

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Sandra Pearce (Applicant)
AND Helen Ahmed t/a Ahmed Manufacturing (Respondent)
REPRESENTATIVES Jock Lawrie, Counsel for Applicant
No appearance by Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 17 May 2001
DATE OF DETERMINATION 1 June 2001

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. The applicant, Ms Sandra Pearce, says that she has been unjustifiably dismissed from her position as a machinist with the respondent, Helen Ahmed t/a Ahmed Manufacturing. She seeks compensation for humiliation and distress, a week's lost wages and also asks that penalties be awarded for breaches of ss.120 and 64.

Background

2. After having been made redundant from her previous position Ms Pearce applied for and accepted a position with Helen Ahmed. She started work on Monday 16 October 2000. Prior to her commencing, Ms Ahmed had told Ms Pearce that she would have a contract drawn up for her to sign on the date that she started. When Ms Pearce reported for work on Monday 16 October Ms Ahmed presented her with a hand-written temporary contract. This contract sets out the hours of work, the nature of the position and the pay rate.

3. Ms Ahmed told Ms Pearce that it was a temporary contract until her lawyer was able to set up a permanent and legally binding document. Ms Pearce told Ms Ahmed that she wasn't going to sign the hand-written document and would wait until Ms Ahmed obtained the formal document from her lawyer. No such document ever eventuated.

4. The initial place of work was in Ms Ahmed's garage which had sewing machines in it. Ms Pearce was given to understand that Ms Ahmed was in the process of negotiating for alternative premises. She asked Ms Ahmed what would happen if the negotiations for the premises fell through and she was unable to secure the lease. Ms Ahmed told her they would carry on as they currently were until such time as alternative premises were found.

5. On Monday 13 November Ms Ahmed told Ms Pearce that the Grey Street premises had fallen through. Ms Ahmed then went to obtain some additional supplies to trim a garment that Ms Pearce was finishing off. Ms Pearce's official finishing time was 4.30 pm and at 4.25 pm she realised she had done as much as she could for that day so she left her a note saying that she could not go any further and that she was finishing a few minutes early. Ms Pearce was driving down the driveway when Ms Ahmed happened to come home. Ms Pearce stopped and told her she couldn't go any further without the trims and that she had left her a note and would see her the following morning. Ms Ahmed said that was fine.

6. The next morning before she left home for work she received a phone call from Ms Ahmed. Ms Ahmed said to her that she was glad she had caught her before she came over and then said, "I'm giving you your notice. I don't want you to come back." Ms Pearce asked why she didn't want her to come back and Ms Ahmed replied that she had decided that because the lease had fallen through, that she didn't want Ms Pearce working any longer. Ms Pearce said to her that that was not what they had discussed.

7. Ms Pearce said she was very annoyed at what had happened because there didn't seem to be any good reason for Ms Ahmed's actions and she was distressed to find herself suddenly out of work just on Christmas, especially given the fact that she had already turned down a job with Sabre Apparel to work with Ms Ahmed because of the allure of being appointed to a management position the following year. She had even discussed with Ms Ahmed attending management seminars the following year and training schemes that she could be involved in.

8. When Ms Pearce went to Ms Ahmed's later that day to pick up her tools she asked Ms Ahmed where she was going to get another job right on Christmas and that nobody hired in the clothing industry right at that time. Ms Ahmed said she didn't have any responsibility for Ms Pearce or her financial situation or anything to do with her personally. Ms Pearce walked to the front of the garage. She was very upset. She turned around and said to Ms Ahmed, "Do you realise you have to pay me for the week you're not letting me work?" Ms Ahmed said she knew that and that Ms Pearce would get her money and it would be in her pay for the following week. This did not happen.

9. Ms Pearce made commendably prompt efforts to secure alternative employment and was successful in finding other work. This has meant that her reimbursement claim is limited to a week's notice.

10. On 24 November Ms Pearce wrote to Ms Ahmed asking for the reasons for her dismissal. On 5 December Ms Pearce's union, the Northern Distribution Union, wrote to Ms Ahmed stating that there was a personal grievance. On 12 December Ms Pearce again wrote to Ms Ahmed asking for the reasons for her dismissal. No response was received to any of these letters.

11. The Authority received the Statement of Problem on 12 March. A copy was sent to Ms Ahmed on 15 March. The Statement of Problem was delivered to and received by Ms Ahmed on 16 March. On 17 April the Authority sent a further letter to Ms Ahmed noting that no response had been forthcoming within the requisite 14 days and enclosing a copy of the relevant part of the legislation. At the date of the Investigation Meeting no Statement in Reply had been received from the respondent and the respondent did not appear at the Investigation Meeting.

Decision

12. Although Ms Pearce and her union notified the respondent of the personal grievance and sought the reasons for the dismissal the respondent did not have the courtesy to reply to any of these communications. That, coupled with the fact that no Statement in Reply has been received and that the respondent did not appear to defend the matter, leads ineluctably to the conclusion that there was an unjustified dismissal.

13. Ms Pearce sought the sum of \$5,000 as compensation for humiliation and distress. I have no hesitation in accepting Ms Pearce's evidence about the degree of her distress. There is always an element of distress when a dismissal occurs. However, in this case the distress was compounded by the failure to provide an explanation, by the fact that it took place in the course of a telephone conversation and that Ms Ahmed subsequently stated that she was not responsible for anything to do with Ms Pearce. This was a short period of employment and Ms Pearce was fortunate in being able to obtain other employment promptly. In the circumstances Ms Pearce is entitled to an award of \$4,000. Ms Pearce also seeks a week's notice.

14. Ms Pearce has sought a week's notice. That equates to \$400 and the respondent is ordered to pay that amount to the applicant.

Penalties

15. Section 64(3) provides "*that every employer who fails to comply with subsection (2) is liable to a penalty imposed by the Authority.*" Section 64(2)(a) provides that "*the employer must before the employee enters into an individual employment agreement, provide to the employee a copy of the intended agreement that complies with section 65(2)*" and (b) "*Advise the employee that the employee is entitled to seek independent advice about the intended agreement.*"

16. Ms Ahmed did not provide that advice to Ms Pearce nor did the draft contract that was given to Ms Pearce comply with the provisions of section 65(2). It did not provide a plain language explanation of the services available for the resolution of employment relationship problems.

17. Section 120 provides that "*the employer must when the employee makes a request for reasons within 60 days of the dismissal, within 14 days after the day on which the request is received, provide the statement to the person who made the request.*"

18. Section 133 gives the Authority jurisdiction to recover penalties "*(a) for any breach of an employment agreement; or (b) For a breach of any provision of this Act for which a penalty in the Authority is provided in the particular provision.*" There is no provision for a penalty in relation to a breach of s.120. I am therefore unable to award a penalty for breach of s.120.

19. There is however provision for a penalty for breach of s.64.

20. Penalties are punitive and discretionary and should not be ordered if the breach is trivial. The applicant must prove a penalty claim beyond reasonable doubt. As a penalty for a breach of s.64, which I am convinced was, like Ms Ahmed's other breaches of the law, wilful, I order that a penalty of \$1,000 be paid and that this penalty be paid directly to Ms Pearce pursuant to s.136 (2).

Costs

20. Costs were also sought at the rate of \$135 per hour for two hours plus travelling costs at State Service rates between Auckland and Hamilton.

21. The respondent is also to pay to the applicant the sum of \$270 as costs. Disbursements are also to be paid. These comprise the \$70.00 filing fee and \$161.20 as travel costs.

Dzintra King
Member of the Employment Authority