

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 276  
3025077

BETWEEN

MELISSA MARSHALL  
Applicant

A N D

THINK GREEN LIMITED  
Respondent

Member of Authority: T G Tetitaha  
Representatives: G Bennett, Advocate for Applicant  
H Pryde, Counsel for Respondent  
Investigation Meeting: 27 August 2018 at Auckland  
Submissions Received: 27 August 2018 from both parties  
Date of Oral Determination: 27 August 2018  
Date of Written Determination: 28 August 2018

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**ORAL DETERMINATION OF THE AUTHORITY**

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**A. The application for personal grievance of unjustified dismissal is dismissed. Costs are reserved.**

**Employment relationship problem**

[1] Melissa Marshall alleges she was unjustifiably dismissed on 26 February 2018 pursuant to an invalid 90 day trial period clause in her employment agreement. She submits it was invalid because she was employed by Think Green Limited (TGL) before she signed the agreement. Think Green Limited disagrees that Ms Marshall was previously employed or that the trial period clause was invalid.

**Relevant Facts**

[2] Think Green Limited is a family owned business that supplies eco-friendly maternity products online and through retail outlets. Max van der Haast and his wife Shu Ting Zhang are both directors of the company.

[3] Ms Marshall is a friend of Mr van der Haast's daughter, Morgan. Morgan was the previous CEO of Think Green Limited. I understand she had an employment dispute with the company that has settled.

[4] Ms Marshall had been living with Morgan for approximately six years prior to 2017. During this period Ms Marshall was also in full time employment elsewhere as an executive assistant to a local law firm. As a consequence of her association with Morgan she became familiar with the company's products.

**Working for Think Green Limited**

[5] It is accepted in 2015 Morgan asked Ms Marshall to assist the company with a baby show in Auckland. Ms Marshall spent approximately 2 to 3 days manning the stand and helping pack it down.

[6] It is accepted in 2016 Morgan asked Ms Marshall to travel to a trade show in Germany. Ms Marshall took paid holiday leave from her full time employment to attend. Think Green Limited paid for her travel expenses from New Zealand to Germany including accommodation and meals. Ms Marshall also paid for a side trip to Greece to see a friend.

[7] In 2017 Ms Marshall began taking on more work for Think Green Limited. In June 2017 she started proof reading Think Green's product manuals. She was asked by Morgan to invoice Think Green Limited for her work. She was told this would make it "easier" on the company. Ms Marshall produced an invoice dated 21 June 2017. The invoice was for six hour work at \$40 per hour for "proofing of product manuals."

[8] Between 22 June and 20 August 2017 Ms Marshall began taking on further work for Think Green Limited. This included 5.5 hours proof reading paid at \$40 per hour and attending a baby show in Auckland for 14 hours at \$20 per hour.

[9] Between 21 August to 4 September 2017 Ms Marshall was asked to attend the trade show in Germany again. This also involved a stopover in the United Kingdom for the purpose of training local staff about Think Green's product. Ms Marshall took no side trips this time. She returned home immediately after the Germany trade show had ended. She provided an invoice for her time dated 4 September 2017. This noted training staff for 14 hours and "working at the German show" 28 hours @ \$20 per hour.

### **Offer of Employment**

[10] It is accepted in October 2017 Think Green's director Max van der Haast contacted Ms Marshall from China. He spoke to her on the phone about full time employment selling a new brand of product the company was about to start selling. Ms Marshall refused to consider any employment offer unless and until she could meet them face to face and received a written employment contract.

[11] Evidence was produced at the hearing of emails between Max van der Haast and his solicitor. The emails dated 1 and 2 November 2017 refer to the drafting of an employment contract. An agreement was given to Ms Marshall but there is a dispute about when she received it.

[12] Mr van der Haast believed the contract had been given to Ms Marshall by Morgan on or about 2 November 2017 or earlier. Ms Marshall attested to having been given the contract for the first time at a dinner that Max van der Haast had arranged to "celebrate" her employment. In either case by 3 November 2017 Ms Marshall signed her employment agreement.

[13] Ms Marshall's employment agreement included in particular, the following clauses:

1.3: ... This agreement shall commence on 1.12.2017.

#### **4 Documents and advice**

4.1 Before entering into this Agreement the Employer shall provide the Employee with a copy of it and shall advise the Employee that they are entitled to see independent advice about it and shall give the Employee a reasonable opportunity to seek that advice.

**18 Trial Period – NA**

18.1 Pursuant to sections 67A and 67B of the Employment Relations Act 2000 (“the Act”), the parties agree that the Employee will serve a trial period of ninety (90) days from the Commencement Date (“the trial period”). Accordingly, at any time during the Trial Period the Employer, at its sole discretion, may terminate this Agreement by giving one (1) week’s written notice to the Employee.

**27 Completeness and advice**

27.1 This agreement is between you, the Employee and the Employer. Any alterations are strictly by mutual agreement between the contracted parties. This agreement replaces all previously written or oral agreements and understandings and it represents a full record of the agreement entered into between the parties.

27.2 By signing this agreement the Employee acknowledges:

- (a) All representations, whether oral or in writing, made by them when applying for this position about their qualifications and experience are true and correct and they have not deliberately failed to disclose any matter which have materially influenced the Employer’s decision to employ them.
- (b) They have been informed about their entitlements under the Holidays Act 2003 and they are aware of their ability to obtain further information in regard to those entitlements from the Department of Labour.
- (c) They have been advised to seek independent advice about the terms of this offer and they have had sufficient time to do so. In accepting this offer they have not relied on the advice of the Employer or any of its representatives about what those terms mean.

[14] Ms Marshall then commenced working at Think Green’s offices on 1 December 2017.

[15] By 26 February 2018, 87 days after the trial period had begun Ms Marshall’s employment was terminated.

**Issues**

[16] The parties have agreed that today's hearing is focussed on the limited preliminary issue of whether there was a valid 90 day trial period.

**Was Ms Marshall employed prior to signing the employment agreement?**

[17] Ms Marshall submits she was employed at some stage between June to September 2017. She accepts she was not employed in 2015 or 2016 when she attended the trade shows in Auckland and Germany. She believes she was employed by September 2017 because of the regular amount of work she was receiving from Think Green at that time. This included proof reading that had to be completed by a deadline. The work continued up to the date she started working at Think Green's offices on 1 December 2017.

[18] Although she invoiced for work prior to 5 September 2017 Ms Marshall decided she would not invoice Think Green again. This is because she alleges she was employed and considered the work she was doing in this period of time as part of her employment.

[19] Ms Marshall also referred to Think Green paying for her travel expenses to Germany in 2017 including accommodation and meals. She alleges she was not allowed any time to herself during this period.

***Definition of Employee***

[20] Section 67A of the Employment Relations Act 2000 provides for when an employment agreement may contain a trial period for 90 days or less. Section 67A(3) of the Act limits trial periods to workers whom have not been previously employed:

**Employee** – Means an employee who has not been previously employed by the Employer.

[21] An "employee" is defined by s.6 of the Act as "any person of any age employed to do any work for hire or reward under a contract of service and includes... a person intending to work."

*Was Ms Marshall an Employee?*

[22] I think that is a reasonable concession by Ms Marshall that she was not employed in 2015 and 2016 by Think Green Limited. There is no evidence of any discussion between the parties about employing her or expectation by her of work for reward.

[23] I accept Max van der Haast's evidence that this was a fledgling company in 2015. It had started in a double garage at his home. It had insufficient funds to pay Ms Marshall any wages at that time.

[24] From the evidence including the invoices Ms Marshall has produced, her work for the company remained sporadic. Although the regularity may have increased in 2017, this was for a 3 month period and for limited hours only.

[25] Ms Marshall undertook the same or similar work at trade shows for Think Green in 2015 and 2016 including paid travel to Germany for a trade show. She did not believe she was employed in 2015 and 2016. Therefore similar work travelling to Auckland and Germany in 2017 cannot be a factor that indicates she is employed.

[26] I do not accept she was under Think Green's "control" or was integral to the business. Although she alleged she had no free time during the travel to Germany in 2017 there was nothing to suggest that it would not have been granted if she so desired it. She was given the time and resources to travel to Greece at her leisure following the Germany baby show in 2016. I see no evidence to suggest she couldn't have travelled or done other things in her free time in 2017.

[27] There was also evidence that she was free to accept or refuse this work throughout 2015, 2016 and 2017. She accepted under examination that she would have refused the Germany trade show if her (then) employer had refused to release her.

