

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2016] NZERA Auckland 354  
5574256**

BETWEEN                      NINA WALKER  
   Applicant  
  
AND                                IRINA LIEBIG  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Hannah King, Counsel for Applicant  
   Respondent, in person.  
  
Investigation Meeting:        19 October 2016 at Whangarei  
  
Submissions received:        19 October 2016 from Applicant  
   19 October 2016 (oral only) from Respondent  
  
Date of oral Determination:   19 October 2016  
  
Date of written  
Determination                    20 October 2016

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Ms Nina Walker, claims that she was unjustifiably dismissed by the Respondent, Ms Irina Liebig, on 12 June 2015.

[2]     Ms Liebig denies that she dismissed Ms Walker, and claims that she was justifiably dismissed pursuant to a 90 day trial period.

**Issues**

[3]     The issue for determination is whether or not Ms Walker was:

- a.    employed subject to a valid trial period
- b.    employed subject to a valid fixed term agreement
- c.    unjustifiably dismissed

## **Background Facts**

[4] Ms Irina Liebig, owner and shareholder, operates a preschool in Onerahi, Whangarei, by the name of 'Simply Kids Preschool' (Simply Kids).

[5] Ms Walker applied for an advertised position for a Teacher Aide with Simply Kids and was interviewed by Ms Liebig who told her that the position was for a part-time Teacher Aide. She was subsequently telephoned and told her application had been successful.

[6] Ms Liebig said that at some time between the telephone call and Ms Walker starting work, she had given Ms Walker a copy of an individual employment agreement to take away and consider, she had explained to Ms Walker that the employment would be subject to a trial period of 90 days, which Ms Walker had agreed to.

[7] Ms Walker said she commenced employment as a Teacher Aide at Simply Kids on 25 March 2015. On that day she was provided with an individual employment agreement (the first IEA) and advised to take it home with her, consider, sign and return.

[8] The first IEA stated at clauses:

**1. Hours of work**

The first day of work under this contract will be the 25.03.2015, and the last day will be 14.06.2015.

Your ordinary hours of work shall be 23+ hours per week. ...

...

**2. Wages**

The ordinary hourly rate of pay shall be \$14.25.

The wages will be paid fortnightly direct into your bank account. ...

...

**3. Term of employment**

Four weeks notice of termination has to be given by either party. This will not however affect the employer's right to instantly dismiss you for serious misconduct or other good cause.

[9] Ms Joanne Furze, Ms Walker's mother, said she recalled Ms Walker bringing home the first IEA after her first day of work. She recalled that it included a sentence about a 90 day trial period, but it had no dates and did not explain the purpose of the trial period or that it would prevent Ms Walker subsequently raising a personal grievance.

[10] Ms Walker said she signed and returned the first IEA on her second day of employment, 26 March 2015.

[11] On 16 April 2015 Ms Liebig had called her to her office and asked her to sign a copy of an individual employment agreement (the second IEA).

[12] The second IEA was virtually identical to the first IEA, although the hourly pay rate was stated to be \$14.75.

[13] Ms Liebig had told her that the only reason for signing the second IEA was because the minimum wage had increased from \$14.25 per hour to \$14.75 per hour, in all other respects it was the same as the first IEA,

[14] Ms Liebig had told her that the dates inserted into the second IEA were the dates of the trial period, and Ms Walker would receive a third IEA at the end of the trial period.

[15] Ms Walker had signed at the appropriate place on the second Employment Agreement within a sentence which read: **"I, [signature] declare that I have read, or (sic) fully aware of the contents of this agreement and fully accept them.**

[16] Below her signature was added the words: *"I also confirm that I have had the opportunity to seek independent advice regarding this agreement"*. This wording is not included on the copy of the first IEA which was provided to the Authority.

[17] Ms Walker said despite the statement on the second IEA, she had been given no opportunity to take the second IEA away and seek independent advice on it

[18] Ms Liebig had also signed the second IEA as the employer, and dated it 16 April 2015.

[19] During the period of her employment with Simply Kids, Ms Walker said she had received no complaint about her performance, other than being told on one occasion not to sit down at work. After the comment, she had not sat down at work again.

[20] Approximately mid-way through her shift on 12 June 2015, Ms Walker said Ms Liebig had called her into her office and asked her how she liked the job. Ms Walker said she enjoyed the job; however Ms Liebig had told her that she did not consider the job was right for her (Ms Walker) and that it was to be her last day of employment.

[21] Ms Walker said she had been told by Ms Liebig that she had to work for the rest of the day, which she did even though she felt very distressed. When her mother arrived at the

close of the day to give her a lift home, her mother had tried to ask Ms Liebig about the dismissal, however Ms Liebig had left Simply Kids for the day.

## **Determination**

### **Was Ms Walker employed subject to a valid trial period?**

[22] Trial periods are set out in s.67A and s.67B of the Act which state:

#### **s.67A. When employment agreement may contain provision for trial period for 90 days or less**

- (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.

#### **S 67B Effect of trial provision under section 67A**

- (1) ...
- (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.*
- (3) *Neither this section, or a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).*

[23] The effect of a valid trial period provision is that if the employee is given notice of dismissal during the trial period, he or she cannot raise a personal grievance for unjustified dismissal.

[24] Ms Walker states that she had been allowed to take away and consider the first IEA. Ms Furze confirms seeing the first IEA at the end of Ms Walker's first day of employment.

[25] I accept Ms Walker's evidence that she signed and returned the signed first IEA on her second day of employment on 26 March 2015.

[26] In the Employment Court case of *Blackmore v Honick Properties Ltd*<sup>1</sup> the Chief Judge addressed the issue of trial periods, stating:<sup>2</sup> "*Parliament's intention is clear that neither a former nor an existing employee of an employer can be put onto a trial period*"

[27] I accept that Ms Walker commenced employment on 25 March 2015 and was given the first IEA on that day. There was no evidence of a signed first IEA preceding Ms Walker commencing employment on 25 March 2016.

[28] Accordingly at the time when Ms Walker signed the first IEA I find that Ms Walker was an existing employee and in those circumstances the trial period does not apply.

### **Was Ms Walker employed subject to a fixed term agreement?**

[29] I have found there was no valid trial period between Simply Kids and Ms Walker and turn to consider whether or not there was a valid fixed term agreement between the parties.

[30] To be valid, a fixed term employment agreement must comply with section 66 of the Act which states:

#### **66 Fixed Term Employment**

1. *An employee and an employer may agree that the employment of the employee 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.*

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<sup>1</sup> [2011] NZEmpC 152 at [69]

<sup>2</sup> Ibid at paras [69] & [70]

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*
  - b. *Advise the employee of when and how his or her employment will end and the reasons for his and her employment ending in that way*

[31] Section 66(2)(a) provides that an employer must have genuine reasons based on reasonable grounds before the employer and employee can agree on the employment ending in a specific way.

[32] Moreover s 66 (4) of the Act states that if the employment of the employee is to end in accordance with the grounds set out in S 66(1) of the Act, this must be stated in writing:

*(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employer's employment must state in writing-*

*(a) the way in which the employment will end; and*

*(b) the reasons for ending the employment in that wa.*

[33] I find that neither the first nor the second IEAs set out the reason for the fixed term nature of the agreement.

[34] I determine that Ms Walker was not employed subject to a valid fixed term agreement.

#### *Unjustifiable Dismissal*

[35] Ms Walker was dismissed on 12 June 2015. Ms Liebig was under a duty of good faith towards her pursuant to s 4 of the Employment Relations Act 2000 (the Act) which required her, in a situation in which she was proposing to terminate Ms Walker's employment, to provide her with access to information relevant to the continuation of her employment, and an opportunity to comment upon it before a decision was made.

[36] In addition the Test of Justification in s103A of the Act 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.*

[37] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Ms Liebig must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[38] There is no evidence, other than the minor reference to sitting down during the work day which was not repeated, that any disciplinary issues had been raised with Ms Walker during her employment, nor was she advised at any time that her employment was in jeopardy.

[39] Whilst I accept that Ms Liebig is a small employer and as such lacks the resources normally available to a larger employer when dealing with disciplinary matters, I consider that there were major rather than minor flaws in that the only procedure followed was to advise Ms Walker that she was no longer employed.

[40] I determine that Ms Walker was unjustifiably dismissed by Ms Liebig.

**Remedies**

*Reimbursement for Lost Wages*

[41] Ms Walker obtained alternative employment on 22 July 2015. In these circumstances I find that she is entitled to lost wages.

[42] Ms Walker is to be paid for the period from 12 June 2015 to 22 July 2015 less the amount paid in respect of the 4 week notice period.

[43] I order that Ms Walker is to be paid the sum of \$474.95 gross by Ms Liebig as lost wages pursuant to s 128(2) of the Act.

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

[44] Her employment at Simply Kids was Ms Walker's first employment after leaving school. The abrupt nature of its termination caused Ms Walker distress and a significant loss of confidence.

[45] I order Ms Liebig to pay Ms Walker the sum of \$4,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

*Contribution*

[46] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[47] Ms Walker did not contribute to the situation in which she found herself and there will be no reduction in the remedies awarded.

**Costs**

[48] Costs normally follow the event and Ms Walker is the successful party in these proceedings.

[49] The starting point for costs is that of the normal daily tariff in the Authority, being \$3,500.00 per day at the date of filing.

[50] This is considered to be a half day hearing and I therefore take \$1,750.00 as the starting point for costs.

[51] Costs are to be arrived at in a principled manner and the Authority can take into consideration: "conduct which increased costs unnecessarily".<sup>3</sup>

[52] In this case the Respondent has by its conduct unnecessarily prolonged the investigation process by actions including non-compliance with the Authority's timetabling directions and failing to file witness statements. These actions resulted in the investigation

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<sup>3</sup>*PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005]1 ERNZ 808

into a relatively simple matter being significantly delayed and I accept has resulted in the Applicant incurring additional costs.

[53] Whilst I accept that attempts have been made to settle the matter, these were not made in a timely manner and after the Applicant had completed preparation for the matter.

[54] I order that Ms Liebig pay Ms Walker \$3,250.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000

**Eleanor Robinson**  
**Member of the Employment Relations Authority**