

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 301  
5600987

BETWEEN                      KERRY DONALDSON  
Applicant

AND                              ROSEMARY TRADING  
LIMITED  
Respondent

Member of Authority:      Robin Arthur

Representatives:            David Prisk, Advocate for the Applicant  
Abolfazl Moghadam, Counsel for the Respondent

Investigation Meeting:     9 August 2016

Determination:              2 September 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Kerry Donaldson's employment by Rosemary Trading Limited (RTL) was not subject to a valid trial period under s 67A of the Employment Relations Act 2000 so Ms Donaldson was not barred from bringing a personal grievance for unjustified dismissal.**
- B. Ms Donaldson was not employed on a casual basis.**
- C. Ms Donaldson did not abandon her employment. She was unjustifiably dismissed by RTL.**
- D. In settlement of Ms Donaldson's personal grievance for unjustified dismissal RTL must pay her the following sums:**
- (i) \$2400 to reimburse lost wages; and**
  - (ii) \$5000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- E. Costs are reserved with a timetable set for memoranda if a**

**determination of costs by the Authority is necessary.**

**Employment Relationship Problem**

[1] Kerryn Donaldson was employed as a shop assistant by Rosemary Trading Limited (RTL) from 5 September to 24 November 2015. RTL operates four stores under the trading name of Giftworld. Ms Donaldson initially worked at the Giftworld store in Glenfield until a new store opened in the NorthWest shopping centre at Westgate in October 2015. She then worked at the NorthWest store for the remainder of her employment except for one day when she was sent to work at the Giftworld store in Henderson.

[2] RTL's director Michelle Dong arranged by text message to meet Ms Donaldson at Westgate on 24 November 2015. When Ms Donaldson asked what the meeting was about Ms Dong replied by text: "We have reviewed this 3 months trial period, there are some concerns I think I better talk to you face to face".

[3] Ms Donaldson said Ms Dong dismissed her during the discussion they had when they met at the arranged time. RTL denied dismissing Ms Donaldson. Instead RTL said it had offered Ms Donaldson more training but she did not take up that offer, made by email to her later that day, and she had therefore abandoned her employment.

[4] Ms Donaldson returned her key for the NorthWest store to a RTL employee working there on 25 November. She said this was because Ms Dong had asked her to do so the previous day. Ms Dong denied making the request. Instead she said she had only sent Ms Donaldson an email asking her to return the key on the afternoon of 25 November because she had not received replies to emails sent to Ms Donaldson on the afternoon of 24 November and the morning of 25 November. Those emails referred to the offer of further training. Ms Dong did not know at the time that Ms Donaldson had already returned the key earlier that day.

[5] The issues for investigation and determination arising from Ms Donaldson's claim that she was unjustifiably dismissed on 24 November 2015 were:

- (i) Was Ms Donaldson employed under a valid 90-day trial period and, if so, was her employment properly ended under those provisions?
- (ii) Was Ms Donaldson's employment casual or permanent and ongoing?

- (iii) Did Ms Donaldson's employment by RTL end by her abandoning the employment relationship or by an act of dismissal by RTL?
- (iv) If she was dismissed, was the dismissal justified?
- (v) If she was unjustifiably dismissed, should any remedies be awarded, considering:
  - (a) Lost wages (subject to evidence of reasonable endeavours by Ms Donaldson to mitigate the extent of her loss); and
  - (b) Compensation for humiliation, loss of dignity and injury to her feelings?
- (vi) If any remedies are awarded, should they be reduced (under s 124 of the Employment Relations Act 2000 (the Act)) for blameworthy conduct by Ms Donaldson that contributed to the situation giving rise to her grievance?
- (vii) Should either party contribute to the costs of representation of the other party.

### **The Authority's investigation**

[6] In determining those issues I took account of evidence from Ms Donaldson and Ms Dong, given in written witness statements and orally in answers to questions asked of them at the investigation meeting, and of oral closing submissions on the facts and legal issues made by the parties' representatives.

[7] I declined an application by RTL made at the opening of the investigation meeting to hear additional evidence from an employee at its Giftworld Henderson store, where Ms Donaldson was sent to work on 17 November 2015. The timetable for RTL to provide witness statements was set on 2 May 2016 and allowed for it to do so by 15 July 2016, more than three weeks before the notified Authority investigation meeting. The evidence related in part to a letter written by that employee earlier in July 2016 and RTL could and should have made arrangements for a witness statement from her by 15 July if it considered she had relevant evidence. Even if there were reasons that were not possible, RTL could have sought leave to provide a witness statement later than 15 July or at least have given earlier notice of its wish to have an additional witness interviewed by the Authority.

[8] After hearing the representatives' closing submissions, I gave an indication of preliminary findings, subject to reflection on the evidence and submissions.<sup>1</sup> This written determination has confirmed the indication given. As permitted by 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 but has not recorded all evidence and submissions received.

### **Was Ms Donaldson employed on a valid trial period?**

[9] Ms Donaldson was an existing employee by the time she signed an employment agreement with the heading: "90 Days Agreement Trial Contract – Shop Assistant" on 5 September 2015. She began work around 9am and was not asked to sign the agreement until later in the day. She was also paid for hours she had spent at the store three days earlier on what Ms Dong described as a trial to check her computer use skills.

[10] Although the agreement Ms Donaldson signed was clearly intended by RTL to provide for a 90 day trial period of the type allowed under s 67A and s 67B of the Act, and specifically referred to preventing her from pursuing a personal grievance for unjustified dismissal, it did not meet the requirements of those sections that would have excluded Ms Donaldson from access to the grievance procedure. Section 67A(3) defines an employee who may enter an employment agreement containing a trial period as one "who has not been previously employed by the employer".

[11] The purported trial period provisions were also ineffective because Ms Donaldson was not given the intended agreement in advance of being asked to sign it or given the opportunity to seek advice on it, contrary to the requirements of s 63A(2) of the Act.<sup>2</sup>

[12] Consequently Ms Donaldson was not barred from pursuing a personal grievance for unjustified dismissal and RTL was obliged to deal with her in good faith in matters concerning the continuation or end of her employment.

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<sup>1</sup> Employment Relations Act 2000, s 174 and 174B.

<sup>2</sup> *Blackmore v Honick Properties Limited* [2011] NZEmpC 152 at [70].

### **Was Ms Donaldson's employment on a casual or an ongoing part-time basis?**

[13] RTL submitted Ms Donaldson's employment was on a casual basis only. However the evidence from her and Ms Dong established she was provided with a roster by text each weekend which identified the days and hours she was expected to work in the coming week. She worked four or five days each week with broadly similar start and finish times. Apart from one day she was off work sick (21 November), Ms Donaldson was available for each day she was expected to work. On the indicia typically applied to determine whether the basis of employment was casual or permanent and ongoing, the arrangement with Ms Donaldson was clearly the latter.<sup>3</sup> The pattern of Ms Donaldson's work was sufficiently consistent and predictable over the weeks of her employment to create a legitimate expectation of continuing employment with a corresponding obligation on RTL to provide her with work on an ongoing basis, subject only to the overall staffing needs of the business and Ms Donaldson maintaining satisfactory standards of performance and conduct.<sup>4</sup>

### **Did Ms Donaldson's employment end by dismissal or abandonment?**

[14] The Authority must determine disputed matters of fact on the civil standard of the balance of probabilities, that is what is more likely than not to have been so from its assessment of the available evidence.

[15] In this case the evidence of Ms Donaldson, and what Ms Dong accepted of that evidence to be correct, established as more likely than not that Ms Donaldson was dismissed by Ms Dong during their discussion on 24 November. The evidence of their subsequent behaviour also suggested it was more likely than not that a dismissal had occurred.

