

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 380  
3148041

BETWEEN LAURA SUSANNE FORREST SMITH  
Applicant

AND SUN KISSED TAN LIMITED  
Respondent

Member of Authority: David G Beck

Representatives: Kay Lawrence, counsel for the Applicant  
Matthew Docherty, for the Respondent

Investigation Meeting: 7 June 2022 at Nelson

Submissions Received: 7 June 2022 from the Applicant  
7 June 2022 from the Respondent and further information 8  
August 2022

Date of Determination: 10 August 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Laura Smith worked as a Beauty Therapist for Sun Kissed Tan Limited (SKT) in a newly established SKT Nelson salon, from 7 December 2020 until she was summarily dismissed on 20 January 2021. Ms Smith alleges the dismissal was unjustified as it relied on an invalid 90 days' trial period and the justification for the dismissal was not compliant with the Employment Relations Act 2000 (the Act).

[2] Matthew Docherty, managing director and a shareholder of SKT, asserts that Ms Smith was dismissed during a legitimate 90 days' trial period and therefore has no right to pursue an unjustified dismissal claim.

## Issues

[3] The issues I am required to resolve are:

- (i) Was Ms Smith dismissed in accordance with a valid 90 days' trial period provision that was compliant with s 67A and s 67B of the Act and is she prevented from advancing an unjustified dismissal claim.
- (ii) Was the notice of dismissal given to Ms Smith in accord with the requirements of s 67B of the Act?
- (iii) If SKT cannot rely on s 67A of the Act was Ms Smith unjustifiably dismissed?
- (iv) If a finding is made that Ms Smith was unjustifiably dismissed, what remedies are appropriate given Ms Smith is claiming:
  - (a) lost wages; and
  - (b) Compensation under s 123(1)(c)(i) of the Act.
- (v) If any remedies are awarded to Ms Smith, should they be reduced by application of s 124 of the Act (consideration of contribution).
- (vi) Costs of these proceedings.

## The Authority's investigation

[4] At the investigation meeting I heard evidence from Ms Smith, Mr Docherty and SKT employees, Emily Foreman (Area Manager) and Sheena Carr (Nelson Salon Manager).

[5] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions on identified issues. Whilst I record that I have carefully considered all material placed before me, I do not record all evidence and submissions received. The discussion below in attributing recollections and assertions made by witnesses draws from their written statements, oral evidence, the parties' submissions and attached documentation. For jurisdictional and procedural reasons, the Authority investigation of this employment relationship problem addresses the substantive issues "however described" by the parties. <sup>1</sup>

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<sup>1</sup> Employment Relations Act 2000, s 160(3).

### **What caused Ms Smith's employment relationship problem?**

[6] After responding to a 20 October 2020 advertisement seeking “experienced beauticians to open our brand-new Nelson salon”, Ms Smith was interviewed by Mr Docherty in Nelson on 28 October. Ms Smith recalls explaining to Mr Docherty that she had no history of working in a beauty salon as she was in the process of completing a NZ Certificate in Beauty Therapy at Nelson Marlborough Institute of Technology and working part-time at a local retail fashion outlet store.

[7] After receiving encouraging feedback from Mr Docherty that she seemed the ‘right fit’ for the business, Ms Smith says the position was described as “permanent full-time” to work alongside a newly appointed salon manager and another full-time beautician. Ms Smith recalled the working days were specified as Tuesday to Saturday with “around 37 hours per week” set by a roster. Ms Smith says she took specific note of the latter as she was not seeking a part-time job and wanted to use her skills gained by study and pursue a career in the beauty industry.

[8] Ms Smith remembers being told she would start on \$20 per hour with a weekly 20% commission if she met a specified target and her pay would be reviewed after three months. Ms Smith says the interview was very informal with no discussion on the content of an employment agreement.

[9] Ms Smith then recalls the interview concluding with her being asked if she would go to Christchurch (where Mr Docherty is based) to do what she recalls being described as a ‘trades test’ to assess her range of skills. Ms Smith says there was no discussion about the test being voluntary and although not discussed, she says she expected to be remunerated for the time involved in completing the test.

[10] Mr Docherty retained no notes of the interview but claimed he made it clear that the trade test was the “next step in the application process” and was essentially a “skills evaluation” part of the application process – Ms Smith says she could not recall that phrase being used.

[11] Ms Smith recalled being phoned by Mr Docherty a few days later to say a day return flight of 5 November had been booked to Christchurch and she should be prepared to “show them what I could do” and that this would probably include an “eye trio” that may take around an hour.

[12] Upon receiving the flight details on 30 October, Ms Smith says she advised her retail employer not to roster her that day and on the afternoon of 5 November, she travelled to Christchurch. Mr Docherty met Ms Smith at the airport and transported her to SKT’s salon in Burnside arriving around 2 pm. Ms Smith recalled being told that only her and one other had been chosen to do the trades test (the other person was subsequently appointed to the second vacant beautician role in the Nelson Salon).

### **The trade test**

[13] At the Burnside salon, Ms Smith recalled being introduced to Emily Foreman as the area manager then Mr Docherty left saying he would come back and see her at the end of the day. Ms Smith says after being introduced to other staff members, she helped unpack a courier delivery of product and then completed the trades test on a staff member overseen by Ms Foreman. Ms Smith recalled this was the eye trio envisaged and it included performing a brow wax, eyelash trim and eyebrow tint and, that she was nervous and took around an hour to complete.

[14] Feedback and improvement tips were then given by Ms Foreman who indicated that Ms Smith would get quicker with practice. Ms Smith says Ms Foreman then proceeded to show her around the salon, explaining product location and use, went through the client booking system and explained the range of services provided and pricing policies.

[15] Ms Smith says she took a break with other staff members and while discussing the salon operation she was invited to undertake procedures on two incoming clients. Later in the day Ms Smith says she undertook, with assistance, a brow wax on one client and an upper lip wax on another and that Ms Foreman observed this occurring. Later in the day, Ms Smith says she was allowed to closely observe a client undertaking a spray tanning procedure in which the client was naked apart from a thong. In addition, Ms Smith says she cleaned a workstation overseen by Ms Foreman.

### **Presentation of the employment agreement**

[16] Later in the day of 5 November at a time the parties dispute, Mr Docherty returned to SKT's Burnside salon (Mr Docherty says it was 3:45 pm and Ms Smith says it was between 5 - 5:30 pm). Ms Smith says in her presence, Mr Docherty enquired of Ms Foreman how the eye trio had gone and was told it went fine apart from the time taken. Ms Smith says Mr Docherty then congratulated her and presented an envelope containing an employment agreement. Ms Smith says she was advised to read it later and discuss with Mr Docherty. Ms Smith says Ms Foreman drove her to the airport as the flight was 7:20 pm and Ms Smith needed to be there at around 6:30 pm. Mr Docherty says Ms Smith was dropped back at the airport at 5pm.

[17] Ms Foreman could not recall the timing of Mr Docherty's return to the salon or when she took Ms Smith to the airport nor could Ms Foreman recall what tasks or observations Ms Smith undertook during the afternoon in question as she says she had clients to attend to. Mr Docherty suggested Ms Smith only completed the eye trio test and no other work but advanced no other evidence to confirm this.

[18] I accept Ms Smith's evidence as more credible as Mr Docherty was not present when the work trial occurred – I conclude Ms Smith completed several supervised tasks and observations as she describes. Given the timing of Ms Smith's flight and the work she undertook, I also conclude that it is more likely than not, Mr Docherty returned to the salon on 5 November later than he recalled.

### **Consideration and conclusion of employment agreement**

[19] Ms Smith says she read the employment agreement a few days later noting it had already been signed by Mr Docherty on 5 November 2020 and it contained a 90 days' trial period provision. At the investigation meeting, Ms Smith indicated she was familiar with such a provision (trial period) from previous employment and did not raise any objections to it as she "thought it was standard".

[20] Ms Smith says she did have significant concerns that the hours of work clause in the agreement was not consistent with how Mr Docherty portrayed the job as full-time. The hours of work clause in full stated:

The employer will roster the employee on for up to 40 hours each week. But no less than 15 hours. The timeframe for these work sessions will be Monday to Saturday within the hours of 10 am to 9pm. The timing of working hours will be set out in a roster.

The employer may offer more hours, and the employee can decide whether to accept the offer of extra hours.

The employer will let the employee know at least 48 hours in advance of the new roster, unless there are exceptional circumstances. The employer will make sure the employee has 2 days off in a row within a reasonable period when the roster is set.

[21] Ms Smith says she interpreted the above, as being her hours could “be as low as 15 hours” and that the agreement’s “Conflict of Interest” clause prevented her from topping up her earnings at another beautician’s business. Ms Smith had also resigned her part-time retail job in anticipation of taking up the position with SKT on 1 December. The relevant “Conflict of interest” provision stated:

The employee understands and agrees that during the term of their employment, the employee must not work for or operate any form of business within the same industry as the employer and any such violation of this condition will result in immediate termination without notice.

[22] I observe that although no remedy is claimed for such, that the agreement when the hours of work and conflict sections are interpreted together, is inconsistent with s 67E of the Act that allows an employee to refuse to perform work if the agreement has no reasonable compensation for a requirement that the employee make themselves available outside minimum hours (here 15 hours). The hours of work clause referring to an employee being able to decide to turn down “more hours” is rendered ineffective by the conflict-of-interest clause and is otherwise ambiguously drafted as it can be read to mean more hours beyond those rostered rather than just above 15 hours. I suggest SKT seek appropriate legal advice to ensure future compliance with s 67E of the Act.

[23] Ms Smith says she called Ms Foreman on the morning of 27 November and indicated she had not signed the employment agreement because of the hours clause, saying it was not what Mr Docherty had portrayed to her. Ms Smith says Ms Foreman assured her that all employment agreements, including her own, were the same but not to worry it was a “full-time” position. Ms Smith took no legal advice and on the latter assurance, she signed the agreement and emailed it to Ms Foreman on 27 November. The commencing date of employment in the agreement is stated as 1 December 2020.

[24] A further call from Ms Foreman elicited that the salon would not open until 7 December but up until then (from 1 December), Ms Smith would be paid for 15 hours. Ms Foreman confirmed the delay in opening by email of 27 November and indicated that the first few days would “involve training and getting up to speed with how the salon will run” before opening to the public by the end of the week. A grand opening of 15 December was alluded to and that such would start at 5:30 pm to around 8pm with Ms Smith being expected at work “to carry out treatments and also introduce yourself to future clientele”. Ms Smith did not raise any further concerns about the hours of work on offer.

[25] In the event, the salon was not opened until 10 December and Ms Smith, before this date, engaged in cleaning and preparation work and met her co-beautician (who had disclosed she also undertook an unpaid trade test in Christchurch) and the newly appointed Nelson salon manager, Sheena Carr.

[26] Ms Carr told Ms Smith her rostered hours would start with: Tuesdays and Wednesdays (10 am – 5 pm), Thursdays and Fridays (1 pm – 8 pm) and Saturdays (10 am – 4pm) and advised the weekly 20% bonus threshold target would be set by Christchurch and posted on the staff notice board each week and was subject to change.

[27] Ms Smith’s first pay was delivered on 10 December 2020 - it was for 15 hours and did not include any compensation for the time spent at the Burnside salon on 5 November. Ms Smith says she chose not to raise any issue about this at the time as she “didn’t want to make waves so early on”. Thereafter, as the salon customer needs fluctuated, Ms Smith described several changes to her rostered hours, sometimes with inadequate notice, that reduced her pay expectations and caused financial hardship.

## **Issues leading up to the dismissal**

[28] SKT witnesses suggested that Ms Smith struggled to establish a positive relationship with the Nelson salon manager and this included an incident of a client having problems with a leg waxing, a bikini wax that took too long and a perception that Ms Smith was not arriving at work fully prepared. By contrast, Ms Smith says she did not receive sufficient training that took account of her lack of experience and that she was expected to undertake unpaid preparation time and that breaks were difficult to take and that being taken off bikini waxing impacted her ability to earn a bonus. Ms Smith indicated the tense relationship with Ms Carr led her to feeling constantly anxious and this was compounded by roster issues. Ms Carr indicated she had had previous conversations with Ms Foreman about Ms Smith's performance inadequacies including her lack of arriving at work suitably prepared (Ms Carr says she addressed the latter issue at meetings with Ms Smith including one involving Ms Foreman).

[29] Matters came to a head when Ms Smith took two days sick leave on 15 January 2021 after visiting her GP and providing SKT a medical certificate for a day's absence. Ms Smith says her GP suggested she take more time off to cope with diagnosed anxiety and the GP provided a one-month medical certificate that Ms Smith did not disclose to SKT. Ms Smith says she felt financially pressured and resolved to try and discuss her concerns with Ms Carr and return to work.

[30] Ms Smith subsequently met with Ms Carr on 19 January and "raised all the issues that had been making her feel miserable". During the conversation, Ms Smith disclosed her GP had advised her to resign but she wanted to resolve matters causing her distress. Ms Smith says she was buoyed by assurances given by Ms Carr including being offered more training. Ms Carr says it was clear Ms Smith was unhappy and claimed she told her she was actively looking for another job and Ms Smith asked her not to discuss this with Ms Foreman.

[31] Shortly after the meeting, Ms Carr called Ms Foreman to relay her concerns. Ms Carr conceded she told Ms Foreman that Ms Smith was looking for other work and that Ms Smith's GP had said the work was stressing her. Ms Carr says Ms Foreman indicated she would speak to Ms Smith, as she was worried about her working in a distressed state.

However in the same conversation, Ms Carr says Ms Foreman spoke about ending the relationship and suggested an option existed of doing this immediately and paying Ms Smith seven days in lieu of notice.

[32] Ms Foreman conceded she did tell Ms Carr that she was contemplating ending Ms Smith's employment but that she would have to clear that with Mr Docherty. Ms Foreman indicated she then spoke to Mr Docherty and he authorised her decision to dismiss Ms Smith and then she resolved to communicate this to Ms Smith.

### **The 20 January 2021 dismissal**

[33] Ms Smith went to work on 20 January and says she felt hopeful there would be change after the discussion with Ms Carr. However, at 3 pm Ms Foreman called her and asked to discuss the issues she had raised with Ms Carr. Ms Smith disclosed to Ms Foreman she was struggling with anxiety due to the matters she had discussed with Ms Carr and Ms Smith related causative issues. Ms Smith says she thought Ms Foreman was calling to address her concerns. Ms Smith says she disclosed her GP had recommended she look for other work but she needed full-time work and she thought that had been assured by Mr Docherty. Ms Smith says Ms Foreman then advised her that she did not think she had a future at SKT and that she was to be dismissed under the 90 days' trial period with 7 days' pay in lieu of notice and she should gather her possessions and leave immediately. Ms Foreman says she gained an impression from Ms Carr that Ms Smith had an "attitude problem" but she did not put that to Ms Smith during the call as she already had the "go ahead" from Mr Docherty to dismiss – no notes were taken of the conversation.

[34] Ms Smith says after being informed of her dismissal on 20 January she rang her Mum and then left the salon. Ms Carr confirmed this chain of events.

[35] Ms Foreman then emailed Ms Smith a letter on 21 January headed "Termination of Employment". The letter referred to the conversation of yesterday "where you were given verbal notice that your trial period with Sun Kissed Tan was being brought to an end" and:

It is with regret we inform you that your employment with the company is being terminated effective immediately under the 90-Day Trial Clause of your employment agreement As your employment is ending effective immediately there

is no need for you to return to work, we will pay you out your one week's notice and any leave entitlements you may have accrued.

This was not a decision that the company came to easily, however with you actively looking for other work combined with your attitude towards your role means the working relationship has become untenable.

### **Personal grievance**

[36] Ms Smith then engaged a Nelson Community Law Centre lawyer, and they raised a personal grievance of unjustified dismissal and unjustified disadvantage (concerning the alleged assurance of full-time work) in a letter of 11 March 2021. The lawyer claimed that the 90 days' trial period had no effect as Ms Smith was an existing employee before she signed the employment agreement having undertaken work for SKT on 5 November 2020. The lawyer also contended that the subsequent dismissal was procedurally and substantively unjustified.

[37] In a letter of response of 15 March 2021 SKT's Mr Docherty claimed the trial period was valid, enabling a dismissal without Ms Smith having recourse to a personal grievance. Mr Docherty expanded upon the reasons for dismissal suggesting it was:

... because of her poor attitude towards work, continued lateness and that she was taking time off to pursue other employment opportunities subsequently the relationship between the parties became untenable and Laura's employment with the company was terminated pursuant to her employment agreement.

[38] Mr Docherty then addressed the various disadvantage claims raised by Ms Smith around her hours of work saying, "at no point was Laura guaranteed 37 hours per week", break opportunities were provided and that starting times and weekly bonus targets were wholly discretionary.

[39] The parties subsequently attended mediation and were unable to resolve matters and the employment relationship problem is now before the Authority.

### **The Law on the threshold issue**

[40] Section 67A and 67B of the Act are the relevant governing provisions that state:

**67A When employment agreement may contain provision for trial period for 90 days or less**

(1) An employment agreement containing a trial provision may be entered into by a small-to-medium-sized employer and an employee who has not previously been employed by the small-to-medium-sized employer.

(2) For the purposes of this section and section 67B, -

**small-to-medium-sized employer** means an employer who employs fewer than 20 employees at the beginning of the day on which the employment agreement is entered into

**trial provision** means a written provision in an employment agreement that states, or is to the effect that -

- (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
- (b) during that period the small-to-medium-sized employer may dismiss the employee; and
- (c) if the small-to-medium-sized employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

#### **67B Effect of trial provision under section 67A**

(1) This section applies if a small-to-medium-sized 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.

(3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (j).

(4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.

(5) Subsection (4) applies subject to the following provisions:

- (a) in observing the obligation in section 4 of dealing in good faith with the employee, the small-to-medium-sized employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and

- (b) the small-to-medium-sized employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

### **Fewer than 20 employees?**

[41] An initial issue was I had to direct SKT after the investigation meeting to provide sufficient evidence to establish they were at the time Ms Smith signed her employment agreement (27 November 2020): a small-to-medium-sized employer with fewer than 20 employees and within the ambit of s 67A (2) of the Act.

[42] SKT after some delay provided records that did not establish to a sufficient degree that they engaged less than 20 employees at the time Ms Smith signed her employment agreement. This point turned on the fact that two additional employees engaged at the Nelson business who started work on the same day as Ms Smith but signed employment agreements at dates earlier than 27 November 2020 would have tipped the number of employees over twenty. A further moot point was whether Mr Docherty, who IRD records showed was paying PAYE, could be deemed to be an employee as well as a director and shareholder.

[43] In the event, I have decided not to make a conclusive finding on this issue as I have found as follows, other grounds on which the trial period is rendered ineffective.

### **Was Ms Smith already an employee when she agreed to the trial period?**

[44] Ms Lawrence's submission was that case law in this area is well-established and that it was evident that Ms Smith was not bound by the trial period because when she signed the employment agreement, she was an existing employee and exempted from the coverage of the trial period clause by dint of s 67A(1) of the Act.

[45] How the Employment Court has approached an assessment of the validity of trial periods is discussed in *Smith v Stokes Valley Pharmacy (2009) Ltd*:

[46] During the Bill's second reading in the House, the Minister said:

“This bill is a moderate bill. It has been prepared to protect the rights of employees. It has been prepared and drafted to give new employees the opportunity to say ‘Give me a go; I will prove myself.’ and to get their foot in the employment door. ...

... This bill applies only to new employees. It will not affect existing employees, and the trial period is established only by agreement. So it is up to the new employee to say 'Give me a trial period.' The bill will not affect the rights of existing employees.

... We have specifically provided, in our bill, that an employee is one who has not been previously employed by that employer.”

[47] These passages confirm the statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise settled during its course. Employees affected are to be new employees. Such clauses contain a balance of employee protective elements as well as facilitating hiring and firing.

[48] Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.<sup>2</sup>

#### **Assessment: validity of the trial period**

[46] The problem for SKT is, if I find that Ms Smith entered an employment relationship by dint of the work she undertook on 5 November 2020 (the so-called “trade test”), then by the time Ms Smith signed the employment agreement on 27 November 2020 she would have already been in employment and the trial period would be rendered invalid and not in accord with s 67A(1) of the Act. To determine if the latter is so, the validity or otherwise of SKT’s assertion that what occurred on 5 November was part of the recruitment process and not a commencement of Ms Smith’s employment is at issue.

[47] In *Salad Bowl Limited v Howe-Thornley* the Employment Court grappled with the same issue of whether a person undergoing a work trial had become an employee (or was working) at that point in time and they formulated the following guideline:

Where the reasonableness line is likely to be crossed most commonly and ‘work’ may be engaged in, for which there may well 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

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<sup>2</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111.

the economic or other business or operational benefit to the employer may not have been optimal at that point due to the needs of 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.<sup>3</sup>

[48] Mr Docherty sought to distinguish *Salad Bowl* as he says that case involved two sole charge shifts being undertaken by a prospective employee (a chef). Mr Docherty suggested what was being evaluated in *Salad Bowl* was “the employee’s ability to multi-task which is a personality trait not a skill obtained through tertiary study” and that the situation of Ms Smith’s trial was “fundamentally different”.

[49] Mr Docherty says he made it clear during the interview and on calling Ms Smith to indicate she was a potential appointee, that she must complete a “skills evaluation” as part of the application process. Ms Smith conceded a discussion on a “trade test” occurred during her initial interview and that it would take place in Christchurch but says Mr Docherty did not use the term “proceeding to the next phase in the application process”. Ms Smith says when Mr Docherty called her after the interview, she only recalled him describing the evaluation as a chance to “show them what you can do”.

[50] In evaluating the situation and applying the guidance in *Salad Bowl*, I have considered that Ms Smith agreed to participate in the so called ‘trades test’ and it arose out of an initial interview where the purpose of such was explained. It was also likely that Ms Smith’s expectation of payment was a retrospective one given she did not ask for such payment at the time. However, I accept evidence that on the day, Ms Smith undertook other work beyond the test and that this included cleaning and performing procedures on two clients (the latter gaining an actual economic benefit for SKT). Ms Smith also engaged in close familiarisation of other tasks including observing a spray-tanning, where to a member of the public undergoing this intimate procedure, Ms Smith would likely be viewed by that member of the public as an employee of SKT.

[51] I find notwithstanding the trade test, the time Ms Smith spent in the Burnside salon extended to her performing a range of supervised and sole charge tasks that she then undertook on an ongoing basis in Nelson. I also see no distinction, as Mr Docherty

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<sup>3</sup> *Salad Bowl v Howe-Thornley* [2013] NZEmpC 152 at [27]. See also Authority application of *Salad Bowl* principles by Member Craig in *Hu v Biform Ltd* [2019] NZERA 436.

suggested, between whether Ms Smith's personality traits or actual skill level were being assessed – they were both under scrutiny. I place little credence on the voluntariness of Ms Smith submitting to the test or a suggestion it was part of an ongoing interview process. The imbalance of power between the parties is evident and by the time the test was undertaken, no other candidates were being assessed. I do understand and have carefully considered Mr Docherty's perspective and his anecdotal evidence, that such trade tests may be commonplace in his industry and that the time spent on the test was only around an hour.

[52] However, in applying the test in *Salad Bowl* I must assess both the trade test and the additional tasks Ms Smith undertook. I accept this may have been a marginal case if perhaps only the trade test was undertaken and the purpose of such had been agreed in writing between the parties including a stipulation it was part of the interview process and unpaid. On an alternative basis, there was nothing to stop SKT undertaking a skills evaluation once employment commenced under a valid 90 days' trial period to ensure strict compliance with s 67A (1) of the Act and then bringing the employment to an end if the work of the employee was unsatisfactory – that is the statutorily provided advantage to an employer of the trial period provision.

### **Finding**

[53] I find Ms Smith commenced employment on 5 November 2020 and SKT cannot rely upon the shield of a valid trial period exempting them from facing an unjustified dismissal claim as they subsequently entered into an employment agreement on 27 November 2020 and by this point in time, Ms Smith had been previously employed by SKT.

### **Notice given to Ms Smith – did it comply with s 67B (1) of the Act?**

[54] To complete an assessment of the situation although not claimed in submissions as deficient, I note that while terminating the employment summarily on 20 January 2021, Ms Foreman impliedly sought to comply with the notice provision in Ms Smith's employment agreement by giving written notice on 21 January and paying Ms Smith an in lieu of notice payment. Whereas the relevant extracts from the "Trial period" clause in the employment agreement, states:

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 weeks (sic) notice before the trial period ends. The employee might decide to pay the employee not to work. For serious misconduct, the employee may be dismissed without notice.

[55] The above provision's first part is consistent with s 67B (1) of the Act that specifies an employer must give "the employee notice of termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period".<sup>4</sup> The second part (last sentence) is however, not consistent with the Act as the Act provides no opportunity for an employer to dismiss without notice, arguably even for serious misconduct. Here however, Ms Smith's dismissal was purportedly on notice (paid in lieu) for performance or other reasons as serious misconduct was not at issue.

[56] The Court of Appeal affirmed in *Ioan v Scott Technology NZ Ltd* that a strict approach to s 67B(1) is required, stating:

The general law regarding the effect of a payment in lieu of notice is well established. The mere fact of a payment in lieu of notice does not itself prevent a termination from being a summary dismissal. It is not an alternative to providing notice as required by the agreement. Nor will the fact of a payment cure a defective notice, including a notice that is defective because it is ambiguous or not in accordance with the contract because, for example, the period of notice is too short. If, however, the payment is simply an alternative to the employer requiring the employee to work out the correct period of notice which has been conveyed in clear and unambiguous terms, then that is a termination on notice.<sup>5</sup>

[57] The problem for SKT is that no notice was given when Ms Foreman summarily dismissed Ms Smith in her telephone conversation of 20 January and sent her away from the workplace. The letter of 21 January purporting to dismiss Ms Smith on notice with a payment in lieu could not cure this defect as Ms Smith had already been summarily dismissed.

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<sup>4</sup> Employment Relations Act 2000, s 67b(1).

<sup>5</sup> *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386, CA 142/2018 at [28] - [29].

## **Finding**

[58] Exercising discretion, I have under s 122 of the Act that the nature of the grievance may be found to be of a different type to that alleged, <sup>6</sup> I find that the payment in lieu of notice although permitted by the employment agreement, did not cure a defective notice – the notice given was not ambiguous or short - it was non-existent at the actual point in time Ms Smith was dismissed.

[59] I find that in addition to or in the alternative to my finding on the ‘trade test’ issue above, that the failure to give Ms Smith proper notice means SKT is unable to rely upon s 67B to justify its decision to summarily dismiss Ms Smith. The defective notice in this context renders the trial period inoperable. The Employment Court in *Best Health Foods Ltd v Berea* found in similar fact circumstances (applying *Ioan v Scott Technology*), found that: “Since the provisions of the trial provision were not complied with, the company can not rely on them”. <sup>7</sup>

### **Was Ms Smith unjustifiably dismissed?**

[60] Given the finding that SKT cannot rely on a valid trial period I now consider whether Ms Smith’s dismissal was unjustified.

[61] The reasons given in Ms Foreman’s letter of 21 January 2021 confirming the summary dismissal were that Ms Smith had purportedly been “actively looking for other work” and reference was vaguely made to “attitude towards your role”. In submissions, Mr Docherty did not specifically address the reasons for Ms Smith’s dismissal, so I am led to imply from evidence given, that SKT consider that the summary dismissal of Ms Smith in all the circumstances was a step which a fair and reasonable employer could have taken.

[62] The first issue is that to dismiss someone summarily it must follow a finding of serious misconduct. Ms Smith’s employment agreement details that a dismissal without notice “following a fair process” is permissible if the employer concludes “the employee has

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<sup>6</sup> Section 122 Employment Relations Act 2000 provides “Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than alleged.

<sup>7</sup> *Best Health Foods Limited v Berea* [2021] ERNZ 696, at [71] and [72].

engaged in serious misconduct”. Whilst not limiting the scope of such, examples of serious misconduct in the employment agreement are said to include:

- theft
- sexual or other assault
- harassment of a work colleague or customer
- use of illegal drugs at work
- repeated failure to follow a reasonable instruction
- deliberate destruction of the employer’s property
- actions that seriously damage the employer’s reputation
- a serious breach of the employer’s policies and procedures.

### **Assessment**

[63] Objectively viewed and contrasted with the above examples, the two reasons given for a finding of serious misconduct do not objectively establish that immediate dismissal was warranted. Even if Ms Smith had been actively seeking alternative employment which was not established on the facts, this could not be considered misconduct. Further, the suggestion that Ms Smith’s “attitude” was at issue was not put to her at the time or established in evidence during my investigation, other than a suggestion that Ms Smith expressed concerns about being misled about her hours of work, lack of break times and training. I accept Ms Carr described tensions between her and Ms Smith and a flashpoint was her not fulfilling an expectation that she would arrive at work early at the beginning of her rostered paid time but these were performance matters that could have been easily resolved.

[64] At best for SKT, it was objectively apparent that Ms Smith was struggling in the role which given her inexperience, was unsurprising in the context of a newly established business with three relatively inexperienced staff. I also accept Ms Smith was having difficulty in establishing a positive relationship with her salon manager Ms Carr. However, I am led to an objective alternative conclusion that one of the predominant reasons for the dismissal was that SKT found out that Ms Smith was potentially suffering anxiety and they quickly moved to dispense with her services. As a fair and reasonable employer, if SKT had performance concerns about Ms Smith they should have properly put Ms Smith on notice about these concerns and advised how they could be addressed, including offering necessary and appropriate training and support. This was not done.

[65] Ms Smith's claim is SKT dismissed her in a procedurally and substantively unjustified manner that cannot satisfy s 103A of the Act and she was, therefore, unjustifiably dismissed. The test in s 103A(2) is whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Section 103A(3), requires that I consider several factors, including whether concerns were raised by the employer with the employee before dismissing the employee, whether a reasonable opportunity to respond to those concerns was given, and whether the employer genuinely considered the employee's explanations (if any) before dismissal. Given that the employment was for a relatively brief period, I find that SKT gave Ms Smith insufficient time and support to develop on the job. I also find that although Ms Smith took no legal advice and entered the relationship knowing only 15 hours per week were guaranteed, the way in which the job was portrayed as full time was not ideal.

[66] The manner of the dismissal was pre-determined and abrupt with no practical opportunity for Ms Smith to obtain representation, have any input into the decision or address the decision-maker (Mr Docherty). Section 103A of the Act and good faith considerations were absent in the decision to dismiss. The procedural defects were not minor and did result in Ms Smith being treated unfairly.

### **Finding**

[67] No fair and reasonable employer could have concluded that summary dismissal was warranted in these circumstances. I find that Ms Smith was unjustifiably dismissed.

[68] In concluding Ms Smith was unjustifiably dismissed she is entitled to consideration of available remedies. I note in exercising the discretion I have under s 160(3) of the Act I have not considered the separate disadvantage claims Ms Smith identified. This is because the contextual background matters leading to the unjustified dismissal decision merge and they form part of the same factual matrix. I consider the remedies I grant below are adequate to address the employment relationship problem Ms Smith has identified.

[69] The remedies below do not include consideration of several claimed penalties for breach of an employment agreement alluded to in Ms Lawrence's submissions, as these

claims were advanced outside the limitation period of 12 months specified in s 135(5) of the Act.

## **Remedies**

### *Lost wages*

[70] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Ms Smith should I find that she has established a personal grievance and, s 128(2) mandates that this sum be the lesser of a sum equal to her lost remuneration or three months' ordinary time remuneration. Here I find Ms Smith's lost remuneration was attributed to the personal grievance. Ms Smith provided ample documentary evidence that she struggled to secure alternative employment in her chosen field (beauty therapy) and other roles outside until she secured a temporary job apple packing between 22 March 2021 to 30 June 2021 and thereafter a position in the beauty industry.

[71] In all the circumstances, given the notice in lieu paid out was for 17 hours, I consider it equitable that SKT is ordered to pay Ms Smith eight weeks' lost wages at a notional 37 hours per week, in the sum of \$6,393.60 gross (a sum including an 8% holiday pay loading).

### *Compensation for hurt and Humiliation*

[72] Ms Smith gave compelling and unchallenged evidence of the humiliating impact of the summary dismissal and the affect upon her self-confidence and mental health, to an extent she had not previously experienced. Ms Smith explained that she felt belittled by the harshness of the comments made by Mr Docherty after her dismissal and the impact of the dismissal lasted for some six months before she could regain her self-belief.

[73] I find that, with some justification, Ms Smith felt SKT dismissed her in a callous and peremptory fashion and that SKT was unwilling to discuss the situation including Ms Smith's objectively real concerns about the application of her employment agreement and employment rights. SKT was dismissive and failed to listen to Ms Smith's perspective of the situation. I find Ms Smith was afforded no dignity and she suffered significant humiliation as a direct result of how she was summarily dismissed.

[74] Ms Smith found alternative employment but not immediately in her chosen field and was unable to put this unfortunate experience behind her for a significant period. Considering the circumstances and awards made by the Authority and Court in similar situations and how SKT effected this dismissal, I consider Ms Smith's evidence warrants compensation of \$12,000 under s 123(1)(c)(i) of the Act.

### **Contribution**

[75] Section 124 of the Act states that I must consider the extent to what, if any, Ms Smith's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedies granted should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>8</sup>. Given the relatively short period of employment and the fact that the dismissal was ostensibly for unidentified performance issues I do not see any issues of contribution from Ms Smith. The decision to dismiss in context, was a disproportionate response to Ms Smith reaching out for assistance and support. I cannot objectively deem Ms Smith's conduct to have been in any way 'culpable'.

### **Finding**

[76] I find that no reduction in the remedies I have awarded is justified.

### **Overall finding**

[77] I have found that:

- a. Laura Susanne Forrest Smith was unjustifiably dismissed from her employment with Sun Kissed Tan Limited.
- b. Sun Kissed Tan Limited must pay Ms Smith the sums below:
  - (i) \$6,393.60 gross lost wages.

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<sup>8</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

- (ii) \$12,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Act.

## **Costs**

[78] Costs are at the discretion of the Authority and are reserved. The parties are encouraged to make an agreement on costs. If no agreement is achieved, Laura Susanne Forrest Smith has fourteen days following the date of this determination to make a written submission on costs and Sun Kissed Tan Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.<sup>9</sup> Costs will not be considered outside the latter timetable unless prior leave to do so is sought from the Authority. The parties can expect if asked to do so, that the Authority by applying a notional daily rate unless circumstances are identified that necessitate an adjustment either above or below the daily rate. I note that Ms Smith was represented by a Nelson Community Law Centre counsel but I do not see that as preventing the Authority considering a costs application from counsel on the basis that I can exercise a wide discretion under cl 15, Schedule 2 of the Act and the Court and Authority has elsewhere upheld this contextual approach<sup>10</sup>.

**David G Beck**  
**Member of the Employment Relations Authority**

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<sup>9</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

<sup>10</sup> See Member Dallas' discussion of why a community law centre, for public interest reasons, may be granted a contribution to costs of representation in *Celia Popkin v Innovative Landscapes Limited* [2020] NZERA 374, an approach upheld by the Employment Court in *Innovative Landscapes (20150 v Popkin* [2020] NZEmpC 96, [2020] ERNZ 262 at [21]-[22].