

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 36  
5408948

BETWEEN                      ANDREA THOMAS  
   Applicant  
  
A N D                              TIC-TAC-TOE EDUCARE  
   LIMITED  
   Respondent

Member of Authority:      K J Anderson  
  
Representatives:              David Vinnicombe, Advocate for Applicant  
   Sandra Pope, Advocate for Respondent  
  
Investigation Meeting:      5 November 2013 at Hamilton  
  
Date of Determination:      3 February 2014

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     The applicant, Ms Andrea Thomas, claims that she was unjustifiably dismissed on 21 December 2012. Ms Thomas asks the Authority to find that she has a personal grievance and award her various remedies.

[2]     The respondent, Tic-Tac-Toe Educare Limited (the company), represented by the managing director, Ms Sandra Pope, denies that Ms Thomas was unjustifiably dismissed. Rather, Ms Pope says that Ms Thomas was employed on a trial basis and as there were too many child carers employed in relation to the number of children enrolled at the Tic-Tac-Toe early childhood education centre, the employment of Ms Thomas was terminated at the end of 2012: being the closure of childhood centre for the year.

**Background**

[3] The company operates a small early childhood education centre located at Huntly. The owner/operator of the business is Ms Pope. The evidence of Ms Pope is that she started her business in July 2012, albeit it seems that she had no experience with the operational requirements of an early childcare business. It appears that Ms Pope relied, to a substantial degree, on the experience of the applicant's mother, Ms Mary-Ann Thomas, who was, at the material times, employed by the company looking after the babies' room at the childcare facility.

[4] Ms Pope attests that Mary-Ann Thomas asked her to employ Andrea Thomas as the latter was in some financial difficulty. Following a Police check, Andrea Thomas was employed on a casual basis, acting as a relief carer when other staff were unavailable. The evidence of Ms Pope is that Mary-Ann Thomas was largely responsible for allocating work to Andrea Thomas and Ms Pope says that looking back on the records, she concludes that Andrea Thomas was receiving more paid hours of work than she should have, given the number of children attending the facility. The latter evidence is of some relevance in the context of Ms Pope's subsequent decision to terminate the applicant's employment.

**The employment agreement**

[5] It seems that because Andrea Thomas was employed on a casual basis, Ms Pope was under the impression, quite mistakenly, that an employment agreement was not necessary. However, in November 2012, Andrea Thomas enrolled in a course of study relating to early childhood education. The evidence of Ms Pope is that Mary-Ann Thomas requested that an employment agreement should be made available to Andrea Thomas to verify that she had employment for a qualifying number of hours at an early childhood centre, in order to be able to participate in and complete the course of study. Ms Pope attests that at the suggestion of Mary-Ann Thomas, a trial period was included in the employment agreement.

[6] But in fact, there was not a trial period provision in the employment agreement at all. The only reference to a "trial period" is to be found at clause 2 of the agreement. This states that:

The nature of your employment is a fixed term employment relationship and is subject to the terms and conditions contained in their agreement.

This agreement is fixed for the period of *3 mths*.

From *19/11/2012* to *19/2/2012* [sic 2013] (no more than 12 months).

The agreement is of a fixed term nature to recognise the fact that the Centre wishes to retain your services exclusively for a fixed period.

The reason for your employment ending at the end of a fixed period is *trial period to re-evaluate*.<sup>1</sup>

The term of this agreement is subject to the termination clause in this agreement and where relevant, the provisions pertaining to the parental leave employee returning earlier than their notified date for return.

You acknowledge that you will receive, in terms of the remuneration package contained in this agreement, consideration for entering into a fixed term agreement.

There shall be no express or implied obligation on either party to renew this agreement at the expiry of its fixed term which is to be no longer than 12 months.

[7] It has to be said that this particular clause is badly drafted and the Authority is unaware if Ms Pope received advice before entering into the agreement with Ms Thomas. And there are risks attached to making alterations to a standard form agreement without giving close consideration to the specific circumstances and context involved.

[8] At clause 17 of the employment agreement, there is a provision that either party may terminate the agreement by giving two weeks' notice in writing to the other party. In the event that the employer terminates the agreement, there is a provision for payment in lieu of notice.

### **The dismissal of Ms Thomas**

[9] It is common evidence that the employment of Ms Thomas was terminated on 21 December 2012 and that this was conveyed to her via a brief letter of the same date; signed by Ms Pope. The letter informs:

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<sup>1</sup> The employment agreement appears to be of a standard form nature. The words in italic hand written.

To Andrea,

I am sorry to inform you that we will not be renewing your contract and your trial period is now terminated. Your final pay will be received today including holidays owing.

Regards

Sandy Pope

[10] The evidence of Ms Pope is that the reason for the termination of the employment of Ms Thomas was that the business had too many staff in relation to the number of children enrolled at the facility. Ms Pope attests that she was new to this type of business with “no money” and a “tight budget” to adhere to. Ms Pope says that the nature of early childhood education is that the number of children enrolled can change from month-to-month and sometimes week-to-week and that funding for the number of children can get out of balance if the business has unqualified staff; such as Ms Thomas. The further evidence of Ms Pope is that she discussed this issue with Ms Thomas when the employment agreement was signed (19 November 2012) and informed her that: “...it might not work”.

[11] Ms Pope attests that 21 December 2012 was the date that the childcare facility closed for the year and this was when she had to reassess what would be happening for the new year (2013) in regard to the numbers of children and the appropriate number of staff to be employed. The further evidence of Ms Pope is that she concluded that the babies’ room was overstaffed: that is, one adult for five children, whereas the staffing ratio for the other childcare room was one staff member for 10 children.

[12] The evidence of Ms Thomas is that she was simply handed the letter (above) on 21 December 2012 and that no reason for the termination of her employment was given to her. In particular, Ms Thomas attests that there was no mention made by Ms Pope of the facility being overstaffed or any other circumstances pertaining to there being a redundancy situation.

### **Analysis and conclusions**

#### **Was there a valid trial period that prevents Ms Thomas from pursuing a personal grievance?**

[13] It appears that Ms Pope relied on the mention of a trial period at clause 2 of the employment agreement when terminating the employment of Ms Thomas. It is not

clear if Ms Pope ever received any professional advice about the content and appropriateness of the provisions at clause 2 of the agreement before it was signed. Ms Pope's evidence is that she contacted the Department of Labour and was given "the ins and outs of the 90 day trial" but that does not really assist either the Authority or Ms Pope. In any event, it must be said that Ms Pope could not rely on clause 2 of the agreement as a means to dismiss Ms Thomas as this provision does not go anywhere near meeting the requirements of ss.67A and 67B of the Employment Relations Act 2000 (the Act). Furthermore, it is now well established that if an employer is seeking to obtain immunity from an employee pursuing a personal grievance, via a 90 day trial period under the above provisions of the Act, not only does the trial period have to be clearly set out in the employment agreement, the agreement must be signed prior to the employee commencing their employment<sup>2</sup>. Regrettably, these conditions were not met.

[14] It follows that the Authority finds that there was not a valid trial period in existence; hence Ms Thomas is entitled to pursue a personal grievance, as she has done.

### **Was there a valid fixed term agreement?**

[15] Section 66 of the Act provides that an employee and an employer may agree that the employment of the employee may be for a fixed term and that the employment 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.<sup>3</sup>

[16] But s.66 also sets down some very specific requirements regarding fixed term employment agreements; as follows:

- (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

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<sup>2</sup> *Smith v. Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253

<sup>3</sup> Subsection (1).

- (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):
    - (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.
  - (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.

[17] Clause 2 of the agreement, while informing that the employment of Ms Thomas was for a fixed term, does not meet the essential requirements of subsection (4) of s.66 of the Act.

[18] An issue then arises as to whether, pursuant to s.66(6) of the Act, Ms Thomas elects to treat the three month fixed term period agreed to as being ineffective. The position of Ms Thomas on this issue is somewhat inconsistent. On the one hand she appears to be saying that the three month term agreed to should be treated as ineffective, thereby making her employment permanent; and this is also argued by her

advocate as being the case. But on the other hand, Ms Thomas told the Authority that she: “... *thought the contract would be for three months*” and that she: “... *didn't think [she] would lose the job inside that period*”. Essentially, the Authority gained the impression that the real nature of the grievance raised by Ms Thomas is that her employment was terminated inside the three month period that she contracted for and hence there was a breach of the agreement. I will return to this matter in due course.

**Was the dismissal of Ms Thomas something that a fair and reasonable employer could do in the circumstances?**

[19] In applying the test provided by s.103A(2) of the Act, the Authority must consider any factors that it thinks appropriate, in addition to those set out at s.103A(3).

[20] The evidence of Ms Thomas is that she believes that the “true reason” for the termination of her employment was related to the information that she provided in a survey undertaken by the company. Apparently, a survey of parents with children at the facility was undertaken. Ms Thomas had children enrolled there, in addition to being a staff member, and she completed the survey, which included some criticism of the enterprise by her. Ms Pope denies that any consequences pertaining to the survey were visited upon Ms Thomas and there is no tangible evidence to support the proposition advanced by Ms Thomas.

[21] While it is clear that the employment relationship between Ms Pope and Ms Thomas was such that neither was brimming with confidence and trust in the other, on the overall weight of the evidence, I conclude that the dismissal of Ms Thomas was most probably on the grounds that Ms Pope concluded that the staff/children ratio was unbalanced to the extent that there would be consequences for the funding of the business and hence the position of Ms Thomas was deemed to be surplus to requirements, albeit I suspect that the employment relationship was becoming tenuous in any event..

[22] It also appears that Ms Pope mistakenly thought that Ms Thomas was employed for a trial period under the Act that allowed for the termination of her employment without any legal consequences. But of course this has been shown to be incorrect.

[23] An argument has been advanced that it is questionable whether the position of Ms Thomas was genuinely surplus to the requirements of the business. However, the evidence about this is inconclusive. But in any event, it is established that the manner in which Ms Thomas was dismissed did not comply with established principles in regard to the requirement to consult with her before deciding to terminate her employment on the ground of redundancy.

[24] Therefore I am left to conclude that the manner in which Ms Thomas was dismissed was not what a fair and reasonable employer could do in the circumstances, hence the dismissal was unjustified. Therefore, Ms Thomas has a personal grievance.

### **Remedies**

[25] Having found that Ms Thomas was unjustifiably dismissed, pursuant to s.123(1) of the Act, the Authority may provide for various remedies, including reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings.

#### ***Reimbursement of wages***

[26] Ms Thomas claims loss of wages in the sum of \$5,655, calculated on an hourly rate of \$14.50 x 30 hours per week for 13 weeks. But this calculation fails to take into account that Ms Thomas was paid two weeks' notice. Nor does there appear to be any acknowledgment by Ms Thomas, consistent with her evidence to the Authority, that she only had an expectation of three months' work which would have ended on 19 February 2013.

[27] Notwithstanding the inconclusive evidence pertaining to the redundancy of the position held by Ms Thomas, the Authority concludes that Ms Thomas could not have had, and did not have, any realistic expectation of continued employment beyond 19 February 2013. Therefore, at best, the loss of wages should not exceed six weeks and two days, i.e. from the end of the notice period, 4 January 2013, to 19 February 2013, at \$435 per week: being a gross sum of \$2,784.

#### ***Compensation***

[28] Pursuant to s.123(1)(c)(i) of the Act, Ms Thomas claims compensation of the sum of \$3,500. She says that the sudden manner in which her dismissal was

implemented, without being given a reason, was humiliating and it was difficult for her to explain to her friends and family why she had been dismissed. On the other hand, Ms Pope attests that she became aware that Ms Thomas posted on a Facebook post: “Don’t ever send your kids to Tic-tac-toe“. And Ms Pope says that there was a further posting from Ms Thomas informing that she had “lost her job”. Ms Pope says that this is hardly the action of a person who claims to have been humiliated and was having difficulty explaining her dismissal. The Authority has not seen the Facebook postings referred to and hence it is impossible to assess the details and/or context of the entries referred to by Ms Pope. And while the Authority formed the impression that Ms Thomas has a fairly robust personality, it is accepted that she would have been affected to some extent by the sudden manner of her dismissal and an award of compensation of \$1,000 is appropriate.

### **Determination**

[29] For the reasons set out above, the Authority finds the dismissal of Ms Thomas was unjustified. Pursuant to ss.123 and 128 of the Employment Relations Act 2000, Tic-Tac-Toe Educare Limited is ordered to pay to Ms Thomas reimbursement of lost wages of the gross sum of \$2,784.00. And pursuant to s.123(1)(c)(i) of the Act, Tic-Tac-Toe Educare Limited is ordered to pay to Ms Thomas the sum of \$1,000 without deduction.

### **Costs**

[30] Costs are reserved. The parties are requested to resolve this matter if they can. In the event that a resolution is not possible, the applicant has 28 days from the date of this determination to file and serve submissions. The respondent has a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**

