

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 179  
5341798

BETWEEN JULIANA HART  
Applicant

AND 32 GEMS DENTAL CARE  
LIMITED  
Respondent

Member of Authority: P R Stapp

Representatives: Anthea Connor, Counsel for Applicant  
John Evans, Counsel for the Respondent

Investigation Meeting: 30 August 2011 at Wellington

Determination: 14 November 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This is about an employment relationship between Mrs Hart and 32 Gems Dental Care Ltd (Gems) that was established with an employment agreement, which included a trial period clause. The employment relationship commenced one day earlier than what was envisaged and outside the dates in the employment agreement. .

[2] Upma Bhasin, director of 32 Gems Dental Care Ltd, and the dentist in charge of the dental practice in Lower Hutt says that the agreement represented the terms of employment when Mrs Hart started on 8 February 2011. On 9 February 2011 Mrs Bhasin learnt that Mrs Hart had a needle strike injury at her last place of employment and created a risk of cross contamination.

[3] Mrs Hart claimed Mrs Bhasin telephoned her on 9 February to inform her not to attend work, and on 10 February 2011 informed her that “*her employment was withdrawn*” because she did not have immunisation for Hepatitis B. Mrs Hart

claimed that this was in breach of clause 11.2 of her employment agreement because the employer did not have good reason for terminating her employment, did not treat her fairly in arriving at its decision, did not allow her a reasonable opportunity to comment on any concerns, and did not invite her to involve a support person or representative. Mrs Hart also claimed that the termination was unlawful because it discriminated against her on the grounds of disability, in that the reason for her dismissal was a presumption that she lacked immunity to Hepatitis B or suffered from Hepatitis B. The latter claim of discrimination has been withdrawn.

[4] Gems claimed that Mrs Hart is statute barred from bringing a personal grievance in respect of termination of her employment under s.67A and s.67B of the Employment Relations Act 2000. It denied the allegation of discrimination. It claimed that the trial period in the employment agreement meets the provisions as per s.67A of the Employment Relations Act. It says that the applicant signed and dated the individual employment agreement on 7 February 2011 before she started work. It says that both parties verbally agreed to change the start date to Tuesday 8 February 2011 instead of starting on 9 February 2011 as planned and that they both intended for the terms to apply. Alternatively Gems claimed that Mrs Hart's failure to tell the directors of the needle strike injury was a breach of trust.

### **The Issues**

- Is the trial period clause in the individual employment agreement valid pursuant to ss.67A and 67B of the Employment Relations Act 2000?
- Did the respondent sign the agreement at the commencement of the employment relationship and or agree in writing on a trial period?
- When did the trial period commence (if it is effective)?
- Was there a suspension from work on 9 February 2011, and if so, was the suspension justified?
- If the trial period clause is not valid does Mrs Hart have a personal grievance for unjustified dismissal?
- Costs will be reserved. Which party is entitled to costs, and how much?

**The facts**

[5] Gems advertised a vacancy for a dental assistant to start work in February 2011 at its Lowe Hutt dental practice. Mrs Hart delivered her CV to be considered for the position and was short listed because of her relevant work experience. There was an initial discussion between Mrs Hart and Mrs Bhasin over the telephone and an interview was scheduled for 21 January. Mrs Hart was interviewed for the position where there was a discussion on her experience and reasons for leaving her last job. Gems at the time had less than 20 employees.

[6] Mrs Hart advised that she had to give two weeks notice to her existing employer. Mrs Hart was offered the position on 24 January 2011. The pay was \$17 per hour and the starting date was planned for 9 February 2011 to enable notice of two weeks to be given to her employer at the time. Her hours were 37.5 per week.

[7] On 27 January 2011 Mrs Hart collected the employment agreement to take away, consider and sign. Mrs Hart collected the agreement before she started work. She was advised to read through the agreement and to be sure on any of the provisions. She was asked to sign and return the agreement for the employer to complete signing it off. Mrs Hart says that she queried the trial period clause in the agreement and says she was told by Mrs Bhasin that Gems would still treat her fairly and consult with her before any dismissal.

[8] On 7 February Mrs Hart went into the practice to look around and talk to the receptionist and temporary assistant, because she did not have to work out her full notice with her previous employer. Mrs Hart had indicated that she was available to work and could start the next day if required, however, because Mrs Bhasin had already made arrangements for a temporary assistant to work on 8 February, it was agreed Mrs Hart's starting date would remain as 9 February 2011 as provided for in the written employment agreement.

[9] During the familiarisation Mrs Hart confirmed that she had read the agreement, was happy with it and had signed it, but had forgotten to return it and would do so on Wednesday (9 February).

[10] On 8 February 2011 Gems received a telephone call from the temporary assistant who had been arranged to work before Mrs Hart started. The temporary assistant advised Mrs Bhasin that she was sick with a cold and cough, and would not

be able to work. Mrs Bhasin contacted Mrs Hart to let her know about the situation and to check if it was still convenient for her to start work on 8 February or if necessary another temporary assistant could be arranged. Mrs Hart indicated she was happy to start on 8 February and work the whole day. Upon starting she was given a set of keys to the practice and the building. Mrs Hart again forgot to return the written employment agreement that she had already signed. There was no evidence to suggest this was anything other than inadvertence and was not a deliberate action by Mrs Hart. She genuinely forgotful to return the agreement, I hold. In any case she was due to return the agreement on her start date Wednesday 9 February 2011.

[11] Mrs Hart returned the employment agreement on 9 February and handed it to Mrs Bhasin. Mrs Bhasin left signing the agreement herself until at around morning tea time on 9 February. Mrs Bhasin also corrected the hours of work to 37.5 and initialled the change without telling Mrs Hart. Mrs Hart accepted that her hours were 37.5, but that the change had not been made on the agreement that she had signed. The change therefore had to have been made after she handed it back to Mrs Bhasin.

[12] On 9 February 2011 Mrs Hart was contacted at work by her husband about needing to make an appointment with the doctor to get a booster shot for immunisation for Hepatitis B because of a needle strike injury, which had occurred during her previous employment. At the time of the injury, and before Mrs Hart's employment with Gems, she had been to her doctor because she was worried about the injury, although Mrs Hart says her employer at the time considered she was able to continue to work. She was worried, but reasonably believed there was nothing to be concerned about because of the attitude taken by her previous employer.

[13] Mrs Hart says she advised Mrs Bhasin of the need to get a booster shot and the reasons for that. Mrs Bhasin was concerned that Mrs Hart had not informed her of the needle strike injury before and says that she could not get any information from Mrs Hart about the patient involved. Mrs Bhasin claimed that Mrs Hart never offered to tell her about the injury. Mrs Hart denied that claim.

[14] On the evening of 9 February 2011 Mrs Bhasin telephoned Mrs Hart three times; (1) for bank details, (2) for details on kiwi saver and (3) that Mrs Hart needed to present a medical certificate before returning to work. Mrs Hart says she was instructed not to come to work the next day. She says this was an unlawful suspension and in breach of clause 11.4 of her employment agreement because no

consultation proceeded the suspension. Mrs Hart says this was presented to her as a fate accompli.

[15] Mrs Hart gave permission for Mrs Bhasin to talk to her doctor. On 10 February 2011 Mrs Hart's doctor advised Mrs Bhasin that the immunisation booster was a precaution. There is an issue as to whether or not this involved a clearance for work. Mrs Hart's doctor could not print out a medical certificate because of computer problems at that time. Mrs Bhasin relied upon the telephone call for her assessment.

[16] On 10 February 2011 Mrs Hart says she told Mrs Bhasin that she had arranged for a doctor's appointment for Monday 14 February 2011 in regard to the needle strike injury. Mrs Hart also says she explained why she needed the doctor's appointment and what had happened. She says that Mrs Bhasin said that she hoped the blood test result would be clear and said she hoped Mrs Hart would be fine.

[17] Mrs Hart says that she was requested to stay at home by Ms Bhasin, although Mrs Hart says that she did try to explain that she could not get an earlier appointment to go to the doctor. Also, she says that she had no choice as to whether or not she could go into work, despite her doctor's involvement. She did not get paid for 10 February 2011. She did not return to work.

[18] Mrs Hart says that Mrs Bhasin "*withdrew*" the employment over the telephone on 10 February 2011. In other words Mrs Bhasin withdrew from the employment relationship. Mrs Hart says that she handed the phone to her husband Mr Robert Hart, who listened in to the call, and then took it over from an upset Mrs Hart. Mr Hart got off the telephone and informed Mrs Hart that she had been dismissed.

[19] Mr Hart confirmed the telephone call on 10 February 2011 occurred and that he had been told of the withdrawal of Mrs Hart's offer of employment by Mrs Bhasin that he considered was a dismissal. Mr Hart says he requested Mrs Bhasin to tell him what the reason was and he says that he was told that it was because Mrs Hart did not have a current immunisation status.

[20] Mrs Bhasin says that Mr Hart told her that she was unnecessarily dragging things out and he also queried why Mrs Hart should have told her about the incident earlier. Mrs Bhasin says she tried to clarify with Mr Hart that this type of instance should be reported immediately and she did her best to explain to him the reasons why but he was not prepared to listen.

[21] Mr Hart stated that if Mrs Bhasin did not take Mrs Hart back to work immediately he would take the matter further and that the practice would have to face the consequences.

[22] Mrs Bhasin confirmed that she had a discussion with Mrs Hart's doctor and confirmed the injury had occurred with the previous employer but had no details about the patient involved. At no time did Mrs Bhasin contact the previous employer for any information. The doctor also advised Mrs Bhasin that at that stage the blood tests were only base tests and were okay. Further tests would be required and without those further tests being completed the doctor could not confirm that there were no infection issues. The doctor also advised that he would start Mrs Hart on a course of immunisation commencing the following Monday.

[23] Mrs Bhasin was concerned about the issues of trust and confidence raised by Mrs Hart's failure to disclose the incident. Although Mrs Bhasin wanted to have a meeting with Mrs Hart to discuss that issue Mrs Bhasin has complained that the Harts led her into dealing with the matter over the telephone, despite Mrs Bhasin advising Mrs Hart to go in that evening to discuss the matter and that she was welcome to bring her husband if she wished. Mrs Hart refused because she had something on with her children and it was suggested that she go into work the following morning. Again she refused and requested the discussion take place over the telephone, and it did.

[24] Mrs Bhasin says that she explained that Mrs Hart should have brought the needle stick injury to her attention before she started work and that it was an issue of trust and confidence as well as an important issue for health and safety. Mrs Hart insisted that the doctor had confirmed her blood tests were okay and that she would be able to return to work and as a caution have immunisation. However Mrs Bhasin's concern was that Mrs Hart had not informed her of the incident either before or on the day she started work. This was especially concerning for Mrs Bhasin as she had yet to receive the initial blood test results and the matter was a major health and safety issue.

[25] Mrs Bhasin's evidence falls short of explaining what her decision, if any, was at this point, since she had concerns about continued trust and confidence in Mrs Hart. Also, Mrs Bhasin says that she had asked Mrs Hart not to come into the surgery because she had no information on the patient concerned in the incident and she was

concerned about the potential cross infection with any patients and other staff. It is more than likely Mrs Bhasin requested Mrs Hart to stay at home, I hold.

