

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 504
3247279

BETWEEN CINDY ROOKES
Applicant

AND TILLMANS FINE FURNITURE
LIMITED
Respondent

Member of Authority: Lucia Vincent

Representatives: Dave Cain, advocate for the Applicant
Kathryn Dalziel, counsel for the Respondent

Investigation Meeting: 16 and 17 April 2024 in Ōtautahi / Christchurch

Submissions Received: 3 and 24 May 2024 from the Applicant
15 May 2024 from the Respondent

Determination: 22 August 2024

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] Cindy Rookes loves selling high-end products to customers. She wanted to work for Tillmans Fine Furniture Limited (**Tillmans**) as a Sales Consultant selling quality furniture in Ōtautahi. To achieve this, Ms Rookes interviewed with Tillmans Director, Mr Lindsay Sandford, a number of times before agreeing to a trial period. She was disappointed when Tillmans terminated her trial close to the 90th day.

[2] After the trial period termination, Mr Sandford gave Ms Rookes a two-month fixed term agreement scheduled to commence shortly before Christmas to tie her over until she could secure another job. Ms Rookes claims Mr Sandford promised her if she

could prove her worth during the fixed term, she could have a permanent role. Mr Sandford says he simply offered her a fixed term to help her out.

[3] Prior to her trial period, Mr Sandford interviewed Ms Rookes at length. She says the interviews were work for which she should be paid. By performing that work, Ms Rookes says she was no longer a new employee when Tillmans offered her a job, causing her trial period to be invalid, and her dismissal unjustified. Ms Rookes says Tillmans then offered her a faulty fixed term because it unlawfully tried to extend her trial period. She seeks remedies that include compensation, remuneration and penalties.

[4] Mr Sandford says he interviewed Ms Rookes at length because he had reservations about employing her - Ms Rookes convinced him to give her another chance. Mr Sandford says he reasonably relied on the trial period to terminate Ms Rookes' employment when her product knowledge did not reach the required standard. He acknowledged the unusual reason for Ms Rookes' subsequent fixed term which he says expired as agreed. He rejects the remedies sought.

[5] In addition to personal grievances for two unjustified dismissals, Ms Rookes alleges Mr Sandford bullied her. He denies doing so.

[6] Tillmans and Ms Rookes have asked the Authority to resolve their employment relationship problem.

How did the Authority investigate?¹

[7] Ms Rookes lodged her statement of problem on 24 August 2023. An original statement in reply was lodged on 13 September 2023; an amended version on 5 March 2024.

[8] I investigated this matter in a meeting that took two days in mid-April 2024. I heard from Ms Rookes, her partner, and Mr Sandford. These witnesses answered

¹ As permitted by s 174E of the Employment Relations Act 2000 (**Act**) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

questions under oath or affirmation. Representatives made oral submissions. Written submissions were timetabled into May 2024.

What were the issues?

[9] The issues for determination were:

- (a) Did Ms Rookes work as an employee for Tillmans before agreeing to a trial period?
- (b) Could Tillmans rely on the trial period to dismiss Ms Rookes or, if not, did it unjustifiably dismiss her?
- (c) Did Tillmans enter into a valid fixed term employment agreement with Ms Rookes or, if not, did Tillmans unjustifiably dismiss her (again) when it expired?
- (d) Did Ms Rookes raise a personal grievance for unjustified disadvantage within time? If she did, did Tillmans unjustifiably disadvantage her by Mr Sandford bullying Ms Rookes during her employment?
- (e) Should I award any penalties against Tillmans?
- (f) What (if any) remedies should I award to Ms Rookes, and what (if any) contribution might she have made?

Did Ms Rookes work as an employee for Tillmans before agreeing to a trial period?

The new issue

[10] Sections 67A and 67B of the Act allow an employment agreement to contain a trial provision for a new employee only. Specifically, an employee, "... who has not previously been employed by that employer." To be truly new, Tillmans cannot have employed Ms Rookes in any capacity prior to her signing the individual employment agreement (**Agreement**) containing a trial provision.²

² Applying the Employment Court's strict interpretation of the requirements of section 67A including who a "new" employee is as explained in *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC

[11] Tillmans says Ms Rookes was new when she accepted an offer of employment on a trial period basis. After interviewing Ms Rookes for the final time, Mr Sandford emailed a copy of the Agreement which he signed and dated on 14 September 2022. His email said, among other things, “Please read through, and let me know if you have any questions.” It attached a covering letter reminding Ms Rookes she had until 20 September 2022 to seek advice. Ms Rookes signed and dated her copy on 16 September 2022, initialling the pages that included a trial period.

[12] The Agreement Ms Rookes signed contained a clause saying Ms Rookes would be subject to a trial period of up to 90 days and that if Tillmans dismissed her, she would be unable to bring a grievance or other legal proceedings about her dismissal:

Trial period

The first 90 days of employment will be a trial period, starting from the first day of work.

During the trial period, the employer may dismiss the employee. Notice must be given within the trial period. Depending on how long the notice period is, the last day of employment may be before, at, or after the end of the trial period.

During the trial period, the employer’s normal notice period doesn’t apply. Instead, either the employee or the employer may end this agreement by giving 1 days notice before the trial period ends. The employer might decide to pay the employee not to work. For serious misconduct, the employee may be dismissed without notice.

If dismissed during the trial period, the employee cannot bring a personal grievance or other legal proceedings about the dismissal. They may still bring a personal grievance if they feel the employer has treated them unfairly for other reasons, eg discrimination, harassment or unjustified disadvantage.

During the trial period, the employer and employee must treat each other in good faith.

[13] Ms Rookes says this clause cannot apply because she was no longer new after working during the interviews that occurred before she signed the Agreement. If Ms Rookes is right, her prior work would have the effect of invalidating her trial period with Tillmans and it could not then rely on it to terminate her employment.

111 at [48] and [85] - applied in *Blackmore v Honick Properties Limited* [2011] NZEmpC 152 at [35] to [60] and *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper* [2021] NZEmpC 45.

Who is an employee?

[14] The Act defines an “employee” as any person employed by an employer to do any work for hire or reward under a contract of service. It includes a “person intending to work” which the Act defines as “a person who has been offered, and accepted, work as an employee.” It excludes a “volunteer” who does not expect to be rewarded for work performed as a volunteer and does not receive any reward.³

[15] The Employment Court has examined the issue of whether someone performed work as an employee when they undertook a short work trial in *The Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152:

[26] Without deciding the issue for this case or generally, it would be very rare that an interview alone with a prospective employee would amount to work in an employment relationship for which there might be an expectation of payment of the employee and in which other employment rights and obligations arise. I would put into the same category a prospective employee’s observation of a workplace so long as this was for a reasonable period commensurate with the purpose of such an observation and the nature of the work performed there. Such would, in most cases, be of benefit primarily to the prospective employee rather than to the prospective employer in the sense that it would allow the prospective employee to consider whether to continue with the appointment application process.

[27] Where the reasonableness line is likely to be crossed most commonly and “work” may be engaged in, for which there may be a requirement for payment as well as where other incidents of an employment relationship arise, is where the employer gains an economic benefit from the employee’s activity. In this case, for example, the defendant performed a number of the range of tasks which would have been undertaken by her had she continued to work for the plaintiff. Although the economic or other business or operational benefit to the employer may not have been optimal at that point due to the need for the defendant to be shown what to do and to develop the necessary skills, the defendant was nevertheless performing work for the plaintiff and contributing to its business.

Interviewing Ms Rookes

[16] Mr Sandford had engaged a recruitment company who interviewed Ms Rookes on 16 August 2022 and put her forward as a candidate. Mr Sandford called Ms Rookes during the week of 26 August 2022. They agreed to meet on 29 September 2022 at a

³ Sections 5 and 6. In deciding whether someone is an employee, the Authority must determine the “real nature of the relationship” considering all relevant matters. Relevant matters include statements about status. Statements are indicative but not determinative.

café over coffee. Ms Rookes does not claim this shorter interview was work, however it is relevant to what happened during the interviews she later claimed were work.

[17] Mr Sandford says Ms Rookes arrived about ten minutes late for the 29 August 2022 interview. He gave her the benefit of the doubt to continue with the interview. After coffee, Ms Rookes accompanied Mr Sandford across the road to the shop where Ms Rookes spoke to a potential co-worker.

[18] When giving evidence, Ms Rookes referred to notes running to seven pages that included recollections of this interview right through to her final day. She says she created this word document on 9 September 2022. It was modified over time. She said she had based this document off original notes she kept in a folder elsewhere.

[19] Ms Rookes' entry on 29 August 2022 recorded she had a 10:00am interview with Mr Sandford that lasted until 1:30pm. However, Mr Sandford provided a copy of his calendar appointment confirming he had scheduled this for between 11am and midday.

[20] Although Ms Rookes' notes refer to a 3.5-hour timeframe, it appeared she retrospectively made that entry and the date may be incorrect. I have treated her notes with caution where there is evidence otherwise for this reason. It seems more likely this interview lasted around an hour as Mr Sandford recalled.

[21] At the end of this interview, Mr Sandford says he made no promises to Ms Rookes, not least because he had misgivings about employing her due to her lateness, a significant period of unemployment and lack of a reference from her prior employer. He agreed Ms Rookes called him in the week of 5 September 2022 during which they agreed to a longer form interview to take place on 8 September 2022.

[22] Ms Rookes claims payment for the two interviews that happened next:

- (a) A period of five hours for what Tillmans says was a long form interview on 8 September 2022 (**8 September interview**); and

- (b) A second period of five hours for what Mr Sandford said was Ms Rookes' second shot at a long form interview at her request on 12 September 2022 (**12 September interview**).

[23] Mr Sandford says the 8 September interview was longer to allow Ms Rookes to undertake testing and for her to observe the business. He wanted to see if she had capability in key areas like computer skills, how well she and he got on (important for a small business where staff worked closely together), and for Ms Rookes to look at the business and see if it was right for her.

[24] Mr Sandford recalled Ms Rookes arrived on time at 10:00am in colourful clothing with her hair hanging loosely and heavily made up (her presentation an issue later raised in the context of taking a more conservative approach). Mr Sandford showed her around the business, asked her to do some IT tasks to see how she managed the computer (like if she could open a web browser, use a mouse and type), and that she had a look around the products. He says Ms Rookes sat around between these tests because he was in the shop on his own and had to undertake some urgent tasks and assist customers whenever they required it. Mr Sandford recalls Ms Rookes stayed until after lunch.

[25] Ms Rookes says she assisted customers by meeting and greeting them, then helping with a fabric choice that resulted in a sale. She also recalled helping with doing dishes after they had stopped for a break and had hot drinks.

[26] Mr Sandford rejects that Ms Rookes assisted customers. He says Ms Rookes primarily observed other than undertaking mostly computer-based tests. He did recall asking Ms Rookes to meet and greet a couple of customers to check her manner, and that Ms Rookes (while observing) started pulling fabrics out and handing them to Mr Sandford as he dealt with the customer. However, he said he thought these interactions occurred in the 12 September interview, as he was impressed with her initiative in pulling out the fabrics, but he did not ask her to do this nor expect her to do anything other than observe.

[27] At the end of the 8 September interview, Mr Sandford said he believed he could train Ms Rookes to do the role, but because he had found her to be distracting (she was

quite chatty about mostly personal matters rather than work), he was hesitant. He was also concerned Ms Rookes did not present as conservatively as he expected. Although he recalled asking about remuneration expectations and asked for other information (which Ms Rookes says would only be necessary if he offered her a job), he said this was standard practice and he did not make any offer of employment. I agree, given what happened next.

[28] Although Ms Rookes claimed Mr Sandford confirmed she had the position at the end of the 8 September interview, this seems unlikely given the concerns he later raised with her and that she accepted were raised. The next day, Mr Sandford called Ms Rookes to tell her he would not progress her application. He explained this was because of her chattiness and less conservative presentation. After much discussion, Ms Rookes convinced Mr Sandford to give her another chance. She suggested coming in for another day – he agreed. Mr Sandford says this was the only conversation he had with Ms Rookes during which he conveyed his hesitation about employing her.

[29] Ms Rookes portrayed this call as a shocking and devastating rescinding of Mr Sandford's prior offer of employment, and she pleaded with him to change his mind. It is more likely Mr Sandford did not make an offer until after the 12 September interview however, when his concerns about Ms Rookes had been addressed. Ms Rookes hoped she had secured the position but had assumed so incorrectly based on the positive interactions she had with Mr Sandford.

[30] Ms Rookes came in for the 12 September interview at 10:00am. She presented more conservatively and was less chatty.⁴ Mr Sandford said he went over similar things as for the 8 September interview and that Ms Rookes was there for a good part of the day, potentially as long as she claimed five hours. At the end of the day, Mr Sandford made an offer to Ms Rookes subject to sending her an Agreement and trial period.

⁴ Mr Sandford said he deliberately tested this at length, by leaving Ms Rookes with nothing to do, to see if she would interrupt him.

[31] Ms Rookes conceded she did not at the time expect to be rewarded or paid for her time for the 8 September interview nor the 12 September interview. Mr Sandford says he did not promise to pay Ms Rookes nor reward her in any way.

Was it work?

[32] Mr Sandford accepts it was unusual to perform two long form interviews. However, the 12 September interview occurred because Ms Rookes requested another chance after he told her he would progress her application after the 8 September interview.

[33] Although the number and length of interviews stretches what I would normally consider to be a reasonable timeframe for an interview or workplace observation, this must be considered in the context of Ms Rookes changing Mr Sandford's mind to convince him to give her a second shot after her unsuccessful 8 September interview. Ms Rookes was highly motivated to prove to Mr Sandford he should give her a chance, and this included I find, undertaking two long form interviews, volunteering her time to do so, and ultimately landing her the job. I am satisfied such an approach did not ultimately undermine the voluntary nature of the interviews when Ms Rookes had asked for the second interview to address concerns Mr Sandford had raised as reasons why he did not offer her the job after the 8 September interview. I prefer Mr Sandford's evidence that he did not offer, and Ms Rookes did not accept, employment until after the 12 September interview.

[34] I am reinforced in my conclusion when considering the nature of the testing she undertook and tasks she did that proved her existing capability and ability to be trained to do the job. She observed the workplace and interacted with (and importantly for Mr Sandford, did not interact with) Mr Sandford for the purposes of addressing the concerns he had raised about her distracting him. This was materially different to the work she later performed as an employee of Tillmans when she independently took responsibility for dealing with customers and sold furniture, financially contributing to the business.

[35] As noted above, at the time Ms Rookes did not expect to be paid for or rewarded for her time spent in each interview. I find both Mr Sandford and Ms Rookes intended for the interviews to be opportunities to assess whether to enter into an employment relationship. They were not work.

[36] In short, I find Ms Rookes did not perform work as an employee for Tillmans prior to her agreeing to accept a role on a trial period basis.

Could Tillmans rely on the trial period to dismiss Ms Rookes or, if not, did it unjustifiably dismiss her?

[37] Tillmans dismissed Ms Rookes by way of letter dated 13 December 2022:

Dear Cindy,

NOTICE OF TERMINATION OF EMPLOYMENT

This is to advise that the Company has decided to exercise its right to end our employment relationship under the 90 Day Trial Period, pursuant to the provisions of sections 67A and 67B of the Employment Relations Act 2000 which is part of our written agreement with you and paragraph “Trial Period” of your employment agreement.

Notice Period:

A notice period of 4 days is hereby given which means your last day of work is the 17th December 2022.

Returns

All books, documents, keys, or any other properly belonging or relating to the company’s business and that of its customers, and any material accumulated during your employment, other than of a personal nature, are to be returned immediately.

Reasons:

The reason for my decision is your product knowledge is not up to the standard required to give an optimal customer experience.

Yours sincerely

Lindsay Sandford

Director – Tillmans Fine Furniture

[38] Tillmans’ terminated Ms Rookes’ trial period on notice before the end of the 90th day of her trial period. Her dismissal attracts the protections afforded by section

67B of the Act. Ms Rookes cannot bring a personal grievance in respect of her trial period termination.

[39] Even if I had found the trial period termination unjustified, I note any remedies would be restricted given the immediate follow on of a fixed term for two months lessening the impact of any termination until the expiry of the fixed term. The remedies claimed by Ms Rookes for one compensatory amount for unjustified dismissal perhaps reflects this.⁵

[40] Ms Rookes has also claimed an unjustified dismissal in relation to the expiry of her fixed term employment agreement, which I turn to next.

Did Tillmans enter into a valid fixed term employment agreement with Ms Rookes or, if not, did Tillmans unjustifiably dismiss her (again) when it expired?

What is a genuine reason based on reasonable grounds?

[41] After Tillmans terminated Ms Rookes' trial period, the two agreed to a two-month period of fixed term employment scheduled to begin after her trial period ended. For Tillmans to be able to rely on expiry of that fixed term (and not have to follow a fair process and have a good reason for employment ending), it must show it met the requirements of section 66 of the Act:

66 Fixed term employment

- (1) An employee and an employer may agree that the employment of the employee will end—
 - (a) at the close of a specified date or period; or
 - (b) on the occurrence of a specified event; or
 - (c) at the conclusion of a specified project.
- (2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—
 - (a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
 - (b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.
- (3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):

⁵ At [67], Applicant's submissions.

- (a) to exclude or limit the rights of the employee under this Act;
 - (b) to establish the suitability of the employee for permanent employment;
 - (c) to exclude or limit the rights of an employee under the Holidays Act 2003.
- (4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee’s employment agreement must state in writing—
- (a) the way in which the employment will end; and
 - (b) the reasons for ending the employment in that way.
- (5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.
- (6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—
- (a) to end the employee’s employment if the employee elects, at any time, to treat that term as ineffective; or
 - (b) as having been effective to end the employee’s employment, if the former employee elects to treat that term as ineffective.

[42] Did Tillmans have a genuine reason based on reasonable grounds for the fixed term as required by section 66(2)(a) of the Act? If not, then other arguments challenging the fixed term nature of the employment become secondary.

[43] What are genuine reasons based on reasonable grounds? In *Canterbury Westland Free Kindergarten Association (t/a Kidsfirst Kindergartens) v New Zealand Education Institute* [2004] 1 ERNZ 547 (EmpC) the Employment Court said, “... reasons must be not only sincerely held but they must also not be improper reasons.”⁶ Relevantly, the Court also noted that, “What s66 contemplates is that fixed term employment should be confined to special discrete projects of limited duration as opposed to situations of ongoing employment.”⁷

[44] More recently, in *Morgan v Tranzit Coachlines Wairarapa Limited* [2019] NZEmpC 66 the Employment Court concluded:⁸

⁶ At [16].

⁷ At [55].

⁸ At [27]. Referred to in *Kwik Kiwi Cars Ltd t/a Mark Cromie Motor Group v Crossley* [2020] NZEmpC 142 at [48].

When assessing whether a fixed-term agreement has been entered into for genuine reasons based on reasonable grounds, it will be relevant to consider whether the stated reasons were sincerely held (at the time the agreement was entered into) and whether they were for proper purposes. It may be arguable that an agreement will fall foul of s 66 where the employer utilised the fixed-term employment model where other mechanisms were reasonably available, that would have less violated the protective principles underlying the provision and ILO 158.

What was Tillmans' reason?

[45] Mr Sandford terminated Ms Rookes' employment using the trial period because her product knowledge was not up to speed quickly enough. Having relied on the trial period, he did not want to offer her anything more than what he considered his moral duty to help her find another job close to Christmas. So, Tillmans and Ms Rookes entered into a fixed term individual employment agreement (**fixed term agreement**) that stated in the section relating to the reason for the fixed term, as follows:⁹

The Employee will work for the employer for a fixed period of time.

Employment will start on 20/12/2022 and end on 25/02/2023. It will automatically end on this date without notice or pay instead of notice, unless the employer or the employee ends it earlier in line with this agreement.

The employer and employee agree there is a genuine reason for the fixed term and for employment to finish when the term ends. The reason for it being fixed term, and finishing at the end of the term, is the employer will have a reasonable amount of time to search for a new job after the Christmas / New Year holiday season finishes.

The employer has explained why employment will finish when the term ends, and the employee has had a chance to get advice on this.

[46] Do I accept that Tillmans reasons are genuine and based on reasonable grounds in terms of section 66(2)(a)? I accept Mr Sandford genuinely wanted to help Ms Rookes by providing her with an income over the holiday period and allowing her time to find another job while she had one. Is that enough?

⁹ The fixed term agreement provided recorded that Tillmans offered and Mr Sandford signed the fixed term agreement on 15 December 2022 and Ms Rookes on 18 December 2022. Mr Sandford sent Ms Rookes a covering letter with the fixed term agreement advising her to seek advice on it from someone such as a lawyer and to discuss anything with Mr Sandford should she wish to do so, or to otherwise return it signed by 20 December 2022, the intended start date.

[47] Section 66 inclusively lists three reasons that are not genuine. These reasons include excluding or limiting the rights of an employee under the Act (such as a right to a fair and reasonable process and justification for dismissal under section 103A). Having decided to employ Ms Rookes on a fixed term basis to satisfy a moral duty, Tillmans also avoided employment obligations beyond the fixed term i.e. it limited liability beyond what was reasonable for finding a role, it was not willing to offer a permanent role. By using a fixed term, Tillmans escaped the obligations of permanent employment like having to follow a process to address any perceived performance shortcomings (before being able to fairly dismiss). Arguably every fixed term has that effect.

[48] Mr Sandford gave consistent evidence he did not consider Ms Rookes suitable because her product knowledge had not grown quickly enough during her trial period (hence her trial period termination). Another reasonably available and appropriate way of addressing the real issue (perceived problems with Ms Rookes' performance) was to follow a process to address her perceived shortcomings. In this context, I do not consider the reason satisfies the requirements of section 66(2)(a). However, even if I am wrong on this point, another issue fundamental to the fixed term reason poses a problem.

[49] Tillmans had an ongoing and constant need for the Sales Consultant role. Ms Rookes had performed the role from September 2022 to February 2023. Tillmans then intended to find someone else for the role after the fixed term expiry. It was a situation of ongoing employment - not a temporary one. That did meet the requirements of section 66(2)(a).

[50] Because I have found the fixed term failed to meet the requirements of section 66, Tillmans could not rely on the fixed term expiry to end Ms Rookes' employment. Having followed no process, I find Tillmans did not meet the requirements of section 103A and therefore unjustifiably dismissed Ms Rookes.

Did Ms Rookes raise a personal grievance for unjustified disadvantage within time, and if she did, did Tillmans unjustifiably disadvantage her by Mr Sandford bullying Ms Rookes during her employment?

What was the disadvantage grievance raised?

[51] Mr Cain raised personal grievances for Ms Rookes by way of letter dated 16 March 2023. In addition to a grievance for unjustified dismissal, the letter alleged in relation to a personal grievance for unjustified disadvantage that:

Lindsay regularly criticised Cindy for things that she had no control over, such as her demeanour and physical appearance. This had a significant negative impact on Cindy’s overall well-being. Whenever Cindy asked for further information or clarification about something, Lindsay would respond rudely and abruptly, saying things like “for fuck sakes, you should know this by now.” Furthermore, Cindy was constantly made to feel unintelligent and unworthy of her position. She had never experienced such adverse treatment in a workplace before.

Despite Cindy’s numerous attempts to raise concerns, Lindsay persisted with this reprehensible treatment.

The employer’s abhorrent actions constitute as grounds for raising a personal grievance based on unjustified disadvantage. It is clear that the employer’s conduct had a negative impact on Cindy’s enjoyment of her work.

[52] Mr Sandford responded at length to the letter setting out his responses to the grievances raised by way of email dated 23 March 2023. This included refuting what were essentially bullying allegations. At that stage, it was unclear when the events subject of the grievance raised by Ms Rookes had occurred. However, Mr Sandford said he assumed it had happened in the last two months of her employment, given her employment ended on 25 February 2023 - referring to the 90-day timeframe.

[53] To be raised within time, the matters subject of the allegations had to have occurred in the 90 days prior to raising the grievance, being mid December 2022.¹⁰ There were two periods of employment, only one of which becomes relevant given that timeframe. The first period - the trial period occurred between 20 September 2022 and 17 December 2022. The second period - the fixed term agreement occurred between 20

¹⁰ Section 114 of the Act requires an employee to raise a grievance within 90 days of the event complained or when it came to their attention.

December 2022 and 25 February 2023. In this context it was reasonable for Mr Sandford to assume Ms Rookes had to be referring to the second period of employment.

[54] That poses a problem for Ms Rookes in raising her grievance for disadvantage. Although the examples described by Ms Rookes in her statement of evidence are not all dated, the dates she did refer to were almost all alleged to have occurred during her first period of employment – during the trial period. In relation to any disadvantage that occurred during that first period, most events described by her occurred prior to the date Tillmans advised her of her termination (13 December 2022). I note Ms Rookes' notes did not record anything between 2 and 19 December 2022.

[55] I accept that in cases of bullying, there may well be a series of actions giving rise to the grievance. However at least one such instance must occur within the relevant timeframe. Although events outside the 90 day timeframe may inform a consideration of the merits of a grievance raised within time, they cannot establish a grievance in their own right.¹¹

[56] Ms Rookes is out of time to raise her disadvantage grievance in relation to any bullying alleged to have occurred during her trial period. In relation to the second period of employment during the fixed term agreement, I explain below that I have concluded no bullying occurred.

Was it bullying?

[57] As set out above, in the letter raising her grievances, Ms Rookes alleged an unjustified disadvantage had occurred in the following areas:

- (a) Mr Sandford regularly criticised Ms Rookes about matters she had no control over such as her appearance and demeanour.
- (b) Mr Sandford responded rudely and abruptly to Ms Rookes asking for information (such as swearing at Ms Rookes in response).
- (c) Mr Sandford made her feel unintelligent and unworthy of her position.

¹¹ *Premier Events Limited v Beattie (No 3)* [2012] NZEmpC 79 at [14] to [20] and *Davis v Commissioner of Police* [2013] NZEmpC 2265 at [47].

[58] In her statement of evidence, Ms Rookes refers to examples, almost all of which occurred during her trial period. She says Mr Sandford made unjustified threats of dismissal on four separate occasions: 22 October, 10 November and 1 December 2022 and 18 February 2023. It alleged the rude responses were constant. She says she found these unpleasant interactions exasperating and demeaning and would often result in her breaking down in tears.

[59] In her notes, Ms Rookes made an extensive entry for 18 February 2023, which appears to be the final date for what she says was an unjustified threat of dismissal. The entry focussed on what appeared to be a discussion about what Ms Rookes claimed was the “bar” set by Mr Sandford for her to prove her worth during the fixed term, and her failure to do so.

[60] A further entry related to her final week (21 to 25 February 2023). She described feeling humiliated by applicants interviewing for her job in front of her, Mr Sandford declining to pay out the remainder of the week, and Mr Sandford giving her a \$100 pizza restaurant voucher said to be a token of appreciation which she found insulting.

[61] After considering whether the examples above amount to bullying as defined by WorkSafe Guidelines, I have concluded they do not: Workplace bullying is repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.¹² Repeated behaviour may involve a range of actions over time. Unreasonable behaviour means actions a reasonable person in the same circumstances would see as unreasonable. Workplace bullying excludes being occasionally rude or tactless, having high performance standards, giving constructive feedback, requiring reasonable instructions to be carried out, or differences of opinion.

[62] In relation to the 18 February 2023 example, it seems unlikely Mr Sandford said what has been claimed not least because at that point his view of Ms Rookes’ performance was to his mind, irrelevant - he had previously undertaken an assessment of her performance during the trial period. If his reason for the fixed term was to help her, then his investment in providing feedback on how to improve in these

¹² At [1.1], “Preventing and responding to bullying at work” for persons conducting a business or undertaking, March 2017.

circumstances was limited. It is understandable Ms Rookes was trying to change Mr Sandford's mind. She felt upset she could not, and that her employment would end at the expiry of the fixed term. I do not accept Mr Sandford threatened her with dismissal although it is likely he reminded her of the upcoming expiry.

[63] In relation to the final week of employment, it would be reasonable to feel upset to see applicants in store regarding the role you are currently undertaking. I understood this to be unfortunate timing and nothing more.

[64] Mr Sandford gave evidence that Ms Rookes was hard working, honest, punctual, loyal and dedicated (despite concerns about her performance). It was in this context that he gave her a voucher. It is difficult to see how a gift from Mr Sandford intended as a genuine gesture of appreciation by Mr Sandford could be bullying, even if Ms Rookes did not appreciate it.

[65] Mr Sandford did not have to pay out the remainder of Ms Rookes' final week. This was not unreasonable in the circumstances.

[66] Ms Rookes does not succeed in her disadvantage claim.

Should I award any penalties against Tillmans?

Wages and time record request

[67] Mr Cain claims a penalty under section 130 of the Act for a failure to provide the wages and time record requested. He says it was requested in a letter dated 16 March 2023 and not provided until 13 September 2023, and was missing records from work performed during the 8 September interview and 12 September interview. Given my finding that Ms Rookes did not work during the interviews, I do not address that aspect of the penalty claim.

[68] Section 130 of the Act requires an employer to keep a wages and time record containing minimum information about an employee. An employer must provide this record immediately upon request with access or a copy of or an extract. An employer is liable for a penalty for failing to do so.

[69] Tillmans says it provided payslips throughout employment. This is not disputed. Mr Cain claims this was insufficient, and a complete copy had to be provided when requested.

[70] Tillmans acknowledges it did not provide a complete copy until filing an amended statement in reply dated 13 September 2023. However, Tillmans had responded in the meantime on 23 March 2023 noting it had provided payslips by email to Ms Rookes and asked what else was required.¹³ There was no reply until proceedings were filed in the Authority.

[71] In these circumstances, I decline to award a penalty.

Good faith

[72] Mr Cain claims a penalty for breaching section 4 of the Act. He has not referred to the grounds set out in section 4A for which a penalty might be awarded. I do not consider those grounds have been made out in any case.

[73] I decline to award a penalty.

Unfair Bargaining Penalty

[74] Mr Cain claims a penalty for unfair bargaining in relation to the fixed term agreement under section 63A(3) of the Act. He says Tillmans did not provide Ms Rookes with a reasonable opportunity to seek independent advice.

[75] Tillmans provided Ms Rookes with a copy of the fixed term agreement with a covering letter dated 15 December 2022 that attached it saying it set out the proposed terms and conditions with a starting date of 20 December 2022. Mr Sandford said she could discuss the offer and seek advice on the agreement with her family, a union, a lawyer, or someone else she trusted. He also said if there was anything she was unclear

¹³ Mr Sandford says “Cindy has all her wage slips in emails. I’m not sure what additional information you require. Please let me know exactly what you need and how to extract it from Xero, and I will be happy to provide it.”

about, disagreed with or wished to discuss about the fixed term agreement to speak with him.

[76] I do not accept the grounds of unfair bargaining have been made out. I decline to award a penalty.

What (if any) remedies should I award to Ms Rookes, and what (if any) contribution might she have made?

Compensation

[77] As a result of her dismissal, Ms Rookes described having had her confidence destroyed and doubting her abilities and job worthiness. She said she suffered depression, severe stress, lack of sleep and loss of self-esteem. Ms Rookes has claimed \$15,000 to \$20,000 for her unjustified dismissal.

[78] After considering the evidence, what has been awarded in other cases and trends generally,¹⁴ I award Ms Rookes \$15,000 under section 123(1)(c)(i) of the Act.

Reimbursement of wages lost

[79] Ms Rookes claimed three weeks' wages totalling \$2,625.00 (gross) for the time between the expiry of her fixed term and her next role. I award this amount under section 123(1)(b) of the Act.

Contribution?

[80] Ms Rookes did not contribute to the situation giving rise to her grievance in terms of section 124 of the Act.

Summary of Orders

[81] I make the following orders:

- (a) Tillmans is to pay Ms Rookes \$15,000 compensation; and

¹⁴ Such as *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [161] to [162].

- (b) Tillmans is to pay Ms Rookes three weeks' wages totalling \$2,625.00 (gross).

Costs

[82] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[83] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Rookes may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Tillmans will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[84] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁵

Lucia Vincent
Member of the Employment Relations Authority

¹⁵ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1