal of her VISA.

[27] There was a series of conversations and emails between the parties about work and Ms Jones' visa status. Mr Milne was supportive of her, filling in employer support documentation to obtain the extension to her existing visa to allow her to continue working for ONL.

[28] However, by about 29 July 2014, Immigration had sent a letter to Ms Jones advising that her extension of visa had not been granted at that stage. She was granted a temporary visa once her existing visa expired on 2 August 2014. That temporary visa stated that she could not work. From that date forward, Ms Jones was on notice that she could not continue working for ONL after 2 August 2014.

[29] Matters took a turn for the worse for ONL. On 1 August 2014, ONL received a positive test result for *pseudomonas syringae pv actinidiae* (PSA). PSA is a bacterial disease affecting kiwifruit that was previously undetected in Northland. As a consequence of that test result, all work in ONL was to cease and deliveries to buyers of ONL kiwifruit rootstock were stopped while buyers were being informed about the PSA test result.

[30] That same day, all staff of ONL were terminated. It is disputed by Ms Jones that that included her. The future of ONL was uncertain. Eventually it was closed and the business moved to a PSA free orchard in Mangawhai.

[31] The following day, on 2 August 2014, Ms Jones' work VISA expired. From that date onwards, she was not allowed to work until her renewed work VISA was approved. Her temporary visa allowed her to remain in New Zealand.

⁹ Clause 12.2 Employment Agreement between P Jones and ONL.

[32] The parties continued the exchange of information primarily resolving the issues about ONL's existing sales. However, on 8 August 2014 Ms Jones sent an email stating she was not happy working while she did not have a valid VISA and "will not work again." Mr Milne replied to the effect if and when her work VISA is approved, she needed to consider if she wished to continue with them.¹⁰

[33] It is accepted that Ms Jones continued to exchange information with Mr Milne about various aspects of the ONL's business. Ms Jones says that this work was done on a voluntary basis. This is consistent with Mr Milne's email dated 15 August 2014 where he states his assumption she was not working.¹¹

[34] By 21 August 2014, Ms Jones appears to have become somewhat anxious about her job with ONL. This is because she starts covertly recording discussions between herself and Mr Milne. Her only motivation must have been to build a case about her matters that are before me today. Otherwise I can see no point as to why she would turn up to work and covertly record various conversations. Despite this those recordings are accepted as accurate by the parties and have been invaluable evidence.

[35] For example the transcript of the recording from 21 August 2014 includes a statement by Mr Milne that he could not employ her or pay her for work done.¹² It also includes a conversation between Ms Jones and a staff member that she had to look for another job.¹³ Even after this, Ms Jones continued working on 21 and 22 August.

[36] She received notification her work VISA had been renewed in the evening of 21 August 2014.

[37] On 23 August 2014 at 8am there is another covertly recorded telephone conversation between Mr Milne and Ms Jones. It is again helpful to the respondent as opposed to any hindrance. It records Mr Milne's clear and unequivocal statement that Ms Jones' employment had ceased when her VISA expired.¹⁴

¹⁰ Applicants Brief of Evidence (ABE) at p57 emails between P Jones and G Milne 8 August 2014.

¹¹ ABE at p61.

¹² ABE at p81.

¹³ ABE at p105.

¹⁴ ABE at p115.

[38] Despite being told this, Ms Jones continued to attend work. In fact she worked that particular day from 8am until 3.30pm. She then returned again on 24 August 2014 and worked from 7.50am to 3pm. This indicates Ms Jones' single mindedness to attend work irrespective of what the respondents say. There is merit to the respondents submission she was motivated to obtain her work VISA as opposed to maintain employment.

[39] It is not until 25 August 2014 when Mr Milne sends her a letter confirming her dismissal together with the reasons that Ms Jones stops attending work.

[40] Ms Jones submits to me that the transcripts are contradictory. On the one hand she is being told there is no job but she is still receiving not direct instructions but what she calls implied instructions to continue working. Mr Milne denies there were any implied instructions to keep working.

[41] I must agree with Mr Milne. Having considered the transcripts and having spent some time examining both parties about what is in them I cannot see any direct instruction to Ms Jones to return to work. In my view, Ms Jones' employment was terminated by agreement or by her emailed resignation on or about 2 August 2014.

[42] As a result the applications for personal grievances are dismissed.

What wage arrears are owed for holiday pay and wages?

[43] Finally there is an issue about wage arrears.

[44] Ms Jones tells me there are outstanding holiday pay and wages due for the week of 21-25 August 2014. Given my finding regarding her dismissal on 2 August 2014, there are no wages owed for that week.

[45] Ms Jones accepts as noted in the final payslip that she received holiday pay of \$1,030.28 on or about 28 August 2014. There would have been a shortfall of \$56.95. However, there was uncontested evidence that Ms Jones received payment for two days' sick leave in advance during the year. That would have to be deducted from her final pay. It is inferred that the amount would be greater than the difference of \$56.95.

[46] Accordingly the application for payment of wage arrears is dismissed.

Costs

[47] Costs are reserved. Costs would normally follow the event. The respondent, ONL, was successful in defending the application. Mr Milne advises the respondent KPPF intends seeking to recover the legal costs it incurred but seeks more time to provide further information. Ms Jones should be given some time to provide any reply.

[48] KPPF shall have to file a copy of its legal invoices from its lawyer showing the amounts that were charged. It should separate out the amounts charged for mediation from those charged in preparation for hearing. Ms Jones may wish to provide me with evidence about her financial situation.

[49] The respondents are to have their submissions as to costs filed by **21 June 2016 at 3pm**. Any reply must be filed by Ms Jones by **28 June 2016 at 3pm**.

T G Tetitaha
Member of the Employment Relations Authority