[26] Mrs Bhasin denied refusing to tell Mrs Hart about the purpose of the proposed meeting. She says it was Mrs Hart who simply refused to attend any meeting and insisted that the matter be dealt with there and then on the telephone. She says she explained to Ms and Mr Hart that the *decision to dismiss* Mrs Hart had nothing to do with her immunisation status, it was due to her failure to advise of the needle stick injury and the issue of trust and confidence this raised. [Paragraph 56 Mrs Bhasin's written statement]. It is more than likely Mrs Bhasin did purportedly *withdraw* from the employment because her evidence and the statement in reply accept that there had been a dismissal. Although it is unclear what Mrs Bhasin actually said it is probable that she dismissed Mrs Hart, I hold.

[27] Mrs Hart was paid for 8 and 9 February 2011 and later she was paid her holiday pay. She was not paid for 10 February 2011. There was no notice.

### **The law**

[28] This matter is about whether or not the trial clause in Mrs Hart's employment agreement was valid under s.67A and s.67B of the Act. These sections read as follows:

**67A When employment agreement may contain provision for trial period for 90 days or less**

(1) *An employment agreement containing a trial provision, as defined in sub-section (2), may be entered into by an employee, as defined in sub-section (3), and an employer.*

(2) **Trial provision**

*Means a written provision in an employment agreement that states, or is to the effect, that –*

- (a) *for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and*
- (b) *during that period the employer may dismiss the employee; and*
- (c) *if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*

(3) **Employee**

*Means an employee who has not been previously employed by the employer.*

- (4) *[Repealed]*
- (5) *To avoid doubt, a trial provision may be included in an employment agreement under –*
  - (a) *section 61(1)(a), but subject to s.61(1)(b):*
  - (b) *section 63(2)(b).*

**67B** *Effect of trial provision under section 67A*

- (1) *This section applies if an employee terminates an employment agreement containing a trial provision under s.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 sub-section (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.*
- (3) *Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in s.103(1)(b) to (g).*
- (4) *An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.*
- (5) *Sub-section (4) applies subject to the following provisions:*
  - (a) *in observing the obligation in s.4 of dealing in good faith with the employee, the employer is not required to comply with s.4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and*
  - (b) *the employer is not required to comply with a request under s.120 that relates to terminating an employment agreement under this section.*

[29] In addition, the written employment agreement provided for the trial clause in the following terms:

**8. TRIAL PERIOD**

- 8.1 *For the first 90 days of your employment, commencing on 09/02/2011 and ending on 09/05/2011, you will be employed for an initial trial period consistent with section 67A and section 67B of the Employment Relations Act 2000, we may*

*terminate your employment at any time during that period, and you will not be entitled to bring a personal grievance or other legal proceedings in respect of the termination.*

[30] Also, the employment agreement made provision for notice in the following terms:

**11 TERMINATION OF EMPLOYMENT RELATIONSHIP**

**11.1 Termination by either party on notice**

*Either party may terminate the employment relationship on **four** week's notice. If a party gives notice, we may pay you in lieu of working out all or part of your notice period.*

**11.2 Termination by us**

*As the employer, we must have good reason for terminating the employment relationship and must treat you fairly in reaching our decision. In particular, we will give you a reasonable opportunity to comment on any proposal or concerns we might have that may lead to termination of your employment. You are welcome to involve a representative or support person in the process.*

[31] On the issue of the suspension there is a clause in the employment agreement in the following terms:

**11.3 SUSPENSION**

*If we decide to investigate an instance of possible serious misconduct, we may, after consulting you, suspend you until we decide what disciplinary action to take. Normally, any suspension will be on full pay. However, in circumstances where the suspension has been, or is likely to be prolonged (for instance where there is an intervening criminal investigation, or where you fail or are unable to take full part in the investigation process), we may, again after consulting you, suspend you without pay.*

[32] The issue of validity of the trial period clause has been commented on by the Employment Court, which made the following comments:

*...trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the*

*employment relationship and not retrospectively or otherwise settled during its course...*

And

*...Sections 67A and 67B remove longstanding protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protection scheme of the Act as it otherwise deals with issues of disadvantage in and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.*

*Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEMPC 111

### **Decision**

[33] There is an issue as to whose evidence is to be believed on a few factual matters. I have preferred Mrs Hart's evidence about what she says Mrs Bhasin said on 9 and 10 February.

