

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Diane Strachan (Applicant)  
**AND** Northern Car Services Limited (Respondent)  
**REPRESENTATIVES** David Bruce, Advocate for Applicant  
Tom Skinner, Advocate for Respondent  
**MEMBER OF AUTHORITY** Robin Arthur  
**INVESTIGATION MEETING** 19 December 2005  
**DATE OF DETERMINATION** 22 December 2005

**DETERMINATION OF THE AUTHORITY**

[1] The applicant says she was unjustifiably dismissed after her employer failed to honour an agreement to pay her two weeks notice on making her position redundant. She seeks lost wages from the time she finished working for the respondent until she found a new job eight weeks later, compensation for distress and costs. She also seeks a penalty against the respondent for not providing her with a written employment agreement.

[2] The respondent denies there was any agreement to pay two weeks notice. Rather, its director Raymond Ha says the applicant never agreed to accept two weeks' notice for redundancy, demanding four weeks instead, and stopped working by her own choice as no finishing date was agreed.

[3] Mrs Strachan and Mr Ha both gave sworn evidence. Mr Ha gave evidence directly in English and, with the assistance of an interpreter, in Korean. Both had prepared written statements and answered questions during the investigation meeting. The advocates for both parties had an opportunity to ask questions and also made oral closing submissions.

[4] The issues for determination include:

- whether the applicant was properly consulted about the redundancy;
- whether the parties agreed on a redundancy payment;
- whether the applicant was unjustifiably dismissed; and
- whether any remedies are due to the applicant?

**Restructuring and redundancy**

[5] In May 2005 Mr Ha took advice from the respondent's accountant. The business – a car services workshop – was in financial difficulties. It needed to increase income and reduce outgoings. The accountant recommended hiring another mechanic. Mr Ha knew a mechanic who

had previously worked for the business was back from overseas and looking for a job. He took steps to hire him.

[6] Meanwhile Mr Ha considered that the only measure he could take to reduce overheads was to lay off the full-time office administrator. He and the mechanics could do more of the work needed to prepare invoices and Mr Ha's wife could take over the books on a part-time basis.

[7] Mrs Strachan worked at the office administrator from November 2003. She worked 40 hours a week answering phones, preparing invoices, and dealing with cash balances and the monthly roll-over for the business accounts.

[8] She and Mr Ha agree that on 30 May they met and talked for some time. Mr Ha told Mrs Strachan that he could not afford to keep her on. He explained the changes he considered necessary and offered Mrs Strachan the options of working for a further two weeks or taking two weeks pay in lieu. Mr Ha asked Mrs Strachan to train his wife to do the end-of-month accounting work. The meeting ended with Mrs Strachan being given time to consider her options.

[9] The applicant does not question the genuine commercial basis for the redundancy. Her claim is that the redundancy was not carried out fairly.

#### **Whether parties agreed redundancy payment**

[10] The accounts by Mrs Strachan and Mr Ha differ on some aspects of their 30 May discussion. The most important is that Mrs Strachan says she immediately told Mr Ha that she did not think a payment of two weeks notice was fair but four weeks would be. Mr Ha says four weeks pay was not mentioned until a later meeting.

[11] Another important difference relates to a discussion on 1 June. Mrs Strachan says she told Mr Ha that she would accept two weeks pay in lieu of notice and expected it to be in her next pay, along with her holiday pay. During 1 June Mrs Strachan spent time training Mrs Ha how to do the end-of-month accounting work. Mrs Strachan was then away from work for the next two days on pre-arranged leave to visit a terminally-ill relative.

[12] Mr Ha denies that Mrs Strachan agreed on 1 June to accept two weeks paid notice. Rather he says Mrs Strachan insisted that she be paid four weeks pay.

[13] Mrs Strachan says she on Saturday 4 June she checked her bank account and was upset to discover that the payment had not been made. Mr Ha returned a phone message left the next day. During that conversation Mr Ha told her that his legal advice was that he need only pay one week's notice. They agreed to meet during the coming week.

[14] On 8 June Mrs Strachan met Mr Ha at the respondent's premises. Mrs Strachan again asked Mr Ha to pay her four weeks' pay in lieu because of the redundancy of her position. Mr Ha would not agree and Mrs Strachan left the premises. At her request he provided a letter stating that her employment was "terminated on the grounds of redundancy effective ... 6<sup>th</sup> June 2005".

[15] At the 8 June meeting Mr Ha refused to make any payment. He considered that Mrs Strachan had rejected his earlier offer of two weeks and was no longer prepared to offer it at that time. His evidence was that at that meeting he told Mrs Strachan: "I gave you two offers but you did not accept so I don't offer any more".

[16] I find, on the balance of probabilities, that Mr Ha had offered two weeks redundancy pay on 30 May and that on 1 June Mrs Strachan accepted that offer. I accept her evidence that she had discussed accepting the two weeks' pay with her husband before going to work on 1 June and that makes it more likely that she did so.

[17] I acknowledge that her acceptance may not have been as clear as it might have been because she also said that it was unfair and that she thought she deserved more. Mr Ha told me that he did not regard this as a "finished deal" but I consider that it met the basic legal requirements of offer and acceptance. Many agreements – both in employment and commercial matters – will be concluded with one of the parties still grumbling about the price but this does not negate the agreement.

[18] I consider this finding is supported by the fact that on 1 June Mrs Strachan went ahead with the training of Mrs Ha which was part of the restructuring. That was conduct by her consistent with accepting the loss of her job. She left work on 1 June for pre-arranged leave on the following two days. She did not attend work on the following Monday. That Mr Ha did not make any enquiry of why she was not there is consistent with an employer knowing that the employment relationship has ended, and having arranged the basis on which it ended.

[19] I also find that the process followed in advising Mrs Strachan of the redundancy of her position was not inadequate given the size and very limited resources of the respondent. Mr Ha spent some time explaining the need for the redundancy on 30 May, gave her options with regard to notice and pay, and gave her time to consider those. I accept that he did not impose any immediate deadline on when her job would finish but left that open for discussion. She was not required to leave by a pre-determined day. There were no realistic prospects for redeployment.

### **Was there a dismissal?**

[20] On the basis of my finding above regarding agreement on payment for notice of redundancy, I find that Mrs Strachan agreed to end her employment and was not unfairly dismissed. Her application for lost wages and compensation is declined. However there are matters relating to the terms on which her employment was ended and some statutory obligations on the respondent which need to be addressed in relation to her application.

### **Remedies**

[21] The Authority cannot set levels of redundancy compensation or the period of notice required for redundancy where parties have not previously agreed such terms in their employment agreement. It can enforce terms that have been agreed.

[22] The offer to Mrs Strachan of two weeks pay in lieu of notice of redundancy and her acceptance of it created a new term of her employment agreement. The respondent's failure to pay it was a breach of that term. The failure to record that term in writing does not render it unenforceable.

[23] Mrs Strachan is entitled to that two weeks pay. **The respondent is ordered to pay Mrs Strachan the sum of \$1280, less applicable tax, in lieu of the agreed period of two weeks notice of redundancy.**

[24] I do not consider the week of 30 May to 3 June is part of that notice period as suggested by the respondent. Mr Ha told me he had not set a date for Mrs Strachan's employment to end. She also worked in that week, including training Mrs Ha on 1 June before taking pre-approved leave on

2 and 3 June. She was paid until 6 June, which was the Queen's Birthday public holiday. The period of pay in lieu of notice applies from 6 June.

### Penalties

[25] The respondent is liable for a penalty for the breach of the applicant's agreement. The applicant also seeks a penalty against the respondent for its breach of the statutory requirement to provide written employment agreements. The requirement was set by s64 of the Employment Relations Act ("the Act") until 1 December 2004 and by s63A of the amended Act thereafter. The Act authorises penalties against a company of up to \$10,000.

[26] There was evidence from both Mr Ha and Mrs Strachan that they had discussed the need for written employment agreements in 2004 but had not made the necessary arrangements. Mr Ha advises that his existing staff have now been offered written employment agreements.

[27] The respondent's advocate made submissions on the ongoing financial difficulties of the company and urged that these be taken into account on any consideration of penalties.

[28] Having taken that factor into account, and all the circumstances of the case, I consider a penalty at a modest level is warranted. **The respondent is ordered to pay a single penalty of \$300 for breaching the applicant's employment agreement and s63A of the Act.** The Act allows for the Authority to order the whole or part of a penalty to be paid to a person. **The respondent is ordered pay the whole amount of the penalty ordered to the applicant.**

### Costs

[29] The applicant has been partly successful in her application. She is entitled to a reasonable contribution to her reasonably incurred costs. In all the circumstances of this case, I consider that \$500 is the appropriate level of costs for an investigation meeting which took less than half a day. The respondent is ordered to pay the applicant \$500 towards her costs in this application and to reimburse her filing fee of \$70.

### Summary of orders

[30] The respondent is ordered to pay to the applicant the following sums:

- **\$1280, less applicable tax, in lieu of the agreed period of two weeks notice of redundancy; and**
- **\$300 in payment of a penalty for breach of the applicant's employment agreement and s63A of the Act; and**
- **\$500 towards her costs; and**
- **\$70 in reimbursement of her filing fee.**