

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 206/08
5093785

BETWEEN

MERE BIRCH
Applicant

AND

PASSAGE SOFTWARE LTD
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Barry Hayes for Applicant
Geoff Nightingale for Respondent

Investigation Meeting: 26 May 2008

Determination: 13 June 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The problem which has brought Ms Birch to the Employment Relations Authority arose at the very end of her employment with Passage Software Ltd. On Thursday 24 May 2007 Ms Birch gave the sales manager, Daniel Handcock, one week's notice that she was resigning from her position as a telemarketer. She had been with the respondent just two months, and was still within her probationary period. Although she was a skilled and successful salesperson, she felt that the job was not for her, partly because she was not familiar with the product she was selling (software.)

[2] Mr Handcock had also found that she did not have the level of computer skill the respondent expected (and needed) when it employed her. Nonetheless, he and director Geoff Nightingale saw that she was a good salesperson who got results. Additional training was provided for her in the hope that this investment would pay off in the long term. Mr Handcock told me he was disappointed to receive her resignation and still hoped that she might change her mind.

[3] Unfortunately what unfolded in the next few days destroyed the goodwill that had existed between the parties up until then. Events on Friday 25 May and Monday 28th May led Ms Birch to feel she was being pushed out of the workplace. She left on the Monday without working out her notice or receiving pay in lieu of notice. Ms Birch says this was not her choice and argues that the conduct towards her on 28 May gave rise to a constructive dismissal or, in the alternative, amounted to unjustified action to her disadvantage.¹

[4] Mr Nightingale denies any mistreatment of Ms Birch at any time during her employment but the respondent has not been consistent in its statements about whether her early departure was her choice, or a requirement of the respondent. Clause 3C of the employment agreement provides:

“During the probationary period the employment may be terminated by either party giving one week’s written notice. The Employer shall be entitled to pay the Employee in lieu of notice and require the Employee not to work out the notice period.”

[5] The Statement in Reply includes the following:

“Brett Fraser was advised by Geof Nightingale that we would exercise clause 3C in that we would payout her remaining days rather than have her in the office...”

“...The company elected to pay her in accordance with 3C of the employment contract ...

And:

“The employment contract allows her to be paid out in full”

[1] ¹ The original statement of problem contained a further cause of action relating to the alleged inadequacy of the training she received during her employment but this was withdrawn during the investigation meeting.

[6] Elsewhere in the Statement in Reply it was indicated that her services were needed for the final week:

“because we had a display at the small business expo it was expect [sic] that all sales staff attend the stand in order to generate leads and represent the company”

[7] The respondent did not seem to deny however that it had not paid Ms Birch in lieu of notice as would be required if clause 3C had been relied upon. When I first spoke with him in a teleconference I asked Mr Nightingale to clarify the respondent’s position. He said that the respondent believed it could ask Ms Birch to leave without working out her notice, and that no issues would arise if it had. He said this had been considered but because they could use her at work she was given the option of staying on. He says she chose to leave.

[8] Between the time of that conference call and the Authority’s investigation meeting Mr Nightingale did however pay out a week’s wages to Ms Birch in lieu of notice. That disposes of one of Ms Birch’s claims. She continues to claim \$7,500.00 compensation pursuant to s.123 of the Employment Relations Act for the hurt and humiliation associated with the ending of her employment, as well as the cost of visits to a counsellor (\$420.00) to deal with this. There was no claim for lost earnings as Ms Birch started a new job on 5 June.

[9] Mr Nightingale says that now that he has paid the week’s pay in lieu of notice there can be no question of Ms Birch being entitled to any other remedies. The respondent counterclaims damages arising out of her alleged misrepresentation of her level of computer skills. He says that as a result of this breach, the respondent incurred the cost of additional training provided to Ms Birch during her employment in the sum of \$3,400.77.

Issues

[10] The issues for determination are therefore:

- i. whether Ms Birch has a personal grievance arising out of the way she was treated between 24th and 28th May;

ii. if so, what remedies she is entitled to, and

iii. whether the respondent's counterclaim succeeds.

Has a personal grievance been established?

[11] On Friday 25 May Ms Birch rang Mr Handcock to say that her daughter was ill and she needed the day off. This was the third occasion in two months that Ms Birch had needed time off for family reasons. Mr Handcock emailed all staff to advise of her absence, as was his usual practice.

[12] At the time he received the email, Mr Nightingale was engaged in preparing the wages as he did every second Friday. He knew that Ms Birch had resigned the day before and upon learning that she was taking the day off, his first thought was that she probably would not be coming back at all. This did not worry him as his usual practice when sales people left was to utilise the provisions of clause 3 C.² Indeed, if she simply did not return, he would save the week's pay in lieu of notice. He decided, since it was payday, that it would be convenient to pay out her holiday pay along with her wages for the fortnight that had just passed. He did not discuss any of this with Mr Handcock.

[13] Mr Handcock told me that like Mr Nightingale, he more than half expected that he would not see Ms Birch again. On Monday 28 May when Ms Birch arrived at work Mr Handcock asked to see her, and told her that that it was up to her whether she stayed on (doing alternative duties for the week) or left. He did not encourage her to stay, did not draw clause 3C to her attention and did not tell her that if she left she would receive a week's pay in lieu. Because he had given her the option of staying on, he did not consider that the clause applied. General Manager Brett Fraser also spoke with her and appears to have told her that her holiday pay had already gone into her account.

[14] Ms Birch told me she felt pressured to leave but did not want to do so as she was not due to start her new job until the following week and did not want to lose a

²I accept that it is commonplace in for employers to pay departing salespersons in lieu of notice.

week's pay. She asked for time to consider the proposal, and went back to her work station.

[15] Ms Birch returned to her desk but within a very short space of time two incidents made her feel under further pressure to go. The first was that Mr Handcock approached her to ask for a medical certificate for the Friday absence. She knew she was not obliged to provide a medical certificate for leave of less than three days and in any event, she understood that this absence would be unpaid, as her previous absences had been. In these circumstances Ms Birch felt the request was unreasonable and intrusive.

[16] The second was that Mr Handcock approached her workstation and (without asking) removed the partitions from around her desk. Although none of the other work spaces in the area were screened Mr Handcock had earlier agreed to provide Ms Birch with some privacy as she found she worked better that way. Now, Ms Birch found his actions aggressive. Feeling uncomfortable, she gathered her belongings and advised Mr Handcock that she had decided to leave. He then asked her to step into a separate meeting room where he asked her what was in her handbag. She removed personal items, a copy of her employment agreement, and lists of prospective leads which she had prepared in her own time and brought in to the office. Mr Handcock told her that he was checking whether she had been taking company property but accepted that the lists were hers to take away.

[17] Mr Handcock then left Ms Birch for a few moments before returning with Mr Fraser who asked her to confirm whether she wanted to work out her notice or not. She was informed that if she stayed she would not be doing her usual duties. This was because all staff were to be deployed to the Small Business Expo however Ms Birch was not aware that this was what Mr Fraser meant. She told Mr Handcock and Mr Fraser that she was upset and embarrassed and did not feel she could continue at work. She then left. The following day she wrote to Mr Fraser telling him that she felt *"pressured to leave and ...embarrassed to even fulfil a days work after yesterday's performance."* She concluded by saying that she would be taking steps to have the matter dealt with.

[18] After hearing from Mr Nightingale and Mr Handcock, I was satisfied that they would have found it easier if Ms Birch had simply not come in to work on the Monday at all. Her arrival meant that Mr Nightingale, Mr Fraser and Mr Handcock had to decide what they wanted and if they did not wish her to work the week out, take some initiative about that. As the statement in reply indicated, they were not clear at the time just what they did want. Mr Handcock's conduct coupled with the prior payment of the holiday pay made Ms Birch feel she was not welcome in the workplace at this point and that the respondent would be happy if she left. I find that this impression was both reasonable and accurate.

[19] I am satisfied that there was a disadvantage to Ms Birch in that the conduct complained of made the workplace uncomfortable for her, and that this conduct was unjustified. I do not accept that the conduct was sufficiently serious to give rise to a constructive dismissal. A grievance has therefore been made out on the limited basis of unjustified disadvantage.

(ii) Remedies

[20] Although I have found that there was a personal grievance it must be acknowledged that, comparatively speaking, this was not a serious employment relationship problem and the respondent has now, in paying out a week's pay in lieu of notice, rectified part of the wrong it did Ms Birch. In all the circumstances I consider only a nominal award of compensation for hurt and humiliation is required. I note however that Ms Birch did not contribute to the situation giving rise to the grievance and indeed conducted herself appropriately in every way. No reduction in remedies is required on account of her conduct.

[21] In all the circumstances I conclude that compensation of \$500.00 is appropriate. **The respondent is therefore ordered to pay to Ms Birch the sum of \$500.00 pursuant to s. 123 of the Employment Relations Act 2000.** No other remedies are awarded.

(iii) Counterclaim

[22] It would appear that at interview Ms Birch asserted that she had “good computer skills” an opinion she still maintains to be correct. Mr Nightingale and Mr Handcock disagreed, but provided no benchmark against which her skills could be compared (then or now.) Whether her skills were “good” is therefore a subjective assessment. In such circumstances I am unable to find that she misrepresented herself. I note that even if she had, the respondent effectively reaffirmed the employment agreement by keeping her on, and providing further training to her, after it realised her skills were not what they had wanted.

[23] Since there has been no misrepresentation there can be no question of breach and no question of damages. The counterclaim fails.

Costs

[24] The issue of costs is reserved. If the parties are unable to agree on this matter, submissions in support of any request for costs must be lodged in the Authority no later than 28 days from the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority