

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

5089590  
AA 46/08

BETWEEN                      SHARON LEE  
   Applicant

AND                              MINOR DEVELOPMENTS  
   LIMITED trading as BEFORE  
   SIX EARLY EDUCATION  
   CHILDHOOD CENTRE  
   Respondent

Member of Authority:        Dzintra King

Representatives:            Anthony Drake, Counsel for Applicant  
   Alison Maelzer, Counsel for Respondent

Investigation Meeting:      29 November 2007

Submissions received:      9 January and 11 February 2008 from Applicant  
   18 January 2008 from Respondent

Determination:              14 February 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]    The applicant, Ms Sharon Lee, claims that the respondent, Minor Developments Limited t/a Before Six Early Education Childhood Centre (“Before Six” or “the Centre”), has unjustifiably dismissed her on the grounds of redundancy, disadvantaged her in the course of her employment, breached her contract of employment by making misrepresentations regarding her terms of employment, including training, and breached the obligation of good faith.

[2]    She claims reimbursement of lost income, compensation and a penalty for breach of good faith.

[3] The respondent says that Ms Lee was employed on a casual basis and that there was no dismissal. It also denies that she has been disadvantaged, that there has been any breach of contract or any breach of the obligations of good faith.

[4] Before Six is a licensed early childhood education centre located in Mangawhai and catering for children aged from 0 to 5 years old. The Centre is licensed to take fifty children. It opened at the end of January 2006.

### **Ms Lee's Employment**

[5] On 17 July 2006 Ms Natalie Alispahic, one of the Directors of Minor Developments Limited, offered Ms Lee what she says was a casual job at Before Six. Ms Alispahic told Ms Lee that she could work for a couple of days to see whether she liked it. After two days Ms Lee told Ms Alispahic that she was enjoying her work. Ms Lee was initially hired to work three seven hour days; three weeks later that was increased to four days a week.

[6] On 19 July Ms Alispahic says she gave Ms Lee a copy of what was then the business's standard casual employment agreement. She says she also gave Ms Lee the policy and procedures manual and a tax code declaration. She explained that the rate of pay was \$13 per hour plus 6% because she was a casual untrained employee. Ms Lee said she was available any day of the week to relieve except for Fridays because she liked to do her cleaning and shopping that day; and she looked after children at the weekend.

[7] Ms Alispahic said Ms Lee told her she would like to take the contract away so her husband could read it before she signed it. Ms Alispahic told Ms Lee that they were using the standard Early Childhood Council contracts for the time being but that Ms Alispahic was going on a BIZ NZ employment course soon and they would be reissuing all staff with new employment agreements in the next month or so.

[8] On 24 July Ms Alispahic asked Ms Lee about the contract. She said that her husband had read it and she would return it. Ms Alispahic also asked about the tax code form because it was payday on Thursday and the company needed the form before she could be paid. Ms Lee said she would return that as well.

[9] On 26 July Ms Lee asked Ms Alispahic for a letter confirming her hours at Before Six. Ms Alispahic wrote a letter for her on Before Six letterhead.

Ms Alispahic asked who she should make it attention to and Ms Lee said she had forgotten and that Ms Alispahic should put on it “*To whom it may concern*”. The letter reads:

*To Whom it May Concern:*

*As of 17th July 2006, Sharon Lee has been offered casual employment at Before Six Early Education Childhood Centre. Sharon will be working approximately 21 hours. Sharon will also be offered any relieving work at Before Six.*

*Please contact Natalie Alispahic on 09 431 4012 if you have any queries.*

*Yours truly,  
Natalie Alispahic*

[10] At the time of writing the letter, Ms Alispahic asked Ms Lee about her contract and tax form as she was due to be paid the next day, the Thursday. Ms Lee went home at lunchtime and returned with the tax form only. Ms Alispahic asked why she had not brought back the contract and if there were any problems with it. Ms Lee said she wanted her lawyer to read it before she signed. Ms Alispahic said it was a standard Early Childhood Council agreement and if she wanted any information Ms Alispahic could phone the Council for her because Before Six was a member.

[11] Over the next few weeks Ms Alispahic asked Ms Lee about the contract several times, probably four times. Ms Lee denies ever having received this contract.

[12] On the balance of probabilities I believe that Ms Lee was given a casual employment agreement as contended by Ms Alispahic. The contract is headed “Employment Application for Casual Reliever”. It states that the parties understand the employment is on the basis of the employee working on an “as and when required basis” and that there was no expectation of ongoing employment.

[13] After attending a BIZ NZ course in August 2006 Ms Alispahic developed new employment agreements. She met with all the staff and gave them their agreements. Ms Lee was issued with a casual agreement because she was the only unsigned casual employee. The other staff were all issued with permanent agreements.

[14] In the week starting 18 September 2006 Ms Alispahic asked all the staff about their agreements and told them to let her know if they wanted to discuss any concerns

with her. Ms Lee said she would bring her's into work but did not say she wanted to talk about anything or had any concerns.

[15] In the week of 23 October Ms Alispahic asked Ms Lee about her agreement. Ms Lee said it was in her bag. Later in the day Ms Alispahic asked to meet with Ms Lee about it, at which point she told Ms Alispahic that she had cleaned out her bag last night and had left the agreement at home. She did not say that she had any issue with the agreement or was not going to sign it.

[16] The new agreement stated that it was an agreement for casual "as required" employment and that it was effective from the date of signed acceptance. It says the employer would offer work as determined by need and available work and the employee agreed to be reasonably available for work and to honour any commitment to work agreed days or hours of work. It also said "Casual employment is generally intermittent and may not be continuous every week."

### **Reduction in work**

[17] During October the numbers of children booked at Before Six were declining. In mid August the average number was 26, by the start of November that number had decreased to 21. The required ratio of staff was one teacher to five under 2 year olds and one teacher to ten over 2 year olds. It became clear to Ms Alispahic that she would need to reduce staff hours at the Centre. Ms Lee was the obvious choice because she was a casual employee and the only person who was not trained or in training.

[18] On 7 November Ms Alispahic contacted all the staff to go over their new contracts and sign them. The meetings had been pre-arranged. Ms Alispahic bought her sister Monique to the meeting. Ms Alispahic told Ms Lee that she would need to address her hours because of the downturn in booked numbers, particularly on Thursdays. She explained that Before Six was covered those days with permanent staff and that as from 16 November, in two weeks time, they would not need her on Thursdays but that she would be able to continue with Mondays, Tuesdays and Wednesdays. She explained that if enrolments increased that would like to call on her for additional hours. Ms Lee was given a letter to that effect.

[19] At that point Ms Lee told Ms Alispahic that she was feeling marginalised and said that her contract was permanent. That was the first time Ms Lee had mentioned

anything about permanent employment. Ms Alispahic showed Ms Lee a copy of her contract (she had still not returned a signed copy), and showed her that it was very clearly a casual agreement. Ms Alispahic reminded Ms Lee that Ms Lee had asked her for a letter that stated she was in casual employment and that at no time had she talked to Ms Alispahic about wanting to be permanent or considering that she already was.

[20] Ms Alispahic also said that Before Six was considering employing a fully qualified ECE teacher so that she could be freed up for more office work during the day. Ms Lee then, for the first time, mentioned an interest in early childhood training. Ms Alispahic explained they would be looking for someone who was fully qualified.

[21] Ms Lee worked on the Wednesday and Thursday that week, 8 and 9 November 2006. Near the end of the week Ms Alispahic had discussions with Ms Sylvie Balluet. Ms Balluet was a fully qualified ECE teacher who wanted to work at the Centre and started with Before Six in February 2007.

[22] On Monday 14 November, Ms Alispahic met with Ms Lee again. She explained to her that booked numbers had dropped yet again and were expected to drop further over the summer Christmas period. She told Ms Lee that they had managed to employ a fully qualified teacher to take some of the pressure off Ms Alispahic which would allow her to do some office work during the day instead of having to take it all home and do it in the evenings or the weekend. Ms Lee was told that she would not be needed over the summer period but that they would contact her again when numbers increased or when there was some relieving work available. Because she was trying to be generous, Ms Alispahic gave Ms Lee two weeks' notice even though the agreement did not require this. This meant that her last day would be 29 November. Ms Lee was given a letter confirming this.

[23] Ms Lee said she was not interested in further casual work at Before Six and that she was going to look after children at home.

### **Incidents at work**

[24] During the course of her employment Ms Lee raised an issue about the re-heating of baby bottles with Ms Alispahic. There was a staff meeting regarding this matter and Ms Alispahic explained to Ms Lee that Before Six would follow what the parents had asked for. She knew that Ms Lee was not happy with the outcome but did

not say anything more about it to her. After Ms Lee left Before Six she made several complaints to the Ministry of Education. One of these was about the heating of baby bottles.

[25] There were other incidents regarding eating difficulties and toilet training. The Ministry has investigated these complaints and the matters have all been resolved.

[26] Ms Lee says that the fact that she raised these issues with Before Six are reasons for her position having been made redundant. However, I am satisfied that the only incident that was raised with Before Six prior to Ms Lee's departure was the bottle heating incident.

[27] Ms Lee also says that she was turned into the cleaning lady. I have looked at the documentary evidence regarding this and it does not bear out Ms Lee's assertion that she was given more cleaning duties than anybody else. Ms Lee made some claims about cleaning rosters disappearing or cleaning rosters possibly having been changed. I do not accept the validity of those assertions.

### **Training qualifications issue**

[28] Ms Lee claimed that Ms Alispahic offered to let her work full time at Before Six while she completed an early childhood education course. She said that three weeks into her employment she was offered the opportunity to obtain training or be trained and that this was a significant factor in her acceptance of the position. One problem with this contention is that Ms Lee had already accepted employment.

[29] Ms Alispahic denies that there was any commitment by Before Six to providing education for Ms Lee. She recalls two conversations with Ms Lee about training. The first related to the Ministry of Education rules regarding qualified staff. That conversation took place about three weeks after Ms Lee started working and was with Ms Sharon Hillier as well. They were talking about meeting targets for the government's strategic plan. Ms Alispahic told Ms Lee that the Ministry's rules required them to have fifty percent of staff registered or in training (she couldn't remember the words exactly) by January 2007. When she told Ms Lee that she was quoting information that came from the Ministry publication, a document which was published in September 2007. Ms Lee has since provided a further document which is dated October 2006. That document states that the Education Minister had "*now confirmed the timeline for implementation of the 2007 teacher registration target.*"

The October 2006 document requires centres to have fifty percent of staff holding a qualification by 31 December 2007.

[30] Ms Alispahic said she understood that so many centres were having difficulty meeting the previous target that the Minister extended the timeline. All staff had to be trained by 2012 so if a person was working full time there was a six year period of part time study in which to complete the qualification. Ms Alispahic said that when she spoke to Ms Lee about the deadline in January 2007 for fifty percent registration she genuinely thought that was the situation. Since then the Ministry of Education has confirmed a later date – 21 December 2007 - and confirmed that fifty percent of staff should hold a recognised Early Childhood qualification.

[31] Ms Alispahic denies that she intentionally misled Ms Lee about the situation; she was simply working from information she thought was correct. Ms Alispahic did not mislead Ms Lee.

[32] The other conversation Ms Alispahic had with Ms Lee regarding training was at the meeting on 7 November 2006 when she told her Before Six was considering advertising for a fully qualified ECE teacher so that Ms Alispahic could be freed up for more office work during the day. That was when Ms Lee first expressed an interest in early childhood training. Before that she had never done so. Ms Alispahic says her impression was that she felt that formal qualifications were unnecessary for someone who had practical experience in raising her own children and grandchildren and had looked after children privately. The lack of interest in formal education was confirmed by other centre employees. I accept that Ms Lee did not express an early interest in obtaining a qualification and that she expressed an interest to Ms Alispahic on 7 November.

[33] Ms Alispahic said she did not offer to ensure that Ms Lee had employment through her training period, nor did she suggest that Before Six would pay for her training. Ms Alispahic said that she had been in childhood education for 18 years and was not aware of any childhood centre that funded anybody's study. She thought that Ms Lee may have overheard a conversation that she had had with Ms Hillier about the fact that Ms Hillier had been accepted as one of 500 students to receive an incentive grant. She had to be enrolled in training in April 2006 to apply for this. I am of the view that Ms Lee misunderstood some of what had been said regarding grants and that Ms Alispahic did not promise to fund Ms Lee's training.

