

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 52/08
ARC 16/08**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN SHARON LEE
 Plaintiff

AND MINOR DEVELOPMENTS LIMITED
 T/A BEFORE SIX CHILDCARE
 CENTRE
 Defendant

Hearing: 21-23 October 2008
 (Heard at Auckland)

Appearances: William Lee, Advocate for Plaintiff
 Alison Maelzer and Jodi Clark, Counsel for Defendant

Judgment: 23 December 2008

JUDGMENT OF JUDGE C M SHAW

[1] This challenge to a determination of the Employment Relations Authority concerns the employment of Sharon Lee by the defendant company and her subsequent redundancy.

[2] The parties are in dispute about whether Mrs Lee had been employed as a casual employee.

[3] Following the termination of her employment, Mrs Lee raised two personal grievances which were investigated by the Employment Relations Authority. The Authority determined that she was not a casual employee and her work was permanent part-time. It found that the reasons for her redundancy were genuine although her dismissal was unjustified because the manner in which it was effected was unfair. It also found she suffered disadvantage in her employment by a reduction in her working hours.

[4] Mrs Lee was awarded \$2,000 compensation for distress but was ordered to pay costs of \$2,000 to the defendant.

[5] Mrs Lee challenged that determination. It was heard de-novo. The issues before the Court on the challenge are:

- What was the nature of Mrs Lee's employment – casual or permanent?
- Did the defendant make representations which misled Mrs Lee to her disadvantage?
- Was Mrs Lee treated fairly in the course of her employment?
- Was Mrs Lee justifiably dismissed for redundancy?

The facts

[6] Minor Developments is a company that owns and operates BeforeSix, an early childcare education centre at Mangawhai licensed by the Ministry of Education. Natalie Alispahic is both director of the company and the licensee of the centre. She is a well-qualified Early Childhood Education teacher with 20 years experience. Since it opened in January 2006 BeforeSix has been regularly audited by the Ministry of Education. Its first Education Review Office report in October 2007 was very positive.

[7] Before the centre opened Ms Alispahic advertised for staff. At that time, the Ministry of Education requirements were that by the beginning of 2007 50 percent of the teachers at an Early Childhood Education Centre had to be qualified. Near the end of 2006 that policy was changed to a requirement that by 2012 all staff had to be registered teachers.

[8] The first teachers employed at the beginning of 2006 at BeforeSix were Natasha Deed who was fully qualified and experienced as an Early Childcare Educator (ECE); Natalie Hillier who was then in training and later qualified in 2007; and Gay Carpenter who had started her training in July 2006. Ngapunawai Woodmass worked intermittently early in 2006 and later on more regularly. She was also in training.

[9] Mrs Lee had spent a considerable part of her working life self-employed until a heart attack prevented her from working. She was on a sickness benefit for several years. When a mutual acquaintance told Ms Alispahic that Mrs Lee was looking for a job she rang her and arranged for her to visit BeforeSix on 17 July 2006. After two days experience there she was employed to work for 21 hours a week - 7 hours a day, three days a week.

The employment agreement

[10] Ms Alispahic said she gave Mrs Lee a copy of what was then a standard casual employment agreement, the centre's policy and procedures manual and a tax code declaration. She explained to her that the rate of pay would be \$13.00 an hour and as she was casual an additional six percent holiday pay each week. They discussed Mrs Lee's availability to relieve. She said she was available on any day except Friday. Mrs Lee took away the agreement but did not return it in spite of several requests by Ms Alispahic. Ms Alispahic was adamant she did not offer Mrs Lee full-time or permanent employment.

[11] The defendant produced a copy of the one page casual employment agreement relied on by Ms Alispahic. The first part of the agreement is headed *Employment Application for Casual Reliever* and is a basic application form. The second half is headed *Employment Agreement for Casual Reliever*. It states that the parties clearly understand that employment as an early childhood worker is solely on the basis of the employee working "*as and where required*" within 50km of the centre. It describes each period of employment as a separate engagement and states that there is no continuity or expectation of ongoing employment. No redundancy will be paid. The conditions included the following:

...
Your starting and finishing days and times may vary depending on the needs of the centres' management and will be changed by mutual agreement.

Termination of employment may be made at any time, by either party, for any reason.

...

[12] While I find that it is quite possible that Ms Alispahic gave Mrs Lee the casual agreement, there is no evidence that Mrs Lee signed it or returned it to her.

[13] The only other reference to casual employment at the start of Mrs Lee's employment is contained in a letter written by Ms Alispahic at Mrs Lee's request to take to WINZ to advise it of the hours she was working. That letter said that she had been offered casual employment. Mrs Lee regrets not challenging that statement as she says she was simply offered part-time work for three days a week, 8.00am to 3.30pm.

[14] I conclude that Ms Alispahic intended to employ Mrs Lee as a casual worker as she had done with two others earlier that year. I also find however that as the only evidence of that is the letter to WINZ and Ms Alispahic did not pursue the signing of the employment agreement, it was open to Mrs Lee to be uncertain about that.

[15] I am not satisfied on the balance of probabilities that there was a meeting of the minds between Ms Alispahic and Mrs Lee to the extent that they reached agreement that she would be employed as a casual worker.

Mrs Lee's employment

[16] Although Mrs Lee was neither trained nor in training she had experience as a mother and grandmother and was actively involved in the care of a pre-school child. She was initially employed in the room catering for babies under the age of two and enjoyed the work at BeforeSix very much. Her first few weeks plainly went well because on 7 August 2006 Ms Alispahic asked her if she could work full-time. After discussion Mrs Lee agreed to work an extra day a week and from then on she worked 7 hours a day, four days a week.

[17] Sometime in August 2006 Ms Hillier who was at that time training with a New Zealand tertiary college, talked with Mrs Lee and Ms Deed about training. Mrs Lee asked some questions about the value of such training and Ms Deed said to Mrs Lee, "*You take out of training what you want – it is up to you.*" Ms

Deed talked about how much she had enjoyed her study and the benefits that she had received from it.

[18] Having learned that it was possible to obtain grants to undertake such training and that other staff members were able to combine onsite training with their studies, Mrs Lee became enthusiastic about the idea of doing some training. She went as far as making a formal enquiry with Auckland University about the possibility of doing that. Beyond this there is no evidence that Ms Alispahic made a representation to Mrs Lee that such training would be given to her and certainly it was not a condition of Mrs Lee working extra hours.

[19] Shortly after this date Ms Alispahic distributed uniforms to all the staff including Mrs Lee. Mrs Lee took from this that she was a permanent member of staff.

[20] On 28 August Ms Hillier saw Mrs Lee throwing out some baby formula that a baby had not finished. Ms Hillier told her not to throw it out but to store it in the fridge for later. Mrs Lee expressed surprise at this. The next day she took some material from the internet into work to show Ms Alispahic the correct procedure for dealing with left-over baby formula. Mrs Lee believed she was “*sent to Coventry*” for the next two days because of this. This is denied by the other teachers.

[21] At a regular staff meeting on 6 September 2006, Ms Alispahic raised the issue of reheating formula with all of the staff including Mrs Lee. As a result of this Ms Alispahic and Ms Deed canvassed the views of parents about this. As none disagreed with this practice it was continued.

[22] On about 12 September when MsWoodmass began regular work at the centre Ms Alispahic asked her to work in the baby room and Mrs Lee was moved to work with the over two year olds. Mrs Lee said she was not happy with the change but did not complain.

[23] In August Ms Alispahic attended a course for employers. On 20 September she produced replacement employment agreements for all of the staff. She distributed them for consideration and asked for them to be returned.

[24] In late October Ms Alispahic asked Mrs Lee for the agreement. She did not have it with her but did not raise any issues about it. Mrs Lee said she did not sign or return her agreement at that time because she did not agree with its statement that she was employed as a casual employee although she did not tell Mrs Alispahic that.

[25] Sometime in October Ms Alispahic asked parents to give notice if their children would be taking holidays. By the beginning of November many had responded and she discovered that given the numbers on holiday combined with children turning five and leaving the centre there was a need to reduce the staff numbers.

[26] At the same time however Ms Alispahic was also advertising for permanent staff. Her explanation was that she was facing knee surgery that would take her out of the centre. She also needed another qualified teacher to relieve her of teaching duties so she could concentrate on administration. At that time she believed the Ministry of Education policy required 50 percent of the staff to be qualified and therefore needed another fully trained educator as well as Ms Deed.

[27] The advertisements for this position appeared on 6 and 20 November. They stated that the positions were needed because of increasing rolls. Ms Alispahic said that this was an error and that she had simply repeated an earlier advertisement. However I note the only earlier advertisement had been sent out in 2005 before the centre opened.

[28] On 6 November Mrs Lee became upset at the way Ms Alispahic was handling the toilet training of a child whom she knew well and confronted her about it. She accused her of psychologically damaging the child. Ms Alispahic called for Ms Hillier to witness what was happening and voices were raised. Mrs Lee felt upset and intimidated by the presence of the two women and said she was disturbed by the incident but Ms Alispahic was also distressed by the violent way Mrs Lee addressed her.

[29] On 7 November Ms Alispahic met individually with all staff. She had previously put up a notice on the staff notice board advising that the purpose of

these meetings was to go through the new staff contracts before they were signed.

[30] Ms Alispahic had her sister Monique attend all of these meetings. She was neither a director nor an employee but had invested in the business and was Ms Alispahic's mentor.

[31] At her meeting with Mrs Lee, Ms Alispahic told her that her working hours would be reduced. Mrs Lee had no prior notice of this. Ms Alispahic explained that the rolls were falling and that the work could be covered by permanent and in-training staff members. She handed her a pre-prepared letter that said:

...
As discussed in person today, BeforeSix Early Education Child Centre has had a decrease in children attending on Thursdays. This downturn in numbers allows us to cover child-staff ratios with permanent staff.

I would like to give you two weeks notice, that from Thursday 16th November, we will not require you to work Thursdays. However if you are still willing, we would like you to continue working Monday, Tuesday and Wednesdays from 8.00am to 3.00pm until further notice.

Sharon, if by chance enrolments change, I would very much like to call on you to work additional hours.

...

[32] Mrs Lee told Ms Alispahic she was feeling marginalised and for the first time said that her position was permanent, not casual. They then discussed the casual agreement which Mrs Lee had not signed and never did sign. Ms Alispahic also told Mrs Lee that she was considering employing a fully qualified teacher to free her up for more office work during the day. Mrs Lee mentioned at that point that she was interested in undertaking some training. Ms Alispahic noted that Mrs Lee did not seem to be upset or surprised about having her hours reduced. Mrs Lee told the Court that although she was happy with three days a week she was unhappy at the lack of consultation about the reduction in hours. She said she felt ambushed.

[33] Mrs Lee believes that from 6 November she was frozen out of childcare work and was instead assigned cleaning duties. The cleaning duties were normally done by all staff members as a condition of their employment but Mrs

Lee formed the strong impression that she was being excluded from contact with the children. She believed that this coincided with the toilet training incident.

[34] One week later on 14 November Mrs Lee was called into Ms Alispahic's office and was told that because of the downturn in numbers and an excess of staff she would have to be "let go." Mrs Lee was again handed a pre-prepared letter which stated:

...
Unfortunately, as of Wednesday 29 November, BeforeSix Early Educational Child Center (sic) will no longer require your services in the capacity of a casual "as required" employee as per the Employment Agreement. I would like to give you two weeks notice, in good faith, and extend to you my appreciation for your efforts over the previous months.

As the centre grows and additional staff members are required, I will advise of any opportunities that may be applicable to your requirements. There will also be occasions where relieving work is available that may interest you.

On your last day, 29 November 2006, could you please return all uniforms, policies, and relevant documentation to BeforeSix. If you have any queries relating to this matter or wish to discuss further opportunities at BeforeSix, please do not hesitate to contact me. In the interim, I wish you well with your studies and let me know if there is any assistance I can provide.

...

[35] Mrs Lee said there had been no prior discussion or consultation about redundancy and she was completely taken by surprise. She had no opportunity to get advice or respond to the decision and she refuted that there had been a reduction in the number of children enrolled.

[36] A few days after reducing Mrs Lee's hours Ms Alispahic had entered into discussions with a fully qualified ECE teacher. She fast-tracked her employment and she began on 21 November 2006 in order to cover for Ms Alispahic's while she underwent knee surgery which would take three months to recover from. She denied that appointment was kept secret or hidden.

[37] Although the intention was that Mrs Lee would work out her two weeks notice on 15 November she slipped, fell and injured her back at work and was not able to return to work. She was paid 80 percent of her wages for four days. Following that Mrs Lee lodged an ACC application. On 22 November Mrs Lee

received a letter outlining her final pay and was asked to return all BeforeSix property.

[38] In spite of Mrs Lee's challenge to Ms Alispahic's evidence about the declining rolls the documentary evidence confirms that at that time of the year there was at least a temporary downturn in the number of children attending the centre due to holidays and families leaving the area. Therefore there was a need to reduce the staff in order to keep control of the centre's costs. By February the centre was in a position to employ further staff as the rolls increased.

[39] Ms Alispahic believed that Mrs Lee was not upset or angry about her redundancy and appeared quite pleasant to her. She denied that Mrs Lee's employment came to an end because of changing attitudes towards her and said that she was happy to consider her for future casual work if this became available.

Effect of redundancy

[40] Mrs Lee said that she was angry about the way she was treated. She said it was emotionally devastating. When she took on the job she had no expectations other than to work three days a week and felt that those expectations were raised when her hours were increased and she had the hope of training and a whole new career. She said the worst humiliation was having to go home and tell all her friends that she had been made redundant and would not be going into a career after telling them of her expectations for the job.

[41] The fact that the redundancy came just before Christmas also was upsetting to her and she said that her health and wellbeing were generally affected. She felt generally unwell through November to the end of January although it was nothing worth taking to the doctor. She needed to take an afternoon nap each afternoon and it was not until February that she felt able to raise complaints about the childcare centre with the Ministry of Education and other agencies. This evidence was largely uncontradicted and is accepted.

[42] Although there was much evidence given about Mrs Lee's complaints and their outcome they are not relevant for the purposes of this personal

grievance although Mrs Lee was to some extent vindicated following a second enquiry by the Ministry of Education which resulted in some changes to procedure at the centre.

Casual employment

[43] In the absence of any definition of casual employment in the Employment Relations Act 2000 the Courts have assessed whether employment is casual against the following characteristics:

- Engagement for short periods of time for specific purposes;
- a lack of regular work pattern or expectation of ongoing employment;
- employment is dependant on the availability of work demands;
- no guarantee of work from one week to the next;
- employment as and when needed;
- the lack of an obligation on the employer to offer employment or on the employee to accept any other engagement¹; and
- employees are only engaged for the specific term of each period of employment.

[44] The concept of casual employees being employed for a specific task and on an as required basis is akin to periods of fixed term employment. Such employment is provided for in s66 of the Employment Relations Act 2000. A genuine fixed term employment arrangement requires there to be an agreement on when the employment will end and this must be linked to specified dates or the conclusion of specific events or projects.

[45] The question of whether or not a person has been employed as a casual employee depends on the mutuality of the intention at the outset of the employment and the nature of the work including its regularity, its hours and the obligations imposed on the employee.

¹ *Drake Personnel NZ Limited v Taylor* [1961] 1 ERNZ 324

[46] In the present circumstances I find that whatever Ms Alispahic's intentions were at the outset of Mrs Lee's employment, Mrs Lee could not have been classified as a casual employee. She worked part-time hours and although was available for extra hours over and above those agreed, the hours that she worked were fixed and regularly performed. They were not linked to specific events or projects. There is no doubt on the evidence that Mrs Lee had an ongoing expectation of permanent employment and Ms Alispahic had an ongoing expectation that she would turn up for work each day. This was not a casual employment situation where she was occasionally and irregularly called in for some limited or purely casual purpose². I conclude that she was not a casual employee but a permanent part-timer.

[47] The consequence of this finding is that her employment was not terminable at will. If circumstances meant that her position was redundant, she was entitled to be treated fairly and reasonably with appropriate consultation.

Were representations made?

[48] There is not sufficient evidence to conclude that Ms Alispahic made misrepresentations to Mrs Lee about training for a teaching qualification that had the effect of persuading her to take up four days employment a week. Discussions about the possibility of Mrs Lee taking up training did occur but they were casual and informal only and did not disadvantage her.

Was Mrs Lee treated fairly in the course of her employment?

[49] I have considered Mrs Lee's allegation that her employment was affected by her being "*sent to Coventry*" following the 6 November incident. It is not surprising that there was some ill-feeling to her following that but I find that arose from her imperious attitude towards Ms Alispahic on that day and she must bear responsibility for any fall-out that followed.

[50] I find that the manner in which Mrs Lee's hours were reduced on 6 November was not fair. She was called to a meeting expecting to discuss her employment agreement and without any notice or previous consultation was

² *Canterbury Hotel etc. Employees UOW Fell* [1982] ACJ 285

advised that her hours would be reduced. Even if she had been a casual employee bound by the casual employment agreement relied on by Ms Alispahic, the variation of her starting and finishing days and times could only be changed by mutual agreement. The changes made on 6 November were unilateral, pre-prepared and unfair.

The redundancy

[51] I agree with the Authority that the reasons for the redundancy were genuine in as much as the needs of the centre had changed. It was facing a reduction in enrolled children and did not require the numbers of untrained staff that had been needed. On the other hand the employment of a trained teacher was necessary to meet Ms Alispahic's needs while she was undergoing and recovering from surgery.

[52] The procedure adopted was in breach of the fundamental requirements of fair process for redundancy. Mrs Lee was not given any warning of the need for restructuring. She was not given any opportunity to present an alternative to her position being terminated. She was not given an opportunity to be supported or represented at the redundancy meeting. The manner in which the redundancy was undertaken gave rise to Mrs Lee's belief that she was being moved out of her job because of the infant formula and the toilet training incidents. The blow was softened only by the giving of two weeks notice.

[53] I therefore find that the actions of the defendant in making Mrs Lee redundant were not those of a fair and reasonable employer and the dismissal for redundancy was unjustified.

Remedies

[54] Because the redundancy was substantively justified Mrs Lee has no valid claim for loss of the position but she is entitled to compensation for the effects of the disadvantage that she suffered in the course of her employment by the reduction of her hours on the 6 November and for the significant hurt and humiliation accorded by the unfair manner in which her employment was terminated.

[55] I assess compensation as follows:

- Mrs Lee is entitled to compensation for wages lost from 6 November when her hours were unilaterally reduced until the termination of her employment on 29 November 2006. The calculation of this amount must take into account the fact that from 15 November she was entitled to only 80 percent of her wages because of absence due to her accident at work. The parties are invited to reach agreement on the amount of salary she has lost. If they cannot agree Mrs Lee has leave to apply to the Court for an order as to quantum.
- Mrs Lee is entitled to the sum of \$15,000 for the hurt and humiliation caused by the unjustified disadvantage and dismissal.

Costs

[56] The Authority's determination on costs is set aside. Although Mrs Lee was represented by her husband in Court she did obtain legal advice in the preparation of the pleadings and other matters relating to the Court case. If she wishes to make an application for contribution towards the costs of this advice this should be done by way of a memorandum to the Court giving evidence of her legal costs and disbursements associated with the Court proceedings.

**C M SHAW
JUDGE**

Judgment signed at 2 pm on Tuesday 23 December 2008