

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Nadia Sword (Applicant)  
**AND** Collins Travel Limited (Respondent)  
**REPRESENTATIVES** David Bruce, Advocate for Applicant  
Barry Collins, Advocate for Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETINGS** 14 February 2006  
2 March 2006  
**FURTHER EVIDENCE RECEIVED** 13 March 2006  
**SUBMISSIONS RECEIVED** 24 March 2006  
**DATE OF DETERMINATION** 21 April 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

- [1] Ms Sword claims that she was unjustifiably dismissed on one month's notice from 14 February 2005. She asks that the Authority find that she has a personal grievance and award her loss of wages and compensation.

Mr Barry Collins, the Managing Director of Collins Travel Limited says that Ms Sword's work performance and attendance was unsatisfactory and following warnings about the need to improve, Ms Sword was justifiably dismissed.

**Background Facts and Evidence**

- [2] Ms Sword commenced employment as a Junior Travel Consultant on 31 March 2004. The position appears to have had two components. Ms Sword was to be trained as a Travel Consultant but the majority of her time was spent organising the details surrounding the operation of Pacific Green Tours. The tours were for mainly older people who were members of the Pacific Green Club. Ms Sword's responsibilities included contacting club members/tour participants and conveying certain information related to the tours.
- [3] Ms Sword was employed on a trial basis for three months and her employment was confirmed after that. The evidence of Mr Collins is that the work performance of Ms Sword was; "*never satisfactory from day one.*" However, given that there was a trial period and Ms Sword's employment appears to have been unconditionally confirmed, this tends to suggest that Mr

Collins never had any substantial concerns about her work performance during the trial period.

- [4] Nonetheless, it is accepted that the work performance of Ms Sword was less than satisfactory. Mr Collins says that over an 11 month period, she was absent from work for 32 days. Ms Sword acknowledges that she had this amount of time off but her explanation is that this included holidays that she was entitled to. Mr Collins agrees that Ms Collins did take some holidays, but those are not included in the 32 days that he is referring to.

### **The evidence of Mr Collins**

- [5] The evidence of Mr Collins is that particular aspects of Ms Sword's performance that he had concerns about were:
- A continuous record of arriving late for work
  - An unacceptable time spent on personal emailing
  - Unchecked and sloppy correspondence being sent out to clients causing their dissatisfaction.

Mr Collins also says that 20-30 members of the Pacific Green Club resigned while Ms Sword worked for him and that prior to her arrival there had not been any resignations.

- [6] Mr Collins says that because of these ongoing concerns, he met with Ms Sword on 23 December 2004. Also present was the Manager, Mr Marcus Niles. Mr Collins says that he discussed with Ms Sword her continual lateness arriving at work, unchecked mail being sent out with mistakes, complaints about her telephone manner and her general attitude.

- [7] A further meeting took place on 4 February 2005. Mr Collins's evidence is that this meeting was; "*an exact replica*" of the previous meeting in December 2004 and that none of the problems that had been discussed then had been addressed. The evidence of Mr Collins is that he conveyed to Ms Sword that matters were becoming serious and that the business was losing members from the Pacific Green Club and this was having a subsequent affect on income. Mr Collins says that Mr Niles explained to Ms Sword that she had to get the basics right. Mr Collins says that he also told Ms Sword that her job "*was in danger*" and that if she didn't improve, "*she would lose her job.*"

- [8] The further evidence of Mr Collins is that as there was no improvement in Ms Sword's work performance, on 14 February 2005 he had a third and final meeting with her. Mr Niles was again present. Mr Collins says that he informed Ms Sword that her work was still unsatisfactory, problems remained and that he didn't see any future for her with the business. Mr Collins says that he informed Ms Sword that she had one month's notice to finish her employment and that she could attend job interviews on pay and he would provide her with a basic reference.

- [9] Ms Sword left work that day. Mr Collins says that Ms Sword did not return to work the next day, rather she phoned about 4:00pm and spoke to Mr Niles and informed him that she would not be coming back to work again.

- [10] The further evidence of Mr Collins is that he subsequently discovered that before leaving on 14 February, Ms Sword had sent emails to 18 recipients conveying words to the effect that; "*the Boss had sacked her because she was pregnant.*" Mr Collins says that he received "*a couple*" of phone calls from other people within the travel industry asking him if he was aware of the email.

## The evidence of Ms Sword

- [11] Ms Sword acknowledges that she had “a few sick days” off work due to the fact that she was pregnant, albeit she did not know of her condition at the time. Ms Sword says that she always made a point of ringing work when she was going to be late and that usually this was due to bad weather and an inefficient taxi service.
- [12] The evidence of Ms Sword (from her written brief), is that she became aware that she was pregnant on 20 December 2004 and informed Mr Collins the following day. Ms Sword says that on 23 December 2004, prior to taking her Christmas leave, she had a meeting with Mr Collins and Mr Niles and Mr Collins informed her that; [“she would not lose her job due to the pregnancy and that they would support me in whatever decision I made and my job was secure when I returned back from Fiji.” At the investigation meeting, Ms Sword told the Authority that she didn’t recall having any meetings with Mr Collins with anyone else present.
- [13] Ms Sword returned to work on 10 January 2005 after her holiday. She says that she had a discussion with Mr Collins and told him that she was going to keep her baby. Ms Sword says that about two weeks later she was told by Mr Collins that her work performance “was lacking” and that she had been rude to clients on the telephone and he had received a complaint. Ms Sword says that she asked what she could do to improve her performance but received no response from Mr Collins. However, at the investigation meeting, Ms Sword told the Authority that Mr Collins told her that; “she had a lot of work to do.” Ms Sword says that she received a “first verbal warning” from Mr Collins for her unsatisfactory phone manner.
- [14] In regard to the dismissal on 14 February 2005, the evidence of Ms Sword is that she was called to Mr Collins’s desk and no one else was present. Ms Sword says that Mr Collins told her that; [“my job was being terminated and I had one month to find myself new employment. When I asked why my employment was being terminated he responded by telling me he had had another complaint about my phone manner.”
- [15] The further evidence of Ms Sword is that Mr Collins asked her if he would like her to tell her work colleagues that she had simply resigned so as to “save face.” Ms Sword says that she told Mr Collins it was up to him and that she didn’t really care what he told them. Ms Sword says that Mr Collins made one final remark to her: “I’m sorry you got yourself pregnant.” Ms Sword says that she immediately felt hurt and discriminated against and that it was her pregnancy that was the reason for her dismissal. Ms Sword acknowledged that she sent an email to; [“a close friend expressing my grievance about the loss of my employment and how I felt it was due to my pregnancy.”
- [16] Ms Sword says that; “the next day when work had finished” she asked a colleague, Ms Kylie Ward, if she knew about the dismissal and that Ms Ward told her that she had overheard Mr Collins talking to the Labour Department on the phone and that he was seeking advice about the process of dismissal. Ms Sword says that she then concluded that; “they had been planning to get rid of me .....
- [17] Ms Sword says that on the evening of 15 February 2005, she felt that she could no longer work at the travel agency and didn’t go into work on 16 February, and on 17 February, she called the office and spoke to Mr Niles and informed him that she would not be returning to work and that she would have someone else call in to get her personal effects and drop off her office key.

## Other evidence

[18] The Authority has also been provided with written statements from Mr Niles, Ms Ward and Ms Hayley Munday. All of these statements were provided after the investigation meeting with Ms Sword on 14 February 2006, and Mr Collins on 2 March 2006. In regard to the latter two statements, I am unable to give consideration to the content of those as Ms Ward and Ms Munday have not been interviewed. However, I have been able to discuss the content of the statement provided by Mr Niles with him and will refer to his evidence in due course.

## Analysis and Conclusions

[19] There is some conflict in the evidence of Ms Sword and Mr Collins in regard to certain matters. Of particular relevance is the evidence pertaining to the meetings that took place between Ms Sword and Mr Collins on the various dates. Ms Sword's evidence is that only Mr Collins and she met, without any other person present. However, having read the statement provided by Mr Niles and subsequently interviewed him, I am satisfied that his evidence and that of Mr Collins is more probable, both to the meetings, and when Ms Sword finished work.

[20] I am further satisfied that there were ongoing problems with the overall performance of Ms Sword particularly related to her attendance, telephone manner and mistakes in correspondence that she sent out to various people, and that the reason for her dismissal was because of her unsatisfactory performance over a period of time. Furthermore, I do not accept that the dismissal of Ms Sword was in any way related to her pregnancy. Indeed, Mr Collins and Mr Niles confirmed Ms Sword's evidence that they assured her that her position was secure upon them becoming aware of that Ms Sword was pregnant.

[21] Nonetheless, while I accept that the overall performance of Ms Sword was far from satisfactory, I am unable to accept that her dismissal was justified; for two particular reasons. Firstly, while I accept that the faults in Ms Sword's overall performance were drawn to her attention, there is no material record of just what was discussed, what was expected of her, and the consequences of a failure to reach an acceptable level of performance.

[22] In *Trotter v Telecom Corporation of NZ [1993] 2 ERNZ 659*, the Employment Court set down the fundamental requirements regarding fair and reasonable treatment of an employee who may potentially be dismissed for poor performance. In summary, those requirements are:

- (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] While it appears that Mr Collins attempted to explain to Ms Sword what was required, it also appears that she was largely left to her own devices with little or no training, or performance

expectations set down for her. While I accept that what was required of Ms Sword was not particularly complex, given her age and inexperience, I conclude that there was an obligation on Mr Collins to have set out in specific terms, exactly what was required of Ms Sword and a specific time frame and a monitoring process to ensure that she had a reasonable opportunity to meet those requirements. There was also an obligation to ensure that Ms Sword received appropriate training and supervision in regard to her role in the business.

[24] Secondly, the method that was used to terminate the employment of Ms Sword was quite unfair and unreasonable and failed to meet the fundamental procedural requirements that an employer must observe before deciding to dismiss an employee. The minimal procedural requirements that an employer must observe before deciding to dismiss an employee are well established and are set out in *NZ (with exceptions) Food Processing etc IUOW v Unilever* [1990] 1 NZILR 37. The 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.

[25] The termination of Ms Sword's employment was sudden, without any warning and implemented without any opportunity to give any explanation or to obtain representation, or to prepare in any way whatsoever. Taking particular account of her age and inexperience in the work place, this was most unfair and unreasonable.

[26] Given all of the above I find that the dismissal of Ms Sword was unjustified and that she has a personal grievance.

## **Remedies**

[27] Having found that Ms Sword has a personal grievance, I turn to the remedies that she may be entitled to.

### (a) Reimbursement of Wages

Section 123(1)(b) of the Employment Relations Act 2000, provides that where the Authority determines that an employee has a personal grievance, it may provide for:

“the reimbursement to the employee of a sum equal to the whole or any part of the wages or any money lost by the employee as a result of the grievance.”

Further to that provision, section 128(2) of the Act provides that:

“If this section applies then, subject to subsection (3) and subsection 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.”

[28] Ms Sword claims for reimbursement of actual loss of wages for three months. Ms Sword was dismissed with one month's notice but chose not to work out the notice period. That was her prerogative, but she cannot be reimbursed for a period where she could have been earning but made a conscious decision not to attend work and/or seek other employment, therefore the reimbursement of wages can only be for a period of eight weeks. Ms Sword was paid \$10.00 per hour or \$400 a week. Therefore, the loss of income is \$3,200 and that is the sum that she would have been awarded. However, as it is my conclusion that Ms Sword contributed to the circumstances that gave rise to the personal grievance, that sum will be reduced accordingly.

[29] (b) Compensation

Section 123(1)(c)(i) of the Employment Relations Act 2000, provides that where the Authority determines that an employee has a personal grievance, it may provide for:

“the payment to the employee of compensation by the employee's employer, including compensation for-

(i) humiliation, loss of dignity, and injury to the feelings of the employee; .....

Ms Sword seeks compensation of the sum of \$7,500. The evidence is that Ms Sword was in a particularly vulnerable position given that she was pregnant and without any obvious means of support and that the dismissal was visited upon her without any warning, albeit on notice. On the other hand, there is the evidence of Mr Collins, which I accept, that Ms Sword engaged in some vindictive action by send a series of emails to various people in the travel industry. Taking everything into account, I conclude that an award of compensation of the sum of \$5,000 is appropriate, to be reduced as below.

[30] (c) Contribution

Pursuant to the provisions of section 124 of the Act, the Authority is bound 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, reduce the remedies that would otherwise have been awarded accordingly. Given the overall lack of performance on the part of Ms Sword and her failure to follow instructions regarding her duties, particularly in the area of client contact and work attendance, I find that the actions of Ms Sword contributed significantly towards the situation that gave rise to the personal grievance. Hence, the remedies that would otherwise be awarded should be reduced accordingly by 50%.

[31] Penalty

Ms Sword also sought that a penalty be awarded for the failure on the part of Mr Collins to provide an employment agreement. However, given the overall lack of evidence pertaining to the failure to provide an employment agreement, and that Mr Collins is no longer trading, I do not consider that the awarding of a penalty is appropriate and decline to do so.

## **Determination**

1. I find that the dismissal of Ms Sword was unjustified. She has a personal grievance and is entitled to appropriate remedies.
2. Pursuant to sections 123(b) of the Act, Collins Travel Limited is ordered to pay to Ms Sword the gross sum of **\$1,600.00** (\$3,200 reduced by 50%).

3. Pursuant to section 123(1)(c)(i) of the Act, Collins Travel Limited is ordered to pay to Ms Sword the gross sum of **\$2,500.00** (\$5,000 reduced by 50%).

### **Costs**

Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 21 days of the date of this determination.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**