IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 311
5545914

	BETWEEN	KYRA HANSEN Applicant
	AND	SHOOTING STAR ENTERPRISES LTD t/a FUSION SALON Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Mary Birch, Advocate for Applicant Chris Eggleston, Counsel for Respondent
Investigation Meeting:	1 & 2 October 2015
Submissions received:	25 September 2015 from Applicant and from Respondent
Date of Oral Determination:	2 October 2015
Date of Written Determination:	5 October 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Kyra Hansen, claims that she was unjustifiably dismissed by the Respondent, Shooting Stars Enterprises Ltd t/a Fusion Salon (Fusion), on 4 February 2015.

[2] Specifically Ms Hansen claims that the trial period provision contained in the individual employment agreement (the Employment Agreement) entered into and which was signed by the parties on 9 December 2014 is not valid on the basis that she was already an employee at the date the Employment Agreement was signed.

[3] Ms Hansen is also claiming that she was unjustifiably disadvantaged and discriminated against during the course of her employment by a lack of training being provided to her during the period of her employment, and as a result of stress caused by the attitude of Ms Tracey Baird, Director of Fusion, towards her during her employment.

[4] Ms Hansen also claims that Fusion breached the duty of good faith it owed to her.

[5] Ms Hansen further claims that she is entitled to unpaid wages due to Fusion not having paid her for working on 6 December 2014.

[6] Fusion denies that Ms Hansen was unjustifiably dismissed and claims that she was dismissed in accordance with a valid trail period provision pursuant to s. 67A of the Employment Relations Act 2000 (the Act).

[7] Fusion further denies that Ms Hansen was unjustifiably disadvantaged or discriminated against in the course of her employment.

[8] Fusion further denies that it owes Ms Hansen any monies in respect of her attendance at the pre-employment test on 6 December 2014 which it claims was a voluntary pre-employment work test.

Issues

[9] The issues for determination are whether or not Ms Hansen was :

- unjustifiably dismissed by Fusion
- unjustifiably dismissed or discriminated against during the period of her employment with Fusion as the result of a lack of training
- unjustifiably dismissed or discriminated against during the period of her employment with Fusion as a result of Ms Baird's alleged inappropriate attitude towards her and Fusion's failure to take reasonable steps to ensure her safety at work
- Did Fusion breached the duty of good faith towards Ms Hansen
- Fusion owes monies to Ms Hansen as a result of its failure to pay her for attending the pre-employment test on 6 December 2014

Background Facts

[10] During 2014 Ms Grace Paton, a Colour Technician at Fusion became pregnant and was intending to take maternity leave during 2015. As she was aware that Ms Hansen, a friend, was keen to enter the hairdressing profession, she discussed the possibility of Ms Hansen providing cover for her position during her maternity leave period.

[11] As a result Ms Hansen was invited to attend an interview with Ms Baird which took place during early December 2014. During the interview Ms Baird said that she had asked Ms Hansen if she would be willing to volunteer at Fusion Salon (the Salon) for a day to ascertain her suitability for the position, and Ms Hansen had agreed.

[12] Ms Baird confirmed the arrangement of the pre-employment test by email on 4 December 2014 attached to which was a job description and a 'client experience' flowchart. The email stated:

> *Hi Kyra,*
>
> *Looking forward to seeing you on Saturday for your voluntary pre-employment test. …*

[13] Ms Hansen attended the Salon on 6 December 2014 and during that time she assisted with some cleaning, made tea and coffee for clients, and did some shampooing of clients' hair.

[14] Ms Isabelle Archibald, the Receptionist at Fusion, said that on leaving on 6 December 2014 Ms Hansen had asked her how many other applicants had been invited for test days, and commented to her: "*I hope I get the job".*

[15] Ms Hansen said that Ms Baird had not discussed payment for her attendance at the Salon on 6 December 2014 with her prior to or after 6 December 2014, nor had she received or requested payment in respect of her attendance that day.

