

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number: WA 66 /08

File Number: 5114348

BETWEEN Sarah Maguire  
Applicant

AND Drake NZ Limited  
Respondent

Member of Authority: Denis Asher

Representatives: Brigette Shone for Ms Maguire  
Maurice O'Brien for the Company

Investigation Meeting Wellington, 13 May 2008

Determination: 15 May 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In her statement of problem filed on 30 January 2008 Ms Maguire sought payment of her resignation notice period, i.e. one month's wages.

[2] By letter dated 5 May 2008 counsel for Ms Maguire advised the applicant might also seek compensation for humiliation, a penalty and costs.

[3] During the Authority's investigation on 13 May Ms Maguire confirmed she was seeking compensation of \$2,000 for humiliation and costs, but was leaving any penalty to the Authority's discretion.

[4] In its statement in reply received on 13 February the Company said Ms Maguire did not have a valid personal grievance and that it was entitled to rely on the relevant contractual provision in the applicant's employment agreement, following Ms Maguire's advice she had employment with a competitor, to terminate her employment forthwith.

[5] During a telephone conference on 28 February the parties were directed to undertake mediation and, in the event of it not settling, to an investigation on 13 May; timelines for providing witness statements were also set in place.

[6] This employment relationship problem was not resolved at mediation and efforts by the parties during the investigation to settle this problem on their own terms were unsuccessful.

## **Background**

[7] From the evidence presented to the Authority I am confident the following is an accurate summary of key events.

[8] Ms Maguire was employed by the Company as a recruitment consultant and entered into what the latter describes as a "*standard employment agreement*" (par 2.a. statement in reply).

[9] The parties agreed that, for the purposes of this problem, the Authority did not need to see all of the employment agreement but only pages 4-7 inclusive (attachment to statement of problem) which include the following.

[10] Clause 31 of the employment agreement provides as follows:

*The employment of the employee may be terminated in writing by either party, which notice may be given at any time. The period of notice is set forth in the schedule.*

[11] The parties agree the period of notice was one month.

[12] Clause 32 provides as follows:

*Payment of salary for the notice period in lieu of the notice period required by this agreement may be given by either party.*

[13] Clause 33 provides as follows:

*Where an employee notifies the employer that he or she is terminating their employment and the employee's next appointment will be with a competitor of the employer, the employer reserves the right to terminate the employee's employment forthwith and the requirements to give notice or pay salary in lieu of notice will not apply.*

[14] Clauses 41 & 42 provide for garden leave on various terms including the following:

*The employer reserves the right to place the employee on "garden leave" for all or part of their notice period ... where they resign, or in the event that they are offered and accept employment with an organisation whose business creates a conflict of interest with the business of the employer.*

*(While on garden leave the employee) ... will be paid ... and remain bound by obligations of fidelity, trust and confidentiality etc.*

[15] During December 2007 Ms Maguire sought and obtained an offer of employment with one of the Company's competitors.

[16] Around the same time Ms Maguire approached her manager and asked that a verbal reference be provided: the Company refused. At that time the Company unsuccessfully enquired as to whether it could do anything to keep her.

[17] Shortly afterward Ms Maguire gave one month's notice of her resignation, consistent with clause 31 of the parties' employment agreement. It is agreed by the parties that, on immediate receipt of her notice, Ms Maguire was required to return her work key and uniform jacket, and to leave the workplace.

[18] Ms Maguire says she thought she was required to be available for the following month if the Company needed her (last paragraph of her witness statement). The applicant accepts she did not discuss or obtain confirmation from the Company of her understanding.

[19] While aware of clause 33 in her employment agreement prior to handing in her one-month's notice of termination, Ms Maguire says she did not understand the Company

intended relying on that clause to immediately terminate her employment. Following advice from another, more experienced colleague, and consistent with the provisions of clause 41 & 42 of her agreement, but without clarifying the matter with her management, the applicant effectively anticipated instead a period of garden leave. Furthermore, Ms Maguire did not understand her managers' advice that she would be/was required to leave immediately amounted to notice of termination of employment "*forthwith*" (clause 33).

[20] The Company's managers, on the other hand, believe it was made clear to Ms Maguire before and at the time she gave notice of her resignation that her employment would terminate immediately.

[21] The Company says that, consistent with clause 33 of the employment agreement, Ms Maguire's employment could be terminated (and was) at the moment she gave notice of her resignation so as to work for a competitor.

[22] The Company also says that, when it refused to provide her with a verbal reference and attempted to persuade Ms Maguire to stay, it told her if she handed in her notice and was going to another agency then she would have to leave immediately (par 3, Craig Muir's witness statement).

[23] The Company says its position was again made clear to Ms Maguire at the time of her resignation.

[24] The Company's managers concede that they did not plainly say to the applicant at any time that employment would terminate forthwith. They claim, however, that the words they used would have been plainly understood by any disinterested, but objective, third party to have that meaning.

## **Discussion and Findings**

[25] The facts of this employment problem are not in dispute.

[26] The parties agree that the Authority's task in respect of this employment relationship problem is to apply s. 103A of the Employment Relations Act 2000, i.e. to determine whether what happened was justifiable, on an objective basis, by considering whether the employer's actions, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time.

[27] In their oral submissions at the conclusion of the investigation neither party provided the Authority with any case law in support of their views that the Company could/could not rely on clause 33 of their employment agreement.

[28] The Company's view is that the clause has a plain meaning and it therefore can plainly rely on its provisions.

[29] I do not accept that view for the following reasons.

[30] By application of clause 33 of their employment agreement the Company elected to summarily dismiss Ms Maguire.

[31] The respondent cannot contract out of statutory requirements, in this case the Employment Relations Act 2000: see *Moffat Appliances Ltd v NZ Clerical Workers Union* [1991] 2 ERNZ 437

[32] Sub-section 4 (1A) of the Act is clear that an employer who is proposing to make a decision that will have adverse effect on the continuation of employment of one of its employees is required to provide that person with information about the decision and an opportunity to comment on the information before a decision is made.

[33] Extensive case law also makes it clear that a fair and reasonable employer is one who, amongst other things, when contemplating dismissing an employee, typically gives that person an opportunity to address the employer's concern, by way of a fair process, and then properly takes into account the employee's response before coming to a final decision.

[34] There is no evidence in this instance of exceptional circumstances such as to justify setting aside these well known and fundamental obligations.

[35] The Company did not act fairly and reasonably and breached ss. 4 (1A) of the Act because I find, amongst other things, on receiving her notice, it did not properly (i.e. openly and clearly) consult with the applicant prior to terminating her employment but instead relied on a predetermined decision to dismiss Ms Maguire forthwith (see par 3 of Mr Muir's witness statement).

[36] The Company did not plainly advise her of its decision at the time; in fact it did not clearly advise the applicant of its position until after the month's notice period when Ms Maguire inquired as to what had happened to her final pay.

[37] In particular, it made no attempt at the time to discuss with the applicant why it preferred to apply clause 33 of their employment agreement instead of clauses 41 & 42, particularly as these clauses commonly address the situation of an employee resigning so as to accept employment with a business competitor (e.g. the "*conflict of interest with the business of the employer*" identified in clause 41).

[38] While the Company had – and has – a legitimate interest in protecting its clients and other business interests, that concern is not a blanket defence in respect of its statutory and contracted obligations to Ms Maguire, particularly when the employment agreement provides various means by which to achieve the same outcome, including garden leave.

[39] A parallel case is that of *Coca-Cola Amatil (NZ) Ltd v Kaczorowski* [1998] 1 ERNZ 264 & [1998] 5 NZELC 95,750. In the first judgement the Employment Court found – amongst other things – that Ms Kaczorowski, while facing a disciplinary investigation, resigned by giving 3-months' notice, and that she then reluctantly yielded to the Company's threat she would receive a month's pay in lieu of notice (consistent with the notice provision in her employment contract) and finish that day or be dismissed. The Employment Court concluded that Ms Kaczorowski was thereby constructively dismissed at best or actually dismissed at worst. The Court of Appeal did not overturn that decision.

[40] One of the parallels in Ms Maguire's application is that she did not consent to the Company's unilateral decision to terminate her employment by application of clause 33. Ms Kaczorowski did not freely agree to the reduction of her notice period and was thereby unjustifiably dismissed: Ms Maguire was similarly unjustifiably dismissed.

[41] Another parallel is that both employers acted precipitately.

[42] As the clause makes clear, the Company "*reserves the right to terminate the employee's employment forthwith*", i.e. summary dismissal is at the employer's discretion. But – it follows – that provision must be applied fairly and reasonably and with due process, consistent with the requirements of s. 103A of the Act. In the absence of fair process and substantive justification, it follows that the applicant was unjustifiably dismissed.

## **Remedies**

[43] Ms Maguire seeks to recover one month's pay, approximately \$2,500, on the grounds she gave notice and kept herself available to work for the respondent if required. I am satisfied from the above, and having acted consistently with her contractual obligations, that the applicant is entitled to recover that money. The Company is to pay to Ms Maguire one month's pay.

[44] Ms Maguire seeks compensation for humiliation, etc, of \$2,000. The basis of the claim was the distress occasioned the applicant by her belated discovery of the Company's position, the tone of its response rejecting her claim and its refusal to undertake mediation. The amount sought is comparatively modest, as is the evidence in support of the claim. However, I am satisfied the claim is made out and it is fair and reasonable to award the sum sought.

[45] Ms Maguire seeks similarly modest legal costs of \$2,160. The hearing lasted less than half a day, starting as it did at 11.00 a.m. and finishing at approximately 1.30 p.m. In the circumstances, while the parties asked that costs be reserved and subject to the respondent's view, I can indicate the likelihood of a costs award of \$1,500, including the filing fee of \$70: *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, applied.

[46] There is no basis to penalise the Company as there is no evidence to support a finding of deliberate conduct by the respondent to breach its obligations to the applicant: *Xu and Anor v McIntosh* [2004] 2 ERNZ 448 applied.

### **Contributory Fault**

[47] There is no evidence to support a claim that Ms Maguire contributed to the Company's predetermined decision to dismiss her summarily on receipt of her notice of resignation. There is therefore no reason to reduce any of the remedies awarded the applicant: s. 124 of the Act applied.

### **Determination**

[48] The Company is to pay to Ms Maguire one month's pay, i.e. the amount she would have received had the respondent accepted her original notice, as well as \$2,000 (two thousand dollars) compensation for humiliation, etc.

[49] Costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**