

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 129
5400602**

BETWEEN LISA UNDERWOOD
 Applicant

AND SHARP SERVICES LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Greg Bennett, Advocate for Applicant
 Audrey Sharp, Advocate for Respondent

Investigation Meeting: 27 March 2014 at Auckland

Submissions received: 27 March 2014 from Applicant and from Respondent

Determination: 4 April 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Lisa Underwood, claims that she was unjustifiably dismissed on 20 July 2013 by the Respondent, Sharp Services Limited, (SSL).

[2] SSL denies that Ms Underwood was unjustifiably dismissed and claims that she was justifiably dismissed in accordance with a 90 day trial period.

Issues

- [3] The issues for determination are whether Ms Underwood:
- Was employed subject to a valid 90 day trial period

 - Was unjustifiably dismissed by SSL.

Background Facts

[4] SSL is a small electrical contracting company which contracts to larger companies and carries out work primarily on Housing New Zealand homes. The SSL offices were at the time Ms Underwood was employed situated at the home of Ms Philippa Whaanga, former Office Manager.

[5] Ms Audrey Sharp, co-director of SSL, said that during June 2012 she had been advised by her co-director, Mr Clifford Sharp, that an Office Assistant was required to assist Ms Whaanga and another employee, Ms Pauline Van Deventer, in their duties.

[6] The position was advertised and Ms Underwood duly applied and was interviewed by Ms Sharp, Ms Whaanga and Ms Van Deventer. It is agreed that during the interview Ms Sharp had discussed Ms Underwood's employment being subject to a three month evaluation basis.

[7] Ms Underwood said she understood the duties for which she was being employed, and that she would be working 8 hours per day, 5 days per week, at an hourly rate of \$18.00 however she had not been provided with an employment agreement despite asking for one.

[8] Ms Sharp said that her expectation at that time had been that Ms Whaanga would organise the issuing of an employment agreement to Ms Underwood. Ms Whaanga agreed that she had previously issued employment agreements when instructed to do so; however all employment agreements had been signed by Mr Sharp as she did not have the authority to do so.

[9] There was evidence before the Authority that Mr Sharp had in fact drafted an employment agreement in respect of Ms Underwood; however Ms Whaanga said she had not received a copy of it, and she had therefore not issued it to Ms Underwood.

[10] Ms Whaanga said that during her employment with SSL the payroll operation fell under her responsibilities and she confirmed that as with the other employees; she had entered Ms Underwood's name into the payroll system. Ms Underwood was paid weekly.

[11] Ms Underwood commenced employment on 25 June 2012 and Ms Van Deventer was given responsibility for providing her initial training. Ms Van Deventer said that after the initial training period, she had become concerned that Ms Underwood was not performing satisfactorily and had discussed this with Ms Whaanga.

[12] Ms Sharp said she had subsequently been advised by her co-director Mr Sharp that Ms Underwood was not performing satisfactorily and that there was not enough work to justify her continued employment. She had consequently taken responsibility to deal with the situation.

Dismissal 20 July 2013

[13] On 20 July 2013 Ms Sharp visited the SSL office premises based at Ms Whaanga's home where Ms Underwood had been working, and had asked Ms Underwood to step outside the offices to speak to her. Ms Sharp said that she had spoken to Ms Underwood in the outdoors meeting area where SSL business meetings were regularly held.

[14] Ms Sharp said that she had told Ms Underwood that SSL no longer had a position for her and because she did not want to distress Ms Underwood further, she had told her that there had been no problem with the standard of work she had been doing, and that the reason for the termination of her employment had been a company restructuring exercise and a lack of new contracts.

[15] Ms Sharp said Ms Underwood had not appeared to be distressed during the meeting and she had informed Ms Underwood that she could work until the end of the week, and following the meeting Ms Underwood had returned to work.

[16] Ms Underwood said she had been distressed at being dismissed effectively in the driveway of a house where passing members of the public might have overheard what was being discussed.

[17] Ms Sharp disagreed and said that the meeting had been held in the driveway and had taken place in the outdoor meeting area which was enclosed on three sides and reasonably private, therefore she did not accept that members of the public passing the property could have overheard what had been discussed and nor could the other employees on site at that time.

[18] Ms Van Deventer said that she had been present in the SSL office at the time of the discussion between Ms Sharp and Ms Underwood; however she had not been able to overhear the discussion between them.

[19] Ms Joanne Simpson, who had been working in an office with Ms Underwood, said that she had been able to see Ms Sharp and Ms Underwood talking together, however she had not been able to overhear what was being said despite being physically quite close.

[20] There is no dispute that that Ms Sharp had used a normal speaking voice when talking to Ms Underwood.

[21] Ms Underwood said she had enquired what was to happen next, and Ms Sharp had told her that she was to finish work that day and that she would receive a couple of days payment.

[22] Ms Sharp said she had spoken to Ms Whaanga after her meeting with Ms Underwood and told her that she (Ms Underwood) would be leaving. Ms Sharp had asked Ms Whaanga to arrange Ms Underwood's final pay.

[23] During the following week Ms Sharp said she had been surprised to be told by Mr Sharp that Ms Underwood had been to see Ms Whaanga, asked for more money, and been paid an additional two week's wages.

[24] Ms Underwood said she had not received her final payment after her employment had terminated, therefore she had visited the offices and asked Ms Whaanga about the payment. Ms Whaanga said she had checked the facts with Mr Sharp and then entered Ms Underwood's leaving date into the payroll system which calculated Ms Underwood's final pay based on a one week notice period, which had then be paid to her.

Determination

Was Ms Underwood employed subject to a valid 90 day trial period?

[25] Although there is that an employment agreement had been drafted by Mr Sharp, Ms Underwood was not provided with this prior to commencing employment, nor did she sign it prior to commencing employment or at any time during her period of employment with SSL.

[26] The Employment Relations Act 2000 (the Act) makes provision for trial periods at ss 67A and 67B. The Act states:

S 67A

*(2) **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 employer may dismiss the employee

[27] In accordance with the legislation the trial period can be agreed upon as set out in an individual employment agreement signed prior to the commencement of work and the commencement of which is expressed to begin on the day the employment commences.

[28] SSL and Ms Underwood did not agree in writing to a trial period prior to the employment commencing and I find that Ms Underwood's employment was not subject to a trial period pursuant to s 67A (2) of the Act.

Was Ms Underwood unjustifiably dismissed by SSL?

[29] The Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) addresses the question of whether or not an action was justifiable or is unjustifiable and states:

S103A Test of Justification

- i. For the purposes of section 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).*
- ii. 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.*

[30] SSL is unable to rely on a statutory 90 day trial period and therefore it is required to show that at the time of the dismissal it acted in a manner that was substantively and procedurally fair.

[31] Although Ms Sharp said there were performance issues regarding Ms Underwood, these were not raised with her and in all the circumstances I find no substantive justification for Ms Underwood's dismissal. Nor is there any evidence that her position had genuinely become redundant as a result of a restructuring exercise.

[32] Moreover I find that the decision to terminate Ms Underwood's employment was not carried out in accordance with procedural fairness given the failure to advise her of any

concerns it had, and the failure to provide her with an opportunity to address those concerns prior to any decision being made to terminate her employment.

[33] I find that SSL's decision to dismiss Ms Underwood was not a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[34] I determine that Ms Underwood was unjustifiably dismissed by SSL.

Remedies

[35] Ms Underwood has been unjustifiably dismissed and she is entitled to remedies.

Lost Wages

[36] Ms Underwood was unable to obtain alternative employment until February 2014. In these circumstances I find that Ms Underwood is entitled to lost wages for the period '

[37] Ms Underwood is to be reimbursed for lost earnings for a period of 3 months pursuant to s 128(2) of the Act.

[38] I order that SSL pay Ms Underwood the sum of \$6,168.00 gross (calculated as \$18.00 per hour x 40 x 13 weeks minus one weeks' notice payment and 12 weeks WINZ benefit).

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[39] Ms Underwood is also entitled to compensation for humiliation and distress.

[40] Ms Underwood said that she had been shocked by the dismissal decision, and that such shock was exacerbated by the public manner in which the termination meeting took place.

[41] Whilst the venue for the meeting was somewhat unusual, I accept that it was regularly used as a meeting place and was in a relatively secluded outdoor area some distance from the road. I further accept that during the meeting Ms Sharp spoke in a normal speaking voice, and the fact that Ms Simpson who was closest to the scene had not overheard the conversation renders it less likely that a person passing by outside on the road would have been able to overhear what was occurring.

[42] I order SSL pay Ms Underwood the sum of \$2,500.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i).

Contribution

[43] I have considered the matter of contribution as I am required to do under s124. Whilst Ms Sharp stated that Ms Underwood's performance had not been satisfactory, this issue was never raised with her prior to the termination of her employment, and the reason provided for the termination of her employment was not performance concerns.

[44] In these circumstances I find that there is no evidence that Ms Underwood contributed to the situation which gave rise to the grievances. There is to be no reduction in remedies.

Costs

[45] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave of the Authority.

Eleanor Robinson
Member of the Employment Relations Authority