

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 381/07
5085853

BETWEEN JERINA FORD
 Applicant

AND GOLD SEAL
 INTERNATIONAL LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Richard Harrison, Counsel for Applicant
 Gary Cunningham, Advocate for Respondent

Investigation Meeting: 28 August 2007

Submissions received: 10 September 2007 from Applicant
 18 September from Respondent

Documents supplied by 11 October 2007
applicant

Determination: 3 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Jerina Ford, says she was unjustifiably constructively dismissed and unjustifiably disadvantaged by the respondent, Gold Seal International Ltd (“Gold Seal”).

[2] Following discussions with Mr Gary Cunningham, the director of the respondent, Ms Ford was offered a job as Sales Account Manager/Production Co-ordinator. She was to be paid a base salary of \$35,000 plus the use of a company vehicle and cell phone. She commenced work on Wednesday 15 June 2005.

[3] Prior to taking up employment she told Mr Cunningham she had a history of back pain and offered to make reports and assessments available to him.

[4] Ms Ford was provided with a RAV4 car. She test drove the vehicle before it was purchased. Mr Cunningham said Ms Ford gave an assurance that she could manage the work and she was satisfied with the car.

[5] However, on the first day of driving it she noticed that her back was sore. That condition worsened over the next few days and by the evening of Friday 17 June she was having difficulty getting in and out of the car, bending and walking. She went to bed over the weekend and took painkillers.

[6] On the Monday she felt better but noticed that after a day of driving the RAV4 her back condition had worsened.

[7] By Tuesday evening she was in considerable pain. She told Mr Cunningham that she suspected it had to do with the car. By Thursday 23 June it had become so bad that she called ACC and spoke to her case manager about the situation.

[8] Mr Cunningham said Ms Ford told him on 22 June that she was having back problems because of the car and asked that it be changed.

[9] It was agreed that an occupational therapist, Ms Marion Moore, would assess the vehicle. Ms Moore had been Ms Ford's occupational therapist since her initial prolapsed disc injury had occurred in 2002. Ms Moore went with Ms Ford for a test drive in the RAV4 and they also test drove a Ford Focus in order to do a comparison.

[10] Ms Moore wrote a report but this was not supplied to Ms Ford until 2 August and Ms Tania Seaton, Mr Cunningham's wife, did not receive a copy until she asked for one. It was supplied on 8 August.

[11] Ms Ford felt that it was the vehicle that was aggravating her health so she borrowed a car from a friend to ease the situation.

[12] Ms Moore concluded that the RAV4 was aggravating Ms Ford's back condition. Ms Moore told Ms Ford that she believed the vehicle needed to be changed but that that was a management decision. Ms Moore also recommended an Obus seatback friend which was ordered but did not arrive until some time later.

[13] In the meantime, Ms Ford continued to drive the car she had borrowed until the owner needed it returned.

[14] On 10 July Ms Ford picked the RAV4 up from Mr Cunningham's house as he had been driving it while she had her friend's car. She said that after a short period driving the RAV4 her back condition had worsened.

[15] Mr Cunningham said he contacted the Labour Department on 23 June and was advised that it was a health and safety issue and that Ms Ford should produce a medical certificate to indicate that she was able to safely continue in her work.

11 July Meeting

[16] Ms Ford met with Mr Cunningham who said he had discussed the matter with his wife and that they were concerned about the situation. Ms Ford said she was told that she would henceforth be a commission only employee. Mr Cunningham said he put that forward as an option regarding how she could manage her job. The proposal was that she could work from home and get paid for the sales she made. No changes were made to Ms Ford's employment.

[17] Ms Ford said she was shocked by what had been said and made an appointment with her GP for that afternoon. The doctor suggested she stay off work for a period to give her back a chance to settle down and asked Ms Ford to return to see him in three days. The doctor gave her a medical certificate for 21 days but had to wait for ACC to approve the leave. Despite the doctor's suggestion Ms Ford went to work the following day.

[18] On 12 July Ms Ford advised that she had an ACC stand own for three weeks. At this stage Mr Cunningham asked for a medical certificate regarding her fitness to work and said the company would pay any costs. Ms Ford did not dispute this. No such assessment was made.

[19] Later in the day Mr Cunningham called and asked for the return of the RAV4 and referred to OSH being a real concern. Mr Cunningham said he had asked for the car to be returned during her period of stand down on ACC. Ms Ford then phoned a friend to arrange to borrow another car and she and her friend went to Mr Cunningham's house to return the RAV4. Ms Ford also went to work on the Wednesday 13 July.

[20] Ms Seaton said she had telephoned Ms Ford's ACC case manager and said she felt awful that the company might be putting Ms Ford's health at risk. She also said Mr Ford had stated that Ms Ford should not drive and at that stage they collected the car.

The first fax and subsequent meeting on 15 July

[21] On Thursday 14 July she saw her doctor again and he instructed her not to go to work. Her husband wrote a letter which was faxed to Mr Cunningham.

[22] Mr Ford's letter dealt largely with the alleged attempt to vary Ms Ford's employment to a commission only position. It also made reference to the problems Ms Ford was experiencing with the RAV4.

[23] When Mr Cunningham received it he called and arranged a meeting for the following day 15 July. At the time this meeting took place Ms Ford was on ACC.

[24] On 15 July Mr and Ms Ford met with Mr Cunningham and Ms Seaton. Mr Cunningham said Mr Ford said she should not have gone back to work so quickly. They spoke about what had happened during the week and Mr Cunningham said he had made some enquiries with two colleagues in the industry regarding the possibility of alternative employment for Ms Ford. One of these people, Mr Rope, had told Mr Cunningham he might have a desk job with no driving. Mr Cunningham said they

discussed a number of options and agreed that Ms Ford would think about them over the weekend.

[25] Ms Ford subsequently telephoned Mr Rope but no employment offer eventuated.

[26] The following week she met with Mr Cunningham and Ms Seaton. They went to the office to tidy up orders and Ms Ford was asked to return the SIM card. This was so that Ms Seaton had a list of the company's contacts and could continue with the business while Ms Ford was on ACC.

Second fax and meeting of 29 July

[27] Mr Ford's fax of 26 July stated that Ms Ford was on ACC "*as a result of her worsened back condition bought about by the RAV4 vehicle you purchased for her employment use. I personally expect there is little likelihood of a resolve to the present dilemma until her condition improves and her medical team and ACC agree to a graduated return to work. Any future employment she intends is now also dependent on an ACC inspection and clearance*".

[28] Mr Ford then stated that Ms Ford would continue to be employed by Gold Seal until one of the following options occurred. These were:

- A variation to the original terms and conditions.
- Ms Ford chose or agreed to resign "for a negotiated alternative position or alternative compensation".
- She was dismissed on legal grounds.

[29] He noted that as there was no legal obligation to top up the 80% ACC payment there were no financial concerns for Gold Seal while she was recuperating. He noted that it was unlikely she would be able to return to work until September at the very earliest. Mr Ford concluded by saying "*I therefore recommend that the matter of her employment with your company be held in abeyance until after your return from Japan in September*".

[30] As a result of receiving this fax Mr Cunningham then telephoned to arrange another meeting with Mr and Ms Ford to "bring this to a conclusion to move forward" before he went to Japan. On 29 July Ms Ford went to meet Mr Cunningham and Ms Seaton at their home. She said she believed the meeting was to tidy up clients and orders as had been the case with the previous meeting. However, Mr Cunningham said the meeting was to bring the situation to an amicable conclusion.

[31] Mr Cunningham said he told Ms Ford that they wanted to discuss her husband's fax. Ms Ford said she was in an extreme emotional state as she had earlier been told her job had been changed to commission only. However, Ms Ford had been told previously that her position was not being changed and that it had been a suggestion.

[32] When I asked her if she knew the content of her husband's fax she said she would have been aware of it in general terms.

[33] Mr Cunningham said they discussed the possibility of a mutual agreement regarding the termination of Ms Ford's position. They asked what money she would want and she said nothing. Mr Cunningham said they offered a week's salary and holiday pay. Ms Ford agrees that this was so.

[34] Ms Seaton and Mr Cunningham insisted that Ms Ford telephone her husband. He told Ms Ford that whatever was being proposed had to be put in writing. Ms Seaton then started to draft a document. As Ms Seaton was having trouble wording it Ms Ford made some suggestions. Ms Seaton said she and Mr Cunningham believed the termination proposal was a mutual agreement.

[35] The letter of 29 July, as originally drafted and typed up by Ms Seaton, read:

It is hereby mutually agreed by both parties that the original position that was made available to Jerina can not be continued due to medical reasons.

It has been acknowledged by all parties including medical staff that the duties required to perform the position of Sales Manager/Production Coordinator are not condusive [sic] to Jerina's ongoing health & safety.

The parties agree that the position will terminate on 29 July 2005.

[36] Mr Cunningham took her home. The original letter was later faxed to Ms Ford. It was not legible and later Mr Cunningham delivered an altered document signed by him. It appears that in the meantime Mr Cunningham had received some legal advice and the letter contained a paragraph regarding Ms Ford's right to seek independent advice. Otherwise, the tenor and purport remain the same.

[37] Ms Ford said she assumed that the letter meant her employment had been terminated.

[38] On 30 July Mr Cunningham returned her chair and desk as he assumed she might need them and asked her for the office key. Mr Cunningham said he asked for the return of the key because the person who had the lease for the building was returning to New Zealand and they needed the keys to enable him to access the building.

Subsequent correspondence

[39] Mr Ford advised by letter that the matter would be referred to a lawyer. He said "*The document endeavours to establish grounds for justification of your termination of Jerina's position with your company as of today's date and your intent is clearly for her to sign this agreement.*"

[40] On 1 August Ms Matthew, acting for Gold Seal, wrote to Ms Stone, acting for Ms Ford, in response to a telephone call. Ms Matthew indicated that the company would be willing to attend an urgent mediation. The letter also stated that Ms Ford's terms had not been varied and that the commission only proposal had been a

suggestion, that the draft of 29 July had been dictated by Ms Ford and that she had not been dismissed. An urgent mediation took place but it was unsuccessful.

[41] On 9 August Gold Seal's solicitors wrote saying that Ms Ford's position would be held open until she was able to return to it.

[42] On 12 August Ms Stone notified a personal grievance for constructive dismissal.

[43] On 17 August Ms Matthew replied reiterating that Ms Ford had not been dismissed. The letter stated that the signed termination agreement was a result of the options presented in Mr Ford's letter of 26 July. Mr Cunningham took the car for health and safety reasons as Ms Ford had said she could not use it. The SIM card was to be returned so that Ms Seaton could continue to deal with Gold Seal's customers and the personal; belongings returned were Ms Ford's ACC supplied equipment as Ms Ford had told him she was applying for another job and he thought she might need then and he was going to Japan.

[44] Ms Ford was paid until 12 July 2005 and received ACC cover from 14 July.

Disadvantage

[45] The applicant argues that the respondent did not take all practicable steps to prevent harm to the applicant and that the respondent should have explored cost issues regarding a change of vehicle much more fully than it did.

[46] Mr Cunningham said that after Ms Moore visited she spoke to him on the phone and said that he was not required to change the car and that his decision to do so or not could be business based.

[47] Mr Cunningham said he had discussions with the owner of the car yard regarding trading in the car and had been told he would lose money as he would not get what he had paid for the car. Mr Cunningham was not specific regarding the amounts paid for the car and what would be lost.

[48] A fax sent from ACC to Gold Seal on 15 July 2005 states that "Mrs Jerina Rae Ford has applied for weekly compensation as a consequence of the injury Thursday 12 December 2002." There is no reference to an exacerbation by use of the car.

[49] I have the view of an occupational therapist that the car was aggravating Ms Ford's back condition. That was based on a test drive with Ms Ford. I am not satisfied that that is sufficient evidence to establish causation. Further medical evidence from an occupational doctor, for example, may well have been of assistance. Ms Ford had the vehicle for a very short period.

[50] Given that I do not have sufficient evidence of causation the issue of whether the employer took all practicable steps to avoid harm is not something that needs to be, or can be, decided.

Dismissal

[51] In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168 the Court of Appeal set out the principles applicable to constructive dismissals. The Court indicated that all the circumstances had to be considered.

[52] If there has been a breach of duty it needs to be considered whether that breach was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to continue to work.

[53] In *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965 the Court stated that the essential questions to be addressed were what the terms of the contract were and whether there had been a sufficiently serious breach of those terms to warrant the employee leaving.

[54] In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 the Court of Appeal held that constructive dismissal included, but was not limited to cases where:

- The employee was given a choice between resigning and being dismissed;
- An employer had followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;
- A breach of duty causing an employee to resign.

[55] Ms Ford considered that she had been dismissed when the 29 July letter was delivered to her home. This letter had been drafted after a fax had been received from her husband including a negotiated exit as a possible resolution, albeit not the preferred one. Ms Ford participated in the drafting of the letter. She was asked to phone her husband and did so. The letter was not a dismissal letter. It was a proposal for a negotiated exit. Ms Ford was free not to sign it or to negotiate on further terms. She could have insisted, for example, that the offer of a week's pay that had been previously offered be included. She did not sign it.

[56] I appreciate that Ms Ford believed that earlier moves had been made to remove her from her employment. However, I am satisfied that the commission proposal was simply that – a proposal. The other matters have quite legitimate explanations which are set out in Ms Matthews' letter of 17 August. In that letter Ms Ford was again told that she had not been dismissed as she had been told on 1 August.

[57] The employer had asked for a report regarding her health and had offered to pay for it. No report was received.

[58] Mr Harrison has said that as the respondent states that Ms Ford has not been dismissed and has remained on its books for ACC that if Ms Ford has not been dismissed then her employment continued and she is entitled to annual leave payments.

[59] The problem with this argument is that whatever the employer may think I am of the view that the employment terminated. Despite the employer stating that Ms

Ford was still employed no contact was made by her with the employer. Instead, a personal grievance was notified and it was a grievance alleging a constructive dismissal. Ms Ford's employment terminated on 29 July, which was the date she asserted she had been dismissed. It is clear that at that stage she regarded her employment as being at an end.

[60] Ms Ford does not have a personal grievance.

Pay

[61] Ms Ford was not paid for 13 July 2005. Payment for this day is to be made. If there is outstanding holiday pay that also is to be paid. Interest on those sums is to be paid at the rate of 10.8% from 20 July 2005 until paid in full.

[62] If the parties have any difficulty calculating the day's pay and the holiday pay leave is reserved to return to the Authority.

Costs

[63] The parties should endeavour to resolve the matter of costs. If they are unable to do so the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority