

who left and did not seek any further work. It denies receiving a letter from her asking about her employment status and it disputes whether she has raised her personal grievance within the statutory time period of 90 days.

Issues

[6] The issues for resolution in this determination are:

- (i) Was Ms Shale's job part-time or casual?
- (ii) Did Ms Shale raise her personal grievance within 90 days of her alleged dismissal?
- (iii) Did Ms Shale resign or was she unjustifiably dismissed?
- (iv) If Ms Shale was unjustifiably dismissed, what remedies are required?

The investigation

[7] Written witness statements were lodged by Ms Shale, ESL's director Nigel Loy and Ms Shale's partner, Neil Wondergem.

[8] Mr Loy was to be out of New Zealand at the time of the investigation meeting. He attended at interview at the Authority premises on 8 September 2008 accompanied by his representative. A copy of a recording of the interview was provided to Ms Shale's representative.

[9] Divia Claudy, who was Ms Shale's supervisor during her time with ESL, attended the investigation meeting under witness summons. Ms Claudy had been made redundant by ESL earlier this year.

[10] Ms Claudy, Ms Shale, and Mr Wondergem answered questions from the Authority and the representatives. ESL director Josef Langreiter also attended the investigation meeting but did not give evidence. The representatives provided oral closing submissions on the issues.

Status of Ms Shale's job

[11] I do not accept ESL's submission that Ms Shale was employed on a casual

basis only.

[12] Her written employment agreement refers to the position as a “*casual part-time telesales representative*”. However this is not necessarily definitive of the real nature of the employment relationship. Although the agreement refers to evaluating the hours of work required “*on a day to day basis*”, it also contains a provision requiring at least one week’s notice of resignation which is not consistent with a truly casual employment relationship.

[13] The pattern of hours regularly worked by Ms Shale between April and November was for five hours a day, Monday to Friday – that is consistent part-time shifts. Mr Loy’s evidence that telemarketing staff could take leave days when they chose does not mean their positions were casual but simply reflected the reality that retaining trained telemarketing staff also required flexibility from the employer. And Ms Shale’s evidence that leave requests had to be approved by Ms Claudy suggests a part-time rather than truly casual employment relationship.

[14] I am also satisfied that ESL understands there is a distinction between casual and part-time employment because its advertisement listed on the “Trade Me Jobs” website on 6 November 2007 refers to having “part-time or casual” telemarketing roles available.

[15] I find the actual nature of Ms Shale’s employment was on a permanent, part-time basis.

Was Ms Shale’s grievance raised within 90 days?

[16] ESL says Ms Shale’s grievance was not raised within 90 days of her alleged dismissal on 30 November 2007 because:

- (i) it did not receive Ms Shale’s letter dated 11 December 2007 raising her employment relationship problems; and
- (ii) even it did receive that letter, a grievance was not properly raised by what the letter said; and
- (iii) a second letter dated 14 January 2008 (which Mr Loy accepts he did receive) refers only to a request to attend mediation.

Delivery of the 11 December letter

[17] I am satisfied from the evidence of Mr Wondergem that it is more likely than not that Ms Shale's letter of 11 December 2007 was delivered to Mr Loy in person.

[18] Mr Wondergem went to ESL's address to hand deliver Ms Shale's letter. The office building was not open and he went to a nearby café. He told a café worker that he was trying to find ESL's offices to deliver a letter to Nigel Loy. The café worker told Mr Wondergem that Mr Loy was in the café and pointed to a man in the room. Mr Wondergem approached the man indicated and asked "Nigel Loy?". He replied, "Yes". Mr Wondergem said he was Ms Shale's partner, handed over the envelope and left.

[19] I am satisfied that it is more likely than not that the café worker did correctly identify Mr Loy (who accepts he was a regular customer at this particular café adjacent to his offices). I reject as too unlikely ESL submissions that there may have been a case of mistaken identity or that the envelope handed over may have been empty.

Contents of the letter

[20] I am satisfied that the 11 December letter met the requirements of s114 of the Employment Relations Act 2000 ("the Act") for raising a grievance. The application of the "*straightforward*" statutory scheme is to be considered without artificial distinctions or unnecessary complexity.¹

[21] The letter referred to a text message from Ms Claudy on 30 November saying that Ms Shale's services "*were no longer required for the future*". It asked Mr Loy to "*clarify*" her employment with the company and asked why the company was advertising for telemarketers if there was no work for her. It asked for a reply within 14 days and stated that "*if there is no forthcoming satisfactory clarification and justification I will lodge a personal grievance case with the Employment Relations*

¹ *Clark v Nelson Marlborough Institute of Technology* (unreported, EC Christchurch, CC 12/08, 19 August 2008, Judge Couch) at [31]

Service (sic)".

[22] Both the substance and context of the letter plainly raised a grievance that Ms Shale sought to have addressed by ESL.

The second letter

[23] Having received no response to that letter by 14 January 2008, Ms Shale sent a second letter. Mr Loy accepts he received that letter. It refers to the letter of 11 December 2007 as being "*personally delivered to you ... asking for clarification of my employment*" and invites Mr Loy to attend mediation through the Department of Labour.

[24] While that does nothing of itself to raise a grievance, it would have alerted Mr Loy to the existence of the previous letter had he truly not received it. However his evidence was that he did nothing to enquire about the 11 December letter referred to in the 14 January letter which I consider supports the notion that he was already aware of it.

[25] I find that Ms Shale's grievance for unjustified dismissal was raised with ESL within 90 days of the actions alleged to amount to her dismissal.

[26] However there is a second aspect to Ms Shale's case on which I am not satisfied that a personal grievance was raised within the required period. This concerns complaints made in her evidence about the earlier conduct of Ms Claudy as a supervisor.

[27] Ms Shale and some of her work mates were not happy with how Ms Claudy behaved as their supervisor. Although not subjected to it herself, Ms Shale said she witnessed "*foul language*" and other workers being "*screamed at*" by Ms Claudy. Ms Shale says she had complained to Mr Loy about this conduct.

[28] Ms Claudy denies that she behaved in the way alleged but the dissatisfaction of Ms Shale and some of her workmates formed part of the circumstances in which Ms Shale says she was effectively dismissed by Ms Claudy. However these concerns

about Ms Claudy's treatment of staff were not referred to in Ms Shale's 11 December letter raising her grievance. Accordingly any complaints about Ms Claudy and whether ESL properly considered them – which might have amounted to a personal grievance for unjustified disadvantage – were not raised, I find, within 90 days and are not considered any further in this determination.

Did Ms Shale's job end by resignation or dismissal?

[29] ESL says Ms Shale was not dismissed on 30 November but was only sent home because she was upset and unable to work productively. It denies that it intended ending the employment relationship and says Ms Shale simply did not seek any more work. Mr Loy said it was "*purely up to Laurel*" whether or not she wanted further work at ESL.

[30] On the morning of 30 November Ms Shale had called into the nearby café referred to earlier. There she saw Mr Loy talking with a workmate who had shared her concerns about Ms Claudy's supervisory style. Shortly afterwards the workmate came over and said he was leaving work and left the café. Ms Shale believed her workmate had been "*fired*" although Mr Loy's evidence was that the employment relationship ended by mutual agreement. Ms Shale went to work but was "*close to tears*". Her voice was shaky when she began client calls. Ms Claudy's evidence was that she noticed Ms Shale was crying and she told her to go home.

[31] On her way out of ESL's premises Ms Shale called into Mr Loy's office. Ms Shale says she told him that she was worried about her future with ESL but Mr Loy assured her that her job was secure. This is similar to Mr Loy's evidence who says he "*would have assured her that I did not intend terminating her role*".

[32] Later that day Ms Claudy sent Ms Shale a text message reading: "*Hi as we got sufficient telemarketegrs (sic) we don't dnt need u on Monday or in future til further notice. Divia (eldersafe).*"

[33] Mr Loy's evidence was that he had not seen this text until he saw Ms Shale's papers lodged in the Authority. He also says that Ms Claudy told him that Ms Shale had said she was not sure if she would come back to work.

[34] Both points are directly contradicted by Ms Claudy's evidence. Ms Claudy told me that she was instructed by Mr Loy to send the text and that she showed him the wording before sending it. She also said, when asked if Ms Shale had said anything about not coming back to work: "*No, nothing like that*".

[35] I prefer Ms Claudy's evidence to Mr Loy's. Ms Claudy, particularly in light of critical comments made about her by Ms Shale, had no incentive to give evidence supportive of her case, and, according to both Ms Claudy and Mr Loy, there was no acrimony about Ms Claudy having left ESL.

[36] Ms Claudy's evidence was also that if a telemarketer did not come to work for four or five days, either she or Mr Loy would call that person and ask if they still wanted work. This did not happen in Ms Shale's case and supports the likelihood that neither Ms Claudy nor Mr Loy intended for Ms Shale to work again for ESL from 30 November.

[37] It amounted, I find, to being 'sent away' and was a dismissal.

[38] As Mr Loy described it, there "*absolutely*" was work available for Ms Shale at the time. ESL was also advertising for new telemarketers at the time of her dismissal.

[39] There was no justification for Ms Shale being dismissed. Mr Loy confirmed that her work was satisfactory but he saw her as part of a "*little clique*" (which included her workmate who left on 30 November) that Mr Loy considered had been "*challenging*" Ms Claudy.

[40] Mr Loy did nothing to discuss this belief with Ms Shale but I am satisfied that this was the real reason for Mr Loy and Ms Claudy not contacting Ms Shale about further work as it usually did with absent staff.

[41] These actions of ESL were not what a fair and reasonable employer would do in all the circumstances at the time. They amounted to an unjustified dismissal. Ms Shale has a personal grievance for which remedies need to be addressed.

What remedies are required?*Lost wages*

[42] Ms Shale was paid at the rate of \$20 an hour, working 25 hours a week for most weeks. I calculate her gross weekly wage as \$500.

[43] After a month of no work from ESL Ms Shale returned to part-time work with a previous employer, providing “*psychic*” readings by telephone. She earns around \$400 a month from that work. She did not look for other work because it suited her family and lifestyle to work shorter hours. While she circulated copies of her resume to some potential employers, she had not found a job fitting the limits of the hours she wanted to work.

[44] While Ms Shale has taken some steps to mitigate her lost wages, I do not consider that she has taken all reasonable steps that could be expected. Accordingly an award of lost wages under s123(1)(b) is limited to four weeks at the full level of her former gross weekly wage at ESL, that is a total of \$2000 gross. Beyond that any loss of wages must be said to be because of choices made for other reasons by Ms Shale.

Compensation for hurt and humiliation

[45] I accept the evidence of Ms Shale and Mr Wondergem as to the distress caused to her by the underhand manner of her dismissal. It has made her unhappy and anxious and affected the atmosphere of her family life. She was embarrassed to tell friends, had broken sleep and was “snappy” with her family. However there was no evidence that this distress caused any longer-term difficulties for Ms Shale or any medical confirmation that it was linked to sinus problems she has experienced.

[46] Taking the particular circumstances of this case and the general range of awards in cases of this type, I consider an award of \$3000 (without deduction) under s123(1)(c)(i) of the Act is appropriate to compensate Ms Shale for the distress and injury to feelings caused by her unjustified dismissal.

Contribution

[47] No reduction of remedies is required for the extent to which any actions of Ms Shale contributed towards the situation that gave rise to her personal grievance. There was no blameworthy conduct by her.

Costs

[48] Costs are reserved. The parties are encouraged to agree any matter of costs between them. If they are unable to do so, Ms Shale may lodge a memorandum as to costs by 9 February 2009 and ESL may lodge a reply by 23 February 2009. No application will be considered outside this timeframe without prior leave.

Summary of determination

[49] Ms Shale raised her grievance for unjustified dismissal within the 90 day statutory period. She was unjustifiably dismissed by ESL by way of a text message saying she was not needed until further notice and then ESL not contacting her again about any further work. She is awarded remedies of \$2000 gross in lost wages and \$3000 without deduction as compensation for distress and injury to feelings.

Robin Arthur
Member of the Employment Relations Authority