IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 55
5406225

	BETWEEN	OLGA VOLKOVA Applicant
	A N D	WILSON PRINT LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Ms Volkova in person No appearance by Respondent
Investigation meeting:	12 March 2013 at Christchurch
Submissions Received:	12 March 2013 from Applicant None received from Respondent
Date of Determination:	14 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Volkova claims that she was dismissed without any warning on 9 November 2012. During a telephone conference with Ms Volkova, in which Mr Dempsey, director and owner of the respondent company, refused to participate, saying that he was too busy, Ms Volkova clarified that her claim included a personal grievance for unjustified dismissal in relation to her dismissal.

[2] Ms Volkova also claims that she was not paid for the period 5 November to 9 November 2012 inclusive, her final week at work. She also claims unpaid holiday pay and seeks her fee for the lodging of her statement of problem.

Non participation of the respondent

[3] Although a copy of Ms Volkova's statement of problem was sent to the respondent company by the Authority (and the Authority has proof of receipt by the respondent of that copy from Courier Post) the respondent company failed to lodge a statement in reply, or indeed, any response whatsoever.

[4] Notice of the directions arising from the telephone conference, together with notice of the Authority's investigation meeting, were also sent to the respondent company, and the Authority received proof of receipt by the respondent of those documents from Courier Post. Despite having been advised of the investigation meeting, no communication was made by the respondent company and no-one appeared from the respondent company on its behalf at the investigation meeting.

[5] Section 173(2) of the Employment Relations Act 2000 (the Act) provides that the Authority may exercise its powers under s.160 of the Act in the absence of one or more of the parties. Section 160 of the Act allows the Authority, in investigating any matter, to call for evidence and information from the parties, require the parties to attend an investigation meeting to give evidence, interview any of the parties before, during or after an investigation meeting, fully examine any witness and, follow whatever procedure the Authority considers appropriate.

[6] Section 173(3) of the Act allows the Authority to exercise its powers under s.160 in the absence of one or more of the parties on condition that the Authority has provided to an absent party any material it receives that is relevant to the case and an opportunity to comment on the material before the Authority takes it into account.

[7] I am satisfied that the respondent company was given ample opportunity to comment on all the material that was put before the Authority and that the Authority has not taken into account in reaching this determination any material that had not already been provided to the respondent. Therefore, I am satisfied that the Authority was able to proceed with the investigation meeting in the absence of the respondent and that the Authority may issue this determination and the orders contained in it despite the respondent having failed to respond to Ms Volkova's statement of problem, provide any materials in response and attend the investigation meeting.

Brief account of events leading to the dismissal

[8] Ms Volkova told the Authority that she had been employed by the respondent as a graphic designer, commencing her employment on 27 August 2012. She said that she was an experienced graphic designer and had been carrying out this work for several years. She stated that she had received excellent references from her previous employers, but that she experienced difficulties with the respondent because of the work methods adopted and the demands placed upon her, which she said were unreasonable.

[9] Ms Volkova stated that, at the end of her last working day on 9 November 2012, Mr Dempsey stated words to the effect that, although he hoped she had a good holiday (she was about to fly to Russia for her son's wedding) she did not need to come back. He indicated that this was because of his dissatisfaction with the way she had been working. She said that she had never received any previous warning from the respondent that she could be dismissed and had never been allowed to discuss strategies with Mr Dempsey to improve the way that jobs were handled.

The issues

[10] The Authority must determine the following issues:

(a) Has Ms Volkova raised a valid personal grievance in respect of her dismissal?

(b) Can the respondent rely on the trial period clause contained in the employment agreement between the parties?

(c) Depending upon the answer to the questions above, was Ms Volkova unjustifiably dismissed?

(d) Is Ms Volkova owed arrears of pay in relation to her final week's work? and

(e) Is Ms Volkova owed holiday pay?

Has Ms Volkova raised a personal grievance within the required time limit?

[11] Section 114(1) of the Act states:

> *(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.*

[12] It would appear that Ms Volkova did not complain about her dismissal until she lodged the statement of problem, which was received by the Authority on 10 January 2013. This was sent to Mr Dempsey of the respondent company by the Authority on the same day by courier post and there is proof of its delivery to the respondent on 11 January 2013.

[13] Section 114(2) of the Act states that, for the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[14] The Employment Court in *Premier Events Group Ltd v. Beattie (No.3)* [2012] NZEmpC 79 held that an employee could raise a personal grievance by lodging a statement of problem in the Authority which outlined his or her grievance. Chief Judge Colgan commented at para.[12] that:

> *… there will remain ample opportunity for the employer to address the grievance and, perhaps, resolve that grievance through discussion and/or mediation between the parties even after the matter is officially before the Authority. If unmeritorious claims are lodged in the Authority, but which could have been resolved by earlier discussion for instance, then the party lodging the claim may well have to bear the costs consequences of such a claim.*

[15] The Authority is bound by *Beattie* and, therefore, I see no reason why the statement of problem cannot be taken to indicate to the respondent that Ms Volkova was raising a personal grievance in relation to her dismissal. In my view, the statement of problem, although succinct, states the essence of the personal grievance so as to enable the employer to understand that she is complaining about being dismissed without warning. Furthermore, the statement of problem was served upon and received by the respondent within 90 days of the dismissal.

