IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 316
3031547

	BETWEEN	OLGA BELOOUS Applicant
	AND	ESKA LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Len Clapham, Advocate for the Applicant Svetlana Strizheva, director of the Respondent
Investigation Meeting:	10 October 2018
Determination:	12 October 2018

DETERMINATION OF THE AUTHORITY

A. Eska Limited failed to meet requirements of s 67A and s 67B of the Employment Relations Act 2000 so no enforceable trial period applied and prevented Olga Beloous bringing a personal grievance about her dismissal.

B. Ms Beloous was unjustifiably dismissed on 27 March 2018.

C. In remedy of her personal grievance Eska Limited must pay Ms Beloous the following sums within 28 days of the date of this determination:

(i) $1,920, less any applicable tax, as lost wages; and

(ii) $8,000 as compensation for humiliation, loss of dignity and injury to her feelings.

D. Eska Limited must also pay Ms Beloous the following sums as arrears of wages, less any applicable tax, within 28 days of the date of this determination:

(i) $471.35 as holiday pay due on termination of her employment;

(ii) $515.85 for eight days pay for notice due but not paid to her on her dismissal (from which $252.15 has been deducted to allow for an overpayment in her wages).

E. Within seven days of the date of this determination Ms Beloous must provide Eska Limited with the password to an email account created for her work with the company.

F. Costs are reserved with a timetable set for memoranda if costs must be determined by the Authority.

Employment Relationship Problem

[1] Eska Limited operates a business publishing and promoting a science magazine for students and their parents. The company's director, Svetlana Strizheva and her husband Eduard Strizhev met Olga Beloous in late 2017. They mentioned plans to employ two sales representatives for their business and Ms Beloous said she was available to do that sort of work.

[2] In December Ms Beloous was offered a job, to start on 8 January 2018, but there is a dispute over whether she received and signed a written employment agreement for that job before she started work. Ms Strizheva says she gave an offer of employment form and an employment agreement to Ms Beloous to consider in December and Ms Beloous returned signed copies of both documents to her on 4 January 2018. Ms Beloous denies this. She says she was not given, and had not seen, the employment agreement until she started work on 8 January 2018. She says she read the agreement overnight and returned a signed copy the next day. Ms Beloous also denied she signed the "offer of employment" form. Ms Strizheva provided what was said to be the original of that form. She said Ms Beloous had written her signature and the date 15 December 2017 on the form and returned it to her on 4 January with a signed employment agreement. Ms Beloous insisted she had not signed that form and described what was said to be her signature on it as a forgery.

[3] The document both women agree is the employment agreement they had each signed bears the date of 8 January 2018 in their own handwriting beside their signature. Ms Strizheva said she wrote 8 January, not 4 January, on the document because that was the day Ms Beloous was due to start work. Ms Beloous said, although she actually signed the agreement on 9 January, she also wrote 8 January because that was the day she had started work.

[4] This conflict of evidence is important because its resolution, one way or the other, affects the validity and enforceability of the 90-day trial period term. Such terms, where worded as required by s 67A of the Employment Relations Act 2000 (the Act), prevent employees bringing a personal grievance for unjustified dismissal if they are given notice of dismissal within that 90 day period. In this case Ms Beloous was dismissed on 27 March 2018, some 78 days after she started work.

[5] When Ms Beloous sought to pursue a claim in the Authority Eska Limited said she was not entitled to because of the statutory bar created by the 90-day term in her employment agreement. Ms Beloous disputed the validity of the term. She said it could not be enforced because she had not agreed to it before her employment started. A further ground against the enforceability of the statutory bar emerged during the Authority investigation – that Eska Limited had failed to give her the notice required under the trial period term in her employment agreement.

[6] Ms Beloous also sought an order for payment of holiday pay she did not get at the end of her employment. In turn Eska Limited had three claims of its own. The first sought an order requiring Ms Beloous to provide the password for an email account created for her when she began work. The second sought an order requiring Ms Beloous to repay $252.15 that Ms Strizheva calculated was overpaid to Ms Beloous during her employment. The third sought an order for Ms Beloous to refund all the wages she was paid while working for Eska Limited.

[7] The issues for determination were:

(i) Was the dismissal of Ms Beloous made under the terms of a valid and enforceable trial period so that she may not pursue a personal grievance regarding her dismissal?

(ii) If not, was her dismissal, and how it was made, unjustified?

(iii) If the actions of Eska Limited in dismissing Ms Beloous were unjustified, what remedies should be awarded, considering
    (a) Lost wages, subject to evidence of reasonable endeavours by Ms Beloous to mitigate the claimed loss; and
    (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
(iv) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Ms Beloous that contributed to the situation giving rise to her grievance?
(v) Is Ms Beloous owed any wage arrears for holiday pay?
(vi) Is Ms Beloous obliged to pay any money to Eska Limited?
(vii) Are any orders required regarding use of and access to an email address?
(viii) Should either party contribute to any costs of representation incurred by the other party?

The Authority's investigation

[8] For the Authority's investigation of those issues Ms Strizheva, Mr Strizheva, Ms Beloous and her husband Alex Lee each lodged a written witness statement and attended the investigation meeting. Under affirmation they each answered questions about their evidence. The parties provided closing submissions on the issues for resolution.

[9] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[10] Some particular initial points need to be made about the evidence considered in this investigation.

[11] Timetable directions given at a case management conference on 24 September required the parties to lodge all relevant documents in advance. Ms Strizheva, as directed, provided various original documents. These included the offer of employment form said to have been signed by Ms Beloous, the employment agreement and a document headed "Notice of Termination of Employment agreement" signed by Ms Beloous and Ms Strizheva on 27 March 2018.

[12] The directions, issued in writing after the conference call, advised the parties that all relevant documents should be provided by dates set for lodging witness statements, so they were available to both parties and the Authority member before the investigation meeting.

[13] Those directions included this statement: "Parties should not attempt to produce additional documents at the investigation meeting". Despite this Ms Strizheva sought to provide several additional documents at the meeting. I declined to include them but in doing so considered their contents and concluded they would make no difference to the outcome. Some comprised photographs of Ms Strizheva and Ms Beloous taken at several social occasions and at least one work event. All those photos established was that their relationship appeared genial at the time. Copies of other employees' job offer forms and employment agreements did not help establish whether the company had provided Ms Beloous with such documents before her employment began. A copy of an eftpos receipt dated 9 January was offered to show Ms Beloous was incorrect in her recollection, given in her written witness statement, of a particular client transaction she had said was made on 8 January. Again this did not assist with determining the issue of when her employment agreement was provided and signed.

[14] Ms Strizheva had also earlier provided a report from a handwriting analyst about the signature on the job offer form that Ms Beloous denied was hers. By Minute on 3 October I had advised the parties that the report did not assist in any relevant way and gave reasons for that conclusion. The report's author, Mike Maran, nevertheless attended the investigation meeting. He said he did so at Ms Strizheva's request. I asked no questions of him and explained why at the outset. His report noted some differences between the signature on the form and the known signature of Ms Beloous on other documents. It then speculated that Ms Beloous had "signed with a slight departure from her usual style in order to renege on any future responsibilities". The partisan and unscientific nature of that comment, and some others of similar ilk, damaged the credibility of his report. However there was a more fundamental point. Even if Ms Beloous had signed a job offer form on 15 December, its contents and her signature did not establish that she was given the employment agreement to consider at the same time. Ms Strizheva firmly held she was. Ms Beloous, as firmly, held Ms Strizheva told her she would get her agreement when she

started work. A closer look at the wording of the "Offer of Employment" form did not help Eska Limited's case. The wording told a recipient who wished to accept the offer to "sign the attached copy of this letter" and return it to Ms Strizheva. No mention is made of an employment agreement or returning it before the intended start date of the employment.

The employment agreement

[15] The agreement signed by Ms Beloous and Ms Strizheva, and dated 8 January 2018, referred to a fixed term starting from that date and ending on 8 January 2019. Ms Beloous' position was described as a consultant. Her hours were set at 30 Monday to Friday each week, at the rate of $16 an hour. The terms included a ten per cent commission on sales, to be paid quarterly, provided her work generated income for the company of at least $2,500 a month.

[16] The agreement's trial period term read as follows:

> The first 90 days of employment will be a trial period, starting from the first day of work. During the trial period, the employer may dismiss the employee. **Notice must be given within the trial period.** Depending on how long the notice period is, the last day of employment may be before, at or after the end of the trial period.
>
> During the trial period, the employer's normal notice period doesn't apply. Instead either the employee or the employer may end this agreement by **giving 14 days' notice** before the trial period ends. The employer might decide to pay the employee not to work. For serious misconduct, the employee may be dismissed without notice.
>
> If dismissed during the trial period, the employee cannot bring a personal grievance or other legal proceedings about the dismissal. They may still bring a personal grievance if they feel the employer has treated them unfairly for other reasons, eg discrimination, harassment or unjustified disadvantage.

Key legal principles

[17] The Employment Court has confirmed the requirements of s 67A and s 67B of the Act must be interpreted strictly because those trial period provisions limited other statutory rights of workers.[1] As the Court explained in *Blackmore v Honick Properties Limited*:[2]

> [65] … Employers have or ought to have been aware that trial periods must be agreed in writing before the affected employees begin work if they are to be

[1] *Smith v Stokes Valley Pharmacy(2009) Ltd* [2010] NZEmpC 111 at [48].
[2] [2011] NZEmpC 152.

> regarded as not having been employed previously by the employer, which is an essential precondition of a trial period.
>
> [66] It is not too onerous an expectation that employers will get the correct paper work and do things in a correct sequence. The benefits of ss 67A and 67B, … , are the quid pro quo for the significant advantages to the employer of removing longstanding rights of challenge to the justification for a dismissal from employment, which may have very significant consequences for the employee.
>
> [67] For these reasons, I do not think it could be said that the requirements on an employer seeking to have those advantages are either impractical or onerous.
>
> [68] Ultimately, of course, it is not a question of whether this Court considers those advantages too onerous in any event. Rather, Parliament has legislated these constraints and requirements, and it is not for this Court to say whether employers should be required to comply with the legislation or be relieved of its obligations. Statutory requirements must be complied with and, for the reasons set out by the Court in *Stokes Valley*, strictly.
> …
> [70] What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss 67A and 67B **must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee**. This will mean in practice that trial periods in individual employment agreements must be provided to prospective employees at the same time as, and as part of, making an offer of employment to that prospective employee.

[18] The short point for the present case is this: if the evidence cannot confirm Ms Beloous got and signed her employment agreement before she started work on 8 January, the term about the trial period is not enforceable for the purpose of preventing her from bringing a personal grievance about her dismissal on 27 March.

[19] The second relevant point relates to the requirements of s 67B that an employee must be given notice of the termination before the end of the trial period. The applicable principles about the notice requirements have been summarised in this way:[3]

- Notice must be given and must be in accordance with the employment agreement.
- It must be clear and unambiguous, and explain how and when employment is to be terminated.
- Making a payment in lieu of notice does not override the need to give notice.

[20] For reasons that follow Eska Limited's argument that the trial period was validly entered and its requirements observed fails on both points.

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[3] *Ioan v Scott Technology NZ Ltd t/a Rocklabs* [2018] NZEmpC 4 at [51].

Insufficient evidence written agreement entered prior to start of employment

[21] The Authority determines matters on the civil standard of proof, that is the balance of probabilities or what is more likely than not to have happened.

[22] In respect of evidence about whether an employment agreement containing a trial period was entered before the employment began, the onus of proof logically rests with the employer who is attempting to establish that was so. This is because the employer is proposing the term in the agreement and is seeking to gain what the Court has described as the significant advantage and opportunity that such an arrangement provides. The employer is expected to get the correct paper work done in the correct sequence, which includes its completion before the employment starts. The employer also bears the statutory burden, under s 63A of the Act, of providing an intended agreement to an employee and, under s 64(2) and (3), keeping a copy of the intended agreement and the final agreement to be produced if later requested to do so. Given those obligations the employer is best placed to provide associated evidence of when an intended agreement was given to a worker and a signed agreement returned. The present case was not one where exceptions to that principle might apply, such as where an employee may have removed from his or her employer's premises the documents on which the employer would rely to establish what was done.[4]

[23] Eska Limited was not able to provide any evidence to corroborate Ms Strizheva's account, based solely on her recall, of when the agreement was provided to and returned by Ms Beloous. Mr Strizhev said he was "aware" Ms Beloous was given documents before her employment started and said he had seen signed documents but could do no more than Ms Strizheva in pointing to any evidence that confirmed the dates this occurred or any objective indications such as emails or texts referring to the agreement being sent and received at an earlier date. Even the company's offer of employment form, said to be signed by Ms Beloous, did not refer to an employment agreement. It was simply not enough to tip the balance of probability to make Ms Strizheva's account more likely than Ms Beloous' similarly uncorroborated denial of returning a signed agreement on 4 January. At best, the two accounts were evenly balanced. The one objective piece of evidence, the employment agreement both woman agreed they had signed, showed 8 January as the date of

[4] See, for example, *Modern Transport Engineers (2002) Limited v Phillips* [2016] NZEmpC 68.

agreement. On that basis Eska Limited had failed to meet its onus of proof on the probability of its account as to when the agreement was entered. Accordingly Eska Limited had not established, to the necessary standard, that it had entered into a valid trial period term that could operate to bar Ms Beloous raising a grievance about her dismissal.

Required notice not given or paid

[24] Even if this first conclusion were wrong, Eska Limited had failed to observe the notice provisions of the trial period term in its employment agreement with Ms Beloous. For the statutory bar against grievances to apply, section 67B of the Act requires notice of the termination to be given before the end of the trial period. The case law cited earlier in this determination establishes that this reference to "notice" is the contractual notice period stated in the employment agreement. For Ms Beloous this was 14 days. She was called to a meeting on 27 March and told she had "not passed the probationary period" and her employment was to be terminated. At Ms Strizheva's request Ms Beloous signed a form headed "Notice of Termination of Employment Agreement". The Notice, written by Ms Strizheva, included this sentence: "With regret, I report about the termination of the employment contract between our parties since 29 March 2018." Ms Beloous was paid her usual wage to 29 March. This meant she got two days' notice, not the 14 days required under the trial term in her agreement. The term allowed Eska Limited to fulfil the notice requirement by paying her for that 14 day period but not requiring her to work during it. Having failed to give her the required period of notice and to pay her for the whole notice period Eska Limited failed to give notice as required by s 67B of the Act. Deficient notice is not lawful notice.[5] As a consequence the provision of s 67B(2), barring a personal grievance, was not operative. On that ground alone Ms Beloous was entitled to proceed with her application about her dismissal.

Dismissal unjustifiable

[25] As the s 67B statutory bar to a grievance did not apply, Ms Beloous' case fell to be considered under s 103A of the Act. Eska Limited had to demonstrate its actions in dismissing her were what a fair and reasonable employer could have done in all the circumstances at the time that the dismissal occurred. The fact that Ms

[5] *Smith v Stokes Valley Pharmacy(2009) Ltd* [2010] NZEmpC 111 at [97].

Strizheva, in her actions as director of Eska Limited, mistakenly believed she was entitled to act as she did makes no difference to the assessment.

[26] Measured against that s 103A test Ms Strizheva's actions were plainly unjustified. Ms Beloous was called to a meeting on 27 March and was told it was to discuss sales. She was given no indication she could be dismissed at that meeting. She was given no opportunity to seek legal advice or representation before the meeting. She was not given an opportunity to address the employer's concerns before the decision to dismiss her was made or to have any explanation she offered to be genuinely considered by the employer before she was dismissed.

[27] Those defects in the process followed by Ms Strizheva were more than minor and resulted in Ms Beloous being treated unfairly. Ms Strizheva had concerns that Ms Beloous had not generated enough sales during her 11 weeks of employment and had clashed with a sales manager who was employed around the same time. The concerns raised did not meet the standard required for an instant dismissal on the grounds of serious misconduct. Fairness required those concerns about performance and compatibility to be openly addressed with a real opportunity, and assistance, to improve being given before any decision to dismiss Ms Beloous was made.[6]

Remedies

[28] In remedy of her personal grievance for unjustified dismissal Ms Beloous sought orders for lost wages and compensation for humiliation, loss of dignity and injury to her feelings.

Lost wages

[29] Elsewhere in this determination an order has required Ms Beloous be paid the remainder of her notice period – that is a further eight days pay (to allow for the full 14 day notice period). Having established a personal grievance Ms Beloous could also get an order for lost remuneration of the lesser of a sum equal to that loss or to three months ordinary pay.[7] In this case the loss must be assessed as considerably less than three months. This is because Ms Beloous decided not to seek alternative paid work. Instead she chose to focus on her personal endeavours as a writer of fiction, which had not generated any income. Part of that decision could reasonably be

[6] See *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 659 at 681.
[7] Employment Relations Act 2000, s 128(1).

inferred, from her brief evidence about it, to partly result from the knock to her confidence caused by how she was dismissed. In those circumstances, on a broad assessment, her loss on those grounds is assessed as a period of only four weeks. This also allows for the contingency that the position might have been disestablished at some near point in the future anyway because sales were not being achieved at a level that the company had hoped for. Eska Limited must pay Ms Beloous the sum of $1,920, less any applicable tax, for lost wages.[8]

Compensation under s 123(1)(c)(i) of the Act

[30] Ms Beloous was shocked by the suddenness of the dismissal but, in her oral evidence, said "usually I try to keep myself in my hands" and she "would not cry or scream" in such circumstances. Although she responded in a composed manner on 27 March, agreeing to sign the notice of termination and agreeing to be an agent promoting the magazine in the future, she was clearly humiliated and embarrassed by her abrupt dismissal. She rang Ms Strizheva the following day and said what had happened was unfair. Ms Strizheva responded by laughing. In the following weeks Ms Beloous experienced insomnia which she said was still present but had eased. She also believed what happened contributed to headaches and worsening of previous problems with her hearing.

[31] Allowing for Ms Beloous' measured personality and expression of the impact on her of her dismissal by Eska Limited, an award of $8000 was an appropriate sum to compensate her in light of her evidence of it effects on her.

No reduction for contributory conduct

[32] No actions of Ms Beloous were established to have contributed in any blameworthy way to the situation giving rise to her grievance, so no reduction was required in the remedies awarded.

Wage arrears

Notice

[33] Ms Beloous was paid for only two of the ten working days in her 14 day notice period – 28 and 29 March. Eska Limited was obliged to pay her for the

[8] Employment Relations Act 2000, s 123(1)(b)(i) and s 128(2).

remaining eight working days. The wage arrears due for notice was $768, less any applicable tax.[9]

Holiday pay

[34] Eska Limited did not pay Ms Beloous holiday pay at the end of her employment, contrary to the requirements of the Holidays Act 2003 s 27(2)(b). Ms Strizheva said the company had already paid whatever holiday pay was due with Ms Beloous' ordinary pay. It emerged from Ms Strizheva's oral evidence that she believed the company was entitled to do so because she misunderstood some Inland Revenue information she had accessed on line. The information related to situations where an employee was paid holiday pay in a lump sum before the holiday was taken. It did not apply to Ms Beloous's circumstances.

[35] Pay records provided by Ms Strizheva showed she had reclassified Ms Beloous' six hours of ordinary pay for each day into two portions – one of five-and-a-half hours and the other of a half hour. The latter portion was designated as holiday pay. Under some circumstances an employee on a fixed term agreement may be paid holiday pay on a pay-as-you-go arrangement but, among other factors, this must be expressly agreed in the employment agreement.[10] The agreement with Ms Beloous did not have such a term. Even if it did, the holiday pay obligation could not be met by merely reclassifying some of her ordinary time pay as holiday pay.

[36] Ms Beloous was entitled to be paid holiday pay calculated at eight per cent of her total gross earnings from the commencement of her employment.[11] Those gross earnings comprised her wages paid for the period from 8 January to 29 March 2018, totalling $5,376, and the remainder of the notice period, being $768. From this total $252.15 is deducted to allow for an overpayment Ms Strizheva calculated was made in the regular pay.

[37] Holiday pay of eight per cent on the resulting total of $5891.85 amounted to $471.35.[12]

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[9] Six hours x $16 x 10.
[10] Holidays Act 2003, s 28.
[11] Holidays Act 2003, s 23(2).
[12] $5376 minus $252.15 plus $768 x 8% = $471.35.

Does Ms Beloous owe Eska Limited any money?

[38] The amount of $252.15, sought by Eska Limited due to what Ms Strizheva said was a miscalculation that resulted in an overpayment of wages to Ms Beloous, was not challenged. Allowance for that amount has been made in the order for payment of notice made at the head of this determination.

[39] Eska Limited also sought an order requiring Ms Beloous to repay all the wages she had received for her work for the company on the grounds she had received those wages unreasonably. It was a claim without any merit or evidential foundation. It is rejected.

Password for email account

[40] Eska Limited does not use a domain name provided through an internet service provider to conduct electronic correspondence for its business. When Ms Beloous started work and was discussing details for her business card with Mr Strizhev, she initially suggested using her personal email address. She changed mind about that idea because she thought her personal information and emails could then be accessed by other people at work. Instead Mr Strizhev created a gmail address incorporating Ms Beloous' first name and the magazine name. She used that for work purposes for the remainder of the time she was employed.

[41] After her dismissal Eska Limited found Ms Beloous had changed the password to access this work email account. The company wanted access to the account so it could maintain any client correspondence for future use. It asked her to provide the password but Ms Beloous refused to do so. In her oral evidence at the investigation meeting she frankly admitted that one reason she did so was because, by that time, the company had refused her request to be paid her holiday pay. Another reason was that she had used her personal email address as the recovery address for the work email account and did not want the company to have any use of that personal email address. Ms Beloous accepted that she could change that recovery address and provide the password to her former work email address, after deleting any genuinely personal emails from family or friends.

[42] The work gmail address created for Ms Beloous was company property. It was appropriate for her to return use of it to the company on the cessation of her

employment. On that basis it was also appropriate to make the order requested by the company for that to happen now. Ms Beloous must do so within seven days of the date of this determination by clearing any personal emails from that account, but not any work-related material, and advising Eska Limited of the password to the access the account.

Costs

[43] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[44] If they are not able to do so and an Authority determination on costs is needed Ms Beloous may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Eska Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[45] A contribution to costs of representation in the Authority is usually assessed from a notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff. As a preliminary indication and subject to any submissions that might be made, an award of costs in this matter is not likely to be any greater than $2000 on the basis of what is presently known and the nature of, and time taken for, the investigation meeting.[13]

Robin Arthur
Member of the Employment Relations Authority

[13] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].