

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 59

File Number: 5309295

BETWEEN Wendy Spratt
Applicant

AND April Sun on Cuba Limited
Respondent

Member of Authority: Denis Asher

Representatives: Michelle MacManus for Ms Spratt
Karl Gill for the Company

Investigation Meeting On the papers

Submissions Received 6 April 2011

Determination: 18 April 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] By way of a preliminary issue, the matter for determination is did Ms Spratt raise a personal grievance with the respondent (the Company) within the statutory 90-day time frame?

The Investigation

[2] During a telephone conference on 16 March 2011 the parties agreed to setting down the substantive employment relationship problem for an investigation in

Palmerston North on 17 May 2011 and, in the meantime, having this preliminary issue determined on the papers, and to a timeline for the provision of witness statements and submissions.

Relevant Facts

[3] I understand the following to be agreed facts or matters not in contention:

[4] Ms Spratt was employed by the Company as an intermediate beauty therapist/receptionist at its premises in Palmerston North.

[5] The parties signed off an employment agreement on 16 February 2009.

[6] Ms Spratt resigned her employment on 18 December of that year, and agreed to work out her 4-weeks' notice. It appears the parties also agreed, a short time later, that Ms Spratt would work until 22 January 2010.

[7] Ms Spratt was asked by the Company to attend a meeting on 13 January 2010 with a support person. The applicant says she had no knowledge as to the purpose of the meeting (but no grievance is being pursued in respect of that meeting or the termination of her employment).

[8] The Company engaged its present advocate, Mr Karl Gill, to represent it at the meeting.

[9] Three allegations were put to Ms Spratt at the meeting:

- a. That she had breached a fixed-term contract,
- b. That she had worked illegally; and
- c. That the applicant had made known her resignation and new place of employment to staff and clients.

[10] By letter dated 22 January Ms Spratt sought her outstanding holiday pay and wages. By reply received on 28 January the Company set out allegations of serious misconduct and sought another meeting by the following day.

[11] Ms Spratt then sought legal representation. By letter to the Company dated 2 March her present counsel, Ms Michelle McManus, sought time and wage and holiday and leave records, any information relating to the respondent's claims of salary and training costs owed to it by the applicant, and any other relevant information.

[12] No response was received and a request for mediation assistance (copied to the Company) was filed on 23 March.

[13] By letter dated 2 April the Company advised that, following an investigation, serious misconduct had been proven. Allegations set out in the letter included that Ms Spratt, *"had consciously applied for other positions ... knowing full well her obligations ... with April Sun on Cuba and failed to inform her employer of this (and) Wendy also agreed to keep her resignation confidential and yet had already participated in an advertising campaign with her new employer"* (attachment to statement of problem). The letter concluded: *"After considering all the facts and carrying out a thorough investigation it is proven that Wendy lied to us as her employers, and this constitutes serious misconduct"* (above).

[14] The respondent also claimed lost revenue arising out of the applicant's alleged early termination and an overpayment.

[15] By letter dated 5 May the Mediation Service advised it had been unsuccessful in arranging mediation.

[16] By letter dated 14 May, Ms Spratt raised a personal grievance for unjustified disadvantage in respect of the finding of serious misconduct. It also repeated the invitation to attend mediation.

[17] By letter dated 11 June (copied to the Company) Ms Spratt again sought the assistance of the Mediation Service.

[18] By letter dated 12 June the Mediation Service advised it had again been unsuccessful in arranging mediation.

[19] In a statement of problem filed on 29 September 2010 Ms Spratt said the problems she wanted the Authority to resolve were unpaid holiday pay, wage arrears and unjustified disadvantage in employment (par 1).

[20] In its statement in reply filed on 27 October the Company said, amongst other things, that Ms Spratt was overpaid her holiday pay, there are no wages unpaid, that Ms Spratt owed the Company more than \$35,000 for the remainder of her contracted employment period and that the grievance was out of time.

[21] Mediation during the first quarter of this year did not resolve the parties' problem.

Discussion and Findings

[22] Ms Spratt says the letter of 14 May 2010 (the letter) written on her behalf by her solicitor, amounted to proper notice of her personal grievance. I accept that submission for the following reasons:

[23] Section 114 of the Employment Relations Act 2000 (the Act) provides that, amongst other things,

Every employee who wishes to raise a personal grievance must ... raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later

[24] The letter formally stated it was notice of grievance (second paragraph of the second page).

[25] The letter provided sufficient detail of the action complained of and made clear that Ms Spratt wanted to have it addressed, i.e. the finding of serious misconduct against her was challenged on the grounds of fairness and reasonableness, caused her

distress and that she was additionally disadvantaged by the respondent's use of the finding to withhold pay owed to her.

[26] The letter clearly stated the remedies sought by Ms Spratt and the consequences of non-compliance with her notice.

[27] The letter was sent within a month of the finding of serious misconduct coming to Ms Spratt's attention.

[28] In claiming the notice of grievance is out of time the Company relies primarily on Ms Spratt not being an employee, her having resigned on 14 January 2010 and being employed elsewhere. I do not accept this submission as the findings relied on by the respondent in determining Ms Spratt had lied to it were in respect of her actions while still an employee; it would be inequitable and unreasonable for the employer, having reached these findings, to now attempt to deny the applicant testing them on the grounds she is currently no longer an employee.

[29] The Company also alleges that the letter does not specify the nature of the unjustified disadvantage nor what the applicant wants the employer to do: the claim is plainly wrong.

[30] The respondent's claim that it would not be just for the Authority to grant leave in the circumstances where, even if Ms Spratt was successful in her grievance, contributory fault was likely to amount to 100%, is not self-evident, irrelevant to the matter for determination, and anyway requires testing by way of a substantive investigation.

[31] I make clear here my doubt as to the strength of the respondent's counter-claim, relying as it appears to do on claims of "*a fundamental contractual arrangement for a fixed term commitment and bonding*" (respondent's letter of 2 April; attachment to statement of problem). No such provision appears in the employment agreement signed on 16 February 2009 which, on its face, appears to be a conventional, ongoing contract of employment.

[32] I record here for the parties' benefit the following:

- a. It is a matter of fact as to whether Ms Spratt is owed any unpaid wages and holiday pay; and
- b. Because of the provisions of the Wages Protection Act 1983 (in particular, s. 4 of that Act), it is unlawful for the Company to set-off any unpaid wages and holiday pay against any claim it might have that it is owed damages by the applicant, whether it be for a bond and/or training as claimed at 3 (c) of the statement in reply. I also note clause 16 of that agreement, which required Ms Spratt to give 4-weeks notice of her resignation: that provision appears to contradict the claim of a bonded or fixed-term arrangement. I record here my preliminary observation that there appears to be no evidence which might support a claim – should it be advanced – that the parties entered into a lawful, fixed-term arrangement. It is therefore difficult to understand, at this juncture, the respondent's claim Ms Spratt has caused it lost earnings.

Observation

[33] In a nutshell, it is overdue for the parties to properly inform themselves as to the real issues in this employment relationship problem and, consistent with the good faith obligations they once owed each other at law, and by way of a hard-nosed risk assessment of likely outcomes, look for a speedy, fair and reasonable resolution of their mutual concerns in advance of the substantive investigation set down for 17 May this year.

[34] Bearing the above in mind, I require the parties to advise by the 28th day from the date of this determination of any concerns they may have as to why I should not exercise the statutory obligation on the Authority and direct them to further mediation: s 159 of the Act applied.

Determination

[35] Ms Spratt is able to bring a personal grievance in respect of alleged unjustified disadvantage as she was an employee of the respondent at the time of the relevant

events; she also remains freely able to pursue her claims of unpaid wages and holiday pay.

[36] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority