IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 114
5391577

	BETWEEN	ANITA MENZIES Applicant
	AND	SAFARI GROUP NZ LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	R Pool, counsel for applicant I Pitham, advocate for respondent
Investigation meeting:	8 February 2013
Determination:	3 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Anita Menzies says her former employer, Safari Group NZ Limited (SGNZL) dismissed her unjustifiably at the end of a probationary period.

[2] SGNZL says Mrs Menzies had not performed satisfactorily during the probationary period, and it decided not to continue her employment.

Background

[3] SGNZL is a property development and construction company. It maintains a small staff of some 3-4 people, and a contractor. After its office manager resigned early in 2012, it advertised for an administration assistant to replace her. The required duties were clerical in nature and included basic account management, data entry, providing secretarial support, managing office services, and other office duties.

[4] Mrs Menzies had a background in sales and promotional positions before establishing a property maintenance company with her husband. She was also

studying for a Bachelor of Architectural Studies degree at the University of Auckland, and had recently enrolled for a National Diploma in Construction Management at the Open Polytechnic. She responded to SGNZL's advertisement because she was looking for an entry level project management position as well as seeking a mentor while she completed the project management course. She hoped the position with SGNZL would assist her into a position more aligned with her career goals.

[5] Ian Pitham, who is a chartered accountant engaged by the Safari Group, interviewed Mrs Menzies on 4 April 2012. The parties discussed the administrative nature of the role, and Mr Pitham noted Mrs Menzies' lack of any bookkeeping or accounting skills. Even so he was impressed with her, and he and the company's directors believed she could be groomed for involvement in the property development business. Meanwhile she would be expected to carry out the administration assistant's duties.

[6] After further interviews, SGNZL made an offer of employment in a letter dated 12 April 2012. The position offered was that of administration assistant, and hours of work were to be 7.30 am to 5 pm on Monday – Friday. Mrs Menzies would report directly to one of the directors, Robert Neil.

[7] The employment agreement included a probationary provision, which read:

> *5.1 The appointment is subject to a probationary period of three months from the commencement date. The purpose of the probationary period is to enable the company to determine whether or not the employee is able to satisfactorily perform the duties and responsibilities of the position.*
>
> *5.2 If the company does not wish to appoint the employee permanently for any reason whatsoever after the probationary period, the company will give one week's notice or the equivalent of one week's pay in lieu of notice prior to, on, or upon the completion of the probationary period. Similarly if the employee does not wish to continue employment during the probationary period, the notice of termination required to be given to the company is one week.*
>
> *5.3 There shall be no express or implied obligation on the company to continue the employee's employment after the expiry of the probationary period.*

[8] Mrs Menzies' employment began on 16 April 2012. She went home sick at lunchtime that day, and was absent for the rest of the week. She was absent because of sickness for a half day on 9 May, for the full day on 14, 15 and 22 May, and again for a half day on 5 June. She was also late to work or left early on other occasions.

There were genuine reasons for these absences, and Mrs Menzies notified SGNZL of them.

[9] Unfortunately, Mrs Menzies' absence during the rest of the first week of her employment meant she was unable to participate in the training and induction planned with the departing office manager. When Mrs Menzies returned to work the office manager's employment had ended, and Mr Pitham attempted to train her in data entry and basic clerical aspects of accounting. During the course of the parties' relationship he concluded that she was unable to grasp basic accounting principles, and had failed to perform particular office tasks accurately or efficiently.

[10] A second area of concern to the company was the perception that Mrs Menzies spent too much time on social interactions in the office, and too much time attempting to discuss project management matters with Mr Neil rather than attending to her duties. From Mrs Menzies' perspective, there was a lull in the workload because the outcome of a council hearing meant a major development which was due to commence would be delayed until at least September. From the company's perspective there was plenty of work for Mrs Menzies to do, had she asked.

[11] In late May or early June a combination of her inability to recover fully from her illness, and her understanding that the current workload was light, led Mrs Menzies to approach Mr Pitham about reducing her hours of work from 5 to 3 days per week. Mrs Menzies, Mr Pitham and Mr Neil, met for a more formal discussion on Friday 8 June 2012.

[12] The outcome was confirmed in a letter dated 8 June 2012. The letter purported to minute the discussion, noting that: '*due to a number of factors, but ma[i]nly your poor health recently, that you have not been able to provide attendance and service to the levels that we had envisaged at the beginning of your employment'*. It recorded an agreement that, to assist Mrs Menzies to recover her health, the hours of work would be reduced to a 3 day week, being Monday, Wednesday and Friday. The arrangement would continue for 4 weeks, after which Mrs Menzies would advise of her progress and the parties would determine the further action to be taken.

[13] The letter ended by commenting that the probationary period would expire on 16 July 2012. It went on to note that *'during this time period we will be able to assess the requirements for the role and your ability to fulfil those requirements.'*

[14] On its face the letter focussed on Mrs Menzies' health as a reason why her attendance and service had not reached the expected level. Although other factors were referred to they were not detailed, and were not identified as significant concerns. On the company's evidence these factors included its concerns that Mrs Menzies: struggled with data entry and basic bookkeeping; lacked attention to detail; lacked urgency; and was not proactive. Despite the wording of the letter, it said these matters were also discussed at the 8 June meeting.

[15] Mrs Menzies denied there was such a discussion. I find it likely that some of the incidents on which these concerns were based were mentioned or commented on at the meeting. I find it unlikely that this was done in a manner sufficient to alert Mrs Menzies that the wider concerns needed to be addressed or her employment would be in jeopardy.

[16] Mrs Menzies was absent again on Monday 11 June and Friday 29 June. On Friday 6 July she asked Mr Neil for an extension of 2-3 weeks to the agreement on her reduced hours of work. She believed she was recovering well and would be back to full health by then, and wanted to ensure she could maintain that state successfully. In an emailed message to Mr Neil dated 6 July she expressed uncertainty about how rapidly or heavily the workload was picking up, and stressed that: '*it is only if you are in a position that you can offer me the extra few weeks of part time without causing you problems.'*

[17] Mr Neil and Mr Pitham remained dissatisfied with Mrs Menzies' level of attendance and service. They decided to act under clause 5 of the employment agreement as they understood it to mean. Mr Neil said in evidence that they did not believe Mrs Menzies' performance would be able to come up to the required standard. Mr Pitham said that, when he became aware of Mrs Menzies' request for an extension to her shortened working week, he was concerned because he believed there was a need for a full time administration assistant. He and Mr Neil believed Mrs Menzies' health had not reached a level that would allow her to return to a full time working week.

[18] Mr Neil and Mr Pitham met with Mrs Menzies again on Monday 9 July 2012. They advised her they were exercising the employer's rights under clause 5.2 of the employment agreement, and were giving her one week's notice of their intention not to appoint her to a permanent position. They offered her a choice between working through the notice period and leaving immediately. Mrs Menzies chose to leave immediately.

[19] Later that day Mrs Menzies sent an email message to Mr Neil, thanking him for the opportunity at SGNZL and saying she understood the position required someone who was more of an accounts clerk. She hoped Mr Neil could mentor her in her construction papers.

Was the dismissal justified

[20] Employment agreements may contain one of two kinds of probationary or trial provisions. They are:

- probationary arrangements under s 67 of the Employment Relations Act 2000, which are subject to the personal grievances procedures; and
- trial periods under s 67A and B of the Act, under which employees are prevented from bringing a personal grievance if their employment agreement complies with s 67A and their employment is terminated in accordance with a notice of the termination of the trial period.

[21] SGNZL believed cl 5 of the employment agreement here was within the second of these. However s 67A and B must be interpreted and applied strictly.[1] Clause 5 does not comply with s 67A in that it does not contain the required express references to the termination of employment and the personal grievance procedure. The clause does not apply to permit the termination of Mrs Menzies' employment on notice and without more, and does not prevent Mrs Menzies from raising a personal grievance.

[22] As worded cl 5 more closely resembles an arrangement under s 67 of the Act, and I accept at least that the parties agreed to a trial or probationary period of three

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

months. Even so, clause 5.2 cannot be applied so that the employer has carte blanche to terminate employment for 'any reason whatsoever', and clause 5.3 is probably unenforceable. That is because the effect of the provisions is to purport to limit the term of employment to a fixed term of three months in a manner that breaches s 66(3) of the Act.

[23] The law on trial or probationary periods (other than those entered into under s 67A and B) is long-standing, and has been expressed as follows:

> *Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings, to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will be coming to an end.*[2]

[24] The termination of employment at the end of a trial or probationary period is subject to the test of the justification for a dismissal in s 103A of the Act. That test is whether SGNZL's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. In applying it the Authority must consider whether SGNZL:

- sufficiently investigated the allegations against Mrs Menzies before dismissing her;
- raised its concerns with her before dismissing her;
- gave her a reasonable opportunity to respond; and
- genuinely considered her explanation before dismissing her.

[25] In that the decision not to offer further employment to Mrs Menzies was based on a view that her health did not permit a return to a full time working week, that view was not put to her before the decision was made. SGNZL should have advised Mrs Menzies that it wished to meet with her to discuss: the requirement for a full time administration assistant; the concerns that her health would not accommodate that

[2] *Nelson Air Limited v NZ Air Line Pilots Association Inc* [1994] 2 ERNZ (CA). The Employment Court re-stated these points more recently in *NZ Meat Workers & Related Trade Union Inc v AFFCO New Zealand Ltd* [2010] ERNZ 139.

requirement; and the possibility that her employment would not continue as a result. It should then have sought and considered Mrs Menzies' responses before making its decision.

[26] During this process it should also have followed up on the uncertainty expressed in Mrs Menzies' 6 July message regarding workload, and discussed this in the context of the request to take more time to recover full health. In doing so it should also have sought more details of Mrs Menzies' current state of health and her prognosis. It could not rely on the message alone as the answer to that.

[27] In that the decision incorporated other performance-related factors, those matters were not put to her on 8 June or any other time as reasons why her employment might not continue beyond the end of the probationary period. Further, SGNZL did not advise Mrs Menzies of what she needed to address in order to show any necessary improvement, and did not state that her continuing employment was in jeopardy if she did not show improvement.

[28] These failures mean I find SGNZL did not act as a fair and reasonable employer could have in the circumstances at the time of the dismissal. Mrs Menzies' dismissal was unjustified.

Remedies

[29] Mrs Menzies seeks the reimbursement of remuneration lost as a result of her personal grievance, and compensation for the injury to her feelings.

1.Reimbursement of lost remuneration

[30] Mrs Menzies did not receive payment in lieu of notice. If that remains the case then she is entitled to the payment of one week's pay in lieu of notice. Her decision to leave immediately when she was offered the choice did not amount to a waiver of her notice entitlements.

[31] SGNZL is ordered to pay Mrs Menzies one week's pay in lieu of notice if that payment has not been made.

[32] Regarding the reimbursement of remuneration lost since 16 July 2012, Mrs Menzies has not obtained alternative employment.

[33] It is not appropriate to order the reimbursement of remuneration lost over the full period of loss to date. Mrs Menzies would not have been able to, or wanted to, remain in a junior clerical position for long. She would either have moved into the junior project management position she hoped for, or sought alternative employment. For those reasons I decline to consider an order for reimbursement of more than three months' lost remuneration.

[34] As for attempts to mitigate her loss, despite an indication she had given on 9 July Mrs Menzies decided not to proceed with the remaining paper in her architecture degree. She has applied without success for vacancies as a junior project manager, and has approached firms of architects for entry level positions, but she has not applied for other positions for which her background would qualify her.

[35] For personal reasons Mrs Menzies has not sought to be active in the property maintenance company of which she and her husband are the shareholders. I accept those reasons and do not consider they contribute to a failure to mitigate. However she could have sought positions other than project management or architecture position, so I find there has been some failure to mitigate. For that reason I take as a starting point two months' lost remuneration.

[36] I turn last to whether there has been contributory fault. Although Mrs Menzies' attendance was poor, her illness was not her fault and the reduction in her hours of work was agreed. Her standard of performance was affected by the fact that she was inexperienced in the tasks required of an administration assistant, and her ability to pick up the requirements of the position quickly was impaired by her absences. I accept in a general way that she made errors and from time to time was inefficient, but some of the specific concerns discussed in the evidence were taken out of context or were overstated.

[37] I find in addition that there was a failure in communication between Mr Pitham and Mr Neil on the one hand, and Mrs Menzies on the other, regarding the company workload. Mr Pitham did not accept that the workload was light, and said Mrs Menzies could have asked for more tasks, or in any event that she should have

been proactive in identifying work to be done. For her part Mrs Menzies made assumptions about workload, which were not necessarily well-founded, based on her limited observations and her knowledge of the delayed start to the major development. Both parties should have been more proactive in addressing what tasks Mrs Menzies should carry out, and SGNZL should at least have indicated to Mrs Menzies at the time the dissatisfaction it has expressed during the investigation meeting.

[38] Overall, although Mrs Menzies should not have made the assumptions she did, SGNZL had the obligation to manage and supervise her. There was not enough in Mrs Menzies' conduct to amount to contributory fault warranting a reduction in the remedy awarded.

[39] SGNZL is therefore ordered to reimburse Mrs Menzies for lost remuneration in the sum of two months' salary.

2. Compensation for injury to feelings

[40] Mrs Menzies suffered injury to her feelings as a result of her personal grievance, particularly in the form of shock and a loss of confidence.

[41] SGNZL is ordered to compensate her for this injury in the sum of $4,000.

Summary of orders

[42] SGNZL is ordered to pay to Mrs Menzies:

(a) one week's pay in lieu of notice;
(b) two months' salary as reimbursement of lost remuneration; and
(c) $4,000 as compensation for injury to her feelings

Costs

[43] Costs are reserved.

[44] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in

which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority