

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michelle Wilson (Applicant)
AND Classic Manufacturing Limited (Respondent)
REPRESENTATIVES Lorne Campbell, Counsel for Applicant
Debra Law, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 1 June 2006
15 June 2006
SUBMISSIONS RECEIVED 21, 23 & 26 June 2006
DATE OF DETERMINATION 26 June 2006

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following orders:-

- A. Classic Manufacturing Limited is ordered to pay to Michelle Wilson the gross sum of \$13,299.00 as reimbursement.**
- B. Classic Manufacturing Limited is ordered to pay to Michelle Wilson the sum of \$5,000.00 as compensation.**
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The problem

[1] Ms Michelle Wilson ("Ms Wilson") claims she was unjustifiably dismissed by the respondent Classic Manufacturing Limited ("Classic"). Classic says Ms Wilson failed to satisfactorily complete a six month training period and consequently did not succeed to permanent employment. It also says Ms Wilson failed to disclose she had secondary employment.

[2] Ms Wilson applies to the Authority for an investigation of the problem and asks that it be resolved in her favour by orders for reimbursement and compensation. She also seeks a penalty against Classic.

[3] Regrettably the parties were unable to resolve the problem between them by the use of mediation.

The issues

[4] These issues fall to be determined:-

- (i) Whether Ms Wilson was employed on a probationary basis;
- (ii) Whether Ms Wilson was unjustifiably dismissed

[5] Ms Wilson commenced employment with Classic on Monday 20 June 2005. She was employed as a trainee production assistant and was paid \$11.00 per hour.

[6] Ms Wilson says she asked Mr Bruce Skelton ("Mr Skelton"), a director of Classic, for an employment agreement. It is not disputed that Ms Wilson was never provided with one.

[7] Classic defends Ms Wilson's claim and says that Ms Wilson was offered and she accepted, employment for six months as a trainee production assistant. Mr Skelton gives evidence that Ms Wilson was informed that her employment would be reviewed at the end of six months and if her position was satisfactory, she would be offered a "permanent job". Mr Skelton is adamant it was made very clear to Ms Wilson that the six month period was a trial period.

[8] Ms Wilson tells the Authority the only review she was advised of was whether her hourly rate of pay would be increased, not whether her employment would continue.

[9] Classic maintains that Ms Wilson did not perform satisfactorily and accordingly, on 28 September 2005, Mr Skelton gave her four weeks notice of the termination of her employment. It also says that it became aware that Ms Wilson had secondary employment, which she failed to disclose when it employed her.

Probationary period

[10] I note at the outset that Ms Wilson was not "reviewed" after six months of employment. She had been employed by Classic for 13.5 weeks when she was advised her employment was to be terminated.

[11] Section 67 of the Employment Relations Act 2000 ("the Act") deals with probationary periods. That section is as follows:-

67. *Probationary arrangements—*

(1) *Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation or trial after the commencement of the employment,—*

- (a) *the fact of the probation or trial period must be specified in writing in the employment agreement;*
- and*

(b) *neither the fact that the probation or trial period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation or trial period.*

(2) *Failure to comply with subsection (1)(a) does not affect the validity of the employment agreement between the parties.*

(3) *However, if the employer does not comply with subsection (1)(a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation or trial if the employee elects, at any time, to treat that term as ineffective.*

[12] Classic did not record the terms of Ms Wilson's employment in an employment agreement. I regard the training period and the advice Mr Skelton gave Ms Wilson, as a probation or trial period. The fact of that probation or trial period was not recorded in writing. Ms Wilson by initiating this investigation and as apparent from the evidence she gives, plainly elects to treat the allegation that her employment was probationary as ineffective. In these circumstances, Classic is not permitted to rely on an alleged probationary period in terminating Ms Wilson's employment.

A justified dismissal?

[13] The Authority scrutinises Classic's decision to terminate Ms Wilson's employment in accordance with the statutory test of justification set out at section 103 of the Act. That section is as follows:-

103A. Test of justification—

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[14] The Act and the statutory test are essentially practical legislation designed to deal with everyday practical situations that arise in workplaces. Every action by an employer is subject to the statutory test and having such wide application, it ought not be interpreted in any esoteric way. I examine Classic's decision to terminate in terms of whether that decision was "unfair, unreasonable, improper, or unwarranted". I ask "should this employee have been dismissed" and "what would a fair and reasonable employer have done in these circumstances."

[15] On 28 September 2005, Mr Skelton met with Ms Wilson to review her employment. Mr Skelton asked Ms Wilson why she had not attended a particular product evening. She gave an explanation for her absence. Mr Skelton then informed Ms Wilson things were not really working out. He said originally he had been looking for someone with experience but had decided to train Ms Wilson for six months. He said she was not to treat the experience as a failure and that he did not think the job was for her. He then informed Ms Wilson he would give her one month to find another job.

[16] Ms Wilson asked if Mr Skelton considered she could improve in three months. He said "No". When she asked why she was being dismissed, he told her it was due to her having other employment, that things weren't working out and I find, that she was not "mongrel enough". Mr Skelton offered to assist Ms Wilson with other employment in the industry.

[17] Ms Wilson asked Mr Skelton to put the reasons for the dismissal in writing. Mr Skelton did so by letter dated 26 October 2005. I find that advice is far more detailed than the actual discussion with Ms Wilson on 28 September 2005. The letter began:-

Dear Michelle

You have requested reasons in writing for Classic Manufacturing Limited terminating your training. These reasons were given to you orally when you were given 4 weeks' notice on 28 September. We discussed the difficulties you were having dealing with our contractors and the problems we were having with the production schedule, where the dates for stock to be finished turned to be meaningless. However, the primary reason for terminating your training was your secondary employment which was simply incompatible with your position at Classic Manufacturing Limited. Your secondary employment meant you were unable to work the hours agreed at the start of your employment. It involved a conflict of interest and your failure to disclose this to us was a serious matter.

[18] The letter then purported to reiterate what was discussed with Ms Wilson on 28 September 2005 with respect to specific issues of poor performance by Ms Wilson. It concluded as follows:-

You could not do your job when our contractors refused to work with you. It was clear that you had little interest in the position you were being trained for and your inability to work the hours expected of you when you were first taken on, made it impossible to carry on with your training. You had a responsible position with Classic Manufacturing Limited and have secondary employment for another Clothing Manufacturer was something we could not tolerate.

To allow you time to find alternative employment we gave you 4 weeks' notice. This Notice period expires on 27 October 2005.

[19] Ms Wilson duly served out her period of notice and she left Classic Manufacturing Limited on 27 October 2005.

[20] Mr Skelton candidly conceded he didn't "follow procedure" in dismissing Ms Wilson. I have concluded that the procedure adopted in terminating Ms Wilson's employment was so unfair that her dismissal was unjustifiable.

[21] It is clear that the decision to dismiss Ms Wilson was already taken before Mr Skelton met with her on 28 September 2005. The decision was therefore predetermined.

[22] Classic was obliged to treat Ms Wilson fairly and reasonable. There are minimum requirements in managing poor performance:-

(a) The employee must be given specific reasons for the dissatisfaction and a reasonably specific and measurable improvement should then be demanded by the employer, giving a reasonable trial period, to establish whether the employee is able to achieve the improvement.

(b) The trial of the employee's work must be fair and the results at the end of the trial period considered dispassionately.

(c) Warnings for poor performance should be explicit and fair. They should describe how an employee's behaviour is deemed to be unsatisfactory, give clear information about what improvement will meet the employer's requirements, and how the improvement will be measured. The purpose is to give an employee an opportunity to improve, and to enable a dismissal to be avoided.

[23] I have no doubt that Classic had concerns about Ms Wilson's performance. But Classic did not formally articulate to Ms Wilson that it was dissatisfied with her performance. Nor did it give specific reasons for any such dissatisfaction nor demand any reasonably specific and measurable improvements within a reasonable period. All that Classic did via Mr Skelton, is tell Ms Wilson things weren't working out and that the employment would terminate. That is what Mr Skelton did on 28 September 2005. But Classic did not put Ms Wilson on notice that her employment was liable to be terminated so that she could rectify the situation.

[24] Obviously, as a trainee, Ms Wilson was being trained and the expectation for both parties must always have been that the training period was going to be successful. However, Ms Wilson was not given a chance to complete her training successfully. She did not know what her employer regarded as unsatisfactory and required improvement, and nor was she given an opportunity to rectify her performance. In failing to deal with the situation in this way, I find Classic did not act fairly and reasonably towards Ms Wilson and the dismissal is unjustifiable. All that Classic did was to dismiss her and tell her why it was dismissing her. But it never gave her a chance to succeed and improve her performance prior to dismissal. That was not fair to her.

[25] If Classic had a problem with Ms Wilson's timekeeping, her relations with contractors and her other work, it never told her it did. She was entitled to be told so that she could defend herself if Classic had formed the incorrect view, or improve her performance so as to preserve her employment. A fair and reasonable employer would have afforded her these opportunities. But Classic did not. It is not good enough or acceptable for Classic to simply dismiss Ms Wilson and then tell her of its problems. She could do nothing about the situation then.

[26] As well, there are fundamental procedural requirements an employer must observe before deciding to dismiss an employee. These requirements are:-

1. *Notice to the employee of the specific allegation of misconduct to which the employee must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be real as opposed to a nominal one, for the employee to attempt to refute or to explain or mitigate his or her conduct; and*
3. *An unbiased consideration of the worker's explanation in the sense that the consideration must be free from determination and uninfluenced by irrelevant considerations.*

[27] The concerns Classic held about Ms Wilson and secondary employment were never formally put to her for her response. In fairness to her those matters should have been. She may have had an explanation that satisfied her employer. Classic would not know until it had put the matter to her. But it did not in the manner the law requires. It made a conclusion about the matter and never sought her input before doing so. That was both unfair and not the actions of a fair and reasonable employer.

[28] The review meeting Mr Skelton held with Ms Wilson on 28 September 2005 did not comply with minimum requirements of procedural fairness. Ms Wilson was a young employee who relative to Mr Skelton was unsophisticated and vulnerable. If Classic had in contemplation her dismissal, she was entitled to minimum requirements of fairness.

[29] I rather consider that Classic and Mr Skelton fell into error because of a reliance on a probationary arrangement. It seems to me Mr Skelton considered he could simply dismiss Ms Wilson at the end of the probationary period without more. That would be a completely erroneous view because the law of unjustifiable dismissal continues to apply. The greater error however, was the complete inefficacy of such an arrangement because it was not recorded in writing.

Determination

[30] For all the above reasons, I find Ms Wilson was unjustifiably dismissed and that she has a personal grievance. She is entitled to remedies in settlement of that grievance.

[31] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Employment Relations Act 2000 to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[32] I do not consider that there is any contributory fault on Ms Wilson's part that requires a reduction in the award of remedies to her.

[33] I am satisfied that Ms Wilson has lost wages as a result of the personal grievance. I am further satisfied that she has taken satisfactory steps to mitigate her losses. Her earnings from contract design work were earned out of hours and therefore not relevant in this assessment. I think it proper that she be awarded her actual lost wages for the 31 weeks from 28 October 2005 until 1 June 2006. **I order Classic Manufacturing Limited to pay to Michelle Wilson the gross sum of \$13,299.00 as reimbursement.**

[34] I am satisfied that Ms Wilson has suffered loss of dignity and hurt and humiliation as a result of the personal grievance. Having regard to her evidence, her length of service and the nature of the personal grievance, **I order Classic Manufacturing Limited to pay to Michelle Wilson the sum of \$5,000.00 as compensation.**

Penalty

[35] Mr Campbell seeks a penalty against Classic under section 63A of Act. I am not persuaded that the penalty prescribed therein is properly imposed outside of the bargaining context. It seems to me the legislation does not prescribe a penalty in respect of a continuing breach of the requirement, at bargaining, to provide to the employee a copy of the "intended" individual employment agreement, after bargaining has concluded. For these reasons, I decline to exercise my discretion to order the same.

Costs

[36] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Campbell is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Law is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority