

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 172
3030830

BETWEEN REBECCA ADAMS
Applicant

A N D PAPER PLUS NEW ZEALAND
LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Jane Taylor and Jeff Goldstein, Co-Counsel, for applicant
Mary-Jane Thomas, Counsel, for respondent

Investigation Meeting: 8 and 9 November 2018 at Christchurch

Submissions Received: 9 November 2018 from Applicant
9 November 2018 from Respondent

Date of Determination: 26 November 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms Adams was not unjustifiably dismissed by the respondent.**
- B. It is not appropriate to impose a penalty upon the respondent.**
- C. Costs are reserved.**

Employment Relationship Problem

[1] Ms Adams claims that she was unjustifiably dismissed by the respondent with effect from 27 October 2017. Ms Adams also seeks the imposition of a penalty upon the respondent for not giving her a copy of the intended employment agreement.



[2] The respondent denies these claims, asserting that Ms Adams was employed by it on a casual basis for one day only on 26 October 2017 in order to carry out stocktaking in preparation for the purchase of the Barrington Mall Paper Plus store business by the respondent from the franchisee, Ms Adams' former employer.

Brief account of the events

[3] Ms Adams was employed to work 30.5 hours per week at the Paper Plus store in Barrington Mall, Christchurch, pursuant to an individual employment agreement between her and E W Adams Limited (E W Adams). E W Adams is now in liquidation but, at the material time, owned and operated the Paper Plus franchise in Barrington Mall. The sole director of E W Adams was Mark Adams, Ms Adams' brother.

[4] It would assist in understanding the background to the personal grievance to set out a chronology of the material events, as I find they occurred. There is not complete agreement between the parties as to when some of these events occurred, but the key material events are not in contention.

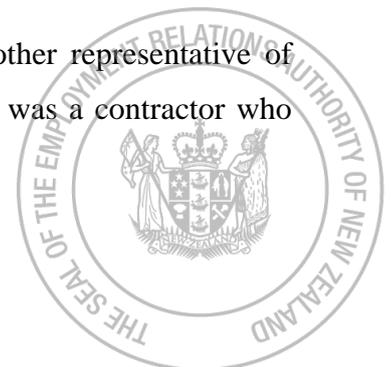
Chronology

[5] On **2 October 2017**, the respondent company (Paper Plus NZ) called in the debt which E W Adams owed to it, leading to the two companies entering into negotiations for the sale and purchase of the business.

[6] On around **16 October 2017**, Paper Plus NZ placed its representative, Genea Instone, into the Barrington store as an observer.

[7] On **Friday 20 October 2017** Mr Adams emailed all the staff to advise them that Paper Plus NZ would be taking over the running of the business from Wednesday 25 October and that Ms Instone would "... take over and will chat to you regarding a position for you going forward". The settlement date was expected to take place on or around that date, but was delayed.

[8] On or around **Tuesday 24 October 2017** Victoria Gunn, another representative of Paper Plus NZ arrived at the Barrington store. At the time Ms Gunn was a contractor who



assisted Paper Plus NZ from time to time with business sales and receiverships. Ms Gunn's role included managing the stock taking exercise that was planned to take place the following day, and she made arrangements for students to assist in the exercise.

[9] On **Wednesday 25 October 2017**, the stocktake did not occur as planned, as the settlement had still not occurred, but Ms Adams carried out some "pre-counting". Mr Adams treats this day as the last day of employment of his staff by E W Adams, and this is the last day that E W Adams retained the takings from the store's trading.

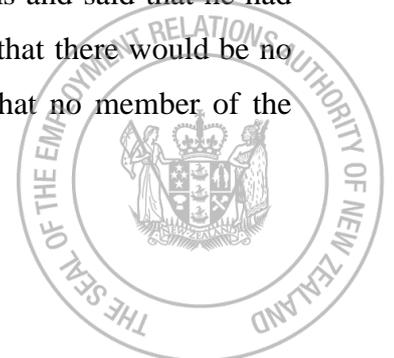
[10] **Thursday 26 October 2017**, the store is closed for the day and the stocktake takes place. The students are expressly engaged as casual employees for the day. Mr Adams attends to speak to his staff, and tells them that he will pay them up to 6pm the preceding day. Ms Adams works for two hours assisting in the stock take and leaves at 11.00, as pre-arranged, for family reasons. Other former E W Adams staff continue assisting with the stock take.

[11] At 16.37, Mr Andy Kean, the General Manager of Operations of Paper Plus NZ, sent an email to the Paper Plus Group and Mr Adams which stated that an agreement had been reached to purchase the Barrington store with immediate effect. Mr Adams forwarded that email to his staff at 10.24 the next day.

[12] After the stock take had finished on the afternoon of 26 October, Ms Gunn gave standard Paper Plus employment agreements to the former E W Adams staff who were rostered to work the next day, Friday 27 October, and they signed them. The commencement date in these agreements was 27 October 2017. Ms Adams was no longer in the store, so did not receive one.

[13] After the staff had left the premises that evening, the locks were changed, and a blank trespass notice prepared in case of difficulties with the Adams family employees.

[14] On the morning of **Friday 27 October 2017**, before the store opened, the Chief Executive Officer of Paper Plus NZ, Sam Shosanya, phoned Mr Adams and said that he had been instructed that Ms Adams was not to go into work that day, and that there would be no work for her, as the Board of Directors of Paper Plus had decided that no member of the



Adams family would be employed in the Barrington store. Mr Adams immediately phoned Ms Adams to pass this message on to her.

[15] This was the first day of trading of the store under Paper Plus NZ. Weekend staff were asked to attend that day so they could be given Paper Plus NZ agreements to sign prior to their starting work that weekend.

[16] **Thursday 7 December 2017**, Ms Adams emailed Ms Gunn asking for payment for having worked on 26 October. She receives this pay, calculated by reference to her hourly rate when employed by E W Adams, on or around the following day.

[17] Ms Adams raised her personal grievance with Paper Plus NZ by way of a letter from her adviser dated **15 December 2017**.

The parties' positions

[18] Ms Adams says that she was employed by Paper Plus NZ from Thursday 26 October 2017, and understood that she was to have been employed on a permanent basis until she was dismissed the following morning.

[19] The respondent says that Ms Adams was only employed for two hours on a casual basis on Thursday 26 October only for the purposes of assisting in the stock take, and that her employment ended when she left the store at 11 am. She was not required again as the stocktake had ended by the end of that day.

[20] Ms Adams says she has several reasons for believing herself to have been permanently employed by Paper Plus NZ from 26 October 2017:

- (a) she had not been told she would not be employed;
- (b) she had worked for Paper Plus before, and had had no problems;
- (c) the roster that had been previously prepared for the week in question showed her as working as normal on Friday 27 October, and this had not been changed by Ms Instone or Ms Gunn;

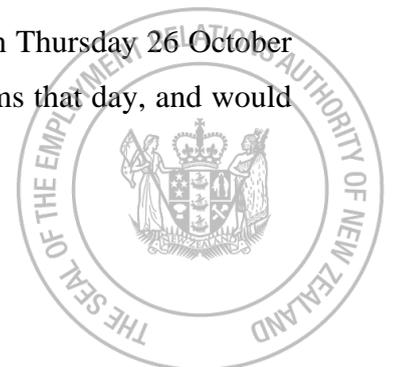


- (d) Ms Instone and Ms Gunn had given Ms Adams permission to leave the store early on 26 October;
- (e) Ms Gunn had directed her in respect of the stocktaking activities, both before and during 26 October;
- (f) Ms Adams says that, when she left the store at 11am on 26 October she asked Ms Gunn whether she would be starting at 9.00am the following day, and Ms Gunn said “Yes”.
- (g) Ms Adams says that she also asked Ms Gunn whether she had keys, and that she could come in early if not, and Ms Gunn had said she did not have keys and thanked her.
- (h) Ms Adams says that Ms Gunn also told her that it would be a normal day the following day.
- (i) Unlike the students, she was not told she was being treated as a casual employee on 26 October.

[21] I understood Ms Adams’ evidence to essentially be that she had assumed that she would be employed going forward because of the above factors. She conceded that she had not been told expressly, by either Mr Adams or Paper Plus NZ representatives, that she would be employed permanently by Paper Plus NZ.

[22] Ms Gunn says that she had been involved in several purchases of businesses for Paper Plus prior to the Barrington purchase. Ms Gunn says in evidence that, when she met Mr Adams and his wife on Wednesday 25 October, she was already aware that none of the Adams’ management team would be employed by Paper Plus NZ once the business had been acquired by it, and that this was common practice in such circumstances. She says that she told Mr Adams that she could not make a decision about Ms Adams being the store manager going forward, and that she was “extremely cautious” about discussing anyone’s offer of employment as she was aware of the situation regarding the management team.

