

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Amanda Kaye Wilmshurst (Applicant)
AND Boulevard Manor Limited a.k.a. Manor Inn Newmarket (Respondent)
REPRESENTATIVES Malcolm Metcalfe, Advocate for Applicant
Lloyd Parrant, Advocate for Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 30 May 2002
DATE OF DETERMINATION 5 June 2002

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

Miss Wilmshurst claims that she was unjustifiably dismissed from her employment at the Manor Inn Newmarket ("Manor Inn"), effective from 5 September 2001. Miss Wilmshurst was fortunate in that she was able to obtain new employment immediately, so there is no claim for lost wages, but she seeks compensation (the sum to be decided by the Authority), for the humiliation, loss of dignity and consequent loss of self confidence brought about by the nature of her dismissal. She also seeks costs.

Background

On or about 5 July 2001, a Hotel Receptionist position was advertised in the New Zealand Herald. Miss Wilmshurst applied for and was interviewed for the position. Miss Wilmshurst says that during the interview with Mr and Mrs Francis, the managers of Manor Inn, she was told that if she was successful in obtaining the position, she would be initially employed on a trial basis for "one or possibly three months."

On the other hand, Mr and Mrs Francis say that the trial period was for one month and that is the standard practice of the business in regard to new employees.

By way of a letter dated 9 July 2001, Miss Wilmshurst was notified that she was successful in obtaining the position and she commenced her employment at Manor Inn on 16 July 2001. The letter of appointment made no mention of a trial period, but it has been established to my satisfaction that it was agreed that there would be trial period of one month. Miss Wilmshurst received training by another member of the Manor Inn staff, Adrienne Williams, for two weeks, but according to Ms William's written statement and the oral evidence of Mr and

Mrs Francis, Miss Wilmshurst was not performing to the expected level required. It seems that there were issues relating to poor communication with Ms Williams, Mr and Mrs Francis and also clients.

Mrs Francis also conveyed that there were two further matters that contributed to the dismissal of Miss Wilmshurst. The first of these related to information received by Mrs Francis from a previous employee. This person happened to be visiting Manor Inn and observed a discussion between a prospective client who apparently was making enquiries about accommodation for a netball team. According to Mrs Francis, it seems that Miss Wilmshurst did not understand the requirements of the netball representative and/or did not make an appropriate response to that person who simply left, hence the potential business of accommodating a netball team was lost.

Mrs Francis says that she put this matter to Miss Wilmshurst but Miss Wilmshurst denied any knowledge of the netball team enquiry. Mrs Francis checked again with her source and had it confirmed that the original information was correct, but it does not seem that she took the matter any further with Miss Wilmshurst.

The second incident concerned was of a more serious nature. On 27 February 2001, cash and cheques to the sum of a little more than \$4,000.00 were stolen from the Manor Inn safe, which is located in the reception area. The reception area had been left unattended and the safe was unlocked. Also stolen was Miss Wilmshurst's bag, which held a number of personal effects. The reason why the reception area was unattended was because Miss Wilmshurst had been showing some young people from the Auckland Technical Institute, the Manor Inn rooms. It seems that these young people informed Miss Wilmshurst that they were conducting a survey on facilities for disabled people and it is believed that while Miss Wilmshurst was showing them the facilities, another party committed the theft mentioned above.

There was no implication of dishonesty on the part of Miss Wilmshurst as far as the missing money is concerned, but Mrs Francis said that upon being approached about not being present at the reception area, Miss Wilmshurst denied that. Mrs Francis was of the view that Miss Wilmshurst was being untruthful as both Mr and Mrs Francis had observed Miss Wilmshurst outside the building with the aforementioned students.

The combination of the above two events led Mr and Mrs Francis to have some serious doubts about the truthfulness of Miss Wilmshurst's responses. In regard to the overall faults in the performance of Miss Wilmshurst, Mrs Francis said that she had attempted to discuss these with her at various times and had asked Miss Wilmshurst if she required further assistance, but had received very little response. I note that Miss Wilmshurst generally concurred with most of what Mrs Francis had to say.

Matters came to a head on Friday 31 August 2001. Miss Wilmshurst was notified by another receptionist, that Mr and Mrs Francis wished to meet with her before she departed work for that day. Miss Wilmshurst went to the office of Mr and Mrs Francis and was informed by them that she was going to have to be "let go". Miss Wilmshurst was also told of a complaint from a netball organisation and that she had lost Manor Inn "a lot of money." She was then given the following letter signed by Mr and Mrs Francis:

"We regret we will not be offering you a position as receptionist at Boulevard Manor Ltd. Your time here will be terminated one week from today.

The reason for our decision being your lack of communication skills with guests at reception and potential guests making enquiries, you have also failed to communicate with management in all aspects of your work.

We regret this decision and wish you well in the future."

Miss Wilmshurst was asked if she had anything to say. Her evidence was that: "Because I was still in a state of shock from the news of my dismissal, I said "No" and at that stage the meeting ended"
Miss Wilmshurst worked out the notice period of one week and departed from her employment at Manor Inn on 5 September 2001.

The Matter for Determination

Miss Wilmshurst claims that she was unjustifiably dismissed. As there is no dispute that a dismissal occurred, it falls upon the employer to show that they acted in a fair and reasonable manner towards Miss Wilmshurst and that the dismissal was justified.

The Legal Issues

There are several issues that arise pertaining to the dismissal of Miss Wilmshurst.

Firstly, Miss Wilmshurst was employed on a trial or probationary basis. Such trial periods are not unusual and indeed can be beneficial for both parties in that the employer has an opportunity to assess the suitability of the employee for the position longer term. Also, the employee gets to make an assessment as to the suitability of the position for them.

However, entering into an employment arrangement on a trial basis brings with it certain legal responsibilities, both in statute law and common law. In an attempt to avoid some of the disputes that arise regarding trial periods, the Employment Relations Act 2000 introduced provisions setting out certain requirements that must be met where the employer and the employee agree to a trial or probationary period. These are to be found at section 67 of the Act, as follows:

“Probationary arrangements

Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation or trial after the commencement of the employment,-

- (a) the fact of the probation or trial period must be specified in writing in the employment agreement; and
- (b) neither the fact that the probation or trial period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation or trial period.”

In regard to Miss Wilmshurst’s position, there was no written employment agreement as required by s.65 of the Act, and of course, there was no written record of the fact that a trial period was in place as required by s.67 of the Act.

However, I do not believe that there was any intent on the part of Mr and Mrs Francis to ignore the employer’s obligations under the Act, rather I found them to be honest and credible people, and as they candidly acknowledged, unfamiliar with some of the legal obligations that go with being an employer, pursuant to the Employment Relations Act.

Unfortunately, they also appeared to be unaware of their obligations in regard to the “application of the law” as referred to in s.67 (b), in regard to the fair and reasonable treatment of an employee, “where the employee is dismissed during or at the end of the probation or trial period.”

The law concerning trial periods has been established for some time. The Court of Appeal in *Nelson Air Ltd v New Zealand Airline Pilots Association [1994] 2 ERNZ 665* at p.669, in referring

to the obligations of a good employer, where it is decided not to confirm an employee's appointment, stated that:

“The requirements of that obligation will vary from case to case. Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings, to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will be coming to an end.”

I accept that Mrs Francis in particular, spent some time with Miss Wilmshurst in an attempt to impress upon her the requirements of the business. I also accept that Mr and Mrs Francis gave Miss Wilmshurst the “benefit of the doubt” and extended the trial period somewhat in order to give Miss Wilmshurst further opportunity to improve. However, I conclude that at no time was Miss Wilmshurst warned that if she did not meet their expectations, then she would not satisfy the requirements of the trial period and hence her employment would be terminated. The failure on the part of Mr and Mrs Francis to be to be specific about the necessary improvements required of Miss Wilmshurst and the failure to warn her of the consequences of not meeting their requirements, was I find, unfair and unreasonable and resulted in the eventual dismissal of Miss Wilmshurst being unjustified.

There is also an issue concerning the manner in which the dismissal of Miss Wilmshurst was implemented and the failure on the part of Mr and Mrs Francis to observe basic procedural requirements. While in *Nelson Air* it was accepted that there are less stringent procedural requirements in the case of an employee on a trial period, it was also held that this does not release an employer from its obligation to act fairly. It follows that acting fairly includes meeting certain procedural requirements.

The minimum procedural requirements pertaining to the dismissal of an employee are well established. They are:

1. The employee is to be given notice of the specific allegation and the likely consequences;
2. The employee must be given a real opportunity, as opposed to a nominal one, to attempt to refute the allegation or to explain or mitigate his or her conduct; and
3. The employer must give an unbiased consideration to the employee's explanation in the sense that such consideration must be free from pre-determination and uninfluenced by irrelevant considerations.

NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd [1990] 1 NZILR 35.

Unfortunately, Mr and Mrs Francis failed to meet any of the above procedural requirements. While I have considerable doubt as to whether Miss Wilmshurst could have said anything that would have prevented her dismissal, as a young person unaware of her basic rights, she should have been given prior notice of the meeting and the reason for it, as she may have, at the very least, brought along someone as a support person, rather than be faced with the daunting prospect of being confronted with her shortcomings, alone, with two other people who she perceived as being much more senior in status to her.

Miss Wilmshurst was also entitled to an opportunity to explain her conduct and whatever she had to say, should have been given consideration by the employer, before making the decision to dismiss her.

The failure to extend to Miss Wilmshurst the most basic procedural requirements was unfair and unreasonable and led to her dismissal being unjustified on that front also.

Determination

The overall evidence shows that Miss Wilmshurst was probably not successful in her role as a hotel receptionist at Manor Inn and that she was unlikely to have been appointed to the position on a permanent basis. However, she was entitled to be treated fairly and reasonably in that her shortcomings should have been specifically drawn to her attention and she should have been made aware that, if she did not meet the necessary requirements of the position, then at the end of the trial period, she may be dismissed. Furthermore, Miss Wilmshurst was treated unfairly and unreasonably in regard to the manner in which her dismissal was carried out.

I find that Miss Wilmshurst was unjustifiably dismissed and hence she has a personal grievance.

Remedies

Miss Wilmshurst seeks compensation for the humiliation, loss of dignity and consequent loss of confidence brought about by the nature of her dismissal and I conclude that such compensation is appropriate. I take into account that Miss Wilmshurst is a young person and her job at Manor Inn was only the second position she has held since leaving school. I also accept that the manner of her dismissal would have had some detrimental effect upon her and that this could have largely been avoided had the employer proceeded on a proper basis. On the other hand, I also understand that she returned almost immediately to her previous employer.

I also take into consideration that Miss Wilmshurst was not meeting the acceptable requirements for the position she was employed in and that her employment was unlikely to have been made permanent, and therefore to some extent, she contributed to her position being terminated. However, she did not contribute in any way to the procedural defects that led to her dismissal being unjustified.

Pursuant to s.123 (c)(i) of the Employment Relations Act 2000, I order that Boulevard Manor Limited pay to Miss Wilmshurst the sum of \$2,000.00 (two thousand dollars).

Costs

Costs are reserved and I would normally request that the parties attempt to resolve that issue themselves if they can, taking into account the usual awards of costs issued by the Authority in similar circumstances. However, I accept that this may be difficult given the non-appearance of anyone representing the Respondent at the determination meeting, apart from Mr and Mrs Francis, whom I accept came along in good faith to give their evidence. My understanding is that Manor Inn Newmarket is now under new ownership. Mr Parrant, representing the Respondent, has conveyed that the company has ceased trading and has no funds. Nonetheless, Miss Wilmshurst and her advocate proceeded with her action in full knowledge of that information.

However, whilst I have no reason to doubt what Mr Parrant has conveyed, I have no tangible evidence that shows the financial status of Boulevard Manor Limited, one way or another, hence I am obliged to invite Mr Metcalfe to file costs submissions with the Authority, and copy to Mr Parrant, within 14 days of the date of this determination. Mr Parrant will have a further 14 days to respond to the Authority and copy to Mr Metcalfe.

Ken Anderson
Member
Employment Relations Authority