[34] Ms Alispahic said she was never shown a letter of interest regarding training written by Ms Lee to AUT until after she raised her grievance.

[35] Having heard Ms Lee give evidence during the investigation meeting, it is apparent to me that Ms Lee at some stage decided she would like to undertake early childhood training. However, she had very little understanding of the requirements of this and believed that she could do a full time course in Auckland and also work full time in Mangawhai. I am satisfied that Ms Alispahic did not make any promises to Ms Lee regarding funding her for full time training or ensuring that she was able to undertake early childhood training. These were things that Ms Lee may have sincerely wished for but that did not accord with any promises that were actually made to her by Ms Alispahic.

### **Was the employment casual or permanent?**

[36] Casual employment is a situation where an employee works if and when required. There is no expectation of ongoing employment: Barnes (formerly Kissell) v Whangarei Returned Services Association (Inc) [1977] ERNZ 626.

[37] Ms Lee worked set days of the week. The hours that she worked during those days varied to a limited degree. She was paid an hourly rate plus 6%. She was given two contracts of employment that were both clearly for casual employment.

[38] Ms Lee's employment was regular, not irregular as anticipated by the employment agreements offered to her, which she did not sign. In a casual work situation there is no obligation on the employer to offer work and no obligation on the employee to accept it.

[39] The letter written by Ms Alispahic refers to Ms Lee working approximately 21 hours and then says that she would also be offered any relieving work. The relieving work seems to be distinct from the set hours.

[40] I do not doubt that Before Six intended to offer casual work. However, in practice it was permanent part time.

### **Redundancy**

[41] It is clear from the evidence that the rolls were falling and that there had to be some retrenchment of staff. There was substantive justification for the redundancy. I

do not accept that Ms Lee's feelings of being marginalised and made into the cleaner and her views about the bottle issue and other matters (which she did not raise at the time) had any impact on the redundancy. There was no ulterior motive. There were fluctuating rolls and a decrease in anticipated enrolments.

### **Disadvantage**

[42] The disadvantage claim in the Statement of Problem was not clear; no specific incidents were mentioned. It appears that the disadvantage consisted in what Ms Lee was a change in her duties when she was removed from the baby room, that she was replaced by a new staff member and that her hours were reduced.

[43] Ms Woodmass did not replace Ms Lee. The employer could ask Ms Lee to carry out a variety of duties involving looking after the children, including cleaning.

[44] The reduction in hours did disadvantage Ms Lee. I appreciate that Ms Alispahic believed she was entitled to reduce the hours because she believed Ms Lee was a casual employee. The hours were reduced due to a lack of work for a person with Ms Lee's experience and qualifications.

### **Good faith breaches**

[45] The employer did not breach its obligation of good faith towards Ms Lee.

### **Decision**

[46] Ms Lee has a personal grievance. The manner in which the dismissal was effected was unfair. She did not have an opportunity to be represented and the decision was predetermined. However, Ms Alispahic did provide her with the rationale for the loss of work and offered her other work when and if it became available.

[47] This being a redundancy, there is no question regarding contribution.

[48] Ms Lee has sought compensation and reimbursement of lost wages. Given that I have found there was a genuine redundancy, there can only be a claim for compensation as the work ceased to exist as a result of the decline in enrolments. Any lost remuneration is due to the redundancy, not to the personal grievance. Ms Lee can only be compensated for the manner in which the dismissal was effected. I accept the

respondent's submission that the manner was not high handed or carried out in such a way as to cause unnecessary distress. I do accept that Ms Lee was distressed and she is entitled to be compensated for that. The respondent is to pay Ms Lee the sum of \$2,000 pursuant to s. 123 (1) (c) (i) Employment Relations Act 2000.

### **Costs**

[49] If the parties are unable to resolve the issue of costs, the applicant should file a memorandum within 28 days of the date of this Determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member of the Employment Relations Authority