[23] Ms Gunn says that, when she managed the stocktake activity on Thursday 26 October 2018, she had believed that the staff were still employed by E W Adams that day, and would



be paid by E W Adams for their participation. She says she only found out afterwards that Paper Plus NZ was going to pay the staff for working that day. She said that the usual practice was for the vendor to pay their staff for taking part in a stocktake, and for Paper Plus to pay any casual staff engaged specifically for the stocktake.

[24] Ms Gunn says that, when Ms Adams approached her around 11.00am on Thursday 26 October to tell her that she was leaving to go to her son's sports event, Ms Adams asked her if she was to work the next day as normal and that Ms Gunn replied that the store would trade as normal and that "we would be in touch". Ms Gunn says that the intention was for the store to open the following day, Friday 27 October, but that she specifically did not refer to anyone's working hours. She also said that she did not have keys, but that Ms Instone did, but that she was aware that the locksmith was coming to change the locks in any event.

[25] Ms Gunn says that she did not have any conversation with Ms Adams that should have led her to believe that she would be employed by Paper Plus NZ, as Ms Gunn knew that that was not going to be happening.

[26] The Authority also heard evidence from Sam Shosanya, the Chief Executive Officer of Paper Plus NZ. He says that, although settlement was delayed because of the problem with the transfer of the lease, it was agreed that Paper Plus NZ would take over the running of the store on 26 October. Friday 27 October was the first day of trading of that store for Paper Plus NZ.

[27] Mr Shosanya says that the approach of Paper Plus NZ is always the same with respect to transferring and non-transferring employees; namely, that they typically take on all team members previously employed by the previous owner but would never take on family members. Mr Shosanya says that, on this occasion, he did not discuss with Mr Adams in advance about transferring any of the E W Adams employees because their conversations had been fragmented, and he would typically leave those discussions to the team on the ground, as they observe the people in question, and seek counsel from the owners as to who should be transferred and why.

[28] Mr Shosanya says that, although the sale and purchase agreement provided that the stocktake would be a joint enterprise, it was in fact Paper Plus NZ that managed the process.



He said that whilst the extra university students were hired on a casual basis, the current employees would still have been technically employed by E W Adams on 26 October, and Paper Plus NZ would have ensured that contracts were offered to those transferring employees who they wanted to employ after the stocktake was finished, and prior to the first day of trading.

[29] Mr Shosanya conceded that the former E W Adams staff had been paid by Paper Plus for their work on 26 October, but that this had been inadvertent, and that, in any event, it would have not been sensible to have not done so if E W Adams was not going to pay them given that Paper Plus wanted to employ them going forward (excluding Adams family members) and needed their goodwill.

[30] Mr Shosanya said that he decided to call Mr Adams on 27 October prior to Paper Plus NZ commencing trading to tell him that the Board of Directors had decided that no member of his family would be offered permanent employment going forward, and to tell Ms Adams himself. Mr Shosanya said that he felt this was the most appropriate way of dealing with a potentially awkward situation and that he was of the opinion that Ms Adams was still Mr Adams' employee, not Paper Plus's.

Issues

[31] There are two issues to consider and determine, as follows:

- (a) What was the nature of the working relationship between Ms Adams and Paper Plus NZ?
- (b) If Ms Adams was an employee of Paper Plus NZ on Friday 27 October 2017, was she unjustifiably dismissed?

What was the nature of the working relationship between Ms Adams and Paper Plus NZ?

[32] Section 6 of the Employment Relations Act 2000 (the Act) sets out the meaning of the term "employee" in the Act. Relevant parts of this section provide as follows:

6 Meaning of employee

- (1) In this Act, unless the context otherwise requires, **employee**—



(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service;

...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[33] The question of the distinction between casual employment and ongoing employment was examined in the Employment Court in the case of *Jinkinson v Oceana Gold (NZ) Limited*¹ in which His Honour Judge Couch said the following:²

[40] Against this background, it is also important to understand what is meant by the terms “casual” and “ongoing” or “permanent”. Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.

[41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

[34] Ms Taylor submitted for Ms Adams that, as this case did not involve a series of engagements between Ms Adams and the respondent, the facts of the case do not resemble a casual relationship of the kind prescribed in *Jinkinson*. The relationship was clearly

¹ [2009] ERNZ 225

² Paragraphs [40 and [41]



permanent she says. Certainly, *Jinkinson* refers to the test of mutual obligations between engagements, and Ms Adams was only engaged for one day by Paper Plus NZ. However, it is clearly possible for an individual to be engaged as an employee on a casual basis for a one off project. As Ms Thomas pointed out, all of the students engaged by Paper Plus for the stock take were casual employees, engaged for one day only.

[35] Ms Taylor submitted that a binding agreement between the parties to employ Ms Adams on a permanent basis was formed on Wednesday 25 October 2017 when the respondent required her to attend work the following day. Ms Taylor submits that Ms Adams accepted that offer by turning up to work on Thursday 26 October to work on the stock take. Because there was no limitation on the nature of the employment being offered, and because it was not specifically characterised as casual employment, the employment being offered was permanent.

[36] Ms Taylor then points to the fact that Ms Gunn did not tell Ms Adams she was employed as a casual the following day, even though she did tell the students that they were. This reinforces the argument that Ms Adams was employed on a permanent basis says Ms Taylor.

[37] The formation of a contract between parties requires there to be offer and acceptance, consideration and an intention to create legal relations. With respect to offer and acceptance, one requirement of an offer is that there is certainty, so that there is a sufficiently definite statement of the terms by which the parties are to be bound.

[38] Ms Adams' statement of evidence does not state what she was told by the respondent on Wednesday 25 October about coming in to work on Thursday 26 October. She says that she told Ms Gunn about her agreement to leave early on the Thursday. She also says she and Ms Gunn discussed the plan for the stocktake. She does not say in her statement of evidence that she was required by the respondent to come into work on Thursday 26 October.

[39] Ms Adams did not state during her oral evidence either that she had been required by the respondent to come into work on Thursday 26 October. In my view she came to work on 26 October 2017 because she worked a weekly roster prepared by E W Adams with set hours



and she was rostered on to work that Thursday as usual. The fact that she only worked two hours was because of her personal appointment that day.

[40] Ms Taylor says that the roster had been adopted by the respondent. However, Ms Gunn's evidence does not reflect that. She said in evidence that she had not seen the roster. There was no objective evidence that the roster had been adopted by the respondent. Whilst E W Adams employees worked that day, probably in accordance with the roster, that does not imply an express adoption by the respondent of the roster.

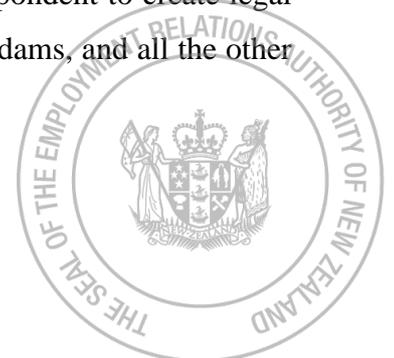
[41] In summary, I do not accept the submission that Ms Adams was required by the respondent to come to work on Thursday 26 October. It follows that there was no offer of employment from the respondent in the way described by Ms Taylor.

[42] In addition, even if Ms Adams had been required to work on 26 October by the respondent, I do not accept that the terms of the offer would have been certain enough to have enabled the parties to have known what terms of employment were being offered. That is to say, there were no express or implied terms about what Ms Adams' role would be, what pay she would receive, what hours she would be required to work and, crucially for this matter, whether the employment would be permanent or casual.

[43] Whilst Ms Adams would no doubt say that she expected the employment to have been on exactly the same terms as she had been on when employed by E W Adams, that is an assumption only on her part. There was no objective evidence available to Ms Adams at all on 25 October, when the offer is supposed to have been made, as to how Paper Plus NZ intended to run the store, how many staff it wanted and what the roles of the staff would be.

[44] I also reject the notion that, in the absence of a specific statement that the employment would be casual, it must have been permanent. I know of no principle of law to that effect. In the absence of specificity (express or implied) in respect of the type of employment being offered, there can be no binding agreement, for want of certainty.

[45] Finally, I find that there was no intention on the part of the respondent to create legal relations with Ms Adams. Ms Gunn stated that she believed that Ms Adams, and all the other



E W Adams staff, were still employed by that company on 26 October and that she knew that Ms Adams would not be employed by the respondent after the stocktake.

[46] Mr Shosanya said that he had left it to the Paper Plus NZ staff on the ground to decide which employees to employ. Mr Kean's evidence was that he was not closely involved in the transaction. On this basis, it is inconceivable that the respondent, or any of its agents intended on 25 October 2017 to offer Ms Adams permanent employment. The fact that the locks were changed, and a trespass notice prepared expressly to keep Ms Adams and other family members out of the store on Friday 27 October is clear evidence that there was no intention to employ Ms Adams.

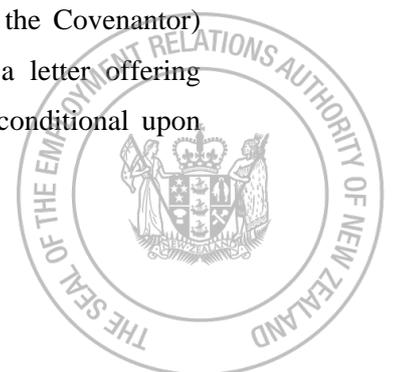
[47] Having decided against the submissions made on behalf of Ms Adams about offer and acceptance having occurred, I will go on to consider whether there are any other arguments that will assist Ms Adams.

[48] Ms Taylor submits that the terms of the sale and purchase agreement between E W Adams and Paper Plus NZ are irrelevant as Ms Adams was not a party to them. However, with respect, they are relevant in casting light on what the likely intentions of the respondent were. As is standard in such agreements, the sale and purchase agreement dealt expressly with the issue of employees. First, I note that the sale and purchase agreement required E W Adams Limited to permit Paper Plus NZ to appoint someone between the date of the agreement and the settlement date to supervise the operation of the business in store. That would explain the presence of Ms Instone and Ms Gunn in the store prior to the settlement date.

[49] The clause addressing employees in the agreement provided as follows, excluding irrelevant sub-clauses, where 'the Purchaser' is Paper Plus NZ and 'the Vendor' is E W Adams:

28. **Employees**

28.1 The Purchaser shall upon this agreement becoming unconditional issue to such of the Employees (other than any of the Covenantor) whom the Purchaser elects at its sole discretion, a letter offering employment in the Business with effect from and conditional upon



Settlement. The offer of employment by the Purchaser under this clause 28.1 shall:

- (a) be made contemporaneously and in concert with the termination (conditional upon Settlement) of employment of that employee by notice by the Vendor (a form of which is to be approved by the Purchaser, such approval not to be unreasonably withheld);
- (b) be on such other terms as determined by the Purchaser; and
- (c) be conditional upon Settlement.

...

28.4 The Vendor will remain solely responsible for and will retain liability for:

- (a) all employment related liability of the Transferring Employees;
- (b) all employment related liability to any Non-Transferring Employee;
- (c) all loss, cost, claims, liabilities and expenses (“Costs”) of an employee related nature in respect of the Employees where any of such the Employees have made or do make a claim against the Vendor or the Purchaser and the circumstances giving rise to such Costs occur prior to the Settlement Date; and
- (d) any redundancy costs incurred in respect of any Non-Transferring Employee.

[50] The term “Transferring Employees” is defined in the agreement as:

those Employees who are offered, and who accept, an offer of employment with the Purchaser upon Settlement made in accordance with clause 28.1.

[51] A “Non-Transferring Employee” is defined as “Employees other than a Transferring Employee (if any)”. The term “Employees” is defined as:

All the individuals who are at the date of this Agreement employed by the Vendor being those people listed in Schedule 3, but in all cases excluding any individual whose employment with the Vendor terminates before an offer is to be made pursuant to clause 28.1.



[52] Whilst there did not appear to be any formal Schedule 3 attached to the sale and purchase agreement, there was a list of names who I understand were employees of E W Adams prior to the sale of the business. The Covenantor referred to in clause 28.1 is Mr Adams.

[53] It appears that clause 28.1 was not strictly followed as E W Adams had terminated the employment of its employees on 25 October and Paper Plus NZ did not offer them employment until 27 October. That is to say, the offers of employment were not made “contemporaneously and in concert with the termination ...of employment of that employee by notice by the Vendor”.

[54] I conclude, as is conceded by the respondent in any event, that Ms Adams was employed by Paper Plus NZ on 26 October 2017, against the usual practice, and contrary to the terms of clause 28.1. I reach that conclusion because Ms Adams was paid, eventually, by Paper Plus for that work and because she worked for the benefit of Paper Plus on that day. Was that employment permanent employment?

[55] I accept the evidence of Ms Gunn that she knew that the Adams family members were unlikely to be employed by Paper Plus after it had acquired the business. She had a lot of experience of such purchases and knew that Paper Plus NZ did not employ the members of the family of previous franchisees. I also, therefore, accept her evidence that she was very cautious about saying anything that could have indicated that Ms Adams was to be employed by Paper Plus NZ going forward.

[56] I also accept Ms Gunn’s evidence that she did not see the roster on the wall that showed Ms Adams as working on 27 October. In any event, that was prepared by E W Adams prior to the settlement, and had become irrelevant. I also accept Ms Gunn’s evidence that she did not give permission to Ms Adams to leave at 11 am on 26 October, as that had already been arranged previously.

[57] Although the terms of clause 28 of the sale and purchase agreement had not been followed exactly, this appears to have been because Mr Adams chose to treat 25 October as the last day of employment of the E W Adams staff. He no doubt had good reasons for doing



so, but this left the E W Adams staff in limbo until settlement. It is to the credit of Paper Plus NZ that they stepped in and chose to pay those staff for their work on 26 October.

[58] All of the evidence suggests that Paper Plus NZ never intended to employ Ms Adams on any basis at all, let alone on a permanent basis, given that she is a member of the vendor's family. Mr Shosanya said that Ms Adams was "inadvertently" employed on 26 October. Whilst that begs some questions from a strictly legal sense, there clearly was no intention to employ her on 26 October at the time, as the belief of Paper Plus NZ representatives was that she was still employed by E W Adams on that day.

[59] There was a specific task that needed to be completed before the takeover of the business, and that was the stocktake. Again, this is standard practice in the sale of retail establishments. A stocktake of an organisation such as the Barrington Paper Plus store would be time consuming and it would have been a situation of all hands being on deck. Ms Adams was therefore one of the people who was permitted to assist with the process. By dint of having done so, Paper Plus has since accepted that it is likely that it did employ her on that day.

[60] However, that engagement of Ms Adams on 26 October 2017 for that specific task does not signal that Paper Plus NZ had any intention to employ Ms Adams on a permanent basis. She was not offered employment in accordance with clause 28.1 of the sale and purchase agreement, and there was no intention that she would be. Paper Plus NZ was also under no obligation, either under the terms of the sale and purchase agreement, or under any enactment or principle of common law under which the Authority has jurisdiction, to offer Ms Adams employment. Offers of employment were made to the other E W Adams staff, in the form of draft employment agreements, but not to Ms Adams. Ms Adams received no offer of employment at all, either orally or in writing.

[61] Therefore, I am satisfied that the arrangement entered into between Paper Plus NZ and Ms Adams in respect of her work on 26 October 2017 was of a casual basis and that the intention was that she would be employed solely for the purposes of helping with a stocktake. That stocktake ended on the evening of Thursday 26 October and there was therefore no longer any need for Ms Adams' services.



[62] It must follow that the decision of Paper Plus NZ not to employ Ms Adams from Friday 27 October 2017 could not have been a dismissal as there was no ongoing employment beyond 11 am on 26 October 2017 between it and Ms Adams.

Conclusion

[63] Ms Adams was not unjustifiably dismissed by Paper Plus Limited.

Penalty claim

[64] Ms Adams also asserts that the respondent has breached s 63A(2) of the Act by not giving her a copy of the intended employment agreement. Ms Adams was employed for two hours as a casual employee and, technically, should have been given a copy of an employment agreement beforehand in respect of that employment.

[65] However, I am satisfied that the respondent believed that Ms Adams was still employed by E W Adams on 26 October, and that she was assisting with the stock take in such a capacity. Therefore, there was no wilful breach of the requirements of the Act, and it would not be appropriate to penalise the respondent for such a failing.

Costs

[66] Costs are reserved. The parties are to try to agree how costs are to be dealt with. However, if no agreement is reached within 14 days of the date of this determination, then Ms Thomas may serve and lodge a memorandum of counsel seeking a contribution towards the respondent's costs which sets out what that contribution is, and the basis of it. Ms Taylor will then have a further 14 days within which to serve and lodge a memorandum in reply. The Authority will then determine the matter of costs on the papers.



David Appleton
Member of the Employment Relations Authority

