

CITATION: *J D Thompson Personnel Pty Ltd v Alex Julius Fishing Media Pty Ltd* [2005] NTMC 060

PARTIES: J.D. THOMPSON PERSONNEL PTY LTD

v

ALEX JULIUS FISHING MEDIA PTY LTD

TITLE OF COURT: Local Court

JURISDICTION: Civil

FILE NO(s): 20428649

DELIVERED ON: 14.9.05 (by posting)

DELIVERED AT: Darwin

HEARING DATE(s): 28 July 2005

JUDGMENT OF: D Trigg SM

CATCHWORDS:

Contract-employment agency
Breach-s.52 *Trade Practices Act*

REPRESENTATION:

Counsel:

Plaintiff: Self
Defendant: Mr Sylvester

Solicitors:

Plaintiff: Self
Defendant: Self

Judgment category classification: B
Judgment ID number: [2005] NTMC 060
Number of paragraphs: 95

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20428649

BETWEEN:

**J.D. THOMPSON PERSONNEL PTY
LTD**

Plaintiff

AND:

**ALEX JULIUS FISHING MEDIA PTY
LTD**

Defendant

REASONS FOR JUDGMENT

(Delivered 14 September 2005- by posting to parties)

MR TRIGG SM:

1. This claim was commenced under the *Small Claims Act* on the 14th day of December 2004 when the plaintiff filed a Statement of Claim in the following terms:

“The plaintiff claims that you owe the plaintiff the sum of \$3520 on the following grounds:

- Non-payment of provision for recruitment of permanent staff in respect to the period of 6th September 2004.
- Fee structure was agreed by the defendant for the recruitment of permanent staff. Attached is the defendant signed Terms and Conditions of Business.
- Defendant offered the candidate a position with Alex Julius Fishing Media Pty Ltd.
- Candidate accepted offered made by Alex Julius Fishing Media Pty Ltd, payment is now being held for services rendered.”

2. On the 12th day of January 2005 the defendant filed a Defence and a Counterclaim in the following terms:

“DEFENCE

1. The breach of express and implied terms of the contract and in breach of a duty of care owed to use all and every reasonable endeavour to ensure the suitability of Katherine Brown for the position required by the defendant to be filled, before recommending Katherine Brown for employment, the plaintiff failed to test her for competency for the position and failed to check her references and carry out probity checks.
2. Katherine Brown was manifestly incompetent for the position. She lacked the necessary skill levels for the task and had an extensive and serious history of criminal dishonesty in the Northern Territory.
3. The defendant claims that the plaintiff’s breach disentitles it to payment for the services it failed to provide.

COUNTERCLAIM

4. In the course of her employment between 6 September 2004 and 10 November 2004 Brown performed her work so badly that another staff member was required to spend a total of 55 hours at a gross hourly rate of \$25.25 cents per hour (total \$2398.75) rectifying her mistakes and other staff put in time additional to their normal duties totalling 42 hours to a gross value of \$1,200 to undertake duties Brown had proved otherwise incapable of performing.
5. Further or alternatively, the plaintiff, by its servant or agent, Carla Mendoza, acting in trade and commerce, represented to the defendant’s managing director, Mr Julius, orally represented to him that Jobwire could provide a superior recruitment service in which they had job seekers available who were suitable for the defendant’s advertised position of Receptionist/Administrator. In agreeing to enter into a contract with Jobwire, the defendant relied on the representation referred to. The representations were false for the reasons in 4 above.

6. The plaintiff claims a sum of \$3,598.75 as damages for breach of contract, alternatively damages for breach of s.52 of *The Trade Practices Act*.”

3. Section 52 of the Trade Practices Act states:

“(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).”

4. The hearing proceeded before me on the 28th of July 2005. At the conclusion of the hearing I reserved my decision and advised that I would publish my reasons by posting the decision to both parties, I now do this.

5. A certificate of registration of a company was tendered in the plaintiff’s case and became ExP1. This exhibit made it clear that the plaintiff was a registered company under the Corporations Law of New South Wales, it was a company limited by its shares, it was a proprietary company, and it’s registration commenced on the 6th day of April 2000. The plaintiff company continues to trade and is a recruitment agency which operates all around Australia.

6. At the hearing of the matter the plaintiff was represented by Jeffrey Thompson. A minute of meeting of directors on the 1st of June 2005 was tendered and became ExP2. That document indicated that Mr Thompson was the sole director of the plaintiff and, as such, he resolved that he was authorised to represent the company in this action in Court. Pursuant to rule 4.07(d)(i) of the *Small Claims Rules*, I granted leave to Mr Thompson to appear on behalf of the plaintiff.

7. The defendant was at all times represented by Mr Sylvester of Counsel.

8. The only oral evidence in the plaintiff’s case was given by Mr Thompson himself. It was clear from the evidence of Mr Thompson that he had no

personal involvement in any of the matters the subject of this dispute as he resides in Sydney.