[28] Ms Marshall also accepted that prior to 1 December 2017 she had not been provided with any training, office or equipment or even paid internet by Think Green to do the job that she says she was employed to do. It is clear on the evidence that she provided her own tools to do this job and had the skills to do it without any training.

[29] Given the low level sporadic work she was offered, it appeared she was in business on her own account. She was in full time employment elsewhere at the time. They were aware of the work she was doing for Think Green. She did not tell them she was in secondary employment at the time. She does tell them she is doing some work for Think Green.

[30] There is also the issue of her invoicing. She ought to have known invoicing was not how employment worked. The invoices also show differing rates to be paid for the work she did - \$40 per hour for proof reading and \$20 per hour for attending trade shows. This was another anomaly she would not have expected if employed. She had simply been told by Morgan to invoice and that that was the rate.

[31] She paid no tax on the income she received during this period of time. When questioned about taxes she did not know whether taxes were to be paid on that income and whether Think Green was going to pay them on her behalf.

[32] Ms Marshall's submission that she continued working for Think Green after her last invoice dated 4 September but did not bill was also perplexing. She may have considered this work to be part of her permanent employment but on her own evidence expects no reward for it.

[33] She never discusses the possibility of not invoicing for that work with anyone from Think Green Limited. She states she assumed she shouldn't invoice because she formed the belief she was then employed after September 2017. She accepted she kept a tally of her hours worked post September 2017 for invoicing, but has since discarded this because of her belief about being employed. This evidence appears inconsistent and contradictory.

[34] Overall the evidence strongly indicates she was not employed by Think Green Limited prior to 1 December 2017.

**Did Ms Marshall agree to the trial period?**

[35] At hearing Ms Marshall appeared to resile from having agreed to a trial period in her employment agreement. Although she accepted she knew what trial periods were, she then denied that she was informed one would apply to her employment. There is no particular discussion she points to with Think Green that would support this statement.

[36] Instead Ms Marshall relied upon the title wording for the trial period in the employment agreement itself. Clause 18 states “Trial Period – NA”. She submits the letters “NA” refer to not applicable. She does not raise this with Think Green at the time. Mr van der Haast accepts that may be an interpretation of the words but it was never intended that a trial period not apply to her employment.

[37] Mr van der Haast did not draft this agreement. I understand it was done by his lawyers. I cannot see how Ms Marshall can rely on those letters in clause 18 of the agreement as evidence that the trial period was not to apply. This is because her earlier evidence when I put to her the contents of the agreement was that she barely read the agreement at all. She stated she “skimmed it” especially clauses 4, 18 and 27. That is her explanation as to why she signed an agreement stating that she had adequate opportunity to take legal advice and yet today at hearing stated she did not have an opportunity to do so.

[38] I prefer Mr van der Haast’s evidence that a trial period was always intended because Ms Marshall had little or no experience in sales given her secretarial background. He wanted to see if she would be able to do the job. The words “NA” are more likely to have been a drafting error. There is certainly no correspondence showing a trial period was not to apply to Ms Marshall. I doubt Ms Marshall even saw those words at the time she signed.

***Opportunity to get legal advice?***

[39] Ms Marshall alleged she had insufficient opportunity to get legal advice before signing. She states she was handed the contract and signed on 3 November 2017. However it is clear she had a copy of the agreement and made the decision to sign it there and then. There is no evidence she was under pressure to sign. She then had a further period of at least a month before she started work with Think Green Limited on 1 December 2017.

[40] When asked why she did not seek legal advice before she signed or even during the period before she started work she told me “I chose not to”. She trusted the van der Haast family to act in her best interests. That is not evidence of unfair bargaining or is a basis to set aside the trial period.

[41] Ms Marshall most likely had more knowledge resources and possibly skill about trial periods than Think Green's directors did. She had come from working in a law firm.

**Outcome**

[42] Mellissa Marshall was not employed by Think Green Limited before 1 December 2017. Therefore Ms Marshall was justifiably dismissed pursuant to a valid trial period clause.

[43] The application for personal grievance of unjustified dismissal is dismissed. Costs are reserved.

**T G Tetitaha**  
**Member of the Employment Relations Authority**