

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Maureen Kelly (Applicant)
AND SOS Plumbing and Gasfitting Limited (Respondent)
REPRESENTATIVES Dean Organ, Advocate for Applicant
No appearance for Respondent
MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 17 November 2005
DATE OF DETERMINATION 15 December 2005

DETERMINATION OF THE AUTHORITY

[1] The applicant was dismissed on 3 March 2005 after being told the previous day that the respondent was in financial difficulties. She seeks lost wages to 10 January 2006, holiday pay, payment of an additional two weeks' notice, compensation for distress, a penalty for breach of the notice period in her employment agreement, and costs.

[2] This matter was investigated together with the application of another former employee of the respondent under file number AEA 987-05. The respondent was not represented at the investigation meeting. It did not lodge a statement in reply but there is no doubt that it was properly notified of the applicant's claim and the investigation meeting. In a letter received at the Authority on 3 November 2005, the respondent's director Kyle Smythe acknowledged receiving notice of the investigation meeting, advised he was unlikely to attend the meeting and stated that he understood "that the Authority may make a decision against the company in its absence". He claimed that the respondent was insolvent and he was not in a position to represent it. Mr Smythe's letter has been taken into account in preparing this determination but it does not have the same weight as the sworn evidence of the applicant given in person at the investigation meeting.

[3] The applicant was employed as the respondent's operations manager from 10 January 2005 on a salary of \$52,000 a year. She left her previous job only after being approached twice by Mr Smythe and strongly encouraged to come and work for the respondent.

[4] The applicant and Mr Smythe discussed a draft employment agreement, made amendments and signed it on 12 January 2005. A clause on the term of the agreement stated:

This agreement shall come into force on 10 January 2005 and continue in force until terminated by either party in accordance with the terminations clause of this Agreement. For a period of one year (at least).

[5] The minimum term was noted in handwriting on the copy of the employment agreement submitted by the applicant and in type on a version of the agreement provided by Mr Smythe with his letter to the Authority. Ms Kelly told me that the respondent proposed the one-year minimum term.

[6] The agreement also provided for termination of employment by either party giving two weeks' written notice, with that minimum period of notice variable by agreement between the parties. It provided for the employer to "summarily terminate" the employment for serious misconduct or where the employee was convicted of any criminal offence. A redundancy clause provides that if, "due to operational needs of the business", the position were made redundant, the employee would be given one month's notice or pay in lieu of notice if the notice period was less than one month. A procedure for consultation on redundancy was set out but payment of compensation for redundancy was expressly excluded.

The dismissal

[7] On 2 March 2005 Mr Smythe asked to speak with Ms Kelly. They drove to a nearby fast food restaurant. There Mr Smythe told Ms Kelly that he had some bad news from the company accountant. The company had earlier looked very profitable but this was due to accounting errors. The company was in considerable financial difficulty.

[8] Ms Kelly told me she was shocked by the news. In mid-February she was asked by Mr Smythe to arrange for an office assistant to "step down". However she understood this was for a short period while Mr Smythe and his business partner resolved some issues between them and had no inkling of the respondent's financial difficulties until the 2 March meeting.

[9] Ms Kelly's evidence was that she asked: "*Do you want me to go?*" and Mr Smythe replied: "*Yes*". She then asked "*when*" and he replied "*today*". She asked if there was any possibility that her employment would be reinstated in the near future if the company's financial situation improved and Mr Smythe "indicated that ... could well be the case".

[10] She says that, while shocked by the news of the company's financial state, she left the meeting understanding that she was not resigning or being dismissed but 'standing down' while the future of the company was assessed. Mr Smythe's letter to the Authority states that "*[t]here was no intention at that meeting to terminate her employment – we were merely discussing the situation.*" It also suggests that, although Mr Smythe had a different view on whether Ms Kelly resigned, the relationship was not severed at that meeting. It states that "*it was everybody's understanding that she had resigned but if things were to get back on track then we would have her back.*" (emphasis added)

[11] I accept Ms Kelly's understanding as being the most likely to be correct as it is corroborated by a note that she made in her work diary on returning to the office after meeting with Mr Smythe. Mr Smythe submitted a copy to the Authority. The note states:

Kyle & I had big talks: - Company not Good & I have offered to stand down until further notice.

[12] Later that day Ms Kelly drove to a late afternoon meeting with a client. Again that was consistent with the actions of someone who had not resigned but had an ongoing relationship with the company.

[13] Ms Kelly stayed home the following day where she received a letter on the respondent's letterhead and signed by Mr Smythe:

Please find attached your final pay cheque as detailed on the accompanying sheet.

It is with disappointment that we confirm our acceptance of your offer to stand down as diarised on 2 March 2005. We also confirm that we are not in a position to alter this situation and therefore, with reluctance, give you the required 2 weeks notice as per your contract.

We appreciate your services to our company, albeit for such a short period of time and wish you the very best for the future.

[14] This letter went a step further than the ‘stand down’, albeit for an indefinite period, offered by Ms Kelly the previous day. It was a dismissal. The final pay enclosed included Ms Kelly’s salary owing to 2 March 2005 and payment of a further two weeks in lieu of notice. It deducted an amount for an earlier overpayment to Ms Kelly which is not disputed. It did not include any provision for holiday pay. Ms Kelly had taken no leave since starting work for the respondent.

[15] That day Mr Smythe arranged for Ms Kelly to return her company car as he had made arrangements to sell it. She returned the car, a mobile phone and a company petrol card that day.

Effect of the minimum term

[16] Ms Kelly was employed for a minimum term of at least one year with the employment relationship to be ongoing and open-ended thereafter. In this respect the period of the minimum term is analogous with a fixed-term contract as described in *Williams v Attorney-General* [1999] 2 ERNZ 457, 470:

It cannot be brought to an end by the employer by notice at will. Unless it provides otherwise, it can only come to an end upon the expiry of its term. An employer terminating a contract early will remain liable for the remuneration for which it provides until the date of expiry. However, the contract may contain provision for early termination in particular events or on particular grounds. These cannot include termination at will for no reason at all because such a provision would be repugnant to the nature of the contract as a fixed-term contract. The fixed term is not only a maximum term but it should also be seen as a minimum term for most purposes.

... It is also competent for a fixed-term contract to provide that the employment will come to an end either automatically or upon the employer desiring that it should do so upon the happening of specified events. Supervening bankruptcy or inability on medical grounds to continue in employment are two examples that feature in this contract.

[17] I find, as a matter of construction, that the two-week notice period and redundancy provisions in Ms Kelly’s employment agreement cannot be applied to reduce the minimum term. Those clauses must be taken, on a reasonable reading of the agreement, to be in contemplation of the circumstances of the on-going employment relationship after the one-year minimum term. Any other reading would render senseless the clause providing for the term of the agreement to be “*for a period of one year (at least)*”, subject to “*the terminations clause*”. That latter clause provides for termination only in the event of instances of serious misconduct and criminal convictions, not business failure. Even if the redundancy clause were applicable, it has not been relied on by the respondent because it did not identify “operational needs” to invoke its use or follow the clause’s provisions for consultation and consideration of redeployment.

[18] Under her employment agreement and in the circumstances of her case, I find that Ms Kelly is entitled to remuneration for the balance of the term: *McAulay v Sonoco New Zealand Limited* [1998] 2 ERNZ 225, 237.

[19] In light of this finding, I need not address Ms Kelly's claim in respect of an additional two weeks' notice to meet the requirements of the redundancy clause for one month's notice rather than the two weeks she was paid. She was paid two weeks notice on 3 March, that is to 17 March. She had worked for eight weeks and was paid for ten. To meet the requirement for payment of the balance of her term, she is entitled to another 42 weeks pay.

[20] The respondent is ordered to reimburse the applicant a sum equal to her salary for the period of 42 weeks, being \$42,000 less applicable tax, under s123(1)(b) of the Employment Relations Act 2000 ("the Act").

[21] The applicant is also entitled to her holiday pay. The agreement provided for "four weeks annual leave in accordance with the Holidays Act 2003". The agreement is for one week more annual leave than the statutory entitlement, as permitted under section 6 of the Holidays Act. If the respondent had terminated the employment at the end of the one year minimum period, Ms Kelly would have been entitled to the four weeks leave. The respondent's breach of her agreement in respect of the minimum term cannot remove her entitlement to the leave. **The respondent is ordered to reimburse the applicant a sum equal to an additional four weeks' salary as annual holiday pay, being \$4000 less applicable tax, under s123(1)(b) of the Act.**

Compensation

[22] I find that Ms Kelly's dismissal on 3 March 2005 was unjustified because it was in breach of the terms of her employment agreement and was done in a way which was abrupt, surprised her and caused her distress.

[23] Payment of a sum of money equivalent to the salary for the balance of the term will not discharge the respondent of its obligations for breaching the applicant's employment agreement by unjustifiably dismissing her. She is entitled to be compensated for the manner of her dismissal.

[24] Her own evidence was that she "*felt gutted*". In her written statement she said:

In the days following ... I found it very difficult to come to grips with the situation and it seriously affected my confidence and self worth. It was humiliating to have left stable employment and then to be dismissed so shortly after. I felt such a fool."

[25] Her partner Grant Kime gave evidence that following her dismissal she:

... was in the state of greatest depression that I have ever seen her. She questioned what she might have done wrong and questioned her abilities and worth.

[26] Ms Kelly said she felt unable to starting looking for a new job until many weeks after her dismissal. After the investigation meeting she provided copies of letters from two recruitment agents confirming she registered with them in May. She said she attended six job interviews in May and August. On 15 August 2005 she started a new job on a salary \$5000 a year lower than her previous salary with the respondent.

[27] Compensation for humiliation, loss of dignity and injury to feelings awarded under s123(1)(c)(i) of the Act is not intended to punish an employer. Neither is it to compensate for lost wages or benefits – those aspects are dealt with under other categories of remedies. Its role is solely to compensate for the actual consequences of the distress caused by the employer's breaches. In the particular circumstances of this case I fix the appropriate award at \$4000. **The respondent is ordered to pay \$4000 to the applicant, without deduction, under s123(1)(c)(i) of the Act.**

[28] Ms Kelly also lost whatever personal benefit she may have gained from use of a car and a mobile phone provided by the respondent. That might be compensated for under s123(1)(c)(ii) of the Act. However there was no evidence on that aspect and I make no order for any remedy under that category.

Penalties

[29] The applicant has sought penalties against the respondent for its breaches of her employment agreement. Penalties are warranted for the respondent's action but I do not order any in this case. I have taken account of Mr Smythe's letter to the Authority stating that the respondent ceased trading in March 2005; paid all outstanding creditors except for some money owed to shareholders, including Mr Smythe; has no assets; and, is technically insolvent. These claims will be tested by whatever steps the applicant takes to recover the amounts awarded to her. If there are funds to meet those awards, they will go to the applicant rather than as penalties to the Crown.

[30] An online check of Companies Office records on the day of this determination showed the respondent remained registered with no note of any measures to change that status by way of removal or liquidation.

Costs

[31] The applicant is entitled to her costs and expenses in bringing this application. The respondent is ordered to reimburse the applicant the amount of her application fee of \$70. If further costs are sought and cannot be agreed between the parties, either party may apply to the Authority for a determination of costs.

Summary of orders

[32] The respondent is ordered to pay to the applicant:

- **a sum equal to her salary for the period of 42 weeks, being \$42,000 less applicable tax, under s123(1)(b) of the Act; and**
- **a sum equal to an additional four weeks' salary as annual holiday pay, being \$4000 less applicable tax, under s123(1)(b) of the Act; and**
- **\$4000, without deduction, under s123(1)(c)(i) of the Act; and**
- **\$70 in reimbursement of the fee for filing her application to the Authority.**

Robin Arthur
Member of Employment Relations Authority