

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 304  
5404262

BETWEEN                      LINDA THOMPSON-FRIEND  
Applicant

A N D                              SUPER FINANCE LIMITED  
Respondent

Member of Authority:      Anna Fitzgibbon

Representatives:            A S Seumanutafa, Counsel for Applicant  
Arunjeev Singh, Counsel for Respondent

Investigation Meeting:      25 June 2013 at Auckland

Date of Determination:      17 July 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Ms Thompson-Friend was a permanent full time employee.**
- B. Ms Thompson-Friend was unjustifiably dismissed.**
- C. Super Finance is ordered to pay the sum of \$1,130.25 gross to Ms Thompson-Friend being arrears of wages.**
- D. Super Finance is ordered to pay Ms Thompson-Friend reimbursement of wages in the sum of \$7,020.00 gross pursuant to s123(1)(b) of the Act.**
- E. Super Finance is ordered to pay Ms Thompson-Friend the sum of \$1,500 compensation for hurt and humiliation suffered as a result of her dismissal pursuant to s123(1)(c)(i) of the Act.**
- F. Costs are reserved.**

## **Employment relationship problem**

[1] The respondent company, Super Finance Limited (Super Finance) owns and operates HP stores in Papakura and Otahuhu which stock various household items including fridge/freezers, mobile phones, beds and appliances.

[2] In addition to the sale of household items, Super Finance offers hire purchase and financing services to customers.

[3] Mr Saleem Raza is the sole director and shareholder of Super Finance.

[4] The applicant, Ms Linda Thompson-Friend, was employed by Super Finance as a sales coordinator. Ms Thompson-Friend says she was employed on a full time basis until her dismissal on 12 August 2012 by Mr Raza. Ms Thompson-Friend says her dismissal was unjustified.

[5] Mr Raza says Ms Thompson-Friend was employed as a casual sales consultant with no fixed hours of work for a trial period of 3 months. Mr Raza says that Ms Thompson-Friend failed to report to work following a conversation he had with her on Sunday, 12 August about her hours of work for the following week. When Ms Thompson-Friend did not report to work he invited her to a meeting on 20 August 2012 about her performance. Matters were not resolved and Ms Thompson-Friend never returned to work. On 28 November 2012, Super Finance finally terminated Ms Thompson-Friend's employment for "*breach of terms of employment and wilful absence for over two months*". Mr Raza says the dismissal was justified.

## **Issues**

[6] The following issues arise:

- (a) Was Ms Thompson-Friend employed on a casual basis for a trial period?
- (b) Was Ms Thompson-Friend's dismissal justified?

## **First Issue**

### ***Was Ms Thompson-Friend employed on a casual basis for a trial period?***

[7] Super Finance advertised for a “*sales coordinator*” in the Manukau Courier Newspaper on 31 May 2012. The advertisement stated:

*Sales Coordinator*

*Full time position required for our South Auckland store. The successful applicant must have excellent phone manner, experience in electronic retail or HP finance is preferable. Wage negotiable depending on experience. Call Leem on ...*

[8] Ms Thompson-Friend phoned the telephone number given in the advertisement and spoke with the manager, Ms Shailza Walia. Ms Thompson-Friend left her name and contact number with Ms Walia who passed it on to Mr Raza because she thought that Ms Thompson-Friend had a good telephone manner and may be suitable for the position.

[9] Ms Thompson-Friend received a phone call from Mr Raza later that day and was invited to attend an interview with him on Friday, 1 June 2012. Ms Thompson-Friend attended an interview with Mr Raza at Super Finance’s offices in Papakura.

[10] Ms Thompson-Friend says she was told by Mr Raza at the interview, that he was primarily seeking a person who had a good telephone manner. This was because they would be required to make appointments for sales agents to visit customers in their homes to see if they would qualify for finance. Mr Raza told Ms Thompson-Friend the role also involved selling products in Super Finance’s HP stores including fridge/freezers, appliances, bedding and mobile phones. Ms Thompson-Friend says Mr Raza told her she would be paid \$12 gross an hour during a 3 week trial period and that her wages would then increase to \$13.50 an hour. Ms Thompson-Friend says that at no stage did Mr Raza say the position was a casual one with no fixed hours.

[11] Ms Thompson-Friend said the interview with Mr Raza lasted approximately 30 minutes. At the conclusion of the interview Mr Raza told Ms Thompson-Friend he would telephone her during the weekend about whether or not she had been successful in obtaining the role. Ms Thompson-Friend says that she did not hear from Mr Raza during the weekend and thought that she had not been successful for the position. However, on Tuesday, 5 June 2012, Mr Raza phoned her and told her that she had

been successful and asked that she start on 7 June 2012. Mr Raza informed Ms Thompson-Friend that on Thursday and Friday, 7 and 8 June she would be working from 10am to 5pm but thereafter she would be working from 9am to 5pm, Monday to Friday.

[12] Ms Thompson-Friend says that from Monday 11 June, she regularly worked from 9am to 5pm, Monday to Friday. Ms Thompson-Friend says her role was to serve people walking into the shop, to provide them with information regarding products for sale and to set up appointments for sales agents to meet and discuss financing options with Super Finance's customers. Ms Thompson-Friend says that she asked the Store Manager, Dinesh Sodd, for her written employment agreement but it was never provided to her.

[13] Mr Raza says there were no applicants for the position with suitable skills and experience in HP finance and so he decided to employ two part-timers on a casual basis. Mr Raza says he was very clear with Ms Thompson-Friend at the interview, that the position was a casual one with no fixed hours and that she would be employed on a trial basis for 3 months. Mr Raza says he paid Ms Thompson-Friend \$13.50 gross. However, Mr Raza says because Ms Thompson-Friend failed to provide him with her IRD number, he was unable to properly calculate and pay her PAYE to the Inland Revenue Department so he retained \$1.50 an hour to cover any tax payable by Super Finance in respect of Ms Thompson-Friend.

[14] Sometime in July, Mr Raza says Ms Thompson-Friend was given a written employment agreement ("the agreement") prepared by Super Finance's inhouse accountant, Mr Jitend Raj. The agreement specified that Ms Thompson-Friend's employment was casual with no fixed hours. Mr Raza did not take Ms Thompson-Friend through the agreement because he said she knew the agreement was a casual one and did not need further explanation. The agreement was not signed by Ms Thompson-Friend. Ms Thompson-Friend says she had never seen the agreement until after she brought her personal grievance claim.

[15] In deciding whether a person is employed under a contract of service, the Authority must consider all relevant matters which include the intention of the parties<sup>1</sup>. Ms Thompson-Friend responded to an advertisement seeking a sales

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<sup>1</sup> Section 6, Employment Relations Act 2000

coordinator for a full time position. Ms Thompson-Friend says there was no mention of the role being a casual one, she was told that she would be on trial for 12 weeks.

[16] Ms Thompson-Friend worked regular hours between either 9 or 10am each day until 5pm each day from Monday to Friday. She also worked on Saturdays from the Otahuhu office. Ms Thompson-Friend was never provided with an agreement in my view. Even if Ms Thompson-Friend was provided with the agreement, it was not provided to her until she had been working for more than a month at Super Finance.

[17] Clause 3 of the individual employment agreement which was prepared for Ms Thompson-Friend states:

3. ***Nature and term of the agreement***

3.1 ***Casual individual employment agreement (intermittent)*** *This employment agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The parties to this agreement agree that the nature of the relationship is a casual "as required" employment relationship. The employer agrees to provide reasonable notice to the employee regarding when they will be requested to perform duties and the employee agrees to take reasonable steps to be available for work during ...*

***No fixed hours*** ... *The duration of this casual agreement is as follows*

(i) *This casual agreement shall continue in force until such time as it is terminated by either party pursuant to the termination clause in this agreement.*

...

6. ***Hours of work***

6.1 ***Casual employment with no minimum number of hours of work.*** *The parties agree that because the Employee is being employed on an as required basis, the Employee has no fixed hours of work, nor any minimum number of hours of work. The hours of work and days to be worked will be as agreed between the Employee and Employer from time to time. The Employee shall take all reasonable steps to be available when required.*

11. ***Termination of employment***

11.1 ***General termination.*** *The Employer may terminate this agreement for cause, by providing **one week's** notice in writing to the Employee. Likewise the Employee is required to give one week's notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period. ...*

[18] As mentioned, it is my finding that Ms Thompson-Friend did not receive the agreement and even if she did it was not provided to her until well over a month after she had commenced employment. Even so, the fact that the written employment agreement describes the nature of the agreement as being a casual one with no fixed hours, is not determinative of the real nature of the relationship between the parties<sup>2</sup>. His Honour Judge Couch in *Jinkinson v. Oceana Gold (NZ) Ltd*<sup>3</sup> said:

*The other significant aspect of the definition in s6 is the direction in subs(2), and amplified in subs(3), about the manner in which the Authority and the Court are to decide whether there is a contract of service between the parties. The decision must be based on the “real nature of the relationship” between the parties. All relevant matters are to be taken into account in making that decision and the parties’ description of their relationship is not to be treated as determinative.*

[19] I find that the description of the employment relationship as “*casual employment with no minimum number of hours of work*” is not consistent with the pattern of dealing between the parties.

[20] The wage and time records produced by Super Finance show that Ms Thompson-Friend almost always worked Monday to Friday, usually between 9am to 5pm or 10am to 5pm. When Ms Thompson-Friend was asked to work from the Otahuhu office, she worked Saturdays in addition. The first time Ms Thompson-Friend was told not to come in because it was quiet was almost two months after she had commenced employment.

[21] Super Finance did not contact Ms Thompson-Friend to ascertain her availability to work on each occasion she was required to work, there was an expectation that Ms Thompson-Friend would work Monday to Friday and when at Otahuhu on Saturday also. This is the pattern of work that she undertook during the two month period with Super Finance.

[22] Mr Raza says that because he had become very busy, he did not include Ms Thompson-Friend’s holiday pay in her hourly rate. However, Mr Raza says he intended paying Ms Thompson-Friend holiday pay at Christmas time which was normally when people took their holidays. When asked about sick leave, Mr Raza

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<sup>2</sup> Section 6(3) Employment Relations Act 2000

<sup>3</sup> [2009] ERNZ 225 at para.[37]

said that sick leave was payable after six months of employment and that if sick leave was taken prior to that time, it was deducted from annual leave.

[23] Following the discussion between Mr Raza and Ms Thompson-Friend on 12 August during which Ms Thompson-Friend claims she was dismissed, Mr Raza raised performance issues and sought meetings with Ms Thompson-Friend. Such actions would not be necessary if Ms Thompson-Friend was a casual employee.

[24] In light of these indicia, I conclude that Ms Thompson-Friend was a permanent full time employee with Super Finance.

[25] Mr Raza claims that Ms Thompson-Friend was on a three month trial. Therefore, Mr Raza claims he could terminate Ms Thompson-Friend's employment and Ms Thompson-Friend could not bring a personal grievance claim. Section 67A of the Act allows for a trial period of employment subject to certain conditions. Section 67 of the Act requires the term to be specified in writing and under s.67A(3) applies to employees not previously employed by the employer.

[26] In this case, I have found Ms Thompson-Friend did not receive the agreement until she filed her personal grievance claim. Mr Raza says the agreement was provided to Ms Thompson-Friend in July. Even if Mr Raza is correct, Ms Thompson-Friend had already been an employee for more than a month at the time that Mr Raza claims he provided her with a written agreement. Mr Raza is not entitled to rely upon s.67A of the Act.

## **Second Issue**

### ***Was Ms Thompson-Friend's dismissal justified?***

[27] I find Mr Raza dismissed Ms Thompson-Friend during their telephone conversation on 12 August. Mr Raza told Ms Thompson-Friend he no longer needed her to work and that he had replaced her. Mr Friend overheard the conversation.

[28] It is my view that Mr Raza believed Ms Thompson-Friend to be a casual employee still working on a trial basis and therefore wrongly believed he was able to dismiss her in the manner he did. It is my finding that when Mr Raza realised that Ms Thompson-Friend had taken legal advice, he attempted to "*backtrack*" and it was then that he raised for the first time issues about her performance. The allegations of

poor performance were raised with Ms Thompson-Friend after she had been dismissed on 12 August, in an attempt by Mr Raza, to justify Ms Thompson-Friend's dismissal.

[29] Mr Raza sent Ms Thompson-Friend a letter dated 16 August as follows:

*Re: Charge Sheet*

***Dear Madam,***

*I wish to share organisation's concerns about the unsatisfactory conduct in your performance as Trainee Sales Assistant.*

*I understand that you have not been able to put your required abilities to come up to the expected standard inspite of training and sufficient time to achieve desired outcome.*

*On the top of it, your wilful absence from the work over the last three days without justifiable cause is not acceptable.*

*I hereby invite you to a grievance meeting on Monday 20<sup>th</sup> August 2012 at 11am in the office at 19 Broadway, Papakura, to answer my concerns and explain your circumstances on the following issues;*

1. ***Unsatisfactory conduct in performance;***
2. ***Wilful absence for the three days without justifiable cause.***

*You can bring one support person with you in the meeting. Also please bring any documentary evidence or medical certificate in support of your explanation(s) if any.*

*In case you choose not to attend the meeting, the organisation would be constrained to take punitive action including termination for the breach of employment conditions.*

*Looking forward to see you in the meeting.*

***Yours faithfully***  
***Saleem Raza (Mr)***  
***Director***

[30] A meeting was held and Ms Thompson-Friend and her husband attended. Mr Raj attended and sometime later Mr Raza attended. Ms Thompson-Friend attended to discuss resolution of what she believed to have been her unjustified dismissal on 12 August. Mr Raza wanted to discuss performance issues. This was unusual given Mr Raza believed Ms Thompson-Friend to be a casual employee still on a trial. The meeting became heated and there was no resolution. Subsequently, on 21 August 2012, Ms Thompson-Friend received another letter from Mr Raza which stated:

*Re: Employment Dispute – Last Meeting*

*Dear Madam,*

*I wish to share my displeasure at your inappropriate behaviour on 20 August 2012. You had come to my office at 21 Broadway, Papakura in response to my last letter for a round table meeting to discuss the concerns, but you left the meeting twice even before it could start, leaving us alone in the meeting room with your husband whose behaviour was highly abusive and intimidating. In spite of repeatedly requesting him to obtain authority from you to represent you, he failed to get one and instead created a scene in the office. Because the meeting could not be conducted due to your “walk out” from the meeting without any justifiable cause, I again request you to attend a round table meeting on **Friday, 24 August 2012 in our office at 21 Broadway, Papakura at 4pm**. You can bring one support person with you to the meeting. Please note that you must bring any evidence or documents in support of your explanation (if any) in the meeting, and furthermore, your IRD number and Tax Code required as previously requested. Also please note that the failure to attend the meeting will be taken seriously and a decision will be made on the basis of information and evidence the company has on record of your file.*

*In case you need any clarification or information in the matter, you can contact me on any working day during working hours or if you decide not to continue with your employment please submit your resignation with your IRD number and tax code so we can close your file. Looking forward to seeing you in the meeting.*

*Yours faithfully,  
Saleem Raza  
Director*

[31] A further request was made by Mr Raza for Ms Thompson-Friend to attend a meeting on 9 October. Ms Thompson-Friend did not attend the meeting as it was her view she had been dismissed on 12 August. On 28 November, Mr Raza sent Ms Thompson-Friend a letter as follows:

***TERMINATION LETTER***

***Dear Linda,***

*You were employed as Trainee Sales Assistant with effect from 7 June 2012. At the time of joining, you were told that you will be on a trial period for three months. It was also categorically mentioned to you that your job was of casual employee with not fixed hours of work*

*.....I hereby terminate your employment with immediate effect on the ground of breach of terms of employment and wilful absence for over two months.*

[32] A cheque was included in the letter, for holiday pay calculated at 8% of gross wages earned by Ms Thompson-Friend.

[33] Section 103A of the Act sets out the test of justification:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[34] In applying the test, the Authority or Court must consider a number of factors which are set out in s.103A(3), including:

- (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
- (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
- (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
- (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

[35] For the reasons above, I find there was no substantive justification for Ms Thompson-Friend's dismissal on 12 August. I find that a fair and reasonable employer would not have taken the action Super Finance did in all the circumstances at the relevant time. I find that Ms Thompson-Friend was unjustifiably dismissed.

## **Remedies**

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

[36] Ms Thompson-Friend is seeking reimbursement of lost remuneration for a period of 3 months from 12 August until 12 November, pursuant to s.123(1)(b) of the Act. Ms Thompson-Friend was being paid \$13.50 per hour at 40 hours a week (\$540

gross a week) which totals \$7,020.00 gross. I order reimbursement of wages in the sum of \$7,020.00 gross.

[37] Ms Thompson-Friend claims arrears of wages for the days she was instructed not to work, namely, 3 August (\$108gross) and the week of 5-9 August (\$540gross). Ms Thompson-Friend was underpaid by \$1.50 an hour from 7 June until 3 August, a total of 321.5 hours being \$482.25 gross. I order payment to Ms Thompson-Friend of wages totalling \$1130.25 gross.

### ***Compensation***

[38] In determining the level of any compensation awarded under s.123(1)(c)(i) of the Act, I have taken into consideration the full extent of all the circumstances at the time. An appropriate award of compensation in the circumstances is \$1,500.

[39] I am required under s124 of the Act to consider the issue of any contribution that may influence the remedies awarded. I find no contributory conduct on the part of Ms Thompson-Friend.

### **Costs**

[40] Costs are reserved. Ms Thompson-Friend has 14 days from the date of this determination to file and serve a memorandum as to costs. Super Finance has 14 days from the date of receipt of the memorandum to file its memorandum as to costs in reply.

**A Fitzgibbon**  
**Member of the Employment Relations Authority**