[16] I therefore accept that Ms Volkova has validly raised a personal grievance within s.114(1) of the Act.

Is Ms Volkova precluded from claiming unjustified dismissal by virtue of the trial period contained in the employment agreement?

[17] Section 67A of the Act provides:

> *(1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.*
>
> *(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; 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.*
>
> *(3) **Employee** means an employee who has not been previously employed by the employer.*

[18] Section 67B provides:

> *(1) This section applies if an 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.*
>
> *...*
>
> *(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 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 employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

[19] Although the respondent did not defend the claim by Ms Volkova, I anticipate that, if it had done so, it may have sought to rely upon the terms of a clause in the employment agreement which imposed a trial period. The wording of the trial period clause was as follows:

*3. **TRIAL PERIOD***

3.1 A trial period will apply for a period of 90 days employment to assess and confirm suitability for the position. This trial period is agreed to by the parties on the basis that the Employer employs fewer than 20 employees at the beginning of the day the employment agreement is entered into; and the Employee has not previously been employed by the Employer.

3.2 During the trial period the Employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal nor other legal proceedings in respect of the dismissal. For the avoidance of doubt, the Employee reserves its right to pursue a personal grievance on any other ground specified in the Act.

3.3 Any notice, as specified in this Agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the employer or the employee (including access to mediation services), except as specified in section 67A(5) of the Act.

[20] Clause 17 of the employment agreement stated:

*17. **TERMINATION OF EMPLOYMENT***

17.1 Employment may be terminated in accordance with the following provisions below subject to Clause 6:

(a) Four weeks notice in writing of termination by either party; or

(b) Four weeks shall be paid or forfeited if requested notice is not given.

(b)(sic) The Employer reserves the right to make payment to the Employee in lieu of notice.

[21] In the Employment Court case *Smith v. Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253, the Employment Court refused to uphold a trial period contained in Ms Smith's employment agreement for a number of reasons, including that Ms Smith was not a new employee when she signed up to the agreement and the 90 day clause, and that she was not given notice as required by s.67B(1).

[22] Ms Volkova gave evidence that she did not sign the employment agreement containing the trial period clause until the day after she had started employment. There is no evidence that she had agreed specifically to the trial period prior to signing the employment agreement and, therefore, in accordance with the principle of *Smith v. Stokes Valley Pharmacy* Ms Volkova had already been previously employed by the employer at the point when she agreed to the trial period.

[23] Furthermore, the respondent failed to give any notice to Ms Volkova in respect of her dismissal. Clearly, if Ms Volkova had been dismissed for serious misconduct amounting to a repudiation of her employment agreement, the respondent would not have been obliged to give notice. However, Ms Volkova was apparently dismissed for performance issues and, therefore, the respondent was obliged to give Ms Volkova four weeks notice pursuant to clause 17 of the employment agreement.

[24] In failing to do so, in accordance with the principles set out in *Stokes Valley Pharmacy*, s.67B(1) has not been complied with and, therefore, the respondent cannot rely upon the trial period provisions to exclude its obligation to Ms Volkova not to unjustifiably dismiss her.

[25] Finally, Ms Volkova was not paid for her final week's work. No reason has been given for this and it is not at all clear whether the respondent is relying on any clause in the employment agreement that may purport to allow it to withhold salary. Therefore, I can only conclude that the respondent has committed a repudiatory breach of the employment agreement by failing to comply with its obligations to pay Ms Volkova for work she has carried out. It is arguable, therefore, the respondent is unable to rely upon the trial period clauses in the employment agreement which prevents Ms Volkova raising a personal grievance for unjustified dismissal in relation to her dismissal.

[26] I acknowledge that this final argument is debateable, but, in any event, even if I am wrong in this, I am satisfied that, for the other reasons given in this

determination, the respondent may not rely upon the trial period provisions in the employment agreement to argue that Ms Volkova is precluded from raising a personal grievance in relation to her dismissal.

Was Ms Volkova's dismissal unjustified?

[27] Section 103A of the Act sets out the test that the Authority must apply in determining whether a dismissal was justifiable. It states:

> *(1) 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).*
>
> *(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.*
>
> *(3) In applying the test in subsection (2), the Authority or the court must consider –*
>
> > *(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.*
>
> *(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
>
> *(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
>
> > *(a) minor; and*

(b) did not result in the employee being treated unfairly.

[28] Ms Volkova's evidence, which she gave on oath, and which I found to be wholly credible, was that no procedure of any kind was followed warning her that she could be dismissed in relation to the concerns that the respondent apparently had about her performance. Therefore, the respondent has seemingly failed in respect of s.103A(3)(b) and (c) of the Act. It has arguably also failed in respect of s.103A(3)(a) and (d). In any event, it is patently clear that the respondent failed to follow a fair procedure in dismissing Ms Volkova and that, therefore, her dismissal was unjustified.

Is Ms Volkova owed arrears of wages in respect of her final week's work?

[29] In the absence of any evidence to the contrary from the respondent, I accept Ms Volkova's evidence that she was not paid for her final week of work and I conclude, therefore, that she is owed the gross sum of $840.

Is Ms Volkova owed anything in respect of holiday pay?

[30] Again, in the absence of any evidence to the contrary from the respondent, I accept Ms Volkova's evidence that she was not paid anything in respect of holiday pay. The Authority saw a copy of a pay slip given to Ms Volkova the week before she was dismissed which indicated that she had accrued three days holiday pay.

[31] In accordance with s.23 of the Holidays Act 2003, I conclude that Ms Volkova is owed 8% of her gross earnings since the commencement of her employment and that she had no annual holidays that she had taken in advance and, further, annual holiday pay was not paid with her usual pay. Therefore, I calculate that Ms Volkova is owed the gross sum of $757.92 in respect of unpaid holiday pay.

Remedies for unjustified dismissal

[32] Having established that Ms Volkova was unjustifiably dismissed, I must now consider what remedies she is due pursuant to s.123 of the Act. Ms Volkova told the Authority that she was unable to find any work until she found a job commencing on 4 February 2013. Therefore, Ms Volkova incurred a loss of wages as a result of her unjustified dismissal in the gross sum of $10,080 during the 12 weeks from her

dismissal until she found new employment. I accept her evidence that she tried to find work in the interim.

[33] Ms Volkova's weekly gross remuneration in her new employment works out at almost exactly the same as she received under her employment with the respondent as, although she is now paid at a lower hourly rate, she works longer hours.

[34] With respect to s.123(1)(c)(i) of the Act, I must consider whether Ms Volkova should be awarded compensation for humiliation, loss of dignity and injury to her feelings resulting from her personal grievance.

[35] Ms Volkova gave evidence that she was shocked by the dismissal and that she still feels shaky when she thinks about it. It is noteworthy that the respondent chose to dismiss Ms Volkova the very day before she was due to fly to Russia (which the respondent knew) so that she was unable to do anything practical about it until her return to New Zealand after the Christmas break.

[36] Ms Volkova also gave evidence that, at some point after her dismissal, she was advised by someone she knew that Mr Dempsey had telephoned this person to tell her, effectively, that Ms Volkova was no good at her job and that the person should not employ her. Ms Volkova gave evidence that she was particularly upset by this. Although this is hearsay evidence, in the absence of any evidence from the respondent, and because Ms Volkova's account of her conversation with the person was credible, I accept it as true.

[37] In determining an appropriate sum to award pursuant to s.123(1)(c)(i), I am able to take into account post dismissal behaviour by the respondent which aggravates an employee's humiliation, loss of dignity and injury to feelings. I believe that it is appropriate for me to take into account this behaviour by Mr Dempsey which Ms Volkova felt was very unfair and unjustified.

[38] I am mindful of the fact that Ms Volkova was not employed by the respondent company for very long and that, in addition, she did not find the work particularly conducive to her well being so that its sudden loss, although a shock, was in some ways also a relief to her.

[39] Taking everything into account, I believe that an award of $5,000 is an appropriate sum to award Ms Volkova in relation to the humiliation, loss of dignity and injury to her feelings that she suffered.

[40] I must now consider whether I should make any reduction to the remedies referred to above pursuant to s.124 of the Act. This states that the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of a personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[41] I have not had the benefit of any evidence from the respondent, although, as I have noted above, I found Ms Volkova's evidence credible. I also found it candid in that she did admit that Mr Dempsey was critical of her work, although Ms Volkova says that this was because he was overly demanding and expected her to do things that were not possible within the timeframes he required.

[42] I believe that Ms Volkova was not in any way to blame for the situation that gave rise to her personal grievance and therefore I decline to reduce under s.124 of the Act the remedies I have awarded.

Orders

[43] I order the respondent company to pay Ms Volkova the following sums:

(a) The gross sum of $840 in respect of arrears of wages owed for the period 5 to 9 November 2012 inclusive;

(b) The gross sum of $757.92 in respect of holiday pay owed to Ms Volkova under s.23 of the Holidays Act 2003;

(c) The gross sum of $10,080 in respect of wages lost by Ms Volkova as a direct result of her unjustified dismissal;

(d) The sum of $5,000 pursuant to s.123(1)(c)(i) of the Act.

(e) The sum of $71.56 in relation to the lodgement fee incurred by Ms Volkova.

Costs

[44] Ms Volkova was not legally represented and so has incurred no legal costs. However, as noted in the orders section above, I believe she is entitled to be reimbursed the sum of $71.56 in respect of the Authority's fee for lodging her application.

David Appleton
Member of the Employment Relations Authority