[34] I have accepted Mrs Hart's evidence as being more reliable in recalling the discussions of the telephone calls on 9 and 10 February. I am supported by the acceptance by the respondent that there had been a dismissal and in all likelihood that Mrs Hart was told to stay at home. The employment never resumed, which is consistent with Mrs Hart believing that she had been dismissed and she was not paid from 10 February. There were no attempts by the employer to retrieve the situation and work through the problem. Both Mrs Hart and Mrs Bhasin speak and read English as a second language, but I am satisfied both of them understood their evidence, what they were saying and could understand the questions that were put to them during the Authority's investigation meeting. Mrs Hart fared better in her consistent responses whereas Mrs Bhasin changed her evidence: for example, by not relying on the trial period clause and then changing her mind, she did not accept that there had been a dismissal when that had clearly been acknowledged in her evidence and statement in reply. Her reason for the dismissal changed to include a breach of confidentiality (without any reasoning) and that Mrs Hart did not tell her what the reason was for the visit to the doctor until she was asked. These were new reasons added by Mrs Bhasin during her evidence.

[35] The Court's judgment in *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEMPC 111 is the leading judgment on trial period clauses and lays down the principles to be applied. The facts are different here, but the principles are still applicable.

[36] The trial period clause in Mrs Hart's agreement is invalid. This is because:

[37] Mrs Hart had been previously employed on 8 February 2011, one day before her employment agreement was to take effect, and without a trial period clause applying. She was not a new employee on 9 February when the agreement was signed off, and the date the agreement applied from. There were no arrangements agreed to for the work on 8 February and no variation as required in writing for her to start earlier and for the trial period clause to start earlier. The intentions of the parties are affected by the failure to have a written variation, if as the respondent claims it was the intention of the parties to apply the employment agreement. Also, Mrs Bhasin had not signed the agreement at the commencement of the employment relationship, when she signed it at morning tea time. In any event the employment agreement was not altered to have a new start date and a new date for the trial period clause to commence. This could not have happened because it would have been retrospective. The trial clause needed to be put in writing with proper effect to meet the requirements under the Act. Thus, on 9 February, Mrs Hart was not a new employee. This was because her status had changed and she had been employed on 8 February without a trial clause.

[38] Mrs Hart genuinely forgot to return her signed employment agreement. That has not been challenged by the respondent. It was the responsibility of her employer to ensure that the agreement was signed off at the commencement of the employment relationship and to put in place any preconditions before the employment would start to ensure the trial period clause would work. This did not happen because the respondent did not sign off the employment agreement until morning tea on the 9<sup>th</sup> of February, after the employment relationship had commenced earlier as Mrs Hart had commenced working a day before. The Court has required that employment agreements be signed off in writing and agreed to before the employment relationship commences. This did not happen here.

[39] The agreement had the required terms for a trial period clause. There were less than 20 employees. The agreement had provision for notice. The notice

provision had not been altered to cater for the trial period clause. So at the very least four weeks notice would have been required as it applied to terminate the employment agreement.

[40] Because the trial period clause is invalid Mrs Hart is entitled to make a claim for a personal grievance for unjustified dismissal. I find the dismissal was unjustified because:

[41] First the telephone discussion was not a real opportunity for Mrs Hart to comment and provide any mitigation.

[42] Second the process is the employer's responsibility and I accept that as the employer wanted to have a meeting it should not have been led by Mrs and Mr Hart into dealing with the matter over the telephone. The employer had the opportunity to make alternative arrangements for a meeting and to put in writing the issue and the possible outcome. The fault in the process meant that a proper investigation did not occur, for example there was no contact attempted with the previous employer for information.

[43] Third, the dismissal was not the action of a fair and reasonable employer. This is because there were other circumstances that meant that a fair and reasonable employer would not have dismissed Mrs Hart. These circumstances include:

[44] (a) That further information from the previous employer could have helped make an assessment of the seriousness of the injury and potential for any cross contamination. The absence of this information prejudiced the applicant.

[45] (b) That the agreement made provision for suspension. This meant that time was available to conduct further enquiries and on full pay before any decision to dismiss was made.

[46] (c) That there was no pre-employment form completed in regard to Mrs Hart's medical circumstances and no questions asked about any injuries and or accidents likely to impact on her employment.

[47] (d) That Mrs Bhasin accepted under cross examination the written codes she produced were not followed and or were not applicable to Mrs Hart as the employee. She accepted the codes applied to the "employer".

[48] (e) That Mrs Bhasin and Mrs Hart have a disagreement about exactly what they recall saying on the telephone. That is almost inevitable with such an important matter being dealt with on the telephone.

[49] (e) That there had been an unlawful suspension in the background involving no proper consultation. This disadvantaged Mrs Hart because she was subsequently dismissed and not paid.

[50] The absence of any opportunity for input to any such action was unjustified, I hold. Ms Bhasin accepted when questioned by Mrs Hart's Counsel that Mrs Hart would have been disadvantaged in her employment by its action. She certainly was disadvantaged because dismissal followed quickly thereafter without a proper process followed, and with a resulting loss of income.

[51] I also find that to reach the conclusion that there had been a serious breach of trust and confidence for a summary dismissal, the employer did not have enough evidence for such a conclusion. The allegation was serious so the evidence had to reach a standard to match the gravity of the allegation. Mrs Hart did disclose the situation once she became aware that her doctor needed to see her. She informed Ms Bhasin of the consultation and the follow up. Mrs Hart allowed Ms Bhasin to contact her doctor for information to assist. This does not lead to a conclusion that one is dealing with an employee with dishonest intentions, I hold. A fair and reasonable employer would have concluded that Mrs Hart did not deliberately withhold information and was being co-operative.

[52] Therefore, Mrs Hart was unjustifiably suspended, (because there was no consultation and opportunity for representation), and disadvantaged in her employment, and her dismissal was unjustified. She is entitled to remedies.

[53] I am satisfied that Mrs Hart has lost income due to her dismissal. This loss occurred from 10 February 2011 until May 2011 when she got a new job (12 weeks). Her claim is for this period. I hold the amount owing for lost wages is \$7,650. I am satisfied Mrs Hart tried to mitigate her loss by attempting to get work because she went to Work and Income, later obtained a job and is the sole income earner in the family. She says she attempted to do to look for work, and I accept it.

[54] In addition, this is a matter for compensation based on Mrs Hart's own evidence. Mr Hart corroborated the impact of the suspension and dismissal on Mrs

Hart. On the details provided, I accept that Mrs Hart was humiliated and her feelings were affected. I assess the remedy at \$6,000 compensation.

[55] There can be no contributory conduct because the matter of one's own health is a matter for privacy unless asked for details. That did not happen. Proper disclosure should have been sought earlier by the employer. A prudent employer would have used pre-employment forms to cover off such an enquiry. Also, Mrs Hart cannot be held responsible and blamed for the employer's process and a process that the employer has to take responsibility for. It was the employer's responsibility to overcome any difficulties arising from Mrs Hart's unavailability and the pressure to use the telephone call instead of a meeting. In this case a meeting would have been necessary and an action expected of a fair and reasonable employer.

[56] I order 32 Gems Dental Care Limited to pay Mrs Hart the sums of:

- (a) \$6,000 nett compensation for humiliation, loss of dignity and injury to feelings under s 123 (1) (c) (i) of the Act.
- (b) \$7,650 before tax lost wages.

[57] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority