

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Jennifer Robertson (Applicant)  
**AND** Poland Motors Limited (Respondent)  
**REPRESENTATIVES** Andrew Flexman  
Douglas Poland  
**MEMBER OF AUTHORITY** Dzintra King  
**INVESTIGATION MEETING** 11 March 2002  
**DATE OF DETERMINATION** 3 April 2002

**DETERMINATION OF THE AUTHORITY**

Ms Jennifer Robertson, the applicant, claims that she was unjustifiably dismissed by the respondent, Poland Motors limited. She asserts that the dismissal was both substantively and procedurally unjustified.

Ms Robertson originally worked For Mr Douglas Poland Senior in the Helensville office. In April 2000 she transferred to the Wellsford office and came under the supervision of Mr Douglas Poland Junior. Ms Robertson had a number of unpleasant encounters with Mr Poland which resulted in her notifying him in writing that she would not meet with him again without a representative present.

Part of Ms Robertson's job entailed dealing with Ace Payroll and included calculation of sick and holiday pay. Mr Poland had made enquires of Ace relating to the payment of holiday pay to an employee, which request necessitated the holiday pay records of two other employees being checked in order to provide verification. One of those employees was Ms Robertson. At the end of the letter Lorraine from Ace wrote: "*We cannot see anything in the holiday pay records that would suggest that the files have not been kept consistently and correctly.*" This letter was received on 8 February 2001.

Ms Robertson's hours of work varied. Initially she worked a 5 day week, then a four day week and a three day week. Her pay rate also varied. She was overpaid for annual holidays. When this was brought to her attention by a letter from Mr Poland dated 9 July 2001 Ms Robertson got in touch with Ace and rectified the matters referred to in the letter. Mr Poland later said he expected her to go back beyond the date of March 2001 referred to in his letter and correct other alleged overpayments and irregularities. However, Mr Poland never expressly made any such request of Ms Robertson. Ms Robertson therefore concluded, reasonably, that she had done all that she had been asked to do by her employer and that the matter had been resolved. She gave Mr Poland an explanatory letter dated 10 July 2001. On 11 July 2001 Ms Robertson received a letter from

Lorraine at Ace confirming the explanation for the overpayments. Lorraine concluded her letter by stating *"I trust this clarifies a rather complicated situation for you."*

Ms Robertson had said that the payroll programme was not easy to use and that holiday and sick pay were calculated by the programme after the number of days had been put into the system and that she did not have any control over the calculation. Mr Poland accepted that. However, paradoxically, he also held Ms Robertson responsible for what were clearly problems with the payroll programme, matters over which she had no control.

On the Tuesday prior to her dismissal on 31 July 2001 Mr Poland told her that there were still problems with the payroll system and that he was getting Ace to investigate matters. Ms Robertson asked him to give her a copy of any further report compiled by Ace. She did not receive a copy and she rang Ace and left a message asking for a copy.

On 30 July 2001 Mr Poland asked her to attend a meeting with him and his father. He did not tell her what the meeting was about but she was concerned because of his manner and arranged for her husband to attend the meeting with her. At the meeting Mr Poland Jnr read to her from a prepared letter which had been typed the previous day. The letter makes a very serious allegation: in essence, that she deliberately defrauded the company. The letter sets out amounts she allegedly owes the company, raises the issue of sick leave overpayments and asks that she resign and pay back the sums allegedly owed. The letter ends by saying *"I undertake not to take this matter any further providing you accept the above terms."*

Ms Robertson did not accept the terms nor did she accept that she had done anything wrong. Mr Poland based his allegations (which were not put to Ms Robertson for her comment) on a report supplied to him by Ace, which report he had not revealed to Ms Robertson and in fact the report had never been revealed to her prior to the investigation meeting.

Mr Flexman, counsel for Ms Robertson, contended that Mr Poland did not understand the payroll system. This is clearly correct and Mr Poland himself accepted that. The Ace report, dated 27 July 2001, states clearly that its conclusions are predicated upon an assumption that an 8 hour day was being worked. The writer of the report says *"Prior to December I am quite unclear as to how many actual hours per day and days per week Jennifer was working, so for the purpose of doing a calculation I am going to assume that she was on a base of 8 hours per day up to that point."* Later the writer states *"On the assumption that your employee was working 7.5 days from December...."*. Later in the report it is stated that: *"Again, I must reiterate that these calculations are based on the assumptions outlined above."* And further in the report the writer states: *"From my discussion with you Corinne it suggests there may not have been a discussion clearly defining what Jennifer was, or was not entitled to. Accordingly, she may have misunderstood what her entitlements were when paying herself leave."*

Mr Poland admitted that he had not checked any of the assumptions on which the report was based. He had never discussed them with Ms Robertson and had not raised any of the issues in the report with her for her comment prior to writing and issuing what amounted, Mr Poland accepted, to a letter of termination.

During the investigation meeting it became very clear that there were cogent and honest explanations for all the concerns Mr Poland had about any alleged discrepancies or overpayments. It is a great pity that this report was not made available prior to the mediation as its discovery could well have facilitated a settlement. To accuse someone of dishonesty is a very serious matter. Ms Robertson was given no opportunity to respond to this allegation which, if she had been, would have cleared her name.

In making a decision to dismiss the employer must base that decision on a full, fair and reasonable investigation which will involve putting all the alleged facts to the employee and giving her an opportunity to respond to them and explain them. This did not happen. In Northern Distribution Union V BP Oil NZ Ltd [1992] 2 ERNZ 483 the Court stated that the decision to dismiss had to be one which a reasonable and fair employer could have taken in the circumstances. Regrettably, this cannot be said to apply in the instant case.

The decision to dismiss was based on a suspicion founded on information which the respondent did not fully understand and which he did not give the applicant the opportunity to comment on. In the circumstances, Mr Poland could not reasonably have concluded that Ms Robertson was guilty of misconduct let alone serious misconduct justifying a summary dismissal. Furthermore, Mr Poland did not tell Ms Robertson what the meeting was about or tell her that dismissal was a possibility. In NZ Food Processing IUOW v Unilever NZ Ltd [1990] 1 NZILR 35 the Court held that an employer should tell an employee that dismissal was a possibility and proffer an opportunity for an explanation. In Honda NZ Ltd v NZ Shipwrights Union [1990] 3 NZILR 23 it was held that the more serious the allegation the more thorough the investigation and the more convincing the evidence had to be. Mr Poland's investigation did not meet the legal requirements for a fair investigation and there can therefore be only the one conclusion: the dismissal was unjustified.

Ms Robertson has sought remedies which include payment of lost remuneration, payment of a lost superannuation contribution and compensation for humiliation and distress.

According to the wages records Ms Robertson earned an average gross income of \$570.00 per week. She has sought reimbursement for a period of seven months. The legislation provides at s. 128 (2) for the minimum payment of three months' lost remuneration. Section 128 (3) provides that a payment greater than that may be made. That is at the discretion of the Authority. Ms Robertson has provided two medical certificates. One is dated 20 August 2001 and states that she has been unfit for work from 13 August until 23 August 2001. The second certificate is dated 20 February 2002 and provides details of Ms Robertson's illnesses. Some of the illnesses referred to predate the dismissal and there is no explicit connection between the other illnesses and the dismissal. The certificate simply asserts: *"This is to conform that Jennifer has suffered a deterioration in her general health subsequent to difficulties with her Employer Mr Doug Poland and her dismissal in July 2001."* This does not assert a causal effect.

Ms Robertson deposed that in October when she was well enough to look for other employment she made efforts to obtain alternative employment. She has also, to her credit, commenced a computer course to enhance her skills. It would be difficult for an employee whose employment has been terminated on the grounds of dishonesty to obtain alternative employment. In order to be fair to both parties I think that I should exercise my discretion to give an award that is greater than the minimum three months but not as great as that sought. This is because while I accept that there was a period of sickness in August I am not convinced that Ms Robertson could not have made earlier attempts to find employment and I cannot find that there is a direct causal relationship between the illness and the termination. The respondent is to pay to the applicant the equivalent of five months' lost wages. At the rate of \$570.00 gross per week this totals \$12,350.00. The respondent is also to pay Ms Robertson the sum of \$450.00 which is the amount that would have been paid by the respondent into her superannuation fund. The requisite notice has been incorporated into the lost remuneration and is not additional to it.

Ms Robertson has also claimed \$20,000 pursuant to s.123 (c) (i). This is large amount and I have not been persuaded by the evidence that it is warranted in the circumstances. To be falsely accused

of dishonesty, especially in a small town, is no light matter. She is, however, clearly entitled to an award and I set that at \$5000.00.

Costs were reserved. If the parties are unable to resolve this between themselves leave is reserved for the applicant to file a memorandum on the subject. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member of Employment Relations Authority