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Lawrence v Clarke Group Management Limited (Auckland) [2018] NZERA 174; [2018] NZERA Auckland 174 (1 June 2018)

Last Updated: 4 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 174
3013231

BETWEEN ELAINE LAWRENCE Applicant

A N D CLARKE GROUP MANAGEMENT LIMITED Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Michael Smyth, Counsel for Applicant

Georgina Todd, Counsel for Respondent

Investigation Meeting: 15 and 16 May 2018 at Auckland

Submissions Received: 4 and 16 May 2018 from Applicant

4 and 16 May 2018 from Respondent

Date of Determination: 01 June 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. The applicant, Ms Lawrence, was not racially harassed by the Director of Clarke Group, Mr Austen Clarke.

B. The applicant, Ms Elaine Lawrence, was not unjustifiably dismissed by the respondent, Clarke Group Management Limited, (Clarke Group).

C. Costs are reserved.

Employment Relationship Problem

[1] The respondent, Clarke Group Management Limited (Clarke Group), is a property management company. Mr Austen Clarke is the director of Clarke Group.

Mr Clarke and his investment company, Austen Clarke Investments Trustee Limited, are the shareholders of Clarke Group.

Employment of Ms Lawrence by Clarke Group – March 2017

[2] Ms Elaine Lawrence was employed by Clarke Group in March 2017 as the Personal Assistant (PA) to Mr Clarke. A large component of Ms Lawrence's job was to organise Mr Clarke's personal life as required and to attend to a number of matters for him.

18 May 2017

[3] Following a misunderstanding on 18 May 2017, between Ms Lawrence and Mr Clarke about her whereabouts and her duties on that day, Mr Clarke asked her to meet with him on 19 May 2017, to discuss what had gone wrong.

Meeting on 19 May 2017

[4] Ms Lawrence described the meeting on 19 May 2017, as one in which she was “assailed” by Mr Clarke verbally. Ms Lawrence says that Mr Clarke spoke to her in an undermining manner and then made personal comments about her age and weight. She says he also made extreme racist statements referring to her South African nationality and her son who is a black African. Ms Lawrence says the meeting ended when Mr Clarke told her to “Take the door, fuck off now and leave the office”. Ms Lawrence says she believed she had been “unequivocally dismissed from her job” by Mr Clarke.

[5] Mr Clarke strongly denies Ms Lawrence’s version of events. Mr Clarke says he asked to meet with Ms Lawrence in order to clear up the miscommunication between them on 18 May 2017. Mr Clarke expected an explanation from Ms Lawrence but did not get one. Mr Clarke says Ms Lawrence became defensive, took no responsibility for her part in the miscommunication and told him that he was an “uncompassionate person”. Mr Clarke says at that point he told Ms Lawrence that if she did not like working for him, she could leave and “There’s the door”.

[6] Ms Lawrence considers she was racially harassed and unjustifiably dismissed on 19 May 2017. Clarke Group says Ms Lawrence was not racially harassed, nor was she dismissed on 19 May 2017..

Termination of Ms Lawrence’s employment within the 90 day trial period

[7] On 21 May 2017, Ms Lawrence was informed that her son, who worked in the French Foreign Legion had died tragically while serving overseas. Ms Lawrence informed Mr Clarke of the tragedy by text. Mr Clarke gave Ms Lawrence time off work and then asked her to attend a meeting on 24 May 2017 about her employment. Ms Lawrence did not attend the meeting saying she was no longer employed as she had been dismissed on 19 May 2017.

[8] On 24 May 2017, Ms Clarke’s employment was terminated by Clarke Group under the trial period contained in her employment agreement. Ms Lawrence says the termination did not comply with the notice provision in her employment agreement and was therefore unlawful and not valid. This is disputed by Clarke Group. It says Ms Lawrence did not return to work, did not attend the meeting to discuss her employment and in those circumstances the one day’s payment in lieu of working her notice out was lawful.

The investigation meeting

[9] As permitted under s.174E of the Act, this determination has not set out all the evidence required. The determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

[10] The investigation in the Authority took place over two full days. Ms Lawrence and her partner, Mr John Lawrence, both filed witness statements. For Clarke Group, Mr Austen Clarke, the Director of Clarke Group, Mr Finn Puklowski, former Investment Manager at Clarke Group, Mr Sam Martin, Financial Controller at Clarke Group, Ms Natalia Rozova, Project Manager at Clarke Group, all filed witness statements.

[11] Each witness who filed a witness statement attended the investigation meeting to answer questions. Each witness either swore on oath or affirmed their evidence was true and correct. Each witness had the opportunity to provide any additional information and comments and did so.

[12] The issues for the Authority to determine are as follows:

(a) Did Mr Clarke make statements to Ms Lawrence which amounted to racial harassment at their meeting on the morning of 19 May 2017?

(b) Was Ms Lawrence dismissed by Mr Clarke at the meeting on 19 May 2017?

(c) If Ms Lawrence was not dismissed on 19 May, was she dismissed on

24 May 2017? If Ms Lawrence was dismissed on 24 May 2017, did the dismissal comply with s.67B of the Employment Relations Act

2000 (the Act)?

(d) If the dismissal did not comply with s.67B of the Act, was it justified in accordance with s.103A of the Act?

(e) If Ms Lawrence was racially harassed, what remedies is she entitled to?

(f) If Ms Lawrence was unjustifiably dismissed, what remedies is she entitled to?

(g) Did Ms Lawrence contribute to either of her situations that gave rise to her personal grievances such that any remedies should be reduced for contributory conduct pursuant to s.124 of the Act?

First Issue

Did Mr Clarke make statements to Ms Lawrence which amounted to racial harassment at their meeting on the morning of 19 May 2017?

Employment of Ms Lawrence by Clarke Group – March 2017

[13] Ms Lawrence was interviewed for the role of Personal Assistant (PA) to the Director, Mr Clarke, on 16 March 2017. Ms Lawrence was interviewed by both Mr Clarke and Mr Puklowski. Both Mr Clarke and Mr Puklowski were very impressed by Ms Lawrence. Ms Lawrence told them, among other things that she had managed a number of companies, had a law degree from South Africa, was excellent with computers and could speak Portuguese fluently. Mr Clarke and Mr Puklowski, felt that she would be ideal in the role of PA to Mr Clarke.

90 day trial period

[14] Ms Lawrence was offered employment on 20 March 2017. The employment agreement included a 90 day trial period during which Clarke Group was able to terminate the employment relationship and Ms Lawrence could not bring a personal grievance on the grounds of unjustified dismissal.

[15] Clarke Group was able to terminate the trial period by providing “one day’s notice to the employee within the trial period”. There was no provision to pay salary in lieu of giving notice specified in the employment agreement.

Acceptance of employment by Ms Lawrence

[16] Ms Lawrence signed the employment agreement on 22 March 2017 and returned it to Mr Clarke.

Job Description

[17] Under the employment agreement Ms Lawrence was employed as Personal

Assistant, reporting to Mr Chris Sutherland and Mr Austen Clarke. [18] The job description included the following:

- Organise the personal life of the Director as required
- Manage office staff on behalf of Director where required
- Manage password or special information registers
- Agenda and Minute management – Director’s level and staff level
- Drive the Director to meetings when required
- Front of house for guests, serve tea and coffee
- Answer main receptionist phone if required
 - Ensure all communications such as Skype are prepared for meetings on behalf of the Director
- Manage Director’s cars, registrations, tickets etc
- Contact management, work and personal phone
- Management of travel reservations and entertainment at request
- Director’s schedule management
- Personal errands where required
- Register of reports and time management of staff responsible for reports
- Spreadsheets and data input
- Presentation preparation
- Drafting letters and email responses on behalf of Director.

Early employment issues

[19] Ms Lawrence says during the first couple of months of her employment, there were a couple of issues that she was unhappy with and surprised about. For example, when she arrived at work on 27 March 2017 there was not a desk or computer for her. There were some issues with the software and she says she was blamed by Mr Clarke for sending an email to the unsuccessful applicants for her position which copied in all the other applicants.

[20] Ms Lawrence says that she found Mr Clarke to be “abrasive with most of the people that he came into contact with” and she complained about his language and behaviour to both staff and suppliers as being “crude, abusive and bullying at times”.

[21] Mr Clarke accepts that at times he swore in the work environment. This was not at people but rather in times of stress. Mr Clarke disputes that he was ever abusive or bullying. Mr Clarke says there were a number of issues which arose during the first couple of months of Ms Lawrence’s employment which he found unusual, for example, her statement that she was fluent in Portuguese but apparently was not. Her statement that she was excellent with computers, but this did not appear to be the case when she started work.

[22] However, these were matters which were not raised with her and certainly no disciplinary steps were taken. Rather, they were matters which, in hindsight, he felt a level of discomfort with.

Thursday, 18 May 2017

[23] One of Ms Lawrence’s sons was due to attend Starship Hospital in Auckland for his quarterly check-up on 18 May 2017. Ms Lawrence’s partner, Mr John Lawrence, was to take him to the hospital. However, due to illness, Mr Lawrence was not able to do so.

[24] At 8:46am on the morning of 18 May 2017, Ms Lawrence messaged

Mr Clarke to inform him that she would be taking her son to a medical appointment at

11am but would be at work “as soon as she could”. Mr Clarke’s response was “No problem Elaine. Thanks for letting me know”.

[25] Ms Lawrence was to organise the cleaning of Mr Clarke’s car on 18 May

2017 for use by a client. There appeared to be a miscommunication during the course of the day about where the car was to be, for cleaning purposes. Ms Lawrence had arranged for the car to be cleaned at Mr Clarke’s house, rather than at Clarke Group’s offices. The cleaner arrived at Clarke Group’s offices to clean the car, but as the car was at Mr Clarke’s house, this was not possible. Mr Clarke was annoyed as he had a number of commitments which he had to rearrange and did not want to let people down.

[26] At 4:10pm, Mr Clarke sent an email to Ms Lawrence asking where she was. He continued:

Just got a message from May saying she is at the office? The first I heard. Now I have to rush home to get the Ferrari out of the garage for her when I was supposed to have my Chinese lesson.

[27] At 5:52pm, Mr Clarke sent an email to Ms Lawrence as follows:

Hi Elaine, I understand you were dealing with your Child today, and your husband was inadvertently sick. However there wasn’t any notice of this for me, and I got left in the lurch with May coming to wash my car at 4pm (when I had asked you to have her do it at my house). I had no idea she was coming in, at that time and had my Chinese lesson at the same time. Net result, I had to put off my lesson

30 minutes, May was kept waiting and I had to drop what I was doing to sort everything out. Also I asked you about it as soon as I knew at

4pm, and almost two hours later haven’t had any reply from you about it. I’ve been really busy today and without your support at work or been in communication to ensure things go smoothly it has made things a bit more challenging. I think it is fair that you are deducted a day’s pay for not coming in today given it was not a sick day and not pre-planned. Sam – please make the adjustment.

Kind regards

Austen Clarke

[28] At 6:14pm Ms Lawrence replied:

Hi Austen,

I have just got home after being at Starship since 11am. There is limited internet capability in the facility which is acknowledged by the medics who work there. I cannot possibly forecast as to when my husband is unwell to the extent that he could not take my son to his appointment. These appointments are set up three to four months in advance and to which my husband handles for me. In the circumstances can you please advise me as to how I can give you notice that my husband is going to be unwell and incapable of attending his normal duties to the point that my husband has been in bed very ill. In my opinion your reaction is extremely unfair and unreasonable and I am deeply hurt and insulted by your lack of compassion. I have excluded Sam from this correspondence and I'll see you tomorrow. If you wish to deduct a day's wage. Please proceed. Thank you.

[29] There were further emails exchanged between Mr Clarke and Ms Lawrence, disagreeing with each other's points of view. Mr Clarke's email complaining that he had not had any notice of the fact Mr Lawrence was ill and unable to take Ms Lawrence's son to the hospital and his deduction of a day's wage without discussion was not reasonable in my view. A more constructive approach would have been to discuss these issues first.

[30] At 8:37pm on 18 May 2017, Mr Clarke sent an email to Ms Lawrence setting out his version of events and asking that they meet in the office at 11am on 19 May

2017.

Meeting between Mr Clarke and Ms Lawrence on Friday, 19 May 2017 at 11am [31] Ms Lawrence says that she and Mr Clarke had a meeting in the boardroom at Clarke Group at 11:16am. She says Mr Martin and Ms Rozova were in the office but were not in attendance at the meeting with Mr Clarke. Ms Lawrence says she was

assailed by Mr Clarke verbally about what had happened the previous day. Ms Lawrence says that during the course of what she described as a tirade by

Mr Clarke he told her that she was a "white, middle aged woman and that she should not play the victim card using her son's medical status for sympathy".

[32] Ms Lawrence says Mr Clarke called her son a "kaffir" and a "nigger" and referred to Ms Lawrence as a "Saffa". There were further comments about her weight. At the end of the tirade Ms Lawrence says she was told by Mr Clarke to "take the door, fuck off now and leave the office". When she went to leave for the door, Mr Clarke said to her "Is that the way you want it?" Ms Lawrence says that following Mr Clarke's tirade she was of the opinion that she had been unequivocally dismissed from her job. She told Mr Clarke that she would finish her work for the day before leaving.

[33] Mr Clarke's version of events is very different. Mr Clarke said that he had arranged the meeting with Ms Lawrence because he wanted to talk about what had happened the day before. Mr Clarke was particularly angry by Ms Lawrence's statement to him that he did not have compassion. Mr Clarke prides himself on having compassion, integrity and values.

[34] Mr Clarke says he asked Ms Lawrence whether she wanted to say anything about their exchange of email correspondence the day before. Ms Lawrence declined. Mr Clarke says he re-stated his concerns about what had happened the day before and informed Ms Lawrence that he had employed her to make his life easier, not more stressful. Mr Clarke said he wanted Ms Lawrence to see his perspective and clear the air between them. Mr Clarke says Ms Lawrence did not see his perspective. Rather, she became incredibly defensive, took no responsibility and acknowledged no wrong- doing on her part.

[35] Mr Clarke says towards the end of the conversation, Ms Lawrence looked at him and said "You are an uncompassionate person, Austen". Mr Clarke was angry and frustrated by Ms Lawrence's apparent refusal to listen to him. Mr Clarke was also upset at the accusation that he was uncompassionate. He said to Ms Lawrence "*If you don't like working for me, Elaine, there's the door*". Mr Clarke says given the way in which the conversation was going and Ms Lawrence's attitude towards him, he wanted to remind her that she did not need to work at Clarke Group if she did not want to. Mr Clarke says the meeting was tense but there was no swearing and there were no personal or racial insults made by him, he would never make such statements.

[36] Mr Martin and Ms Rozova, who were both in the Clarke Group offices at the time, did not hear the conversation between Mr Clarke and Ms Lawrence. Following the meeting, Ms Lawrence apparently sent an email to Mr Lawrence. The email address to which the email has been sent is eljl@extra.co.nz. Subject: Meeting with Austen/dismissal.

[37] The email stated:

Hi Honey,

Austen has just told me to take the door and F off. He was so vocal and abusive it was unreal. I was wondering whether you could call Michael and get some advice for me.

I have asked Austen for a letter to confirm his decision and await same. In the meantime, I have to finish off urgent tasks and hand over everything to Sam (accountant) since he and Natalia are the staff in the office.

Austen and I were the only two in the meeting which was held in the boardroom. Can he fire me like this?

Love you.

[38] The reference to Mr Smyth, was to Mr Michael Smyth, Ms Lawrence's lawyer.

[39] Mr Lawrence says he telephoned Mr Smyth following receipt of the email. A

copy of phone calls made by him to contacts include to Mr Smyth at 12:22 on 19 May

2017.

[40] Counsel for Clarke Group was concerned at the veracity of the email and asked counsel for the applicant to provide a screenshot which included the metadata¹ for the email. This was not provided. At the Authority's investigation meeting, the Authority directed that the screenshot be provided. The screenshot has not been provided. The Authority had concerns over the email, as it differed in style to all other emails exchanged. The Authority wished to investigate this further. The

screenshot with the metadata was never produced.

1 <https://techterms.com/definition/metadata>: A text document's metadata may contain information about how long the document is, who the author is, when the document was written, and a short summary of the document

[41] Mr Lawrence says he received the email from Ms Lawrence at 11:45am. After receiving it, he tried to ring Mr Smyth and eventually was able to talk with him. Mr Lawrence did not speak with Ms Lawrence between receiving her email and speaking with Mr Smyth. Mr Lawrence said he told Mr Smyth that Ms Lawrence had been told to fuck off and to use the door. Mr Lawrence asked Mr Smyth what his "take on that was". The response from Mr Smyth was that he thought it was an "unequivocal dismissal". Upon receiving this advice from Mr Smyth, Mr Lawrence rang and told Ms Lawrence.

[42] In her witness statement, Ms Lawrence says that after the meeting with Mr Clarke, she was of the opinion that she had been unequivocally dismissed from her job. This appears to be the advice that she received through her partner, Mr Lawrence, not having spoken to Mr Smyth herself.

[43] Ms Lawrence did not clarify with Mr Clarke whether or not she had been dismissed. Ms Lawrence continued working in the office from the conclusion of the meeting at approximately 11:30 in the morning until approximately 6pm that evening. I find this very difficult to reconcile with Ms Lawrence's claim that at the meeting with Mr Clarke he made extreme racial slurs about her and her son and told her to fuck off.

"Contemporaneous notes"

[44] Ms Lawrence says that she made "contemporaneous notes" following the meeting with Mr Clarke on 19 May 2017 recording events and what was said. These "contemporaneous notes" were not provided to the Authority or to Clarke Group prior to the investigation meeting. Ms Lawrence referred to them for the first time at the investigation meeting. The "contemporaneous notes" were stapled in to the pages of a hard-back workbook from Clarke Group that Ms Lawrence brought to the Authority meeting. This was the first the Authority was aware of them. They were not mentioned in the personal grievance letter, the statement of problem, Ms Lawrence's witness statement nor Mr Lawrence's witness statement. The parties had been issued with a direction at the Authority's telephone conference held on 8 November 2017 that all relevant documents be provided in a bundle of documents by 15 December

2017.

[45] There was no plausible reason given to the Authority for the failure by Ms Lawrence to produce the notes prior to the Authority's investigation meeting or to reference them in the pleadings and witness statements filed. I do not accept that the notes were made by Ms Lawrence immediately following the meeting on 19 May

2017. I do not accept they were "contemporaneous".

[46] The Authority directed Ms Lawrence to produce a screenshot of the email from her to Mr Lawrence on 19 May at 11:45am with the metadata. This has never been produced, nor has an explanation for its non-production been provided.

[47] The email from Ms Lawrence to Mr Lawrence, even if it was sent, contains no reference to racial slurs by Mr Clarke at the meeting on 19 May 2017. This seems highly unusual given their specificity.

[48] I do not accept that Mr Clarke made racial statements as alleged by Ms

Lawrence. Ms Lawrence was not the subject of racial harassment.

Findings regarding meeting on 19 May 2017

[49] It is my view that at the meeting on 19 May 2017, Ms Lawrence became defensive with Mr Clarke when questioned by him about the events of the day before. Mr Clarke told her that she did not have to work for him and if she did not want to, “there’s the door”. Following this statement by Mr Clarke, Ms Lawrence did not go home, she remained working. She asked Mr Clarke for a decision and he told her there was no decision.

[50] Ms Lawrence sent an email to a work colleague using her work email address over the weekend. Following tragic news about her son in the early hours of the morning of 21 May 2017, Ms Lawrence sent a text message to Mr Clarke telling him about her son. Mr Clarke responded later that morning with his condolences.

[51] Ms Lawrence’s actions were not consistent with those of a person who has been racially harassed.

Second Issue

Was Ms Lawrence dismissed by Mr Clarke at the meeting on 19 May 2017?

21 May 2017

[52] At 7:48pm on Sunday, 21 May 2017, Mr Clarke sent an email to Ms Lawrence informing her that in light of her family situation, she could have the following two days off as paid leave but that he would like to meet with her at 4pm on Tuesday, 23 May 2017, to “catch up with [her] about her employment”. Ms Lawrence was offered the opportunity to bring a support person. If Ms Lawrence thought she had been dismissed on 19 May 2017, this email should have made it clear that she had not been.

[53] On Tuesday, 23 May 2017, Ms Lawrence forwarded an email received from Mr Clarke’s Russian teacher to Mr Clarke. This suggests Ms Lawrence was still using her work email and had not been dismissed. I do not consider Ms Lawrence’s actions following the meeting on 19 May 2017, were consistent with those of a person who had been subject to serious racial slurs and dismissed. Ms Lawrence was not dismissed by Mr Clarke on 19 May 2017.

Personal grievance claim

[54] At 3:40pm on 23 May 2017, just prior to the scheduled meeting with Mr Clarke to discuss her employment, Mr Clarke received a letter from Ms Lawrence’s lawyer, Mr Smyth. The letter raised personal grievances of racial harassment and unjustifiable dismissal.

[55] The letter from Mr Smyth stated that Ms Lawrence was not going to attend the meeting scheduled for later that day because she had already been dismissed.

[56] I agree with the submissions made on behalf of the Clarke Group that if Ms Lawrence genuinely believed that she had been dismissed, then she should have attended the meeting on 23 May 2017 to have her misunderstanding clarified. Instead, through her lawyer, Ms Lawrence declined to attend the meeting, informing Mr Clarke she was of the view that she had been dismissed.

[57] Ms Lawrence was not dismissed on 19 May 2017.

Third Issue

If Ms Lawrence was not dismissed on 19 May, was she dismissed on 24 May

2017? If Ms Lawrence was dismissed on 24 May 2017, did the dismissal comply with [s.67B](#) of the [Employment Relations Act 2000](#) (the Act)?

[58] On 24 May 2017, Mr Clarke sent an email to Ms Lawrence. The subject heading was “*About your employment with Clarke Group*”. Mr Clarke clarified in the email that he did not dismiss Ms Lawrence on Friday, 19 May 2017. Mr Clarke then stated the purpose of the meeting that she was to attend on 23 May 2017. The letter states:

The purpose of my meeting with you scheduled for 4pm yesterday (23rd May 2017) was to invoke clause 12.1 of your employment agreement, which provides that we may terminate your employment on the provision of one day’s notice during the 90 day trial period from the commencement of your employment (27 March 2017). As you did not meet with me at 4pm yesterday, I attach confirmation of this decision effective today, Wednesday 24 May 2017. You are entitled to one day’s notice, so you will be paid up until tomorrow, Thursday 25th May 2017. Your last day is today, so you will be paid in lieu of you working out your notice.

[59] Clause 12 of the employment agreement states:

12.1 Termination of trial period

The employer may terminate the trial period by providing one day's notice to the employee within the trial period.

[60] [Section 67A\(2\)](#) of the Act is the trial period provision. There was no dispute between the parties that the employment agreement contained a valid trial provision. However, counsel for the applicant submits that Clarke Group did not comply with the notice provisions in the employment agreement when terminating Ms Lawrence's employment under the trial period provision. [Section 67B](#) of the Act materially states:

(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.

[61] Therefore, if there is not a lawful termination under [s.67B\(1\)](#), then the personal grievance barrier provided by subsection (2) does not apply.²

[62] Mr Clarke's letter of termination gave Ms Lawrence one day's notice. Ms Lawrence was informed that her final day was the day on which she received the notice of termination but that she was going to be paid in lieu of working out her notice. There was no provision in the employment agreement for payment in lieu of notice. In *Farmer Motor Group Limited v Adam McKenzie*³, Judge Perkins referred to

the Employment Court decision in *Coca Cola Amatil v Kaczorowski*⁴ in which the

Court reinforced that "usually it will be expected that an employee will work out the period of notice". Judge Perkins then confirmed the case law in respect of 90-day trial period provisions which have—

removed a fundamental right to bring proceedings for an unjustifiable dismissal and accordingly must be given strict interpretation both in respect of the statutory provisions applying and the contractual provisions. That was the primary principle enunciated by Chief Judge Colgan in *Smith*⁵ and it prevails in this case.

[63] The distinction in this case is that Ms Lawrence, through her lawyer, had informed Mr Clarke in writing on 23 May 2017 that she believed she had been dismissed and therefore was not going to attend the meeting on 24 May 2017 to talk about her employment. This was a clear statement in my view that Ms Lawrence was not going to return to work for Clarke Group; she was of the view that she had been dismissed.

[64] Ms Lawrence erroneously formed the view that her employment had been terminated on 19 May 2017 and acted accordingly. My conclusion is that Ms Lawrence waived her right to work out her notice period by refusing to come to the meeting on 24 May 2017 and by not returning to work. It was not then open to Ms Lawrence to challenge the validity of the termination of the trial period on 24 May

2017. Ms Lawrence was paid out notice.

[65] Ms Lawrence does not have employment relationship problems. Accordingly, there will be no remedies.

² *Smith v Stokes Valley Pharmacy (2009) Limited* [\[2010\] NZEmpC 111](#)

³ [\[2017\] NZEmpC 98](#)

⁴ [1998] 1 ERNZ 264 (CA at 280)

⁵ *Smith and Modern Transport Engineers (2002) Limited v Phillips* [\[2016\] NZEmpC 68](#)

Costs

[66] Costs are reserved. Clarke Group has 14 days within which to file a memorandum as to costs. Ms Lawrence has 14 days within which to respond.

Anna Fitzgibbon

Member of the Employment Relations Authority