

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 27
3019094

BETWEEN SHONTAL TUKAKI
 Applicant

AND GLADSTONE RETAIL
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Nicky McFarlane for Respondent

Investigation Meeting: 25 January 2018

Oral Determination: 25 January 2018

Record of Oral
Determination: 26 January 2018

DETERMINATION OF THE AUTHORITY

- A. Ms Tukaki is barred from pursuing a personal grievance for unjustified dismissal.**

- B. One or more conditions of Ms Tukaki's employment were not affected to her disadvantage by unjustified actions of Gladstone Retail Limited.**

- C. Ms Tukaki's application for the imposition of a penalty for a breach of good faith is declined.**

- C. Costs are reserved.**

Procedural history

[1] When Ms Shontal Tukaki lodged her statement of problem with the Authority on 5 September 2017 she was represented. During a case management call on 2 October with both representatives a timetable for the lodgement and service of witness statements and the investigation meeting were agreed. The timetable directions were set out in a Notice of Direction sent to the parties' representatives on 4 October.

[2] On 16 October Ms Tukaki's representative advised the Authority he was no longer acting for her and attempted to withdraw Ms Tukaki's application.

[3] The Authority made direct contact with Ms Tukaki seeking confirmation that she wished to withdraw her application. Ms Tukaki was, at that time seeking alternative advice and representation and asked if she could advise the Authority by the end of October if she wished to withdraw her application. This request was granted and Ms Tukaki was advised that in the meantime the investigation meeting set down for 25 January 2018 would proceed.

[4] On 7 November Ms Tukaki advised the Authority she was still seeking assistance. Her email indicated she wished to continue to have her unjustified dismissal claim determined by the Authority.

[5] Having heard nothing further from Ms Tukaki she was advised on 18 December that as she had not withdrawn her application it would proceed as set down, on 25 January. Ms Tukaki was reminded there may be cost implications if she did not attend the investigation meeting and was asked to make urgent contact with the Authority.

[6] On 11 January 2018 the parties were reminded that the investigation meeting set down for 25 January would proceed and the consequences of not attending the investigation meeting were set out.

[7] At a case management call on 23 January 2018 Ms Tukaki confirmed that she wished to continue with the investigation meeting on 25 January and was happy to proceed without representation.

Employment relationship problem

[8] Gladstone Retail Limited owns and operates a Pak'n Save Supermarket in Hamilton. Ms Tukaki started work as a Butchery Assistant on 14 January 2017 and says she was promoted to the role of team leader in March.

[9] The terms and conditions of Ms Tukaki's employment were set out in an individual employment agreement which the parties signed on 13 January 2017. The employment agreement contained a 90 day trial clause. At the time of receiving the employment agreement Ms Tukaki was also provided with a copy of Pak'n Save's Business Rules.

[10] On 29 March 2017 Ms Tukaki was dismissed for failing to follow company procedures. She challenges her dismissal which she says was unjustified and claims one or more conditions of her employment were affected to her disadvantage by the unjustifiable actions of Pak'n Save. Ms Tukaki also claims Pak'n Save breached its statutory obligations of good faith and has asked the Authority to impose a penalty for the breach.

[11] Pak'n Save denies the claims and says the Authority has no jurisdiction to investigate and determine the claim for unjustified dismissal because of the bar contained in s 67B of the Employment Relations Act 2000 (the Act).

Issue

[12] In order to resolve Ms Tukaki's employment relationship problems I must determine the following questions:

- a) Is Ms Tukaki barred from bringing a personal grievance claim for unjustified dismissal?
- b) If there is jurisdiction, was Ms Tukaki unjustifiably dismissed and if so what if any remedies should be awarded?
- c) Were one or more conditions of Ms Tukaki's employment affected to her disadvantage by unjustifiable actions of Pak'n Save and if so what if any remedies should be awarded?

- d) Did Pak'n Save breach its statutory obligations of good faith and if so what if any penalty should be imposed?

[13] As permitted by s 174E of the Act this determination has not recorded all the evidence received from Ms Tukaki and Pak'n Save but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Is Ms Tukaki barred from bringing a personal grievance claim for unjustified dismissal?

[14] Pak'n Save says the provisions of s 67B of the Act barred Ms Tukaki from pursuing a personal grievance for unjustified dismissal. Pak'n Save says its employment agreement with Ms Tukaki included a valid and binding term that provided for a 90-day trial so she had no right to bring a grievance about a dismissal during that trial period.

[15] Section 67A of the Act allows for written employment agreements to provide for a trial period of 90 days or less. The trial provision must be in writing and must state:

- a) That for a 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 employer may dismiss the employee; and
- c) If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[16] Section 67B of the Act applies where an employer terminates an employment agreement containing a trial provision by giving notice of the termination of employment prior to the end of the trial period.

[17] The obligations set out in ss 67A and 67B of the Act are to be interpreted strictly. This is because these provisions of the Act remove a right of access to justice.¹

[18] The employment agreement provides for the trial period in the following terms:

28. Trial Period

- 28.1 The first 90 days of your employment with us will be a trial period, starting from the beginning of the day you start work.
- 28.2 This means that, during the 90 days, we are allowed to give you notice of dismissal if we form a view that you are unlikely to be a satisfactory appointment to our permanent staff. Providing we give notice to you within the 90 days, your employment may be terminated before, at, or after the end of the trial.
- 28.3 Where the notice period for permanent employees is 2 weeks the notice period during the 90 day trial is also 2 weeks. We may pay you in lieu of notice.
- 28.4 We may also dismiss you without notice for serious misconduct.
- 28.5 If we give you notice of dismissal, you are not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- 28.6 We are not required to give you reasons for your dismissal but will, in good faith, advise you as early as possible if the trial period is not going well.

[19] Ms Tukaki signed her employment agreement before starting work with Pak'n Save. The employment agreement records the start date as 14 January. It is clear, reading the employment agreement as whole that Ms Tukaki's employment would be subject to a trial period for the first 90 days of her employment starting at the beginning of 14 January 2017.

[20] Ms Tukaki said Pak'n Save failed to advise her that her employment was not going well as required under clause 28.6 of the employment agreement.

[21] Ms Nicky McFarlane, the Store Manager, gave evidence that Pak'n Save did discuss issues as they arose with Ms Tukaki. By way of example Ms Tukaki was moved following a complaint by another employee that Ms Tukaki had bullied her and issues about Ms Tukaki's disruptive behaviour in the Butchery department were also raised with her.

¹ Ibid at [82].

[22] Ms Tukaki says the role she was employed for and the role she was dismissed from were different roles and the trial period should not apply to the new role as when she started the new role she was already an employee and therefore does not come under the definition of a new employee set out in s 67A of the Act.

[23] It was common ground that Ms Tukaki was given a different role in March 2017. At that time there was no Butchery Manager managing the department. In order to ensure all tasks were being completed within the department tasks were divided up between the employees employed in the department. As a result of the reallocation of these tasks Ms Tukaki was assigned responsibility for ensuring that the necessary meat packs were in the case in the correct layout. Before this change Ms Tukaki was part of the Butchery team and from one day to the next could have been assigned to the Case crew, the packing crew or one of the machines in the department.

[24] Ms Tukaki told me she was promoted to a Team Leader role. I have not accepted that description of her new role. While members of the team were told to check with Ms Tukaki if they had questions about the Case, tasks were still allocated by the Butchery Supervisor and not by Ms Tukaki. Her role was to answer questions about whether a particular cut or type of meat was required to fill the Case. She had no supervisory function and was not directing team members on a day to day basis.

[25] It is common ground that the change in tasks was not documented and I find it was not necessary to do so. The employment agreement allowed Pak'n Save the discretion to change tasks depending on the needs of the business.

[26] Given my findings above, it was not necessary for Ms Tukaki to receive a new employment agreement and the terms she agreed to in January 2017 continued to apply in their entirety.

[27] Pak'n Save was entitled to rely on the trial period provision in the employment agreement and in accordance with s 67B Ms Tukaki is barred from pursuing a personal grievance for unjustified dismissal.

Unjustified disadvantage

[28] A finding that the trial period provision was valid does not prevent Ms Tukaki from having her claim of unjustified disadvantage investigated and determined.

[29] There are two aspects to Ms Tukaki's claim that one or more conditions of her employment were affected to her disadvantage by the unjustifiable actions of Pak'n Save. Firstly she says she was appointed to a team leader role and was not paid a promised wage increase. Secondly, she says she was subject to bullying during her employment which was not adequately addressed by Pak'n Save.

[30] Ms Tukaki bears the onus of establishing on the balance of probabilities that she was disadvantaged in her employment. If Ms Tukaki discharges that onus then the burden of proof moves to Pak'n Save to establish on the balance of probabilities that any disadvantage Ms Tukaki may have suffered was justified.

[31] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Pak'n Save's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

Changed role

[32] As set out earlier in this determination Ms Tukaki was allocated specific tasks to perform within the butchery team. At the investigation meeting I asked Ms Tukaki what rate of pay she was offered when she was told of the change in her duties. Ms Tukaki acknowledged that a new rate of pay had not been discussed.

[33] In her statement of problem Ms Tukaki says the main difference between her Butchery Assistant role and the new role was that in the new role she had to monitor the product levels in the Meat Cases. She says she was required to liaise with the butchers and the Case team to ensure no particular meats were low in volume or ran out and that this was not something she had to do as a Butchery Assistant.

[34] At the investigation meeting Ms Tukaki acknowledge that she does not recall, but may have had a conversation with Ms Samantha Martin, Fresh Food Manager,

about there being no Butchery Manager and the divvying up of the tasks required on a day to day basis. Ms Martin recalls Ms Tukaki agreeing that someone was needed to look after the Case and indicated an interest in doing so. I accept Ms Martin's evidence as being more likely than not.

[35] Ms Tukaki says her hours of work also changed. As a Butchery Assistant she was working eight hours each day whereas in her new role she was working between 10-12 hours each day.

[36] There was a dispute over when the actual change in tasks took place. Ms Tukaki told me it was 1 March. However, I have accepted it is more likely than not it was 14 March. I have reached this conclusion because Ms McFarlane did not start working as an employee for Pak'n Save until 3 March and her evidence, which I have accepted, is that she was employed when the team meeting took place at which the tasks were confirmed to the team.

[37] I have been provided with the record of Ms Tukaki's clock in and clock out times. An analysis of that record shows that the average number of hours worked by Ms Tukaki rose in the period between 1-14 March but not to the extent she says it did. It was not uncommon for Ms Tukaki to work between 9 and 11 hour days during the period 14 January to 28 February.

[38] In the period 14 January – 28 February Ms Tukaki worked 10 hours or more on 24 occasions which equates to 66.67% of the days worked in that period. In the period 1 – 13 March Ms Tukaki worked 10 hours or more on 9 occasions and this equates to 75% of the number of days she worked. In the period following the change in tasks Ms Tukaki worked 10 hours or more on 5 occasions which equates to 41.67% of the days worked. I accept there was a period of 13 days over which Ms Tukaki worked an increased number of hours, however, that reduced significantly after the 14 March changes.

Bullying

[39] Ms Tukaki says she was subjected to bullying during her employment and that she raised issues on a number of occasions before making a formal complaint. The formal complaint was raised on 21 March.

[40] I am satisfied Pak'n Save took steps to assist Ms Tukaki in addressing the concerns she raised about another employee in the Butchery department. Ms Martin had a discussion with Ms Tukaki where she provided coaching to her around how to engage with the employee.

[41] After receiving the formal complaint Pak'n Save undertook an investigation into Ms Tukaki's allegations. As a result of its investigations Pak'n Save was satisfied the employee's behaviour was unacceptable and the decision to dismiss the employee was made and implemented.

Conclusion

[42] Ms Tukaki has not established to my satisfaction that one or more conditions of her employment have been affected to her disadvantage by unjustified actions of Pak'n Save.

Breach of good faith

[43] Ms Tukaki says Pak'n Save breached its statutory obligations of good faith when it promoted her to the team leader role and then dismissed her within a month under the guise of a 90 day trial period. She seeks the imposition of a penalty against Pak'n Save.

[44] As already stated, the trial period provision in the employment agreement was valid and Ms Tukaki is unable to challenge her dismissal. In the event that the trial provision was not valid, I spent time investigating the circumstances around Ms Tukaki's dismissal so that if a decision was necessary I was in a position to determine that matter.

[45] I am satisfied Pak'n Save has not breached its statutory duty of good faith toward Ms Tukaki. During the employment relationship it remained communicative with her and has not mislead or deceived her. During the process leading up to the decision to dismiss Ms Tukaki was provided with the information used by Pak'n Save to terminate her employment.

[46] During the investigation meeting I raised several questions with Pak'n Save about its business rules and disciplinary procedures. The rules state that Checkout Operators must not serve family members or friends. The wording indicates the onus

is on the Checkout Operators to ensure adherence to the rule. Ms Tukaki was not a Checkout Operator. Also the rules on clocking in and out requires a “regular failure” to clock in or out correctly before disciplinary action is taken. Ms Tukaki failed to clock in on only one occasion and was about 10 minutes late in doing so after she had left work and realised she had not clocked out.

[47] These issues of themselves do not establish a breach of good faith and Ms Tukaki’s application for the imposition of a penalty is declined.

Costs

[48] Costs are reserved. I am of a mind to let costs lie where they fall. However, the parties are invited to resolve the matter between them. If they are unable to do so Pak’n Save will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Tukaki will have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[49] During the case management call on 23 January Ms Tukaki raised concerns about her ability to contribute to costs in the event that she was unsuccessful. If costs have to be determined by the Authority Ms Tukaki should ensure the Authority is provided with full information on her ability or inability, to contribute to costs.

Vicki Campbell
Member of the Employment Relations Authority