

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 166
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5335388

BETWEEN TESSA ANN WILSON
 Applicant/Respondent

AND PROMOTIONAL SYSTEMS
 LIMITED
 Respondent/Applicant

Member of Authority: Alastair Dumbleton

Representatives: Christian Wilson, advocate for Tessa Wilson
 Clive Bennett, advocate for Promotional Systems Ltd

Investigation Meeting: 18 March 2011

Determination: 26 April 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problems

[1] Ms Tessa Wilson and Promotional Systems Ltd have an employment relationship problem with each other arising out of the individual employment agreement they entered into and performed for three months. In particular, the termination of that agreement by Promotional Services, and the conduct of Ms Wilson upon termination and afterwards, have led them to seek an investigation and determination by the Authority to resolve their problems.

[2] A written employment agreement was signed the day the employment began, 17 February 2010, by Ms Wilson and Mr Graeme Foster, a director of Promotional Systems. Ms Wilson was employed as Business Development Executive, a sales position paying a base salary of \$45,000 per annum. She was dismissed by Mr Foster on 18 May 2010 with oral advice, which he confirmed in writing the following day, 19 May. Those two dates were respectively the 91st and 92nd day after the beginning of Ms Wilson's employment, timing regarded by her as a matter of critical importance

to a personal grievance she raised with Promotional Systems immediately after her dismissal.

[3] Ms Wilson claimed her dismissal was unjustified and sought a number of monetary remedies for that problem and for a claim that she had been underpaid wages and holiday pay. The remedies included compensation for hurt feelings and humiliation, reimbursement of lost wages, full payment of wages for a notice period, payment of accrued leave entitlements, and compensation for the loss of use of a car Promotional Systems had supplied with the job.

[4] Promotional Systems responded to the personal grievance claim by denying that it had acted in breach of any contractual or statutory obligations owed by it. The company denied that any payments remained owing to Ms Wilson under her employment agreement, whether from her performance of the agreement or from the termination of it. Promotional Systems claimed that Ms Wilson's dismissal was lawful and justifiable, having resulted from the company implementing and enforcing a "trial period" as permitted under s 67A of the Employment Relations Act 2000 and as provided for by an express term of the employment agreement.

[5] In its response to her claim Promotional Systems accused Ms Wilson of acting in bad faith after termination of her employment, by "reneging" on an agreement reached when the parties had been in mediation undertaken to settle their problems. Promotional Systems also notified Ms Wilson of its intention to file a claim against her for breach of confidentiality and restraint provisions in her employment agreement. In this regard the company accused her of having attempted to deal with one of its customers during a two week period of notice following her termination.

[6] After mediation there were further attempts to settle Ms Wilson's personal grievance made directly between her representative Mr Christian Wilson, who is her husband, and Promotional Systems representative Mr Bennett.

[7] In February 2011, following an adjournment of the investigation meeting to allow Mr Bennett to recover from incapacity, the company lodged a claim against Ms Wilson. Promotional Services alleged that she had breached a fiduciary duty owed to her employer and had failed to comply with an obligation of good faith, by:

- During her notice period attempting to deal with and entice one of Promotional Systems customers;

- When she was dismissed, taking with her and not returning property belonging to Promotional Systems; and
- When she was dismissed, deleting all her emails and work related reports from her computer provided by the company.

[8] As remedies Promotional Systems sought penalties for each breach of the employment agreement and an order that Ms Wilson pay damages.

[9] The Authority directed that the detail provided in Promotional Systems claim was inadequate and that Ms Wilson was not required to respond to the claim until better information as specified by the Authority was given.

[10] The Authority required to know the basis Promotional Systems had for claiming that Ms Wilson had been still in the employment relationship after she was dismissed on 18 or 19 May, what the property was Ms Wilson had allegedly taken away, the basis under the Employment Relations Act for bringing the penalty claim for a breach of good faith and, with regard to the un-quantified claim for “damages,” the amount claimed and detail as to what loss or harm had been suffered by Promotional Systems as a result of the wrongful actions alleged against Ms Wilson. An amended statement of problem was duly lodged providing more particulars of those matters including the amount claimed as damages, \$4,000.

[11] Ms Wilson responded to the claim against her by denying that she had acted in breach of her employment agreement or the Act, whether in relation to good faith obligations or fiduciary duties owed to Promotional Systems. She denied acting in breach by dealing with Clariant (NZ) Ltd, a firm alleged to have been a customer of Promotional Systems, and she denied retaining any property of Promotional Systems after her termination or improperly interfering with the company’s computer system or data stored in it.

[12] The Authority directed Promotional Systems to bring as a witness to the investigation meeting a person identified as having been approached by Ms Wilson in an attempt to deal with that person’s firm Clariant. His first hand evidence was required for the investigation of that allegation, including the claim that Promotional Systems had lost Clariant business as a result of Ms Wilson’s approach, for which \$4,000 damages was claimed against Ms Wilson.

Trial period in the employment relationship

[13] A trial period was provided for in the parties' employment agreement, as follows:

6.0 Trial Period

- 6.1 *The Employee's employment is subject to a trial period of three months during which the Employee's sales performance and conduct will be monitored and appraised.*
- 6.2 *During the trial period the Employee may be terminated by either party giving two weeks written notice, provided that the Employer may in its discretion make payment in lieu of notice, and further that no notice shall be required in the case of summary dismissal.*
- 6.3 *If the Employee's sales performance as per schedule and conduct meets the performance standards required by the Employer, the Employee shall at the end of the trial period be offered permanent employment.*

[14] In a written statement of evidence presented by him on behalf of Promotional Systems shortly before the investigation meeting, Mr Foster maintained in relation to clause 6:

- 11. *The employment relationship was subject to a trial period of 3 months under s.67 of the Employment Relations Act and I terminated the Applicant's employment in terms of this provision.*

[15] Up to the start of the investigation meeting Promotional Services had insisted that Ms Wilson's employment had been terminated during the trial period of three months provided for in clause 6.1. By the end of the meeting Mr Foster had conceded that the termination occurred outside that trial period. I find that advice of the dismissal was given orally by Mr Foster to Ms Wilson one day after the end of the trial period and was confirmed by him in writing two days after the end of the three month trial period.

[16] For nearly a year Promotional Systems resolutely maintained that the end of a period of "three months," starting when Ms Wilson's employment began on 17 February 2010, was on 18 May. The employer's insistence in this regard was despite the simplicity of a calculation that requires only the most basic counting skills, and the advice given to Mr Foster by Ms Wilson and by Mr Wilson, immediately before and

after 18 May, as to the date on which ‘three months’ ended. That advice I expect was also given or was available to the employer from its professional representative Mr Bennett, and no doubt from a neutral evaluation offered in mediation by the mediator. Before the investigation meeting the Authority had questioned whether this matter remained an issue to be resolved by it, or whether time could be saved by the company accepting this plain and obvious fact; that three months from 17 February is 17 not 18 May.

Trial periods under s 67A of the Act

[17] Section 67A of the Act allows employers and employees to agree to a trial period in their employment agreement, provided the requirements prescribed in s 67A are met. If so, and if the agreed trial period clause is complied with on its terms, a dismissal within the trial period bars an employee from having access to the personal grievance remedy as a means of challenging the justification for the dismissal. The effect of a trial provision under s 67A is expressed by s 67B(2) to be that no legal proceedings are able to be brought in respect of the dismissal.

Smith v Stokes Valley Pharmacy

[18] The trial period provisions of the Act were closely considered by the Employment Court in *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEMPC 111. In its decision the Court held that the obligations of employers who wish to take advantage of s 67A and 67B are to be interpreted strictly and against the removal of rights of access to justice, unless clearly expressed to have that effect; see para [82] of decision.

[19] In relation to s 67A and 67B the Court held, at para [83];

The new sections provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with. Significant obligations of good faith dealing remain upon employers.

[20] One of the requirements of s 67A is that a trial period must not exceed 90 days. Although clause 6 of the employment agreement in this case specified “three months” as the trial period, as it happened 17 February to 17 May in 2010 was 90 days and therefore clause 6 was not deficient in this regard.

[21] Perhaps because Promotional Systems allowed itself to become obsessed with the idea that 17 February to 18 May was 90 days and that therefore dismissal occurred during the trial period, it overlooked a fundamental and fatal flaw in the trial provision at clause 6 of the employment agreement. Section 67A(2) defines a “trial provision” as one that states, or is to the effect, that if the employer dismisses the employee during the trial period the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal. In the agreement, whether at clause 6 or anywhere else, there is nothing stated or to this effect about any disentitlement to bringing a dismissal grievance. Clauses 24 and 26 in particular dealing with employment relationship problems and their resolution, make no exception to the ability of Ms Wilson to raise a claim of unjustifiable dismissal and to have it investigated and determined by the Authority

[22] This omission from the agreement is fatal to Mr Foster’s assertion in his written evidence that Ms Wilson’s employment was subject to a trial period “under s 67 of the Employment Relations Act.” In accordance with the strict approach required to be taken when interpreting and applying s 67A and 67B of the Act, the Authority must find that Promotional Systems cannot rely on those provisions. This is so even if Ms Wilson had been dismissed within the period between 17 February and 17 May 2010. Whatever else it may have been or may have permitted, clause 6 was not a “trial provision,” because an essential step had been missed out of it when it was drafted.

[23] It is not disputed in this case that Mr Foster had told Ms Wilson on 18 May he was terminating her employment. That was on the 91st day of the three month trial period in clause 6. In so far as Promotional Systems had bound itself to give written notice of termination, it did not do so until Mr Foster sent Ms Wilson an email on 19 May. By that time she had already been asked to leave her workplace. Mr Foster’s email, sent at 6.30pm in the evening of 19 May, said:

This notice serves as a written termination notification from the verbal termination of which it took effect, May 18th 2010.

Please note that Tessa Wilson employment was terminated under s.67 clause.

This was simply due to not meeting performance standards.....

Hence the reason for her termination in her employment while in the trial period.

[24] The email also advised Ms Wilson that she was to be paid two weeks wages in lieu of notice “in the normal pay cycle on Thursday.”

[25] During the Authority’s investigation Ms Wilson pointed to an email she had received from Mr Foster on 18 May which had referred to her “three month review.” This had been sent in response to her advice given to Mr Foster on 17 May that the trial period was ending. Mr Foster responded:

Anyhow by the end of this week it will be three months for sure. Then the job is reconfirmed to you in writing from myself.

[26] Later on 18 May during a meeting, Mr Foster told Ms Wilson that her employment was terminated. The employer is unable to rely on s 67A of the Act for doing that and the Authority must therefore find that Ms Wilson is not prevented from having her grievance claim of unjustified dismissal investigated and determined.

Justification for dismissal

[27] The test of justification is at s 103A of the Act. The section provides that the question of whether a dismissal was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[28] I find that Promotional Systems in dismissing Ms Wilson relied on a statutory provision which had no application. This error was not the result of any complex legal situation which had arisen but from plain inadvertence or miscalculation on the part of Promotional Services. A fair and reasonable employer would not have made such mistakes, especially when the continuation of an employment relationship was at stake.

[29] Whether Promotional Systems had drafted clause 6 badly, or whether Mr Foster had made a mistake of fact as to the date of the 90th day on which he could still have lawfully terminated Ms Wilson’s employment if under s 67A, or whether he had made a mistake of law as to when the 90 days is counted from, or, as he seemed to think, whether the 90 days included non-working days, makes little difference.

Promotional Systems did not act in the way that a fair and reasonable employer would have done in all the circumstances at the time it dismissed Ms Wilson.

[30] I find that both procedurally and substantively the dismissal was unjustified.

[31] Ms Wilson is entitled to have her claims for personal grievance remedies considered by the Authority. The remedies are those available under s 123 of the Act, except for reinstatement which is not being sought.

Contribution

[32] In deciding both the nature and extent of the personal grievance remedies Ms Wilson is entitled to, the Authority must under s 124 of the Act consider the extent to which her actions contributed towards the situation that gave rise to the grievance. If she was at fault the Authority must reduce the remedies that would otherwise have been awarded.

[33] Mr Foster said that the only reason he had for deciding to terminate Ms Wilson's employment on 18 May, by purporting to invoke the clause 6 trial period, was his belief that her performance had been so poor as to leave him no choice. In his statement of evidence he said:

33. *Based on Tessa's extremely poor results to date and the fact that her prospects were no better, I believed I had no option but to terminate her employment immediately which I did on the basis of the trial period provision in her employment agreement.*

[34] I accept that Mr Foster had believed that Ms Wilson's performance as at 18 May was poor or inadequate and I accept his evidence that this was the reason why he invoked the purported trial period provision on 18 and 19 May. The law is clear that to constitute contributory behaviour the conduct of the employee must be blameworthy in nature. Generally, where performance is relied on as a ground for disciplinary action, including dismissal, a fair and reasonable employer, in the absence of a s 67A trial period to invoke, must communicate with the employee its assessment of the employee's performance and the standards that are expected, and also the likely consequences if its expectations are not. The requirements in this regard have been well settled since a decision of the Employment Court in *Trotter v. Telecom Corporation of New Zealand Ltd* [1993] 2ERNZ 659.

[35] Even if clause 6 had been capable of operating or being applied independently of s 67A and 67B, it was not complied with. As found already, the dismissal was first notified to Ms Wilson by Mr Foster on 18 May. Clause 6 expressly required termination to occur “during the trial period.” Also, termination was required to be effected by “written notice.” The dismissal was notified orally one day outside the trial period and in writing two days outside that period.

[36] Although Ms Wilson’s performance was not raised at all as an issue in the employer’s statement in reply, the Authority has considered whether her work performance was poor or inadequate and whether that amounted to blameworthy conduct which was causally linked to the situation giving rise to the grievance. If so there was contributory fault present on Ms Wilson’s part for the purposes of s 124.

[37] Given Mr Foster’s concerns about Ms Wilson’s performance, the express requirements of clause 6 in this regard are important. Performance Systems had expressly undertaken and represented to Ms Wilson that during the trial period her performance and conduct were going to be “monitored and appraised”. It is implicit that the monitoring and appraisal would be carried out in consultation with Ms Wilson, who would have an opportunity to provide advice, comment and explanation where needed. It is found this did not occur and as a result any perceived failure in her performance cannot be relied upon as blameworthy conduct for the purposes of assessing contribution when determining remedies.

[38] There are several reasons in this case why the Authority is unable to conclude that Ms Wilson’s performance amounted to conduct that was blameworthy on her part. Firstly, I accept that she had not agreed to the Schedule B – KPI’s that formed part of the draft employment agreement submitted to her for signing. I am satisfied that Schedule B was set aside unsigned by the parties after discussion about it in which Mr Foster had accepted that Ms Wilson would need a start-up period before she could reasonably be expected to achieve the level of sales specified in the schedule.

[39] Secondly, I am satisfied that there were reasons outside Ms Wilson’s control why her sales performance was low from the start and remained low after three months. Mr Foster drew attention to some of those in his statement of evidence, where he referred several times to a general downturn in business and in the economy and, at the time Ms Wilson had commenced in February, a significant drop in sales from \$77,600 to \$1,900. Thirdly, Mr Foster had not wished to discourage Ms Wilson

from her attempts by negative discussions about her performance and the consequences for her if it did not improve but rather, as he said in his statement of evidence, “I had tried to encourage her by assuring her that her employment would be reconfirmed.” He said his approach was to be complimentary, as employees given warnings will “go to pieces,” a situation he obviously wanted to avoid. Even right up to the 90th day of the trial period, Ms Wilson had been given no express communication of concern about her performance and the possibility of termination for that. Also, Mr Foster until late in the three month period, as he also said in his statement of evidence, was not “fully aware of how bad her results and prospects were until the final financial and client reports were completed”. Whatever his appraisal was of that, Mr Foster did not share it with Ms Wilson until the dismissal meeting that took place on 18 May, by which time the purported trial period had ended and he had decided to dismiss her.

[40] I find that Ms Wilson did not contribute in any way to Mr Foster’s mistake as to whether there was a valid trial period provision in the employment agreement. There is no suggestion that she was responsible for the inadequate wording of clause 6. Neither did she in any way contribute to Mr Foster’s miscalculation as to when the three month (90 day) period would expire. Ms Wilson was responsible for her own performance, but although Mr Foster believed there was a problem with that he did not make Ms Wilson sufficiently aware of the problem and the likely consequences for her if it was not fixed, for her conduct in that regard to be regarded as contributory.

[41] I therefore make no reduction in the remedies Ms Wilson is entitled to.

Remedies

[42] Some of the remedies sought for Ms Wilson are not within the statutory powers of the Authority to grant. The giving of an apology, providing a reference and transforming a dismissal into a resignation, are among those. The remedies claimed that are available for consideration are:

- Four weeks notice;
- Compensation for lost wages of four months;
- Compensation for hurt and humiliation of \$10,000;

- Payment of accrued leave;
- Compensation for the loss of the use of the car during the notice period;
- Interest on unpaid monies;
- Reimbursement of legal costs.

[43] The above were as listed by Mr Wilson in his memorandum of 17 October 2010. Dealing with each in turn, I find in relation to notice that under clause 17 of the employment agreement Ms Wilson was entitled to either four weeks notice or payment in lieu of notice for that period. She was paid, belatedly, for two weeks in lieu of notice. Had her employment been terminated within the clause 6 trial period of three months only two weeks notice or payment in lieu was required. As termination did not occur until the 91st day (orally) and the 92nd day (in writing) clause 6 had no application and the general termination provision requiring four weeks notice applied. Ms Wilson should have been paid wages for four weeks following her termination. As she was paid for only two weeks she is entitled to recover a further two weeks. The amount is \$1,730.76.

[44] In relation to the claim for four months lost wages, I consider a shorter period is appropriate. I am satisfied that Mr Foster recognised with Ms Wilson that a lead in period of some three months might be required before she started to gain traction with sales. He acknowledged this by not insisting upon the KPI's set out in Schedule B becoming part of the employment agreement. To assess sales and to implement a performance management plan, a reasonable period of three months after 17 May would have been needed, if Promotional Systems had regarded low sales as a personal performance problem rather than a consequence of the state of the national economy. It is also likely that if low sales had continued a redundancy situation would have arisen within three months of the dismissal.

[45] I therefore consider that if Ms Wilson had not been unjustifiably dismissed she would most likely have remained in employment for a further three months (13 weeks) after 18 May 2010 when she was dismissed. As that period of thirteen weeks includes the notice period of four weeks, two weeks of which were eventually paid, the award of lost wages to be reimbursed to Ms Wilson is for 11 weeks at the rate of

her base salary of \$45,000 per annum. I calculate the amount due as \$9,519.23, two weeks of which - \$1,730.76 - have been awarded as notice above. The balance of nine weeks lost wages is \$7,788.46.

[46] In fixing a three month period I am satisfied that Ms Wilson made reasonable attempts to find new employment and mitigate her loss of income by that means. I accept that she applied, unsuccessfully, for about 30 jobs. She was interviewed for some and eventually obtained a sales role, taken up by her in the last few weeks.

[47] In relation to compensation for hurt feelings, I accept from Ms Wilson's evidence and that of her husband, that she was badly shaken emotionally by the unjustified dismissal and the suddenness of it. A circumstance also to be taken into account is that Ms Wilson was the sole income earner in her family at the time and had school age children. Her husband was without employment and Ms Wilson was clearly carrying a high responsibility for the financial security of the family when she lost her job suddenly.

[48] The abruptness of the dismissal was also aggravated by the absence from Mr Foster of any warning of poor performance. Mr Foster chose to compliment Ms Wilson rather than say anything adverse or negative which he thought might have discouraged her from trying to improve.

[49] I take into account that Ms Wilson had to leave the premises almost immediately on 18 May, and without the employer complying with the requirement to give her written notice. Also, the notice given orally was inadequate and therefore no notice at all; see para [97] of *Smith v Stokes Valley Pharmacy* (above). Subsequently Ms Wilson has faced something of a battle to get Mr Foster to acknowledge, what should have been plain to him on 18 May, that the dismissal occurred outside the time permitted by clause 6, or under s 67A if that provision had applied. Although Promotional Systems promptly held itself obliged to pay Ms Wilson two weeks pay in lieu of notice, it unreasonably refused to pay her the money for some four months, a circumstance I accept increased her humiliation and distress. I have found that Promotional Systems ought to have paid four weeks, two weeks of which still has not been paid to Ms Wilson.

[50] The company then threatened to bring a counterclaim based on alleged behaviour of Ms Wilson but did nothing about this until shortly before the

investigation meeting, when it belatedly lodged a claim deficient in details as required to fully and fairly inform Ms Wilson of the alleged problem. Included was a claim for damages which as it has turned out was unsupported by evidence. Despite the fact that Ms Wilson was required to leave the premises almost immediately the company alleged that she had found the time to go to her office, remove property, which it was not able to specify the nature of until shortly before the meeting, and delete all her emails. I accept Ms Wilson's evidence that she simply had no time or opportunity to do that and that she did not remove property or interfere with data on the computer. There is no evidence that she did so and all of the evidence indicates that she was numbed by the dismissal and the suddenness of it and simply took up the offer to be driven home.

[51] The company eventually filed a claim for "damages," but without specifying the amount or what exactly the damage to Promotional Services had been. Ultimately the company, despite being required to present evidence to support this claim, did not or could not, which tended to confirm to the Authority that the company simply used its counterclaim to try and intimidate or harass Ms Wilson.

[52] The company raised matters, which should not have been put before the Authority, to do with the parties' conduct in mediation. It is quite clear that the attempts at mediation were made on the basis that any settlement would be formally recorded under s 149 of the Act. Mr Foster alleged bad faith against Ms Wilson because a settlement had apparently been proposed but it seems Ms Wilson changed her mind. She was fully entitled to do that up to any point until she signed the s 149 record of settlement. This matter should not have been raised at all before the Authority, as mediation is a confidential process. I conclude it was raised only to try and make Ms Wilson look bad.

[53] I am satisfied that together with these matters of aggravation on top of the hurt and humiliation suffered from the unjustified dismissal itself, an award pursuant to s 123(1)(c)(i) of the Act of \$7,500 is appropriate as compensation for hurt feelings, humiliation and general distress caused to Ms Wilson.

[54] In relation to annual leave payments that are still due, I find that Ms Wilson is entitled to \$277 for annual leave due on the four weeks notice that was payable to her. This amount is 8% of four weeks wages.

[55] In relation to the claim for compensation for loss of the use of the company car during the notice period, an award must be made for the two additional weeks of notice Ms Wilson has been held entitled to. Promotional Services had acknowledged that private use of the company car was a benefit of the employment when it allowed Ms Wilson to continue using the vehicle during the two week period of notice for which wages were paid. Two further weeks is a period of 12 days including the weekend in between the two weeks, a time when she was able to use the car if she wished. At an average cost for a rental car per day of \$45, for 12 days use the amount due is \$540.

[56] Ms Wilson is entitled to recover interest on the holiday pay and wages as awarded above. Under clause 11 of Schedule 2 of the Employment Relations Act the interest rate is now 8.4%, as set by the Judicature (Prescribed Rate of Interest) Order of 2008. This is the rate at which the Authority since 1 April 2011 must award interest, although a discretion is retained as to whether the award is for all or only part of the money due and whether it is for all or only part of the period after the cause of action arose until payment.

[57] The full four weeks wages in lieu of notice should have been paid on or very shortly after 18 May when Ms Wilson was dismissed. Had she not been dismissed then she would have been paid her salary as normal for at least a further 13 weeks up until 10 August 2010. Therefore in the exercise of the discretion to award interest Promotional Systems is to pay interest on the total amount of wages and holiday pay awarded as above (\$) at 8.4% from 10 August 2010 until the amount is repaid.

[58] In relation to the claim for reimbursement of legal costs, reference has been made by Ms Wilson to a solicitor she retained for mediation. Costs are not awarded by the Authority for engagement in that dispute resolution process. For the purposes of the investigation Ms Wilson was represented by her husband in his capacity as a close family member rather than as a professional advocate. I therefore can make no award of costs.

Promotional Systems claim against Ms Wilson

[59] As indicated above, this was an entirely unmeritorious claim that failed through a complete of evidence. The evidence I find is that Ms Wilson in the circumstances of her sudden dismissal had no chance or opportunity to take property

or improperly interfere with computer files. I accept her evidence that she did not do either of those things. She was hastened from the premises on 18 May in a state of some shock, before having any real chance of doing anything.

[60] There was evidence in the form of an email that Ms Wilson dealt with a third party who was a representative of Clariant (New Zealand) Ltd, a company claimed to be a customer of Promotional Systems. That email was sent about two weeks after Ms Wilson had been dismissed, on 1 June 2010. I reject the argument put forward that at that time Ms Wilson remained employed under notice. Plainly by its treatment of her Promotional Systems had intended to end the employment on 18 May, or 19 May the following day at the very latest. Payment of wages in lieu of notice does not indicate a continuing employment relationship and I reject Mr Foster's desperate suggestion that Ms Wilson had been on 'garden leave' during the period of notice. If that had been the case the company would have paid her wages for that period of garden leave, rather than deliberately withholding them from her.

[61] There is no evidence that the name of Clariant or its representative Ms Wilson dealt with was confidential information that she had acquired while she was working for Promotional Systems, so that she was in breach of her ongoing duty of confidentiality after the termination of employment. There is also no evidence to support a claim for damages of any amount, as it has not been shown that Ms Wilson contact with any the third person caused harm or loss for which damages are an appropriate remedy to Promotional Systems.

[62] The company was directed to secure the attendance of the third person if it was going to maintain this claim for damages, as that person would provide the best evidence of his firm having been enticed away from concluding a particular contract with Promotional Systems. His evidence would also help establish whether Clariant had been a customer or "client of the Employer" at material times. That witness was not called and his evidence was not provided as directed.

[63] As to the "Restraint of Trade" provisions of clause 18 of the employment agreement, there is no evidence that Promotional Services gave Ms Wilson consideration in return for this restriction of six months on her rights. The reasonableness of a six month restraint clause when the employer in clause 6 purported to have and exercise the right to dismiss during a three month trial period,

must be questionable. The purpose of the clause appears to be simply anti-competition and is therefore unenforceable.

[64] For the above reasons I consider there is no basis for making any orders against Ms Wilson as claimed by Promotional Systems.

Determination

[65] In summary, Promotional Services is ordered to pay Ms Wilson the following amounts;

- 1 As two weeks wages in lieu of notice, \$1,730.76.**
- 2 As nine weeks lost wages, \$7,788.46.**
- 3 As compensation under s 123(1)(c)(i) of the Act, for hurt feelings and humiliation, \$7,500.**
- 4 As annual holiday pay, \$277.**
- 5 As the value of 12 days use of the company car use withheld during the notice period, \$540.**
- 6 As interest on all the above amounts except \$7,500 compensation, 8.4% per annum from 10 August 2010 until paid in full.**

A Dumbleton
Member of the Employment Relations Authority