[16] Ms Baird emailed Ms Hansen on 8 December 2014 attaching a letter of offer (the Offer Letter), and the Employment Agreement. The Offer Letter offered Ms Hansen the position of colourist/intermediate at Fusion commencing on 10 December 2014 for a fixed term period due to Ms Paton's impending maternity leave,: "*subject to a 90-day trial period".* The Offer Letter further stated:

> *Please note that you are entitled to discuss this offer and to seek advice on the attached proposed agreement with your family, a lawyer, or someone else you trust. …*
>
> *If you disagree with, do not understand or wish to clarify anything in this offer, please contact me to discuss.*

> *If you are happy with the proposed terms and wish to accept this offer of employment, please sign the duplicate copy of this letter and return it to me by close of day 9 December 2014. If I have not heard from you by that date, this offer will be automatically withdrawn.*

[17] Ms Hansen met with Ms Baird at the Salon on 9 December 2014 and both parties signed the Employment Agreement. The Agreement set out the terms of employment including :

- At clause 3: that the employment would commence on Wednesday 10 December 2014 and the relevant dates for the purpose of the fixed term employment;

- At clause 4: the 90 day trial period;

- At clause 16 an acknowledgement that Ms Hansen had been advised of her right to take legal advice on the terms of the agreement, had been given a reasonable opportunity to do so, and had read and understood the terms of employment; and

- At Schedule A that the commencement of employment was 10 December 2014, that it was part-time position with regular hours on Saturday and in call on other days, and the date the trial period ended, being 10 March 2014.

[18] Ms Hansen had initialled each page of the Employment Agreement including Schedule A and had signed below a statement which stated that she had: "*Read and understand the conditions of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement and have been allowed a reasonable time to do so."*

Training

[19] Ms Hansen, who had attended a 34 week course at Servilles hairdressing academy in 2011 had some experience and training in colouring techniques, but had never worked in a salon environment and required training to be able to work at the required standard when Ms Paton commenced her maternity leave.

[20] On 10 December 2014 Ms Hansen underwent an induction with Ms Baird in which she had provided training in health and safety, and the Salon procedures.

[21] During December 2014 Ms Paton said that she had provided one-on-one training to Ms Hansen who had 'shadowed' her while she provided training in colouring techniques involving discussion of the colour mix to be applied to a client's hair prior to applications, Ms Hansen actually mixing the colour, and then observing Ms Paton applying the colour.

[22] In addition Ms Archibald said she had provided Ms Hansen with training in the reception duties and procedures, and Ms Rebecca Cole, Senior Stylist, said she had assisted at Ms Hansen's induction, and shown her computer procedures.

[23] Voluntary training sessions at the Salon took place on Monday evenings during which the Salon employees carried out colouring and other procedures on each other's hair and on mannequins. Ms Hansen attended at least one such session.

[24] Ms Baird was away from the Salon due to illness during December 2014 and during that time Ms Cole acted as the Salon Manager. Once Ms Baird returned to the Salon in January 2015, she said she had become aware that Ms Hansen had not progressed as quickly as she had anticipated.

[25] As a result she had sent a text message to Ms Hansen on 11 December 2015 offering her one-on-one training on 12 January 2015; however Ms Hansen was unable to accept due to personal commitments.

Attitude

[26] Ms Hansen said that following Ms Baird's return to the Salon on 10 January 2015 she had noticed a change in her attitude towards her.

[27] Ms Baird met with Ms Hansen on 19 January 2015 to formally review her performance. During the meeting she said she had provided some positive feedback, but had also set out her concerns using the job description and client experience flowchart which had been provided to Ms Hansen with the email dated 4 December 2014.

[28] Areas of concern raised by Ms Baird with Ms Hansen on 19 January 2015 were specified as including:

- More training in hi-lights and reception needed;
- A lack of initiative in forwarding thinking about tasks in the Salon;
- More speed and accuracy in bookings;
- Better timing and more accuracy with colour mixing

[29] Ms Hansen agreed that Ms Baird had discussed with her the areas in which she (Ms Baird) wanted to see improvement from her at the meeting on 19 January 2015.

[30] Ms Hansen said that on 21 January 2015 Ms Baird had asked her to perform certain tasks which she had not found difficult, but she had found Ms Baird's attitude towards her to be unacceptable. The day had culminated in an incident in which she felt Ms Baird had behaved rudely to her by ignoring her.

[31] Ms Hansen said that she had found the manner in which Ms Baird had told her to do the tasks had been bullying and intimidating and had caused her stress

[32] Ms Baird said that she had asked Ms Hansen to complete some simple tasks for her and had not been aware that Ms Hansen had found her manner to be unacceptable, and she did not believe she had behaved rudely to Ms Hansen.

[33] On or about this time Ms Baird had asked Ms Hansen to do a client hair colour for her, and she had demonstrated how it needed to be done. Upon checking Ms Hansen's work as requested, she had been shocked because most of the roots of colour had been missed. She said it had been apparent to her that Ms Hansen had either not understood her requests, or had been incapable of carrying them out.

[34] When she had discussed what had occurred afterwards with Ms Hansen, she had concluded that Ms Hansen was not picking up the skills required to do the job.

[35] Following a staff training evening on Monday 26 January 2015, Ms Baird said she had received a complaint about Ms Hansen from a client which had contributed to her concerns about Ms Hansen's ability.

[36] Ms Baird said she had considered what action to take, and on 28 January 2015 she met with Ms Hansen and explained that her employment was being terminated and the reason for this. Ms Baird gave Ms Hansen a letter confirming the decision dated 28 January 2015 sent a letter to Ms Hansen which stated:

> *As per our discussion this is to formally notify you that I am terminating your employment with Fusion as per Clause 4 90 Day Trial Period, of your individual employment agreement with one week's notice. Your last day with us will be Wednesday 4th February 2015. …*

> *Having worked with you extensively over these past couple of weeks I believe that while you have a really good work ethic and have tried to the best of your ability your skill level has not improved enough for me to be able to continue to employ you.*

[37] There was a meeting subsequently [5 February 2015] which Ms Baird attended with Ms Joan Watson, an HR consultant, and Ms Hansen attended with Ms Mary Birch.

[38] During the meeting Ms Birch had discussed the fact that Ms Hansen had been requested by Ms Baird to work on Sunday 25 January and Sunday 1 February 2015 and not on Saturday 24 January and Saturday 31 January 2015 when Saturdays were specified in the Employment Agreement as her regular work days. As a result, Ms Baird agreed to pay Ms Hansen for Saturday 24 January and Saturday 1 February 2014 although she had not worked on those days.

[39] Following her employment Ms Hansen said that she had applied for employment at another Salon but had been unsuccessful which she suspected was as a result of Ms Baird commenting adversely upon her performance. Ms Baird denied that this was the case.

Determination

Was Ms Hansen unjustifiably dismissed by Fusion?

[40] The Act makes provision for trial periods for a specified period not exceeding 90 days pursuant to ss 67A and 67B. The effect of a trial period under s 67A is set out in s 67B of the Act which states:

> ***67B Effect of trial provision under section 67A***
>
> *(1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.*
>
> *(2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.*

[41] Subsection (3) of s 67A of the Act defines an employee, for the purposes of s 67A(1) as an employee who has not been previously employed by the employer.

[42] The central issue in this case is whether or not Ms Hansen was already an employee before she signed the Employment Agreement with Fusion on 9 December 2014 by virtue of her attending at Fusion's premises on 6 December 2014 for a pre-employment test.

[43] An employee is defined at s 6 of the Act as follows;

> *In this Act, unless the context otherwise requires, employee—*
>
> *(1) (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*
>
> *(b) includes—*
>
> *(i) a homeworker; or*
>
> *(ii) a person intending to work; but*
>
> *(c) excludes a volunteer who—*
>
> *(i) does not expect to be rewarded for work to be performed as a volunteer; and*
>
> *(ii) receives no reward for work performed as a volunteer; …*

[44] The email which Ms Baird sent to Ms Hansen on 4 December 2014 referred to `a "*voluntary pre-employment test".* I note that Ms Hansen confirms that there was no discussion of payment for the pre-employment test discussed between her and Ms Baird prior to, during, or after the pre-employment test on 6 December 2014.

[45] Moreover at no stage following 6 December 2014 and during her employment at Fusion did Ms Hansen query the non-payment, present a time-sheet in respect of the hours she attended the Salon on 6 December 2014, or request payment for that day.

[46] There is no evidence that Ms Hansen had received an offer of employment prior to or on 6 December 2014. I note the evidence of Ms Archibald that Ms Hansen commented upon leaving the Salon on 6 December 2014 that she hoped she got the job, which supports the fact that she had not been offered employment at that time.

[47] The Employment Agreement was not received by Ms Hansen until 8 December 2014, two days after the pre-employment test. It sets out clearly at both clause 3 and in Schedule A that Ms Hansen's commencement date of employment was 10 December 2014, and Ms Hansen signed the Employment Agreement on 9 December 2014 confirming that she had read and understood the conditions of employment and accepted then fully.

[48] I find that Ms Hansen's employment with Fusion commenced on 10 December 2014 and not on 6 December 2014 which I find to have been a voluntary pre-employment test and not employment.

[49] In the Employment Court case of *Blackmore v Honick Properties Ltd*[1] the Chief Judge addressed the issue of trial periods, noting:[2]

> *[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. ....*

[50] I find that the trial period was in accordance with s67A and 67B of the Act, and mutually agreed in writing by the parties on 9 December 2014 prior to Ms Hansen's employment commencing on 10 December 2014.

[51] I determine that Ms Hansen was not unjustifiably dismissed by Fusion, but justifiably dismissed in accordance with the trial period provision set out in clause 4 of the Employment Agreement.

Was Ms Hansen unjustifiably disadvantaged or discriminated against during the period of her employment with Fusion due to a lack of training?

[52] Ms Hansen worked at the Salon during December 2014 and 28 January 2015. During that time she was provided with one-on-one training by Ms Paton during December 2014. In addition during December 2014, Ms Hansen was provided with induction training, by Ms Baird, by Ms Archibald and by Ms Cole.

[53] The Salon was closed for a two week period between Christmas and 10 January 2015. Upon Ms Baird's return she offered Ms Hansen one-on-one training on 12 January 2015 which Ms Hansen was unable to attend.

[54] Training was also offered regularly at the voluntary Monday evening training sessions at which Ms Hansen had the opportunity to practice colouring techniques on the other Salon employees' hair and on mannequins. Whilst Ms Hansen was not always able to take advantage of the training due to valid personal commitments, I find that does not reflect adversely upon Fusion as the employer

[1] [2011] NZEmpC 152
[2] Ibid at paras [69] & [70{

[55] I find that Fusion provided adequate training and determine that Ms Hansen was neither unjustifiably disadvantaged nor discriminated against during the course of her employment by a lack of training.

Was Ms Hansen unjustifiably disadvantaged or discriminated against during the period of her employment with Fusion due Ms Baird's alleged inappropriate attitude towards her or its failure to take reasonable steps to ensure Ms Hansen's safety at work?

[56] Ms Hansen said that she felt Ms Baird's attitude changed towards when Ms Baird returned to the Salon on 10 January 2015. In particular she pointed to the incidents on 21 January 2015 as highlighting the situation.

[57] Ms Hansen said it was not the tasks she was requested to undertake by Ms Baird which she stated she had no problem performing, but Ms Baird's manner in making the requests. In particular Ms Hansen claims that as a result she suffered stress and emotional harm.

[58] There is no evidence that the work tasks requested of Ms Hansen were excessive or that there was unrelenting pressure for her to perform them. There is no evidence from Ms Cole or Ms Archibald that there was any difference in the way Ms Hansen behaved towards them and towards Ms Hansen, describing Ms Baird's manner as firm but pleasant towards them.

[59] I find that Ms Baird did not unjustifably disadvantage or discriminate against Ms Hansen by asking her to perform duties which formed part of the Salon normal workplace duties, or by her manner towards Ms Hansen

[60] I further note that at no time did Ms Hansen inform Ms Blair, which she was required to do for the purposes of the Health and Safety in Employment Act 1992 that she felt under any pressure or stress by the work she was being asked to undertake or by Ms Baird's attitude towards her.

Was there any breach of the duty of good faith?

[61] I find that Ms Hansen was advised of the concerns regarding her level of performance in a timely manner and she was offered additional training and determine that there was no breach of good faith in regard to training.

[62] I observe that the duty of good faith in s 4 of the Act is in the nature of a two-edged sword. Employers and employees are both under a duty pursuant to s 4 of the Act to act in good faith to each other, in particular they are required pursuant to s 4(1A)(b) to be: "*responsive and communicative".*

[63] I find that during the course of her employment or at the review meeting held on 19 January 2015 Ms Hansen failed to advise Ms Baird that she was unable to cope with the tasks she was required to complete as part of her employment, nor did she mention at that time that Ms Baird's attitude towards her was causing her any stress.

[64] I find there has been no breach of good faith towards Ms Hansen as a result of Ms Baird's attitude to her during her employment which I have not found to be unacceptable.

[65] I find that there is no breach of good faith as regards the alleged adverse employment reference provided by Ms Baird as the duty of good faith only applies during the period of employment.

[66] I determine there has no breach of the duty of good faith towards Ms Hansen by Fusion during the course of her employment.

Does Fusion owe any monies to Ms Hansen as a result of her attending for the pre-employment test on 6 December 2014 in breach of the provisions of the Wages Protection Act 1983 or s.131 of the Act?

[67] I have found that Ms Hansen voluntarily attended the Salon on 6 December 2014 for a pre-employment test. Volunteers do not expect and are no remunerated.

[68] I determine that Fusion does not owe Ms Hansen monies in respect of her attendance at the Salon on 6 December 2014.

Costs

[69] Costs are reserved. The parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions by the Applicant to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority