

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 71
5561019

BETWEEN

CAROLINE HALE
Applicant

AND

CAROLINE SUTHERLAND
Respondent

Member of Authority: Vicki Campbell

Representatives: Stan Austin for Applicant
Caroline Sutherland in Person

Investigation Meeting: 14 December 2015

Determination: 4 March 2016

DETERMINATION OF THE AUTHORITY

- A. Ms Hale was not bound by a 90 day trial period pursuant to section 67A of the Employment Relations Act 2000.**
- B. Ms Hale was unjustifiably dismissed.**
- C. Ms Sutherland is ordered to pay to Ms Hale the following sums within 28 days of the date of this determination:**
- \$7,507.50 gross plus 8% holiday pay pursuant to section 123(1)(b) of the Employment Relations Act 2000; and**
 - \$5,000 without deduction pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**
- D. Ms Sutherland is ordered to pay to Ms Hale arrears of wages in**

the amount of \$512.80 gross plus 8% holiday pay pursuant to section 131 of the Employment Relations Act 2000.

E. Costs are reserved.

Employment relationship problem

[1] Ms Caroline Hale claims she was unjustifiably dismissed or in the alternative that one or more conditions of her employment were affected to her disadvantage by unjustifiable actions of her employer, Ms Caroline Sutherland. Ms Hale also claims arrears of wages for unpaid public holidays pursuant to the Holidays Act 2003.

[2] On 3 September 2015 Ms Hale withdrew two claims from her original statement of problem. They were claims that Ms Sutherland had breached her obligations of good faith toward Ms Hale and that Ms Hale was owed arrears of wages for unpaid hours worked by her.

[3] Ms Sutherland denies the claims and says Ms Hale was dismissed within 90 days of her employment commencing and was subject to a 90 day trial period pursuant to section 67A of the Employment Relations Act 2000 (the Act).

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

Background

[5] Ms Sutherland has entered into a contract with Kawerau District Council to provide information services at the Kawerau Information Centre.

[6] Ms Hale undertook a one week training with Ms Hale from 31 October 2014 and began regular employment in the position of Receptionist/Administrator/Cleaner at the Kawerau information centre on 24 November 2014.

[7] Ms Hale was provided with a written employment agreement based on the Ministry of Business Innovation and Employment template document. The agreement records Ms Hale's commencing date as 17 November 2014. At the investigation

meeting Ms Hale acknowledged that she did not commence employment until 24 November 2014.

[8] The employment agreement provides for a Trial Period of 90 days pursuant to section 67A of the Act. Clause 12.1 allows the employer to terminate the trial period with 5 days' notice.

[9] The employment agreement is signed but has not recorded the date on which the agreement was signed.

[10] On Thursday 15 January 2015 Ms Hale and Ms Sutherland had an online conversation through the social media website Facebook. It was during this online conversation that Ms Sutherland advised Ms Hale that her employment would be terminating. Later in this exchange Ms Sutherland advised Ms Hale that they could not work together and she wished to terminate the contract. The decision to dismiss Ms Hale was confirmed in writing by letter dated 15 January 2015.

Issues

[11] The issues for determination are:

- a) Was Ms Hale dismissed under a valid 90-day trial period provision?
- b) If the Authority lacks jurisdiction to investigate Ms Hale's claim that she was unjustifiably dismissed, was Ms Hale subject to a disadvantage in her employment and if so what remedies should be awarded?
- c) If the Authority has jurisdiction to investigate Ms Hale's claim that she was unjustifiably dismissed, was Ms Hale unjustifiably dismissed and if so what remedies should be awarded?
- d) Does Ms Hale have a claim for unpaid wages for public holidays?

90 trial period

[12] Ms Sutherland says that the terms of the employment agreement at clause 3.2 sets out the terms of a 90 day trial period pursuant to section 67A of the Act and that this acts to prohibit Ms Hale from pursuing a personal grievance for unjustified dismissal.

[13] Section 67A of the Act allows employers and employees to enter into a trial provision in a written employment agreement which complies with the provisions of the Act. Arrangements pursuant to section 67A are only enforceable if at the time they were entered into the employee had not been previously employed by the employer.

[14] If section 67A is complied with section 67B operates to mean that an employee whose employment is terminated under a trial provision by the giving of notice within the 90 day period may not bring a personal grievance or other legal proceedings in respect of the dismissal. Section 67A must be strictly interpreted.¹ This is because section 67A prohibits previously available access to courts and tribunals.

[15] It was common ground that prior to commencing her work in the information centre Ms Hale had previously worked for Ms Sutherland albeit in a different business. That work involved carrying out maintenance work for properties owned by Ms Sutherland. For both engagements it was Ms Sutherland personally who employed Ms Hale.

[16] Further, during Ms Hale's employment at the information centre Ms Hale continued to undertake tenancy work for Ms Sutherland which related to the properties owned by her.

[17] At the investigation meeting I gave an oral indication to the parties that my preliminary finding on this point was that Ms Sutherland was unable to rely on the trial provision in the employment agreement and the Authority would continue to determine whether Ms Hale's dismissal was justified. I now confirm that preliminary finding.

[18] Ms Hale had been previously employed by Ms Sutherland prior to signing the written employment agreement for her role at the Information Centre.

Dismissal

[19] There is no dispute that Ms Hale was dismissed from her employment on 15 January 2015. The question for the Authority is whether the dismissal was justifiable.

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

[20] The statutory test of justification is contained in section 103A of the Act. That section provides that the question of whether an action was justifiable must be determined on an objective basis, having regard to whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[21] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[22] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.²

[23] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the decision and conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[24] As a full Court observed in *Angus v Ports of Auckland Ltd*³

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that

² Employment Relations Act 2000, section 103A(5).

³ [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[25] In November 2014 Ms Hale sought approval from Ms Sutherland to take two weeks off work between 22 December 2014 and 4 January 2015 to attend a family reunion. Ms Sutherland granted the time off and made alternative arrangements for cover with other staff and posted the rosters for the period accordingly.

[26] Ms Hale changed her mind about taking all of the time off that she had requested and asked to be placed back into the roster. Ms Sutherland was not happy to accommodate the request as other staff had been promised the shifts, however, one of the employees rostered to work during the period Ms Hale was to be away offered Ms Hale the opportunity to pick up four of her shifts (two in each of the weeks she was supposed to be away).

[27] Ms Sutherland told the Authority that during December 2014 Ms Hale was “mucking” other employees around wanting them to do her shifts and wanting to swap other shifts.

[28] This continued into January 2015. On 14 January 2015 Ms Sutherland advised Ms Hale that she wished to have her working four days each week instead of five. This did not suit Ms Hale and no agreement was reached.

[29] On 15 January 2015 both Ms Hale and Ms Sutherland were sick. Ms Sutherland attempted to make contact with Ms Hale by telephone but was unable to. Ms Sutherland reverted to using Facebook messages and advised Ms Hale that in her opinion the position was not working out and she wished to terminate the employment relationship. Ms Hale responded immediately asking if she would receive two weeks’ notice. Ms Sutherland advised she would receive five days’ notice.

[30] Ms Sutherland offered to assist Ms Hale into alternative employment which Ms Hale appreciated. Ms Hale acknowledged that she had been looking for alternative employment.

[31] Ms Hale expressed to Ms Sutherland that she was okay with the decision to terminate her employment and wanted to part ways on a good note.

[32] In a letter dated the same day Ms Sutherland advised Ms Hale that her services were no longer required and that Ms Hale could work out her notice period of five days.

[33] At the investigation meeting I gave the parties an oral indication that I had reached a preliminary finding that the dismissal was unjustified. This preliminary finding can now be confirmed. Ms Sutherland has failed to meet any of the tests set out in the Act. No allegations of misconduct or poor performance were investigated or raised with Ms Hale prior to the decision to dismiss being made. Neither was Ms Hale provided with an opportunity to address any issues with Ms Sutherland.

[34] The decision and conduct of Ms Sutherland did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. Ms Hale was unjustifiably dismissed.

Remedies

[35] Having found that Ms Hale was unjustifiably dismissed I now turn to the appropriate remedies.

[36] Section 123(1)(b) of the Act provides that the Authority may award the reimbursement of a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128(2) provides that, subject to section 128(3) and section 124, the Authority must, whether or not it provides for any other remedies, order the employer to pay the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

[37] Section 128(3) provides that, despite subsection (2), the Authority may, at its discretion, order the employer to pay a sum greater than provided in subsection (2).

[38] Ms Hale seeks reimbursement of lost remuneration greater than three months' ordinary time remuneration. I am satisfied Ms Hale took steps to mitigate her loss, however, there is no compelling reason for the Authority to exercise its discretion and award a sum greater than the standard set out in section 128(2). In reaching my conclusions I have taken into consideration the evidence before the Authority that Ms Hale was already seeking alternative employment before Ms Sutherland dismissed her.

[39] Three months' ordinary time remuneration amounts to a gross sum of \$7,507.50 calculated at \$16.50 an hour, multiplied by 35 hours a week, multiplied by 13 weeks. Ms Hale is also entitled to receive holiday pay at the rate of 8% on this amount.

[40] Ms Sutherland is ordered to pay to Ms Hale \$7,507.50 gross plus 8% holiday pay within 28 days of the date of this determination.

[41] Turning to Ms Hale's compensation for humiliation, loss of dignity and injury to feelings, I accept Ms Hale's evidence that she had given up a steady permanent job to take on the role with Ms Sutherland. I also accept her evidence about the impact the dismissal had on her. Although I have not accepted as proven, Ms Hale's allegations that Ms Sutherland conducted a campaign to hamper her job search.

[42] I find a suitable award under this heading is \$5,000 and Ms Sutherland is ordered to pay this amount without deduction to Ms Hale within 28 days of the date of this determination.

[43] I find there was no contribution on Ms Hale's part for the purposes of section 124 of the Act.

Arrears of wages claim

[44] Ms Hale claims payment for four public holidays being 25 and 26 December 2014 and 1 and 2 January 2015 which she claims were days that would otherwise be working days for her. A review of the Transaction Book kept by Ms Sutherland shows that Ms Hale worked regularly on a Thursday and Friday of each week.

[45] As all four public holidays fall on days that would otherwise be working days for Ms Hale, she is entitled to be paid for those days. The claim for arrears of wages was confirmed at the investigation meeting as being \$512.80 gross plus 8% holiday pay. This amount is to be paid to Ms Hale within 28 days of the date of this determination.

Costs

[46] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Hale shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Sutherland shall have a further 14 days in which to file and serve a memorandum in reply. All submissions

must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[47] The parties could expect the Authority to determine costs, if asked to do so, on its usual ‘daily tariff’ basis unless particular circumstances or factors require an adjustment upwards or downwards

Vicki Campbell

Member of the Employment Relations Authority