

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 125/09
5120566

BETWEEN HEIKE SAGE
 Applicant

AND I REDELMAN & SON (NZ)
 PTY LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Chris Eggleston for Applicant
 Sarah Jane Neville for Respondent

Investigation Meeting: 10 December 2008

Further information
received 17 December 2008, 23 December 2008, 15 January
 2009, 20 January 2009, 21 January 2009

Submissions received: 30 January 2009, 23 February 2009 from Applicant
 16 February 2009 from Respondent

Determination: 20 April 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter concerns an allegation of unjustified dismissal.

[2] The respondent provides furnishings, fabrics and wall coverings to clients in Australia and New Zealand. In early 2008 Ms Sage, a sales representative with almost three years' service, was one of three full time staff in New Zealand. At that time, as she knew, the New Zealand arm of the business was not doing well.

[3] On 27 February 2008 Ms Sage was called to a meeting with the director of the respondent company, Geoff Redelman, who was visiting from his principal business base in Melbourne. Ms Sage was not told the meeting was disciplinary in nature and

understood it to be for the purpose of discussing the sales proposal she had recently prepared at Mr Redelman's request. She says it began in that way, with Mr Redelman explaining why he felt her recommendations would not work. However he then went on to tell her that he was issuing a final written warning for poor performance, and that she had a period of one month in which to bring her sales up to an acceptable level otherwise she would be dismissed.

[4] Ms Sage says she immediately challenged the basis for the warning, telling Mr Redelman that she believed the targets he had set were not achievable in the timeframe given unless changes were made (as she had proposed.) Ms Sage says that she also told him that she had not been warned previously (and so could not be given a 'final warning'.)

[5] Mr Redelman says that she was "*belligerent in saying that there would be no improvement.*" He construed this as a signal that she wished to end the employment relationship at that point and advised Ms Sage that her employment would be terminated with one week's pay in lieu of notice. As instructed, Ms Sage packed her things and left immediately. That afternoon, Mr Redelman emailed her confirming the termination of her employment but indicating that he saw it as by agreement. She responded by email disputing her agreement and telling him that she would take matters further.

[6] Mr Redelman told me that that he discussed Ms Sage's performance with her twice in the second half of 2007 and claims that a warning was issued each time. Both are disputed by Ms Sage, as is the assertion that she agreed in any way to the termination of her employment.

[7] Ms Sage seeks reimbursement of earnings lost as a result of the personal grievance, compensation for hurt and humiliation in the sum of \$15,000.00, and a penalty of \$10,000.00 for breach of good faith.

[8] The latter claim relates to the fact that Mr Redelman insisted on paying her final pay by cheque (contrary to the usual practice of making direct payments to her bank account) and then attempted to assert that its acceptance amounted to an accord

and satisfaction. Ms Sage believes this was a deliberate attempt to trick her into forfeiting her rights to pursue a grievance.

[9] The respondent also counterclaimed a penalty in relation to an allegation that when she left Ms Sage did not return her work diary for the 2007 year. Mr Redelman expressed concern that Ms Sage thus retained important and confidential information which the respondent needed back. Ms Sage's response to this was that she no longer had the diary and was not certain what she had done with it when finished with it. She said any important information it contained (client details etc) had been transferred to the respondent's information systems well before her employment ended.

[10] In closing submissions the respondent did not actively pursue this claim although it reiterated that it was properly brought. For the sake of completeness I note that I do not accept that there is anything sinister in Ms Sage being unable to find her diary for the previous year, and as a consequence, this claim fails.

Issues

[11] The following issues arise to be determined in this matter:

- i. Was the termination of employment by agreement?
- ii. If not, did Mr Redelman follow a fair procedure in dismissing Ms Sage?
- iii. If Ms Sage was unjustifiably dismissed, did her conduct contribute to that dismissal, and
- iv. what remedies will be appropriate in the circumstances?

(i) Was the termination of employment by agreement?

[12] Even by Mr Redelman's account of the meeting of 28 February (which he clarified in his oral evidence) it is clear that Ms Sage did not expressly agree to the ending of her employment. By Ms Sage's account, she did not say anything that was capable of being construed in that way at all. Even if she had, Mr Eggleston argues on her behalf that Mr Redelman could not treat the employment as ended by inference. He drew my attention to the following statement of Judge Shaw in *Monteith v Hakansson* 18/3/08, WC 5/08:

“...In the absence of a clear and unambiguous resignation, an employer is not entitled to seize on words not intended or capable of amounting to a resignation especially where an employee makes it clear that resignation was not intended.”

[13] I accept Ms Sage’s assertion that she did not intend to resign. I also accept that her vigorous challenge to the warning did not reasonably support the construction Mr Redelman placed upon it. Finally, even if it had, she made it clear that she did not wish to resign in her response to his email of the afternoon of 28 February.

[14] In short, the evidence does not support a conclusion that the employment was terminated by agreement. Ms Sage was dismissed, and it falls to the respondent to justify that dismissal.

(ii) Procedural fairness

[15] The termination of Ms Sage’s employment was not procedurally fair. The two most significant errors (both sufficiently serious in themselves to render the dismissal unjustified) were the absence of warnings and the failure to provide notice of the purpose of the meeting of 28 February.

[16] Mr Redelman told me that Ms Sage knew her sales did not cover the cost of her position and that he felt that it should have been clear to her that in such circumstances her job was not safe. There is no dispute from Ms Sage that she was aware that the New Zealand business was struggling. She told me she understood that from the time she was employed it had been “carried” by the Australian business. However she said she was given no indication, prior to the February 28 meeting, that her job was at risk.

[17] It is clear even from Mr Redelman’s own evidence that he never explicitly told her this. Nor did he tell the NZ manager (to whom Ms Sage reported in between his visits, which were at intervals of several months) that he had warned Ms Sage. In short, Mr Redelman did not warn Ms Sage in the formal sense: he did not put her expressly on notice that her job was in jeopardy, with specific advice as to what improvements were sought and in what timeframe. To do so was a minimum requirement of procedural fairness.

[18] In addition, procedural fairness required him to give prior notice of the purpose of the meeting of 28 February. His failure to do this meant that Ms Sage was not able to prepare for the meeting and so did not have a full opportunity to respond to his concerns. The practical consequence of this was that he proceeded to dismiss without having established that he had all the information necessary to make that decision.

[19] These procedural failings rendered the dismissal unjustified.

(iii) Contributory conduct

[20] In order to assess the extent to which any poor performance by Ms Sage might have contributed to her grievance, it is necessary to establish:

- i. what her level of performance was;
- ii. how it compared to Mr Redelman's expectations (as communicated to her) and
- iii. whether those expectations were reasonable.

[21] Ms Sage told me that she always understood that Mr Redelman expected her to do 6-8 calls a day. Documentary evidence to the Authority included daily call sheets providing detailed information about Ms Sage's visits to clients and prospective clients. The call sheets confirm that in general Ms Sage averaged close to 6-8 calls per day.

[22] However Mr Redelman's evidence was that he expected 6-8 "A level" calls per day, by which he meant full presentations to clients who were serious prospects. (the respondent utilised a system by which call sheet results were analysed by type of call, "A" "B" or "C.") There is however no record of him ever telling Ms Sage this.

[23] Ms Sage did not average 6-8 "A" calls per day and says she was never told that this was the expectation. If she had been, she said, she would not have considered it reasonable. She said unless they were engaged in project work clients did not wish to be visited more than about once a month, and she simply did not have enough "A" clients on her list to be able to find 6-8 per day to do. As for finding new prospects,

Ms Sage said that in a market the size of Auckland, there were not significant numbers of these to be had. She also noted that the respondent catered to a specific section of the market because it carried a product range that was “classic” in style and did not suit the styles favoured by many contemporary designers and architects.

[24] At the investigation meeting I heard from Ms Lamb, Ms Sage’s immediate manager, who stated:

“Heike was doing well with the client base she had, in the economic circumstances.”

[25] During the Authority investigation meeting it became clear that Mr Redelman’s had limited knowledge of the market in Auckland (or New Zealand generally.) His expectations of what could be achieved in the Auckland market were arbitrary and unsupported by research. After the investigation meeting he provided listings from the yellow pages to demonstrate that his expectations were reasonable however much of this information did not relate to potential customers at all and did nothing to change my view that he was uninformed about the nature and size of the Auckland market.

[26] The evidence does not establish that Mr Redelman told Ms Sage that she had to make 6-8 “A” calls each day but even if he had, it has not been demonstrated that this was a reasonable and achievable target. I am not satisfied that Ms Sage contributed to the situation that gave rise to her personal grievance.

(iv) Remedies

[27] Ms Sage was in receipt of an annual salary of \$37,500.00. (Her package provided for commission but none was ever achieved.) She also had personal use of a motor vehicle and in submissions claimed \$8,000 per annum (on a pro-rata basis) in respect of that benefit. This figure was based on information provided by Mr Redelman as to the cost of the vehicle to the respondent. It is treated here as reliable for the purpose of fixing remedies notwithstanding Mr Redelman’s assertion that some of this cost related to petrol used in work business. This is because he provided no evidence of what portion of the petrol costs were work related and because the figure of \$8,000.00 it is within the range of value set by case law for personal use of a

motor vehicle. It is accepted therefore that Ms Sage's losses amounted to \$875.00 per week.

[28] Upon termination, Ms Sage received one week's notice which took her to 5 March. Thereafter she took up a domestic purposes benefit before going to Germany for a pre-arranged holiday from 11 July to 13 August 2008. She finally started a new job on 8 September 2008. Ms Sage seeks lost earnings for the period between the end of her notice period and the commencement of her new employment (excluding her holiday, 22 weeks in all) less what she received on domestic purposes benefit (\$3,652.46 for the entire period.)¹

[29] On the question of lost wages, I note that s. 128 (2) provides that where the Authority determines that a grievant has lost remuneration as a result of a personal grievance, it must:

“order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration...

(3) despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.”

[30] Ms Sage provided the Authority with evidence of her job search efforts and in submissions Mr Eggleston argued that since she was diligent in seeking work, the Authority should exercise its discretion to award compensation for the entire 22 week period she was out of work.

[31] In submissions for the respondent, Ms Neville drew the Authority's attention to indications in the evidence that Ms Sage had limited her job search efforts after 20 June 2007, on the basis that she planned to travel overseas on 11 July, and that she

¹ I also heard argument from the respondent that I should take Family Assistance tax credits into consideration of post dismissal income. I have declined to do so primarily because I find it difficult to accept the proposition that a tax credit calculated on an annual basis can be treated as income.

obtained work within two weeks of her return on 13 August. I accept this submission. The evidence supports a finding that Ms Sage lost earnings as a result of the personal grievance in the period 5 March 2008 to 20 June 2008; a period of 15 weeks.

[32] Ms Sage is therefore entitled to 15 weeks wages at \$875.00 per week less what she received on the domestic purposes benefit. As set out above, I was provided with correspondence from Inland Revenue showing the total benefit paid out to her but was not told the weekly rate or the number of weeks it was actually paid to her. I therefore referred to the relevant Government website² which set out the Domestic Purposes Benefit Sole Parent Rate at 1 April 2007 as \$309.73, rising by approximately a dollar a week on 1 April 2008. However, \$309.73 per week for 15 weeks would come to more than Ms Sage actually received from Income Support. I therefore deduct only the amount paid to her, \$3,652.46.

[33] Ms Sage's losses can therefore be calculated as the difference between what she would have earned (15 weeks wages at \$875.00, being \$13,125.00) and what she received (\$3,652.46.) This comes to \$9,472.54.

[34] In relation to her claim for compensation for hurt and humiliation, Ms Sage spoke of the shock of her dismissal and the associated financial stress, given that she was the sole provider for herself and her child. She also spoke of the fact that nothing of this sort had ever happened to her before, and of the blow to her self-esteem. To reinforce this point she provided me with her C.V. which demonstrated that she had had a flourishing career in the design industry before these events.

[35] I am satisfied that the experience was a distressing one. I consider the sum of \$8,000.00 to be an appropriate level of compensation in all the circumstances.

[36] Finally, I come to the claim for penalty. I do not find it surprising that Ms Sage inferred that Mr Redelman acted deliberately in paying her by cheque. It is not an unreasonable construction to place on that action. However, the standard of proof in relation to a claim for penalty is higher than that in respect of other matters for the

² <http://www.winz.govt.nz>

Authority's determination. I am not satisfied that this higher standard has been made out. The claim for penalties is declined.

Summary of orders

[37] **The respondent is ordered to pay to Ms Sage the following sums:**

- i. \$9,472.54 gross reimbursement of lost earnings, and**
- ii. \$8,000.00 compensation for hurt and humiliation.**

Costs

[38] Costs are reserved. If this issue cannot be resolved between the parties then they have a period of 28 days in which to make submissions on it.

Yvonne Oldfield

Member of the Employment Relations Authority