

*Under the Employment Relations Act 2000*

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE

BETWEEN Farrukh Rashid (Applicant)  
AND Skilled Engineering (Contract Labour) Limited (Respondent)  
REPRESENTATIVES Farrukh Rashid in person  
Victor Fong for Respondent  
MEMBER OF AUTHORITY Y S Oldfield  
INVESTIGATION MEETING 4 May 2001  
DATE OF DETERMINATION 25 May 2001

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Mr Rashid lodged his employment problem with the Employment Relations Authority on 5 March 2001. That same day, after allegations of misconduct, he had been given one week's notice of termination of his work at Sealed Air Ltd, the company he originally named as respondent. He believed that this was unjustified and sought reinstatement.

As soon as it was notified about these proceedings, Sealed Air Ltd denied that it was Mr Rashid's employer. It claimed that he had been placed at its factory through a temporary labour agency, Skilled Engineering (Contract Labour) Ltd ('Skilled Engineering'), and that the agency employed him at the date of dismissal, two months into a three month placement. Skilled Engineering conceded that it had employed Mr Rashid, but Mr Rashid did not agree. In a minute dated 12 April 2001 I recorded the outcome of a preliminary meeting about the identity of the employer, which was that I accepted that Skilled Engineering was the employer. That minute records my reasons for that determination.

Background to dismissal

Mr Rashid was employed by the respondent at the beginning of January 2001. After a brief induction process conducted by the respondent, he was placed at Sealed Air Ltd to work as a machine operator. He did not receive a written contract.

A few days before the dismissal Sealed Air Ltd had passed on to Mr Fong, the operations manager of Skilled Engineering, a complaint it had received through the union that represented its staff. It read as follows (with the name of the complainant deleted by the Authority):

“I [complainant] when [sic] to the toilet around about 11.15 to 11.30 on Monday 26<sup>th</sup> Feb and as I left the toilet I saw Farrukh coming up the stair. I [complainant] when [sic] in the kitchen and got a cold drink as I came out I saw Farrukh looking through the crack in the door of the Ladies Toilet.”

This complaint was initially made orally and did not include the name of the person accused. Later, when accompanied through the factory and asked to point out the man she had seen, the complainant identified Mr Rashid. The complaint was put in writing after this.

Mr Fong first interviewed Mr Rashid about the matter on 1 March. Mr Grant Edwards of Sealed Air Ltd sat in on the interview and listened to what Mr Rashid had to say. Mr Fong put the allegation to him but Mr Rashid vehemently denied it. Mr Fong’s notes of that meeting record:

“Farrukh has denied the above- he has said that he is not even remotely interested in any of the women- he is only interested in working.”

Because of the nature of the complaint and the circumstances of the employment (that is, the fact that most of Mr Rashid’s co-workers were women) Mr Fong felt that he had no option but to remove Mr Rashid from the position while he made further inquiries. Mr Rashid was therefore suspended for the following day (a Friday) while Mr Fong went back to do more follow up with Sealed Air Ltd on the complaint. He was instructed to meet with Mr Fong again first thing on the Monday morning.

On the Friday Mr Fong discussed the matter further with Mr Grant Edwards of Sealed Air Ltd. Mr Edwards did not want Mr Rashid back on the site. Mr Fong said that he had dealt with Mr Edwards before and believed him to be competent, experienced and fair in relation to staff matters. However, Mr Fong said he would not have accepted what Sealed Air Ltd said at face value. He wanted to satisfy himself that their conclusions had foundation. He said that the decisive factors for Mr Edwards had been:

- the reliability of the woman who had made the complaint, who was an employee of long standing with a good work record, and not someone to make a malicious or unfounded complaint.
- the union had also taken the complaint seriously.
- it was unlikely that the complainant would fabricate a complaint about someone she did not know at all. (Mr Rashid acknowledges that he did not know the complainant.)
- it was unlikely that the complainant could have mistaken the identity of the peeping tom, since she claims to have seen him at close range, in the daylight.
- with a majority of women on the site, he could not ignore such a serious complaint.

All in all, Mr Fong thought Mr Edwards’ conclusions were reasonable and he had done what he could to investigate the matter thoroughly. He met with Mr Rashid again on the Monday but Mr Rashid could add nothing more to what he had already said. Mr Rashid was therefore dismissed, according to Mr Fong’s notes because:

“of the nature of the complaint and the circumstances of your working with a lot of women in the workplace at Sealed Air Ltd.”

The dismissal was confirmed in a letter from Mr Fong that read as follows:

“As discussed on Monday 5<sup>th</sup> March this letter is to confirm with you that your Temporary trial position as Machine Operator has been terminated. As of the Monday 5<sup>th</sup> March 2001 we are giving you seven days notice of termination which will take effect on the 11<sup>th</sup> March 2001.

I am sorry that this has happened but circumstances are beyond my control.”

Mr Rashid received payment in lieu of working out his notice period.

### Conclusions of the Authority

Before conducting a meeting to investigate this problem, I advised the parties in a minute as follows:

“it appears from the terms of the contract for placement of workers at the client company that the respondent had no choice but to remove the applicant from that site upon the request of the client. However the respondent went further and dismissed the applicant altogether.”

When I made these comments I had already been given a copy of the contract between Mr Fong’s company and Sealed Air Ltd Ltd, which contained the following provision:

“3. Termination of hire  
One day’s notice is required prior to termination of jobs. Should this notice not be given, a charge for one day may apply.”

