

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Stephanie Shacham (applicant)
AND	Wright Spa Pools Limited (respondent)
REPRESENTATIVES	Geoff O'Sullivan for the applicant Mike Gould for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION MEETING	Wellington, 26 May 2005
SUBMISSION RECEIVED	31 May & 6 June 2005
DATE OF DETERMINATION	7 June 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Ms Stephanie Shacham says she was unjustifiably dismissed, both procedurally and substantively, by the Company on 8 January 2005 – statement of problem received on 24 February. Remedies sought include reimbursement of lost salary, compensation of \$20,000 for humiliation, etc, compensation for loss of benefit in failing to qualify for paid parental leave and costs.

2. The Company says it justifiably terminated Ms Shacham's employment when, within a week of commencing employment, she advised she was unable to undertake key duties of her position.
3. The parties underwent mediation without settling their employment relationship problem. They subsequently agreed to a one-day investigation in Wellington on Thursday 26 May. Written statements of evidence and documentary evidence were usefully provided by the parties in advance of the investigation. Their efforts to settle the matter on their own terms during the investigation were unsuccessful.

Background Facts

4. The Company retails spa pools and related products from its Lower Hutt shop. In late 2004 it advertised for a new sales person. Ms Shacham applied for the position. She was interviewed on 17 December 2004 and, on either 20 or 21 December, was offered and accepted the position. On 29 December the parties signed off a written individual employment agreement. Ms Shacham commenced duties on 3 January 2005. By agreement she did not work 5 & 6 January, and resumed on 7 January. Her employment terminated the following day.
5. The parties are in dispute as to what was said at Ms Shacham's interview on 17 December. The applicant says she was asked if she was fit: she said she was. She says she copied the gesture of the Company's Managing Director, Mr Grant Edwards, by raising her arms in a muscle flexing gesture, to confirm her fitness. Mr Edwards says that he and his then assistant, Ms Sue Louwman, explained the duties of the position to Ms Shacham. They say they specifically asked if she was capable of lifting – and that Ms Shacham said she was.
6. As it happened, during a visit to her doctor on 23 December, Ms Shacham received advice she was pregnant, that she should not lift weights in excess of 10 kg and not tell anyone of her pregnancy for 3-months because of the risk of miscarriage in that period. Ms Shacham said she also did not want to advise anybody of her pregnancy before she was able to tell her family.

7. On 7 January 2005, and because of a suggestion that her job required her to lift a heavy object, Ms Shacham was prompted to disclose her pregnancy to Ms Louwman, along with her doctor's advice that she was not to lift weights in excess of 10 kg. Spa pools, their covers and boxes of chemicals used to treat spa pools often weigh significantly more than 10 kg.
8. Ms Louwman advised Ms Shacham that she would have to report the situation to Mr Edwards and that there might well be a meeting on the following day, 8 January. That proved to be the case: on reporting to work at the usual time Ms Shacham was invited into a meeting with Mr Edwards and Ms Louwman.
9. Ms Shacham says the meeting lasted five minutes – Mr Edwards and Ms Louwman say it ran for 15 to 20 minutes. At its conclusion the applicant was told her employment could not continue.
10. Mr Edwards says he was:

... extremely disappointed to hear that the person we had just employed was really unfit to do significant parts of the job. It was quite expensive and time consuming to put a new employee in place with the advertising costs, interviewing and so on. So when I found out that the new employee basically couldn't do the job, it was very frustrating. ...

We told her that had that been disclosed to us, then we would not have offered her the position. ... There was no other position within the company. ...

The meeting concluded with me deciding that as Stephanie was clearly unable to fulfil the duties of the position, the company could not continue to employ her.

Given the circumstances, I felt we had no option but to terminate her employment.

(pars 8, 11, 12 & 14, witness statement).

Discussion and Findings

11. I find in favour of Ms Shacham's claim that she was unjustifiably dismissed for the following reasons:

12. The Company mistakenly assumed Ms Shacham knew she was pregnant at the time of her job interview or at least at the point that she was offered and accepted the position. That was clearly not the case. A measure of the inadequate investigation carried out by the respondent prior to dismissing the applicant is that it failed to clarify that advice of Ms Shacham's pregnancy occurred after the parties agreed to an employment relationship. The Company cannot therefore say it was induced to enter into a contract by misrepresentation (and that it now can now reasonably expect the Authority to cancel the employment agreement, under the Contractual Remedies Act 1979). At the time of dismissing the applicant, the Company's obligations to Ms Shacham were no different to those applying to a longer-serving pregnant employee, for example Ms Louwman, were her situation to be the same as the applicant's.
13. The issue of whether Ms Shacham was under a good faith obligation (per s. 4 (1A) (b) of the Act) to advise her employer the moment she was aware of her pregnancy, and that it was recommended she lift no more than 10 kg, is – I find – irrelevant in as much as little delay occurred between the applicant receiving that medical advice and the Company being informed and no disadvantage was occasioned the Company.
14. Once it became aware of Ms Shacham's pregnancy it was not open to the Company to terminate her on the ground that she was unable to fulfil the duties of her position, or – in other words – to regard the contract as frustrated, because the inability to lift was a direct consequence of the applicant's pregnancy and that is a prohibited ground. I note here that the Company would also have discriminated against Ms Shacham if it had not offered her the position solely on the grounds she could not lift/was pregnant.
15. The parties entered into an employment relationship on either 20 or 21 December 2004, when Ms Shacham accepted the position offered to her by the Company. At that time the applicant was an employee in terms of either ss. 6 (1) (a) or (b) (ii) of the Act, i.e. Ms Shacham was either "*a person ... employed by an employer to do any work for hire or reward under a contract of service*", or she was "*a person intending to work*".
16. At that time Ms Shacham had no reason to doubt her ability to perform all of the duties expected of her. She could not advise the respondent at that time of her pregnancy and her limited ability to lift as that information only became available to

her two or three days later. Because of the timing of her doctor's advice it is not necessary for me to determine the disputed claims between the parties as to whether Ms Shacham was asked at her 17 December interview if she could lift, or if she was fit. There is no evidence to support a claim that Ms Shacham misrepresented her fitness to the Company, so as to secure employment.

17. Ms Shacham's dismissal was profoundly procedurally unjustified. This is because, in breach of long-established requirements, the applicant was not advised as to the purpose of the meeting on 8 January 2005, nor given an opportunity to be represented, nor warned that an outcome could be her dismissal. The Company's investigation was clearly minimal, if not non-existent. For example, it clearly made no effort to have the applicant discuss the lifting issue further with her doctor. No effort was made to explore or analyse in any detail what the 10 kg limit meant in respect of the full range of duties expected of the position held by Ms Shacham. A more complete discussion was also required so as to address the parties' mutual obligations in respect of health and safety.
18. The dismissal was substantively unjustified because it is not open for an employer to terminate an employee on the ground of pregnancy: s. 105 of the Act provides that the prohibited grounds of discrimination referred to in s. 104 of the Act are those set out in s. 21 (1) of the Human Rights Act 1993, which in turn defines one of the prohibited grounds of discrimination as,

Sex, which includes pregnancy ...

19. The Parental Leave and Employment Protection Act 1987 (PLEPA) also provides at s. 49 (1) (a) (i) that no employer shall terminate the employment of any employee by reason of her pregnancy or,

(ii) Her state of health during her pregnancy, unless her state of health during her pregnancy is materially affected by causes not related to her pregnancy.

20. The only restraint on Ms Shacham's ability to lift was her pregnancy: her state of health was unaffected by other causes.

21. It was not open to the Company, without exploring all matters more fully with the applicant, to equate Ms Shacham's pregnancy with an inability to perform her job and to thereby dismiss her.
22. There was nothing in Ms Shacham's conduct that deeply impaired or was destructive of the employment relationship or of misconduct warranting dismissal.

Remedies

23. Ms Shacham claims lost salary of 18 weeks, or \$10,730.80. That figure relates to the time between the applicant's dismissal and her finding new employment. I accept that Ms Shacham's unjustified dismissal caused her the loss of a chance to earn wages. The absence of a proper investigation by the respondent means it is not easy to now accurately measure the extent of that loss. An attempt is now required. I consider it proper to take account of the following: the applicant's employment with the respondent clearly required the applicant to lift objects weighing in excess of 10 kg, whereas Ms Shacham was unable to perform that work. The short duration of her employment, the unavoidability of lifting heavy objects from time to time and the uncontested absence of alternative duties with the respondent, meant the applicant – under ss 14 & 16 of the PLEPA – would most probably have been obliged to take leave or early commencement of maternity leave, for neither of which could she expect to be paid. It was reasonable, however, for the respondent to have spent some time with the applicant working through these matters and I therefore conclude that Ms Shacham should receive two weeks' lost remuneration.
24. The applicant claims \$325.00 per week for 13 weeks damages as compensation for the loss of benefit in failing to qualify for paid parental leave. I do not accept that claim: in order to be eligible it was necessary for the applicant to be not only pregnant but to have worked an average of ten hours a week over the six months immediately preceding that leave (s. 7 of the PLEPA). Because of the brief nature of her employment and her admitted inexperience in sales positions, I am not prepared to accept that Ms Shacham would have met those requirements were it not for her unjustified dismissal.

25. I do accept that Ms Shacham is entitled to significant compensation for humiliation, etc as a result of the summary nature of her dismissal, including the loss of any opportunity to explore alternatives to dismissal, including leave without pay and early commencement of maternity leave. Ms Shacham not only underwent a particularly brutal experience, in light of her pregnancy, but lost any opportunity to return to employment with the Company at a future date. In all the circumstances, I am satisfied that a figure of \$15,000 compensation is justified.

Contributory Conduct

26. Ms Shacham's actions cannot be held to have contributed in any way to the situation that gave rise to her personal grievance, in particular discovering after the formation of the employment agreement that she was pregnant, etc and the unfair process adopted by the Company leading up to her summary dismissal.

Determination

27. For the reason set out above, I find in favour of Stephanie Shacham's claim that she was unjustifiably dismissed by the respondent, Wright Spa Pools (LH) Limited, and direct it to pay to the applicant the sum of \$15,000 (fifteen thousand dollars) compensation for humiliation, etc and two weeks wages. Leave is reserved for the parties to refer the wages' calculation to the Authority if agreement on the quantum is not forthcoming.

28. Costs are reserved.

Denis Asher

Member of Employment Relations Authority