[16] They met at the NorthWest store at around 2pm on 24 November. Ms Dong then took Ms Donaldson to sit on a bench in Pumanawa Square, an open air area outside the shopping centre. Ms Dong told Ms Donaldson she was happy with her work at the store but she needed to do more with the customers. During the conversation that followed Ms Donaldson became upset that she was not told earlier if Ms Dong thought her customer service was inadequate, rather than 80 days into what

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<sup>3</sup> *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 (EmpC) at [47]

<sup>4</sup> *Jinkinson*, n 3 above, at [63] and [64].

she understood was her 90 day trial period. Ms Dong replied that she had not wanted to offend Ms Donaldson.

[17] Ms Donaldson said she then asked Ms Dong if she was giving her two weeks' notice to dismiss her and Ms Dong had replied, "yes, I am dismissing you". Ms Dong denied that account of that part of the conversation. However Ms Dong accepted that, as Ms Donaldson had questioned her further and again asked "if I'm fired", she had answered "yes". My note of Ms Dong's oral evidence about what she had said reads:

I said yes because she was shouting at me and making me feel bullied and nervous. She kept asking that question. It was like she thought she was scaring me or she was daring me to fire her.

[18] Ms Donaldson denied shouting. She said she was crying as she spoke to Ms Dong.

[19] Although Ms Dong subsequently denied she intended to dismiss Ms Donaldson that day or at all, what she meant and what Ms Donaldson could reasonably have taken her to mean had to be considered on the basis of what Ms Dong accepted she had said. In light of Ms Dong's own evidence, Ms Donaldson left the meeting with the clear and reasonably-held impression that her employment by RTL was terminated. Relevant to her impression was her understanding at that time that she was employed under a 90-day trial period during which the employer could dismiss her at will.

[20] Ms Dong then spoke with her husband, Wenhui Wong, who worked as manager of the Giftworld business. At 4.35pm she sent Ms Donaldson an email in which offered her more work on the following conditional basis (bold emphasis added):

Thanks for working at our company for this trial period. We are satisfied with your computer skills and acknowledge (sic) with the stock. You are good at sorting out the stock and data entry.

The area we think you really need to improve is the customer service skills. ... This is the critical point for a retail shop. Since last week you were in Henderson store, it was not up to our satisfaction yet.

**If you think you could improve the above point, we are happy to have you at Henderson store** to get more training from [two named employees], whom are very experienced at the retail customer service area. ...

Please contact me if you have any questions.

[21] Ms Donaldson saw the email in the evening but said she was confused about what it meant. And because of her discussion with Ms Dong earlier that day, Ms Donaldson said she also doubted RTL intended to keep her on after the upcoming end of the 90-day trial anyway. She did not respond to the email.

[22] At 9am the following morning Ms Donaldson returned her key to the NorthWest store before she saw a further email from Ms Dong sent at 9.12am. The 9.12am email said Mr Wong wanted to know “how do you make your decision, he needs to know so that he can arrange the roster between the shops”. Ms Donaldson replied by email at 1.19pm that she was seeking legal advice. Ms Dong then replied at 3.13pm:

If you have made the decision to leave, would you please drop off the key at any of the store at your earliest convenient time.

[23] Ms Dong was not aware at that time that Ms Donaldson had already returned the key. She found out later that day from the store employee who received it.

[24] On the balance of probabilities Ms Donaldson’s employment ended by dismissal during her discussion with Ms Dong soon after 2pm on 24 November 2015. She was “sent away” as a result of words of dismissal by Ms Dong that were unequivocal. The emails sent later in the day were an attempt to by Ms Dong, with Mr Wong’s counsel, to retrieve the situation. However, if the email could be read as an offer of ongoing employment, the offer was clearly conditional on Ms Donaldson agreeing she could improve her customer service skills and then doing so through further training. At best it was a conditional offer to re-commence an employment relationship already severed by the words of dismissal used by Ms Dong earlier on the afternoon of 24 November.

[25] The surrounding circumstances support the notion that dismissal of Ms Donaldson was Ms Dong’s likely intention on 24 November. Ms Donaldson was not included on the weekly roster prepared on Sunday, 22 November. Ms Dong said that was because Ms Donaldson had not attended work on Saturday, 21 November due to illness and she was not sure if Ms Donaldson was fit to work in the coming week. However at 5.02 pm on Sunday, 24 November Ms Dong sent a text to Ms Donaldson asking: “Are you better?” Ms Donaldson had promptly replied: “Yes, thank you”.

Ms Dong did not reply to that text or send Ms Donaldson any information, as was usually done on a Sunday, about her hours for the coming week. Ms Donaldson sent a text at 9.30pm on Sunday: “Hi, what are my hours for next week?” but got no reply from Ms Dong. The next morning Ms Donaldson tried to reach Ms Dong by telephone but she did not answer the call. Soon after Ms Dong sent a text saying she would ring Ms Donaldson later. Later in the day Ms Dong sent the text arranging to meet Ms Donaldson in the following afternoon, Tuesday 24 November.

[26] The conclusion expressed in this determination that Ms Donaldson was dismissed on 24 November was reached without relying on an email that Ms Dong sent Ms Donaldson’s advocate, David Prisk, on 8 December 2015. Mr Prisk’s email asked Ms Dong whether Ms Donaldson was “dismissed under the 90 day trial provisions of her Employment Agreement?” Ms Dong sent a one line reply: “Yes, she was”. Asked at the Authority investigation meeting about that exchange Ms Dong said she did not know at that time what “dismissed” meant. Ms Dong’s explanation was not compelling given her sound general command of English, as a second language, apparent from her answers to questions at the investigation meeting,. However, even allowing Ms Dong the benefit of the doubt about what she wrote in that email, the evidence from both Ms Donaldson and Ms Dong about what was said on 24 November was sufficient for the firm finding that Ms Donaldson was dismissed that day.

[27] Ms Donaldson became unsure about her status after receiving the email sent to her at 4.35pm on 24 November in which she was told she could undergo further training at the Henderson store, if she thought she could improve her customer service skills. She sought employment law advice.

[28] As she had already been dismissed by that point, she did not abandon her employment by not taking up the conditional offer of further training. She simply declined, by her actions, to agree to her former employer fixing a mistake already made, being the decision to dismiss her at that time and the manner of doing it.

[29] As a further ‘reality check’ it was unlikely Ms Donaldson would abandon her employment. She had begun the job with RTL after a period of around eight months without a job. She was happy with her new work at the NorthWest store and its

convenient location near her home. It was more likely than not she would have stayed in the job for the foreseeable future but for her dismissal.

### **Was the dismissal justified?**

[30] Ms Dong's evidence established she and Mr Wong held some concerns Ms Donaldson was not doing enough to engage with customers visiting the store. An employer is entitled to address such a performance concern and seek improvements. However employment law required RTL to address those concerns in good faith, by being open with Ms Donaldson about any concerns it had about how she could improve her work. It could not justifiably move to dismiss her without setting objective and measurable standards for improvement and giving her a reasonable opportunity to meet those standards.<sup>5</sup>

[31] Ms Donaldson was sent to work at the Henderson store on 17 November. In her evidence for the Authority investigation Ms Dong said she sent Ms Donaldson there for training in customer service skills. However Ms Dong accepted that she did not tell Ms Donaldson that was the purpose. She said she "did not really want to say that" as she felt Ms Donaldson was "quite sensitive" and might be offended. Ms Dong said she had only ever provided positive feedback to Ms Donaldson about her work, and Ms Donaldson's evidence confirmed that was so.

[32] RTL had failed to openly advise Ms Donaldson of any concerns about her supposed need to improve customer interactions but then dismissed her for that reason. It was not an action that a fair and reasonable employer could have taken in all the circumstances at the time. Open communication, further training and further opportunities to improve were required before Ms Donaldson could have been justifiably dismissed for her allegedly poor performance on one aspect of her work.

### **Remedies**

[33] In settlement of her personal grievance for unjustified dismissal Ms Donaldson sought an award of lost wages for the period from 25 November 2015 to 27 January 2016 and \$5000 distress compensation.

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<sup>5</sup> *Trotter v Telecom New Zealand Limited* [1993] 2 ERNZ 659 (EC) at 681.

*Lost wages*

[34] Ms Donaldson's lost wages claim was limited to eight weeks because she began a new job at a receptionist for a courier business, on a better rate of pay, from 28 January 2016. She had since successfully completed a trial period with her new employer and also received a positive performance review after six months' work there.

[35] While eight weeks was the length of time for which lost wages could be awarded, Ms Donaldson was also required to establish she made reasonable endeavours to mitigate her loss during that period. Mitigation includes reasonable endeavours to look for new work and any earnings made in the period for which the loss is claimed.

[36] Ms Donaldson received no other earnings until she started her new job in late January. Her evidence about her job search endeavours identified five North Shore businesses which she could remember applying to for work before Christmas. She said she had also registered with other businesses and applied for other jobs through the Trade Me website. However Ms Donaldson was not able to provide documentary evidence confirming her applications. She said her husband had deleted emails in their joint email account without her knowledge. She was unsuccessful in efforts to retrieve those emails on their home computer or through their Internet Service Provider.

[37] She was clearly active in seeking new work because she did get a new job eight weeks after being dismissed by RTL. At issue was whether she had met the mitigation evidence requirements described by the Employment Court *Allen v Transpacific Industries Group Ltd*:<sup>6</sup>

*... dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.*

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<sup>6</sup> AC20/09, 4 May 2009 at [78].

[38] In the *Allen* case, with what the judge called a paucity of evidence about the loss of income, Mr Allen was awarded lost wages for the equivalent of three months, although he had experienced a longer but uncertain period of unemployment.

[39] Ms Donaldson's evidence was not sufficient to establish she made adequate mitigation efforts throughout the full period of eight weeks for which lost wages were claimed. However it was not so insufficient as to entirely discount her efforts, which also needed to be assessed in the particular circumstances and time of year at which her dismissal occurred.

[40] As a matter of general credibility it was more likely than not that Ms Donaldson did apply to the five identified North Shore businesses and her ability to provide the supporting documentation was not her fault. She was frank about what she could remember of what she had and had not done.

[41] Seeking work in the retail sector, in which Ms Donaldson had around 20 years of experience, was also likely to be difficult at the particular time of year. Many businesses would already have recruited their additional 'Christmas casual' staff for the festive shopping and sales season. In the following weeks of the January summer holiday season managers who make hiring decisions are often away.

[42] Against that background four weeks lost wages could reasonably be awarded on basis that Ms Donaldson had, in the circumstances, made sufficient mitigation endeavours for at least that period. On the basis of a 40 hour week at the \$15 hourly rate RTL paid her, reimbursement of lost wages for four weeks required an order for the sum of \$2,400 under s 123(1)(b) of the Act.

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

[43] Ms Donaldson's evidence established she was distressed by how she was dismissed, without notice or warning, in a public area near her workplace. She was humiliated and suffered a loss of dignity because she felt she had let down her three teenage children and her husband by losing a job that she had started only recently and after some months of prior unemployment. The injury to her feelings included a loss of confidence that continued through a "very anxious first few months" in her next job where she was fearful she might again be told her performance was inadequate.

[44] Her evidence adequately supported her claim for \$5000 as compensation for humiliation, loss of dignity and injury to feelings resulting from her dismissal. It was a modest award, well within the range of what could be awarded in the circumstances.

#### *Contribution*

[45] No reduction of remedies awarded to Ms Donaldson was required under s 124 of the Act. Ms Donaldson had more than 20 years of retail experience. RTL's evidence did not establish there were significant performance failures by her that might have warranted a reduction of remedies due to blameworthy conduct by her. Ms Donaldson was not responsible for RTL's failure to properly address any genuine performance concerns or its dismissal of her for a reason and in a way that a fair and reasonable employer could not have done.

#### **Costs**

[46] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Donaldson 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 RTL 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.

[47] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>7</sup> The daily tariff applicable when this application was lodged was \$3500. As this one day investigation meeting ended by 3pm the parties could expect any assessment to begin from the amount of \$2500.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>7</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].