

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Advance International Cleaning Systems (NZ) Limited (Applicant)

**AND** Aleli Dalauidaao (Respondent)

**REPRESENTATIVES** Jiwa Nadan, for applicant  
Brian Spong, for respondent

**MEMBER OF AUTHORITY** A Dumbleton

**INVESTIGATION MEETING** 21 August 2002

**DATE OF DETERMINATION** 26 August 2002

**DETERMINATION OF THE AUTHORITY**

Employment relationship problem

[1] The problem of Advance International Cleaning Systems (NZ) Ltd (“Advance”) in this case stems from the change of mind suddenly announced to the company by Ms Aleli Dalauidaao that she would not start working for it. This was contrary to an agreement made earlier in writing by her. On 7 January 2002, Ms Dalauidaao signed her acceptance of terms and conditions of employment offered by Advance, at the same time confirming that she would start on 1 February 2002. The day before commencement however, Ms Dalauidaao went to see the Operations Manager of Advance, Mr Hadi Younan, and told him she wanted to stay in the job she had been going to leave. This was not acceptable to Advance. Although there was some discussion about alternatives to her starting with Advance, nothing was agreed upon and Mr Younan advised Ms Dalauidaao that the company would take action over the termination of the employment agreement initiated by her without the notice expressly required under the contract.

[2] The action taken by Advance was to bring to the Authority the problem it has described as a breach of employment contract on the part of Ms Dalauidaao. To resolve this problem Advance has claimed \$17,000 as costs and damages in relation to the recruitment and replacement of Ms Dalauidaao, wasted company time, and stress suffered by staff of Advance. In its documents Advance states that there was frustration caused to staff and others outside including clients, and that opportunities were lost to the business as a result of the breach. When it lodged its problem. the employer anticipated that it would have to repeat the process of readvertising and selecting a person to carry out the Purchasing Officer position that Ms Dalauidaao had contracted to perform. Advance acknowledged however the difficulty in assessing the financial cost of loss of business and disruption and it sought to pursue in particular the claim for general damages arising from frustration and stress suffered by staff.

[3] A statement in reply lodged on behalf of Ms Dalauidaio denied that there was a breach of the employment agreement and asserted that in any event Advance had rejected reasonable offers to minimise the effect of Ms Dalauidaio's last minute decision not to commence employment. It is also asserted that Advance suffered no loss and that any it did suffer was the employer's own fault.

[4] The parties endeavoured to resolve this relatively straightforward employment relationship problem through mediation but were not successful. They have taken part an investigation meeting and it remains for the problem to be resolved by determination of the Authority.

#### Breach of employment agreement

[5] I find that Ms Dalauidaio did breach her employment agreement. Mr Spong, her representative, conceded this. Without complying with the express notice provision she was bound by, Ms Dalauidaio terminated the employment agreement when Advance had not consented to her doing so in that way. She did this after her then current employer lost the person employed to replace Ms Dalauidaio, who was then offered a pay increase if she would stay instead of going ahead with her resignation. This offer was attractive to Ms Dalauidaio and I find was the main reason why she decided not to work for Advance. To her credit, Ms Dalauidaio was not unconcerned about the problem created by her actions and did try to face up to her responsibilities by discussing her situation with Advance.

[6] Ms Dalauidaio claimed that she had withdrawn from the employment contract because the day before she was due to start, during discussion with Mr Younan about the job she had contracted to perform for Advance, she discovered it had fewer responsibilities and was more junior than she had previously believed. While this may have played a small part in her decision it is largely an afterthought to justify the fact that she succumbed to an offer of more pay where she was. I am satisfied that any mistake in this regard was entirely her own fault and that there was no misstatement by Advance about the job. Before accepting the job Ms Dalauidaio could have enquired further about the exact nature of the work if she had wished, and a job description had been provided with the employment agreement for her to read before she agreed to take the position.

#### Alternative performance of the agreement

[7] I find that although Ms Dalauidaio did suggest to Mr Younan she could work for Advance for a period of time while remaining ultimately with her old employer, she made no firm proposals but simply indicated a possibility that she could do so for two or three weeks. This would have been of little use to Advance because a training period of about four weeks for Ms Dalauidaio had been contemplated. A longer-term investment in the employee was obviously intended. I also find that although Ms Dalauidaio offered a replacement employee, a friend waiting outside apparently, Advance rejected that proposal because the friend had no New Zealand work experience. Given the personal nature of an employment relationship, it is not surprising that Mr Younan found unattractive the idea of a substitute employee as offered by Ms Dalauidaio.

[8] Mr Spong argued that opportunities to mitigate any loss by Advance had been provided by Ms Dalauidaio in offering to work for a while at least and in offering the services of her friend to work as a stand-in. In my view Advance cannot be criticised for rejecting these proposals. I find there was no definite offer to work for a period and that in any event both parties had intended to enter into a permanent on-going relationship and not a short-term temporary employment. Advance was entitled to seek a replacement who could meet this requirement and the employer could not reasonably be expected to accept the substitute offered. It was entitled to select the staff it wanted rather than have another, who had rejected the contract, make that decision.

### Proper notice – forfeiture

[9] As for any employee, for any employer the purpose of the period of notice to be given by a departing employee is to provide the employer with adequate opportunity to adjust to the changed circumstances and to seek another employee to perform the work. Ms Dalauidaio did not give to Advance notice of termination of one month but merely gave forewarning of a few hours. Neither did she pay to Advance, which had not released her from her express obligations, an amount equivalent to one month's salary, or \$2,917. Although the forfeiture provisions of the agreement could have been better expressed, it is clear the parties intended that in the absence of actual notice given by Ms Dalauidaio she would become indebted to Advance for this amount, whether she had commenced work and had earned any pay, or not. Mr Spong conceded that liability.

[10] As has been held in relation to the requirement for an employer to give notice to an employee, the right of an employer to be given notice or to insist on forfeiture of pay for the period of notice, becomes enforceable at the time of termination of employment, see *Atwill v Tanners Timberworld Ltd* [1994] 1 ERNZ 321 at 324,325. Even if shortly after termination the employer is able to find a replacement for an employee who is departing without giving notice, the employer is nevertheless entitled to insist on performance of the agreement in this respect. It does not have to wait for the period of notice to expire and then account for any employment of a replacement in that time or show that it made reasonable efforts to find such a replacement. The parties had agreed upon what would happen if the employment was terminated by either of them without giving actual notice or without paying in lieu or forfeiting money. Liability is not to be determined after the event of termination without proper notice. Even if there were opportunities to mitigate, and I am satisfied that Advance made reasonable efforts to find a replacement as soon as it could and did not have to accept the replacement offered by Ms Dalauidaio, the employer was not under any duty to mitigate before becoming entitled to the benefit of the notice provision. Forfeiture became a requirement as soon as the failure to give notice occurred and was not conditional on subsequent events.

### Claims by Advance to recover for financial losses and other harm

[11] Expenditure prior to entry into the agreement on recruitment and items such as advertising, in my view cannot be recovered as the cost was incurred before Ms Dalauidaio became a contracting party. Also, her breach was not in terminating the contract, but in doing so without giving notice. Notice of one month was about the same period as the company expected would be needed to train Ms Dalauidaio and therefore Advance would not have started to receive the benefit of the recruitment costs until after one month. The same money would have been expended in any event and could not have been recovered if Ms Dalauidaio had given notice almost as soon as she had started but had worked the period out.

[12] Advance has claimed \$10,000 for distress, stress for staff and frustration experienced both within the company and externally among clients. This amount is also claimed to cover loss of opportunity, although Advance expressly acknowledged the difficulty of accounting for loss of business and disruption. As a matter of general principle, damages are recoverable for mental suffering flowing from a breach of contract if such harm is within the contemplation of the parties at the time they entered into the contract. The nature of an employment agreement and that form of relationship is such as to make it more likely the parties' will contemplate that mental suffering will result from a breach of contract. In the case of employees statutory rules of law, the grievance provisions of the Employment Relations Act 2000, provide this remedy. In the case of employers rules of law developed by the courts have moved in the same direction over the last few years. The claim for injury to feelings, including inconvenience, disappointment, frustration, worry and distress, cannot succeed however in this case for the simple reason that Advance, being a company, has no feelings or emotions and is not therefore capable of suffering this form of harm. The

management and staff of Advance and clients of the company who are natural rather than legal persons, had no employment agreement with Ms Dalauidao.

[13] Advance is on stronger ground in claiming the costs of recruiting a replacement for Ms Dalauidao and for engaging on a temporary basis consultants or contractors to fill in while that was done. The claim is \$3,500. It seems to me, however, that the parties have already assessed the damages or compensation that should be paid in the event of a failure to give proper notice. This is the sum equivalent to one month's salary that Ms Dalauidao was required to forfeit. Whether in the nature of a penalty or compensatory damages, the sum was liquidated by the parties presumably to avoid difficulties of proving later on the exact loss or harm. In the circumstances therefore, the award of one month's pay is appropriate to meet this claim.

#### Determination

[14] For the above reasons I find that although Advance cannot succeed with the particular claims presented to the Authority, to resolve the problem it is appropriate that Ms Dalauidao should comply with the forfeiture provision of the agreement and pay to Advance the sum equivalent to one month's salary. The amount of \$2,917 is to be paid by her. Advance will be responsible for deducting income tax from that amount and accounting for it to the Inland Revenue Department. In addition, Advance, which was represented by its manager, is entitled to payment of \$70 from Ms Dalauidao in reimbursement of the lodgement fee.

A Dumbleton  
**Member of Employment Relations Authority**