I am satisfied that this permitted Sealed Air Ltd to end a placement on one day’s notice. However, at the investigation meeting, Mr Fong explained that he has an on-going arrangement to supply labour, as and when needed, to Sealed Air Ltd Ltd. In the context of this on-going business relationship, Sealed Air Ltd did not normally exercise its right to insist on removal of a worker without consulting Mr Fong. Mr Fong told me that if he had felt that Sealed Air Ltd were being unreasonable or unfair, he would have fought for Mr Rashid’s job. However, after he heard what both Mr Edwards and Mr Rashid had to say, he felt it was open to Mr Edwards to accept the complainant’s version.

In the same minute, I also advised the parties that my final determination in the matter would depend upon whether Mr Fong

- “conducted a fair and sufficiently thorough investigation into the complaint, including putting all the information it had to Mr Rashid and giving him adequate opportunity to comment.
- Was justified, on the information it had, in concluding that serious misconduct had occurred, and that dismissal was open to a fair and reasonable employer.”

These comments were based on an expectation that if the placement at Sealed Air Ltd ended, Mr Fong’s company could continue to employ Mr Rashid and to place him somewhere else. In fact, further questioning of Mr Fong at the meeting revealed that this was not the case. Mr Rashid was employed after responding to an advertisement for labour specifically to fill this particular three-month placement. As Mr Rashid knew, there had been a possibility that at the end of it Mr Rashid would have been offered a permanent position with Sealed Air Ltd, but if this did not happen, employment with Skilled Engineering would have ended as there was no other work for him. Having subsequently heard more from Mr Fong about the nature and extent of his business, I am satisfied that he was not in a position to offer Mr Rashid any other work at that point. He did not operate much in the way of a pool of labour for a variety of clients. The ending of the placement at Sealed Air Ltd did therefore mean the ending of his employment with Skilled Engineering.

Because of this, the questions I posed in my minute cease to be the deciding factors in this case. I am satisfied that:

- Sealed Air Ltd refused to have Mr Rashid on site, and this was ultimately its decision, not Mr Fong’s, to make.

- Once this client had refused to have Mr Rashid, Mr Fong was not in a position to continue to employ Mr Rashid. He had employed him specifically to work for that client and had no other suitable work for him.

In other words, Mr Rashid's employment ended because the client did not want him on site any more, and because Mr Fong had no work for him elsewhere. For the sake of completeness, I note that Mr Fong made it clear that he did satisfy himself, as best he could, that Sealed Air Ltd had conducted a proper inquiry into the complaint and had not just dismissed Mr Rashid out of hand. At the end of the day, he decided that it was reasonable for them to accept the complaint as valid and to act on it. They knew the complainant better than they knew Mr Rashid, and believed her to be a reliable and trustworthy person. Mr Fong felt that he could not argue with that, and I accept that in the circumstances, he could not.

Mr Rashid continued to vehemently assert his innocence of any wrongdoing and is very bitter about what has happened. He came to the Authority in the hope that he could restore his good name. As I explained to him at the meeting, any determination I make here does not answer the question whether the behaviour alleged of him actually happened. Instead I have investigated whether Mr Fong was able to terminate Mr Rashid's employment as he did, and I have found that he could, because the client would no longer have him, and because he had no other work for him. I have also found, however, that Mr Fong did his best to make sure that the client had grounds for acting as it did. In all the circumstances, I do not think Mr Fong could do any more than that.

I have considered whether the employment agreement (being, as I accept it was, in the nature of fixed term employment) entitled Mr Rashid to be paid out for the balance of the term of three months. I have decided that it did not, because the continuation of the placement was always subject to continued satisfaction from the client. In the absence of written terms of employment I construe the agreement to provide for employment that would end upon the termination of the placement by the client, or the close of the three month period, whichever was the sooner.

Turning to another issue, I note that it emerged, during the investigation, that the respondent failed to comply with the provisions of Part 6 of the Employment Relations Act 2000. As I explained to Mr Fong at the investigation meeting, Part 6 places upon employers a number of obligations in respect of individual employment agreements. These include putting proposed terms of employment in writing and providing new workers with time to go away and consider those terms before signing. The Act also sets out provisions relating to use of fixed term contracts. The facts of this case highlight the importance of meeting these new obligations.

Mr Rashid never saw a written contract. He named the wrong respondent at the outset because he thought Skilled Engineering had acted as an employment agency when it placed him at Sealed Air Ltd. Although this turned out to be clearly wrong, in all the circumstances it was a very understandable mistake to make. The type of arrangement that existed between Sealed Air Ltd and Skilled Engineering (while probably increasingly common) is one that could easily confuse the individuals involved, particularly those for whom English is a second language. A written agreement would have enabled Mr Rashid to see who was employing him. Proper advice of the reasons for the fixed term nature of the agreement would also have assisted him in understanding the arrangement. Finally, he would more clearly have understood the potential vulnerability of his position (being subject to one day's cancellation by the client.)

Another colleague of Mr Fong was involved in the hiring of Mr Rashid but was not present at the investigation meeting. I have considered whether I should require this person to give evidence, but because it is not in dispute that Mr Rashid never saw a written contract, I do not think that is

necessary. More importantly, I have decided that it is not appropriate for me to impose any sanctions on the respondent for this breach, since it was genuinely unaware of its obligations and came along to the Authority to defend a personal grievance. Nonetheless, I take the breach very seriously, and do not consider it unrelated to the problem that brought Mr Rashid to the Authority, as I have explained. The employment arrangements used here have the potential to negate some of the protections provided for in the Employment Relations Act 2000, and in these circumstances it is particularly critical that sections 66 and 67 of that Act are complied with. The respondent should consider itself on notice of its obligations in this regard.

In conclusion, I do not know whether Mr Rashid was guilty of the conduct alleged, and can make no finding in that regard. The termination of his employment has been sufficiently explained, and I can do nothing more to resolve the employment problem.

Y S Oldfield  
Member of Employment Relations Authority