

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Sonia Ward (Applicant)  
**AND** SOS Plumbing and Gasfitting Limited (Respondent)  
**REPRESENTATIVES** Dean Organ, Advocate for Applicant  
No appearance for Respondent  
**MEMBER OF AUTHORITY** Robin Arthur  
**INVESTIGATION MEETING** 17 November 2005  
**DATE OF DETERMINATION** 15 December 2005

**DETERMINATION OF THE AUTHORITY**

[1] The applicant says she was effectively dismissed, without being told, sometime between 16 February and 3 March 2005. She seeks lost wages, holiday pay, payment of notice, compensation for distress, a penalty for failure to provide her with a written employment agreement, and costs.

[2] This matter was investigated together with the application of another former employee of the respondent under file number AEA 985-05. The applicant in that matter was the respondent's operations manager Maureen Kelly who I have found was unjustifiably dismissed on 3 March 2005. I heard evidence from her and the applicant.

[3] The respondent was not represented at the investigation meeting. It did not lodge a statement in reply but there is no doubt that it was properly notified of the applicant's claim and the investigation meeting. In a letter received at the Authority on 3 November 2005, the respondent's director Kyle Smythe acknowledged receiving notice of the investigation meeting, advised he was unlikely to attend the meeting and stated that he understood "that the Authority may make a decision against the company in its absence". He claimed that the respondent was insolvent and he was not in a position to represent it. Mr Smythe's letter has been taken into account in preparing this determination but it does not have the same weight as the sworn evidence of the applicant given in person at the investigation meeting.

[4] In January 2005 the applicant began doing cleaning work at the respondent's premises. Ms Kelly was a personal friend. There was a backlog of work in the respondent's office. At Mr Smythe's suggestion Ms Kelly offered Ms Ward work as an office assistant.

[5] Ms Ward accepted the offer and was employed as a part-time office assistant from 1 February 2005. She was not provided with a written employment agreement but the agreed terms were for her to work Tuesdays and Wednesdays from 8.30 am to 2.30pm for \$15 gross an hour.

[6] During Ms Ward's third week of work, Ms Kelly asked to her to "stand down" for two weeks. Ms Kelly told Ms Ward that this request came from Mr Smythe. He had issues with his business partner who he wanted to remove and another person in the office who was "inefficient". Ms Ward would return after that was sorted out.

[7] She left work on 16 February expecting to be called back to work within two or three weeks. Around a fortnight later she rang the respondent's offices to speak with Ms Kelly. Ms Kelly was not there because she was dismissed on 3 March after Mr Smythe told her the previous day that the company had financial difficulties.

[8] Ms Ward rang Ms Kelly at home.

[9] Ms Kelly told her that Ms Kelly had been dismissed, that things were not as they appeared with the company, and that there was no job for her or Ms Ward to return to.

[10] Ms Ward told me that she did not contact Mr Smythe to confirm this but that if there had been a job to go back to he would have contacted her as promised. She said she believed that she was lied to when she was asked to "stand down" on 16 February. If she had been informed properly of the situation, she could have looked for another job in that time.

[11] Mr Smythe's letter to the Authority claims that Ms Ward's work as a cleaner and an office assistant was undertaken as an independent contractor. However he also states that an employment agreement was prepared for her "in the same form as Maureen [Kelly]'s".

[12] I am satisfied that it is more likely than not that Ms Ward was employed as an office assistant. I find that she was dismissed on 16 February by being 'sent away' by the respondent – by Ms Kelly acting on Mr Smythe's request – and not being recalled to work. The dismissal was by omission rather than commission.

[13] Although she did not have a written employment agreement she was entitled to reasonable notice on termination. In the circumstance of a weekly wage worker in her third week of work, the reasonable notice is one week. She is entitled to be paid one week's pay in lieu of notice.

[14] I also find that Ms Ward's dismissal was in breach of the respondent's statutory duty of good faith to its employee. It had a responsibility to let her know what was happening.

[15] Ms Ward has looked but not been able to find another part-time job with hours suitable for her home and family needs. She has three children aged between 4 and 11. She felt upset at not being able to continue to contribute to the family income.

[16] She was not paid holiday pay on the \$540 gross that she earned in her three weeks work as an office assistant for the respondent.

[17] In these circumstances I find the following remedies are warranted and order the respondent to pay to the applicant the following sums:

- **\$360, less applicable tax, for two weeks lost wages, under s123(1)(b) of the Employment Relations Act ("the Act"); and**
- **\$180, less applicable tax, in lieu of notice, under s123(1)(b) of the Act; and**
- **\$36.40, less applicable tax, as holiday pay on her earnings, under s123(1)(b) of the Act; and**
- **\$500, without deduction, as compensation for humiliation and loss of dignity arising from the manner of her dismissal, under s123(c)(i) of the Act; and**

## Penalties

[18] The applicant has sought penalties against the respondent for its breaches of her rights to a written employment agreement, to reasonable notice and to holiday pay. Penalties are warranted for the respondent's actions but I do not order any in this case. I have taken account of Mr Smythe's letter to the Authority stating that the respondent ceased trading in March 2005; paid all outstanding creditors except for some money owed to shareholders, including Mr Smythe; has no assets; and, is technically insolvent. These claims will be tested by whatever steps the applicant takes to recover the amounts awarded to her. If there are funds to meet those awards, they will go to the applicant rather than as penalties to the Crown.

[19] An online check of Companies Office records on the day of this determination showed the respondent remained registered with no note of any measures to change that status by way of removal or liquidation.

## Costs

[20] The applicant is entitled to her costs and expenses in bringing this application. The respondent is ordered to reimburse the applicant the amount of her application fee of \$70. If further costs are sought and cannot be agreed between the parties, either party may apply to the Authority for a determination of costs.

## Summary of orders

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

- **\$360, less applicable tax, for two weeks lost wages, under s123(1)(b) of the Employment Relations Act (“the Act”); and**
- **\$180, less applicable tax, in lieu of notice, under s123(1)(b) of the Act; and**
- **\$36.40, less applicable tax, as holiday pay on her earning, under s123(1)(b) of the Act; and**
- **\$500, without deduction, as compensation for humiliation and loss of dignity arising from the manner of her dismissal, under s123(c)(i) of the Act; and**
- **\$70 in reimbursement of her fee for filing an application in the Authority.**

Robin Arthur  
Member of Employment Relations Authority