9. At the time the events in dispute in this matter occurred, the plaintiff had been operating in the Northern Territory for less than a year. All dealings on behalf of the plaintiff were apparently conducted through Carla Mendoza (hereafter referred to as “Mendoza”). She did not give evidence before me.
10. Mr Thompson said in his evidence that Mendoza was originally from the Caribbean and that she had now returned there to live and was not coming back to Australia. Hence, given the amount of the claim involved, her non-attendance in Court was explicable. However, not only did I not hear from Mendoza, also no evidence was led as to her qualifications (if any), experience in the employment sector (if any) or generally. I know nothing of her apart from the fact that she was obviously very convincing to Julius.
11. However, the failure to call Mendoza had the inevitable consequence that any evidence given in the defendant’s case in relation to conversations or communication with Mendoza remained uncontradicted.
12. In the defendant’s case, evidence was given by Alex Julius (hereafter referred to as “Julius”) and Carolyn Forrest (hereafter referred to as “Forrest”).
13. The person the subject of the claim, being the person who was employed, Katherine Brown (hereafter referred to as “Brown”), also did not give evidence before me. No evidence was lead as to the current whereabouts of Brown, and therefore I have no idea whether she would have been reasonably available to either party if they had been desirous of calling her.
14. Thompson said in his evidence that “Jobwire” was a trading name of the plaintiffs. He went on to assert that it was a registered business name but no evidence in relation to this registration was tendered before the Court. It does not appear that the defendant takes any issue in this regard.

15. According to the evidence of Thompson, Brown was “on the books” of Jobwire. No explanation of this was provided in the evidence. I do not know how Brown came to be “on the books” of Jobwire or what this meant. There may well have been some form of agreement or contractual arrangement between Brown and the plaintiff but no evidence was led as to what this might have been.
16. Thompson said that the plaintiff reviewed Brown’s resume, interviewed her, checked with her referees and checked her ability on keyboard.
17. Brown’s test results were tendered in cross-examination of Thompson and became ExD1. It does not appear that ExD1 was made available to the defendant at any relevant time prior to proceedings commencing.
18. ExD1 disclosed that in relation to Microsoft Word 2000 she recorded an overall score of 22 of 30 correct, thereby a 73% success rate. In relation to Microsoft Excel 2000 of 30 questions, she had 10 correct, 10 incorrect and 10 she left blank. She therefore recorded an overall score of 10 out of 30 or 33%. This was a poor result but not one that was ever apparently disclosed to the defendant. There was no other testing apparently completed.
19. ExD2 discloses that on the 20th day of January 1993, Australian Company Number 057 840 392 changed its name to Alex Julius Fishing Media Pty Ltd, and the company was a proprietary company, limited by its shares.
20. Julius is the managing director and shareholder of the defendant company. He also has another company called Fishing Tropical Australia Pty Ltd. He operates numerous businesses through various companies and these included:
 - NAFA – which was a fishing annual.
 - NAFA’s Barra and Bass Digest which was published three times a year but was moving towards being published four times a year.

- Hot Spot Fishing Tours – which was a booking company, mainly for Arnhem Land lodge, but also for a New Guinea lodge, and a mother ship in the Kimberley for which they had exclusive use, and two ships in the Northern Territory that they used but not exclusively, plus other tours.
- Fishing North Australia – which was a Channel 9 television show for which the defendant was a co-producer and responsible for all financials.

21. The various operations of Julius had an annual turnover of about \$2.4m. It was therefore a busy organisation, and not a small operator. The businesses operated from a residential block at Howard Springs. On the block there was a fairly large office complex. A number of employees were employed for the various businesses and enterprises. Forrest was the main person who was responsible for the general office and financial matters but her work load was becoming excessive. As a result, Forrest was being tied down in administrative and financial work rather than devoting time to promotion of tours etc. As a consequence, Julius decided that he would recruit an office administrator/receptionist in order to take over these functions from Forrest, and free her up for other duties.
22. On the 14th day of August 2004 the defendant placed an advertisement in the Northern Territory News. This advertisement read in part:

“Office Administrator/Receptionist

An established fishing media, magazine publishing and fishing tour booking company has a vacancy for a full-time office administrator/receptionist.

The position requires a person with a pleasant manner and good communication skills, excellent organisational ability, preferably with knowledge of MYOB, and a high level of initiative.

Applications should be received by post, fax or e-mail by COB Wednesday, 18th August 2004.

More details at www.hotspot.com.au.”

23. As a result of that advertisement the defendant received a number of applications from interested persons. In addition, Julius received a call from Mendoza who had seen the advertisement. Mendoza informed Julius that she had seen the advertisement, that she was from Jobwire, that she was the manager of Jobwire, and she thought she could fill the position for him. Julius advised her that he would see who applied and how they went with their interviews.
24. Julius then proceeded to assess applicants and interview those who he short-listed. There was one applicant who he was contemplating putting on on a trial basis when he received a further phone call from Mendoza. In this conversation Julius advised Mendoza that he wasn't completely happy with the situation. Mendoza informed him that she had two people on her books who were immediately available. As a result of this conversation, an appointment was made for Julius to meet with Mendoza.
25. Mendoza attended upon the defendant's premises with another lady. This other lady also did not give evidence in the plaintiff's case, and no explanation for this was given. If this witness was reasonably available I would have expected the plaintiff to have called her, if her evidence may have assisted the plaintiff's case. The meeting took over half an hour. At the meeting Julius showed Mendoza the various magazines that they published, he showed her their brochures to illustrate the sort of things that they did, he showed her the web sites (there were four web sites), and showed Mendoza the duty statement for the job.
26. This duty statement became ExD4 and was in the following terms:

“

Duty statement

Office Administrator/Receptionist

SPECIFIC RESPONSIBILITIES:

GENERAL ADMINISTRATION

- Maintain effective office and financial administration systems and procedures including filing, purchasing, postage, freight, petty cash, payment of bills, invoicing, ordering, banking, payroll tax, insurance, tax and telecommunications systems
- Maintain MYOB company accounting system.
- Prepare and lodge quarterly Business Activity Statements in accordance with Australian Taxation Office requirements.
- Produce sales reports as required.
- Ensure that all systems and procedures established are cost-efficient.
- Establish and maintain effective liaison with new and existing clients and service providers.
- Perform reception duties in a courteous and efficient manner.
- Research, compile and analyse data and information as required.
- Liaise with the accountants as directed or with approval.
- Scrutinise/check all bills to be paid for accuracy.
- Maintain petty cash.

MERCHANDISE

- Handle all routine correspondence; maintain the timely dispatch of merchandise and magazines direct sales, mail orders and subscriptions and endeavour to increase sales as appropriate.
- Liaise with retail/wholesale outlets on a regular basis to ensure adequate stocks supplies at all time.
- Identify, recommend and, where appropriate, undertake marketing/promotional activities.
- Maintain customer databases.

OTHER DUTIES

- Driving duties, occasional travel both within NT and interstate

- All other duties as directed.”

27. Mendoza advised after all this that she was confident she had someone to fill the job. Mendoza showed Julius the plaintiffs “terms and conditions” and explained them to him, although these were not signed at this time.
28. Julius said that Mendoza was very convincing and told him what Jobwire would do. She told him that she already had people on her books, and she would interview candidates again, would screen them, would check referees, and would check the person against the position. Julius kept raising the issue of honesty with Mendoza and made it plain to her that confidentiality and honesty and trust were very important to any person to fill the position.
29. I find that Julius made it clear to Mendoza that any person Mendoza might put forward for the position had to fulfil the defendant’s requirements of confidentiality, honesty and trust. I find that Mendoza accepted this. However, despite this there is no evidence (and any such evidence could only have come from the plaintiff’s witnesses) that the plaintiff made any checks or enquiries as to Brown’s criminal history or honesty. Thompson said that in all the time that he had been involved in recruitment there had only been one occasion that he had been requested to do (and performed) a criminal history check.
30. In the course of the hearing Thompson raised the issue of whether the relevant Anti Discrimination legislation might make it inappropriate for an employer to seek to rely upon such information in any event. Section 19(1)(q) of the *Anti-Discrimination Act* (NT) states:

“Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:

- (q) irrelevant criminal record”.

31. “Irrelevant criminal record” is defined in section 4(1) of that Act to mean:

- “(a) a spent record within the meaning of the *Criminal Records (Spent Convictions) Act*; or
- (b) a record relating to arrest, interrogation or criminal proceedings where –
 - (i) no further action was taken in relation to the arrest, interrogation or charge of the person;
 - (ii) no charge has been laid;
 - (iii) the charge was dismissed;
 - (iv) the prosecution was withdrawn;
 - (v) the person was discharged, whether or not on conviction;
 - (vi) the person was found not guilty;
 - (vii) the person's finding of guilt was quashed or set aside;
 - (viii) the person was granted a pardon; or
 - (ix) the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises;”

32. Accordingly, I find that there was nothing to prevent the plaintiff from making a criminal history check in relation to Brown and providing the results to the defendant. The only difficulty that might have arisen would be if the defendant then discriminated against Brown in deciding whether to employ her based upon an “irrelevant criminal history” as defined. But this difficulty was one for the defendant. The only difficulty that the plaintiff could have faced was if it also (in some way) discriminated against Brown based upon an “irrelevant criminal history”. But that did not prevent the enquiry being made. Julius had made it clear that the honesty of any prospective employee was very important to the defendant. In those circumstances, I find, that the plaintiff should have conducted a criminal history check of Brown, or made it clear to the defendant that none had been done.

33. Further, I find that absent any proper criminal history check of Brown, and without direct personal knowledge of her, the plaintiff was in no position to make any comment about her honesty, her ability to maintain confidentiality or her trustworthiness.
34. Mendoza advised the defendant that of the two people she wanted him to see, she believed that Brown was the one most suited to the position. Mendoza later sent details in relation to Brown and the other candidate and Julius interviewed both of them.
35. The documents that were provided by the plaintiff to the defendant in relation to Brown became Exp4. Exp4 was headed “Introducing Katherine Brown”. Page two of the document was a candidate summary for Katherine Brown interviewed 16/08/04. This page stated as follows:

“Katherine comes across as a well balanced and skilled individual. After taking the last 3 years off to raise her family, Katherine is back in the job market. To assist her in securing “the right job” Katherine decided last year to commence a Bachelor of Education degree and upgrade her professional skills. She hopes to have her studies completed by the end of 2006.

Katherine’s work background is from very strong administrative support roles inclusive of Receptionist, Systems Clerk and Secretarial. Katherine enjoys working with people and taking a leadership role, and this combined with her MYOB knowledge, excellent communication skills and organizational abilities ensure she is a solid candidate for this role of office administrator/receptionist.

Katherine sees her strengths in having the ability to look outside of the square, she is a hard worker and enjoys being part of a group who can be open to ideas. She is willing to take on knowledge, can adapt to any situation and enjoys continued development of her professional skills. She has an outgoing personality and an easy nature which encourages a comfortable environment.

Katherine presentation is smart office, and she shows very clear communication skills during her interview at Jobwire. She is able to get along with people from diverse backgrounds and various levels of status due to her work experience whilst at the Department of

Defence – RAAF between 1986 – 1993, at the ALHM Workers Union and most recently whilst working at Coles in a customer service role.

The culture Katherine enjoys working with is one where people are willing to give as much as they can gain, as she herself tries to give 110% into everything she does. She also enjoys a sense of humour.

The management style to bring out the best in Katherine is one which is open minded, knows what he/she wants and is approachable. One who can have a lot of trust in her abilities and confidential nature.

Katherine is looking to get out of her next role a sense of achievement and job satisfaction. She wants to be a role model to her children and other people around her.

Katherine is not restricted to hours and is available to commence immediately on a temporary basis whilst seeking a permanent job role.

She believes she is the best candidate for this role due to her associated background, her willingness to give anything a go, and her passion to give back to the community.”(emphasis added)

36. Pages 3 to 7 inclusive of Exhibit P4 contained personal details (which did not include any date of birth), education and employment history. In the employment history it is noted that there was no employment after May 2001 listed, and this is explained on page 2 as “After taking the last three years off to raise her family”. The employment history also has gaps from July 1999 to June 2000, April 1997 to February 1998, January 1994 to May 1994. These gaps in employment were not explained to the defendant at all.
37. In addition, as part of ExP4, there were three reference forms. The first one was from Ernie Higgins of Coles Palmerston, a second one was from Sergeant Nagl from the Department of Defence, and a third one was from Ken White of Cullen Bay Services Apartment. That was the extent of the documents and information that was provided by the plaintiff to the defendant.
38. It is clear, and I find, that ExP4 was clearly intended by the plaintiffs to put Brown forward in a very positive light as being very suited to the position

that the defendant wished to fill. It was effectively an advertising or promotional document intended to sell Brown to the defendant as a suitable employee. In particular, the plaintiff made specific representations in ExP4 which (I find) were important to the defendant, namely:

- This combined with her MYOB knowledge
- She is a solid candidate for this role of office administrator/receptionist.
- She's willing to take on knowledge, can adapt to any situation and enjoys continued development of her professional skills.
- She herself tries to give 110% into everything she does.
- One who can have a lot of trust in her abilities and confidential nature.

39. Given what I have noted earlier in these reasons (in relation to no criminal history check being undertaken) I find that there was no proper basis for the plaintiff representing to the defendant that it could “have a lot of trust in her confidential nature”. I therefore find that this assertion was conduct that was likely to mislead the defendant, and therefore constituted a breach of s52 of the *Trade Practices Act*. I will refer to the other representations when I have dealt with Brown's performance in the employment of the defendant.

40. In the course of the pre-trial proceedings, orders for mutual discovery were made. Thompson advised that this was explained to him and he did provide discovery. However, it became apparent during the evidence of Thompson that he had other documents and records relating to Brown and this particular matter that he did not discover, and that he chose not to discover or make available during the actual hearing. I infer from this that none of these documents would have assisted or supported the plaintiff's case. I do not know therefore, what enquiries or other information the plaintiff may have had about Brown. For example, the only reference to MYOB in ExP4 comes on page 4 in relation to the employment from July 2000 to May 2001

which states: “Pay invoices (through Defence system and with access to MYOB)”. There is no other reference to it anywhere in Exhibit P4. It is also apparent from ExD1 that there was no testing in relation to MYOB. If that was the extent of the plaintiff’s knowledge (and there is no evidence from the plaintiff to suggest otherwise), then I find that the words “her MYOB knowledge” on page 2 of Exhibit P4 was likely to (and in fact did) mislead the defendant.

41. As it will become apparent later in these reasons, I find that Brown had very little and limited knowledge of MYOB and was not competent in relation to it.
42. Whilst in the advertisement (ExD3) knowledge of MYOB was only preferable, Julius explained that salary would be dependant upon this knowledge. If a person was competent in MYOB they would pay them more. If the person needed to be trained in MYOB then they would be paid less. Accordingly, based upon the false representation by the plaintiffs that Brown had “MYOB knowledge”, the defendant agreed to pay Brown \$32,000 per annum, which (I find) was in excess of what it would have paid had the truth been known. Accordingly, I find that as a result of this misleading statement the defendant suffered a financial loss directly.
43. Julius was in a hurry to make a decision as he was under pressure at work and had to go away in relation to his TV show. He had never used an employment agency before. He thought there were a lot of good things in ExP4 and it had everything to do with employing her. I find that Julius relied heavily upon the representations of Mendoza, and acting upon her recommendations that Brown was suitable for the position, the defendant employed Brown.
44. Some time prior to employing Brown Julius signed a document headed “Terms and conditions – Darwin, NT”. He signed this on 23 August 2004.

This document became ExP3 and contained a number of matters, some of which were as follows:

“Schedule of Fees and Guarantee for Permanent Recruitment.

A sliding scale permanent placement fee based on base salary (including any non-cash payments that fall under the FBT definitions and any Superannuation payments), plus all additional shift allowances, penalty rates, commissions and bonuses, including special benefits such as a company car (valued at \$15,000), and other allowances which are conditions of the job specifications that make up the total salary package is payable to Jobwire in the event of the successful selection and placement of any candidate referred to The Client by Jobwire...

Standard Permanent Fees

Up to \$32,000	10%
\$32,001 - \$55,000	12%
\$55,001 - \$75,000	15%

A minimum fee of \$2000 will apply to any permanent part-time position. Strictly full payment within 14 days from the date of invoice is required and payment is also necessary to ensure that your guarantee remains valid.

Guarantee Period for Permanent Recruitment

Jobwire guarantees the employment of the successful candidate from the date of commencement of the employment for 12 weeks. Should the candidate prove unsuitable and we are notified within the guarantee period in writing, we will undertake the assignment for one replacement candidate for that position without charging additional professional fees. This replacement guarantee is valid for a period of six (6) months from the date the candidate leaves your employment.

The Jobwire guarantee requires that:

Payment of the fee in full is made within 14 days from the date of invoice. Accounts not settled become payable in full, irrespective of the duration of stay of the candidate.

Notification has been given to Jobwire of the client's intention to call upon the guarantee prior to expiry of the guarantee period.

The cessation of employment during the jobwire guarantee period is not due to a restructuring of the job description, or redundancy or redeployment caused by the client.

The client agrees that jobwire will be provided with a reasonable time the opportunity to submit a mutually acceptable replacement candidate. The original fee will be adjusted if the replacement is at a higher or lower salary.

By accepting details of, or viewing, or engaging, a candidate introduced by jobwire in a position offered by the client, or in any other position, or for a casual/temporary assignment, the client agrees to be bound by these Terms of Business.

Testing and Reference Checking:

Testing and reference checking are carried out as far as it is practical to do so. Jobwire makes every effort to maintain high standards of integrity and reliability among our permanent, casual and temporary staff. We cannot, however, accept any responsibility for any claim, loss, expense, damage or delay arising from any failure to provide staff for all or part of the booking or from any lack of skill, negligence, dishonesty or misconduct of the staff provided.”

45. Brown signed the defendant's employment agreement on the 15th day of September 2004 having commenced the position on 6th of September 2004. She was to receive \$32,000 per annum.
46. Accordingly, as the defendant did employ Brown, there was a “successful selection and placement of a(ny) candidate referred to” the defendant by the plaintiff. In accordance with Exp3 the plaintiff was entitled to seek \$3,200 plus GST from the defendant.
47. Julius was present in the office for the first two or three weeks of Brown's employment and became quickly concerned about her capabilities. He said it was in the first week he became terrified as Brown was mixing up the various cheque accounts. As there were so many businesses in operation it was important that entries were recorded for the correct business and

cheques paid out of the correct business account and money receipted into the correct business and company accounts. Brown was not doing this.

48. Brown had been given access to the internet banking but after the first week Julius withdrew that from Brown as she was putting money in the wrong place all the time. As a consequence he had to change the various banking codes to ensure that Brown couldn't get access to the internet banking. Julius also asked Forrest to keep an eye on Brown.
49. Julius said that he would ask Brown a question and she would then go ferreting through a stack of invoices. He said that she was clueless. He received information from Forrest that Brown was making lots of errors on MYOB. Accordingly he reduced Brown's level and Forrest then had to actually supervise Brown, as also did another employee, Makepeace.
50. Brown's employment with the defendant was terminated on the 10th of November 2004.
51. On 6th of September 2004, Jobwire prepared and sent an invoice to the defendant for \$3200 (being 10% of Brown's annual salary) plus GST, making a total of \$3520. This invoice became ExP5. In ExP5 it noted that Brown commenced on 6th September 2004 and the guarantee period expired 6th December 2004. This appears to be an extension of the guarantee period which was included in ExP3. Thompson agreed and accepted, during his evidence, that the guarantee period had been extended.
52. It is clear, and I find, that Brown's employment was terminated during the guaranteed period.
53. Forrest gave evidence before me that she was the sales and marketing executive for the defendant. She was competent with MYOB and Brown was employed in order to free up her time so that she could devote more time to marketing and tours. When Brown was employed there they were seated a couple of metres apart in an open area.

54. Forrest said that it was clear to her that Brown was not competent on MYOB. I accept this evidence. She noticed small errors in amounts, and dates been incorrect. Accordingly, she had to spend time correcting and instructing Brown in relation to MYOB. I find that Brown could do basic inputting on MYOB but that was the extent of her capability.
55. Forrest also noted that Brown was not competent in compiling some of the reports that she had to do and accordingly, she had to step in and assist. Further, Forrest also had to check in order to ensure the accuracy of Brown's work.
56. The defendant companies rely heavily on e-mails. Forrest had cause to look at the e-mails one day and noted that some one hundred e-mails were coming through and they were all personal e-mails from eBay directed to Brown and they were not work related. It transpired that Brown had redirected her home e-mails to work and she was trading on eBay at work. Apparently Brown was heavily involved in dog and breeding clubs.
57. Forrest also noted errors in the accounts done by Brown. Some accounts had been entered twice on some occasions and there was one occasion where an invoice was paid twice by the defendant. Forrest kept notes of the errors that she encountered and these, in part, became ExD6. In addition, Forrest subsequently prepared a letter on behalf of the defendant that was sent to the plaintiff concerning problems with Brown, and this letter became ExD7. ExD7 did not set out all the errors that Brown made, rather it was a summary of various items.
58. Forrest said that they had to go through the data base and check that client's received their correct magazine orders. She said that some orders were entered wrongly, and some were not entered at all. Out of about 500 subscribers they found 30 or so errors.

59. Forrest said they had to go through and check all the accounts and records. She found numerous errors that had to be fixed. She had to check every account and bank reconciliation. There were difficulties with the fuel account. There were errors with the client's monthly statements (one where the client told they had paid when they hadn't).
60. Forrest also had to check the accounts with the computer entries made by Brown. She found errors with dates, amounts and invoice numbers. Forrest did not see any improvement in Brown's work over time. She said that Brown didn't have the necessary attention to detail that was required. She wasn't keeping the companies separate. It is not hard to see that these errors by Brown would create a real problem for the defendant if not corrected.
61. In summary the defendant had to recheck all the work that Brown did in order to identify and correct errors that she had made. I accept the evidence of Forrest.
62. On the evidence before me I find that Brown was not suitable for the position that she obtained with the defendant. I find that the defendant had no reason to suspect that she may not have been suitable at the time that they employed her. I further find that the defendant decided to employ her relying upon the representations of the plaintiff that she was suitable. These representations were not accurate. The defendant was misled by the representations of the plaintiff.
63. Sometime after Brown's employment was terminated an unidentified person contacted Julius and advised him to be wary of Brown. As a result of this information, Forrest obtained a Certificate of Proceedings relating to a Katherine Jane Gillespie, who was a female born on 10 March 1967. This Certificate of Proceedings became ExD9. ExD9 disclosed that Ms Gillespie was, on 12 June 2001, before the Court of Summary Jurisdiction in Darwin, for a charge that between 9 September 1999 and 28 January 2000 at Darwin she did steal cash valued at \$9960.50, the property of Gregory Taylor

trading as LJ Hooker Pty Limited, Darwin. For this offence the defendant was convicted and sentenced to 6 months imprisonment. She was released after serving two months, and the balance of the sentence suspended for a period of three years with conditions.

64. It was submitted that this matter related to Brown. In Exp4 the reference form from Sergeant Nagl, the candidate is described as “Katherine Brown (alias Mrs Gillispie)”. I firstly note that the spelling of the surname of the alternate name is different to the spelling of the surname on ExD9. Further, in none of the documents or evidence that was put before me was any middle name of Brown identified or even suggested. Further, there is no evidence before me, on any of the documents or evidence called, as to what the date of birth of Brown might have been. Certainly, the period of offending in ExD9 does coincide with a period where there is a gap in Brown’s employment history on pages 3 and 4 of Exp4 but there is a paucity of evidence linking ExD9 to Brown.
65. It is certainly possible that ExD9 does relate to Brown but I am unable to be satisfied of this on the balance of probabilities. I therefore disregard ExD9 from my deliberations. This leaves this aspect of the case in a state of uncertainty. I find that if Brown was the same person as appears in ExD9 then the defendant would never have employed her if it had been aware of the true position. However, it appears that the plaintiff made no real enquiry of Brown as to whether she may or may not have had any alias or criminal record. If the plaintiff did this, but was misled by Brown, then I would have expected this evidence to have been introduced.
66. I would not have thought that a criminal record check would be necessary as a general rule. But where the prospective employer emphasises (as I find the defendant did here) that honesty and confidentiality were very crucial, then it should have been done in this case. If the plaintiff was unwilling to do

such a check then, in my view, it was incumbent upon the plaintiff to have made this clear to the defendant. It did not do so.

67. However, as I can not be satisfied that Brown is the same person as that referred to in ExD9, I do not know what any such enquiries might have disclosed. Thus I am unable to find that Brown did have a relevant criminal record that should have been advised to the defendant. But that is not the end of it. Having made no enquiries the plaintiff was in no position to say anything about Brown in this regard. Rather than stay silent on this aspect the plaintiff expressly asserted that Brown was “a solid candidate for this role” and that an employer could “have a lot of trust in her abilities and confidential nature”.
68. I find that the plaintiff was in no position to honestly make either of these assertions. There is no evidence from which I could find that the plaintiff was misled by Brown, or had any proper basis for either statement. I am unable to find that either statement was true. I find that the defendant was misled into employing Brown based in part on this conduct.
69. The plaintiff also misled the defendant as to Brown’s MYOB knowledge. There was nothing in ExP4 that would have suggested to the defendant that Brown was inexperienced and lacking competence in MYOB (as I find that she was).
70. I find that Brown was not a “solid candidate” for the position. On the contrary, on the evidence before me, she was a very poor candidate. I find that she was not competent in what she did, was not thorough in her work, made regular and repeated mistakes, could not be relied upon to perform work accurately, used her work email inappropriately for excessive personal business, and could not be relied upon. In making these findings I am conscious of the fact that I have not heard from Brown (as she is not on trial). The findings may have been considerably different if Brown had had the opportunity to be heard. Unfortunately, it is, in my view, necessary for

me to make these findings based on the issues raised in this case. None of these findings therefore are matters that should be used against Brown in any other context.

71. As noted earlier, Brown's employment was terminated during the "guarantee period". Hence in accordance with Exp3 the defendant was entitled to require the plaintiff to undertake the assignment of one replacement candidate for Brown's position. There is no evidence that the defendant ever requested this. Accordingly, there is no evidence that the defendant ever sought to rely upon the guarantee. It is not suggested on the pleadings that the guarantee was invoked at any relevant time, or that the plaintiff failed in any way to honour the guarantee.
72. There was no evidence in the defendant's case as to why the defendant chose not to seek to enforce the guarantee. When I pointed this out to Mr Sylvester he suggested that I could infer that because of the poor standard of Brown the defendant was unwilling to risk using the plaintiff again. Certainly that is an inference that might be available, but there may be others. I do not know for example whether the defendant has ever refilled the position that Brown held. Maybe the defendant chose not to for some reason. I simply don't know, and in my view, I should not speculate. Absent any evidence I am unable to decide why the defendant did not seek to enforce its guarantee.
73. The plaintiff did what it undertook to do in Exp3, once it introduced a candidate who was acceptable to the defendant, and employed by the defendant. However, the plaintiff (through Mendoza) engaged in some misleading conduct in order to induce the defendant to employ Brown. If that misleading conduct had not occurred it is more probable than not that the defendant would not have employed Brown.
74. Based upon the misleading conduct of the Mendoza I find that the plaintiff should not be entitled to receive 10% of \$32,000. If the true ability of

Brown had been known she would not have been paid \$32,000. There was no evidence before me as to what (if anything) she may have been worth as an employee. I would expect Julius to have said “nothing” or “not much” (given the tone of his evidence) if he had been asked. Further, it is clear that the defendant regrets employing Brown at all.

75. Has this misleading conduct by the plaintiff been such that there was a total failure of consideration, so that the plaintiff should have no right to recover any monies from the defendant? Brown was employed from 6 September 2004 until 10 November 2004, being a period of around 9 weeks (or about three quarters of the guarantee period). She was to work 42.5 hours per week (according to schedule two of ExD5 her hours were 8.30 am to 5pm Monday to Friday). Accordingly, she presumably worked some 382.5 hours over the period of her employment. She may not have lasted this long if Julius had not been away for work for parts of her employment period.
76. It was not suggested that everything Brown did was wrong. I therefore find that there has not been a total failure of consideration on the part of the plaintiff (in that Brown was not totally unemployable), but I do find that there has been a substantial failure of consideration on the part of the plaintiff (in that Brown was not suitable for the position that the plaintiff said she was).
77. In hindsight it is clear that the defendant would not have employed Brown, and knowing what they found out about her they certainly would not have paid her \$32,000 per annum.
78. It appears that the plaintiff has prepared ExP3 with a view to absolving itself from any responsibility in the employment process. However, it was the plaintiff who supposedly did all the background and competency checks on Brown, and thus it was not necessary for the plaintiff to do these. In that regard clearly the defendant relied upon the recommendations of the plaintiff. I find that the plaintiff did inadequate background and competency

checks on Brown in the circumstances of this case, and yet they still actively promoted Brown as suitable for the position (when she was not). It was the case that the defendant did interview Brown before offering her a position, but on the evidence it is clear that this interview did not go into the matters already covered (but not well enough) by the plaintiff in ExP4. The interview would have enabled Julius to have to make observations as to Brown's general appearance, presentation and basic interpersonal skills, but little else.

79. Assessing what value the plaintiff actually provided to the defendant in putting forward Brown in a positive light as a suitable employee is a difficult task. The plaintiff would argue that, in accordance with ExP3, as soon as the defendant employed Brown they were entitled to \$3,200. However, in my view, this approach does not take into account the various factual findings that I have made herein. Whilst there has not been a total failure of consideration, there was a substantial failure. In addition, the defendant did not rely upon the plaintiff totally. If it had done so there would have been no need for the interview that took place between Julius and Brown. Accordingly, the defendant must take some (but not as much as the plaintiff) responsibility for the decision to employ Brown. I therefore find that the plaintiff should receive less than half of a normal commission (based on 10% of annual salary), but not based upon \$32,000 (as I find that Brown was not worth this salary based upon her competency level). I have no evidence before me to assist in deciding what (if anything) Brown might have been worth as an employee at the time. If I start with the assumption that \$32,000 was an appropriate amount to pay a person who was capable of performing all the tasks referred to in ExD4, then clearly Brown was worth considerably less. Given the tasks that Brown was unable to do it would seem that she was notionally worth somewhere between 50% and 75% of this salary.

80. It is not possible to be precise in this regard and a broad brush approach is necessary, in my view. I therefore assess that the plaintiff should be entitled to \$1,000, plus GST, which would make the total \$1,100.
81. **There will be judgement for the plaintiff on the claim for the sum of \$1,100 plus \$65 filing fee, making a total of \$1,165.**
82. As noted earlier, the defendant had the option of enforcing the guarantee if it wished to do so. It chose not to. Without any evidence as to why the defendant chose not to do this I am unable to find that this was (or was not) a reasonable choice to have made. Given the unsatisfactory experience with Brown it would not be surprising if the defendant was reluctant to give the plaintiff a second chance.
83. Clearly, on the evidence, the defendant has also been out of pocket from this whole experience. It paid Brown more than she was worth, relying upon the recommendations of Mendoza. Further, it employed Brown when it would not have otherwise done so, again relying upon the recommendations of Mendoza. Other employees of the defendant had to undertake additional duties to check Brown's work or do work that she was not capable of doing (but should have been able to do if what Mendoza said was correct).
84. It was Mendoza who was actively pushing the defendant towards employing Brown, and ultimately Mendoza was aware that the defendant was relying upon her recommendation. Hence, in my view, Mendoza owed a duty of care to the defendant to ensure her representations were accurate, and that the defendant did not act to its detriment. In both these regards Mendoza failed on the evidence before me.
85. In the absence of any evidence from Mendoza, as to any other reason for pushing for Brown to be employed, I can only assume that it was because there was a financial advantage to be obtained by the plaintiff.

86. According to the counter-claim some 55 hours of other employee's time was utilised in correcting Brown's mistakes, plus another 42 hours of staff doing tasks that Brown should have done, but was unable to do. This 55 hours in the Counterclaim is claimed at \$25.25 per hour, but this totals \$1,388.75, and not the \$2,398.75 as referred to in the Counterclaim. However, when ExD7 is looked at it becomes clear that the figure of \$2,398.75 is made up by adding the 40 hours Forrest spent over the last 4 weeks of Brown's employment and the 55 hours after Brown left.
87. Also in ExD7 the last paragraph claims 42 hours and then goes on to break this up amongst the various employees. However, when the breakdown of hours is totalled this adds up to 40.5 hours and not 42 hours. However, when the various amounts claimed for the hours worked by the various employees (other than Forrest) are added up these do total the \$1200 claimed in ExD7 and in the Counterclaim.
88. One problem that I have with the Counterclaim is that no evidence was introduced in the defendant's case of any additional wages that had to be paid to Forrest, or Julius, or Petersen, or Makepeace, or Krantz for any of the additional work that they had to do to check and correct Brown's work. Forrest said in her evidence that she was not paid for the overtime that she did checking on Brown's work. In that case the defendant cannot be out of pocket for additional monies that it did not actually incur. I am unable to be satisfied that the defendant was obliged to pay any additional money to other employees because of Brown. If there was any additional money paid then this should have been proved in evidence. It was not.
89. However, that is not necessarily the end of the Counterclaim. It is clear, and I find, that staff (in particular Forrest) had to spend time supervising and directing Brown in her work. As such these staff were not able to concentrate upon their duties fully which would have a resultant loss to the

defendant. If staff were being paid for doing work that Brown should have been able to do unassisted then the defendant would be paying twice.

90. It is not clear from the evidence how much time was spent during normal work hours supervising and correcting Brown's mistakes (apart from the 40 hours referred to in ExD7), and how much time was spent outside normal work hours. For the work done outside normal work hours, as already noted, there is no evidence that the defendant paid any additional money (or gave any benefit that might have a financial consequence) for such work.
91. It is clear from the evidence of Julius and Forrest that both Forrest and Makepeace had to supervise Brown in her work. It is also clear that after Brown left Forrest and other employees had to do additional work to check on Brown's work, and identify and correct errors that she made. Some of this would have been done during normal work hours and some outside. The evidence is silent as to what proportion was during normal work hours. This is evidence that could only come from the defendant. I find that there was some, but in the absence of any evidence from the defendant to assist me to quantify it, I must err on the conservative side.
92. I allow the defendant the 40 hours at \$25.25 that Forrest worked overseeing Brown over the last 4 weeks of her employment. This totals \$1,010. In addition I will allow 4 hours (of the 12 hours claimed) for Makepeace at \$25 per hour. This totals \$100. I therefore find for the defendant on the Counterclaim in the sum of \$1,110.
93. **There will be judgement for the defendant on the Counterclaim in the sum of \$1,110.**
94. The consequence is that the defendant owes the plaintiff \$1,165 on the Claim and the plaintiff owes the defendant \$1,110 on the Counterclaim. Offsetting these two amounts leaves the nett result that the defendant owes the plaintiff the sum of \$55 in full satisfaction of this file.

95. I now publish this judgement by posting it to the plaintiff at suite 24, level 16, 327-329 Pitt Street, Sydney, NSW 2000; and to the defendant at P.O. Box 571 Howard Springs, NT, 0835.

Dated this 14th day of September 2005.

D. TRIGG SM
STIPENDIARY MAGISTRATE