IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 474
3105172

	BETWEEN	ROXANNE BEREA Applicant
	AND	BEST HEALTH FOODS LIMITED Respondent
Member of Authority:	David G Beck	
Representatives:	Paul Brown, advocate for the Applicant James (Yuan) Gu, for the Respondent	
Investigation Meeting:	19 October 2020 in Christchurch	
Submissions Received:	19 October 2020 from the Applicant 19 October 2020 and 19 November 2020 from the Respondent	
Date of Determination:	17 November 2020	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Roxanne Berea worked as a Marketing, Sales and Production Co-ordinator for Best Health Foods Limited (BHF), a Christchurch based manufacturer of infant powdered milk formulae and nutritional products. Ms Berea says she was unjustifiably dismissed on 21 January 2020.

[2] James Gu, General Manager, director and shareholder of BHF asserted that Ms Berea was dismissed during a legitimate 90 day trial period and has no claim against BHF.

Issues

[3] The issues I have to determine are:

(i) A 'threshold' issue of whether Ms Berea was dismissed in accordance with a valid 90 day trial period provision of her employment agreement and is prevented from advancing her unjustified dismissal claim;

(ii) if not, was Ms Berea unjustifiably dismissed by BHF?

(iii) If Ms Berea was unjustifiably dismissed, what remedies are appropriate given Ms Berea is claiming:

(a) lost wages; and

(b) compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 ("the Act").

(iv) If any remedies are warranted should they be reduced taking into account s 124 of the Act if it is found Ms Berea contributed to the situation given rise to her personal grievance claim.

(v) Costs of these proceedings.

The Authority's investigation

[4] At the investigation meeting I heard evidence from Ms Berea, Mr Gu and a BHF employee, Lynne Yu. In addition, BHF's Quality Manager provided a written statement that was not contested.

[5] Pursuant to s 174E of the Act, I make findings of fact and law and outline a conclusion on identified issues. Whilst I record that I have carefully considered all material placed before me, I do not record all evidence and submissions received. The discussion below in attributing recollections and assertions made by witnesses draws from their written statements, the parties' submissions and attached documentation.

What caused Ms Berea's employment relationship problem?

[6] On 9 January 2020, Mr Gu and his co-director, interviewed Ms Berea for a newly created position marketing position. Ms Berea who has extensive sales and marketing experience, recalls an interview of approximately two hours and being shown around BHF's factory but she did not recall any discussion of a trial period at this point in time.

[7] On Saturday, 11 January by email, Mr Gu offered Ms Berea a job. The email stated in part:

> We think you have good potential to grow with our company. Therefore, we are happy to offer you a permanent position. Initial position will be Marketing, Sales and Production Co-ordinator. Once you've had good understanding our production operation, you may also do Sales and Production Planner's work.
>
> As usual, there will be a 90-day trial period. During the trial period, your annual salary will be $50,000 including PAYE and KiwiSave if any.
>
> Normal working hours are 40 hours per week, Monday to Friday, 9am to 5:30 pm. If you want to start from 8:30 am and finish at 5pm, it is not a problem.
>
> If you are happy with this offer, please confirm your acceptance and advising the earliest starting date by replying this email. I'll then prepare a detailed employment agreement for you to review and sign before you start.
>
> We have an audit this Tuesday and Wednesday and will be very busy. You could start Thursday or Friday.
>
> (Emphasis added).

[8] In response to the proposal above, Ms Berea says she had a telephone conversation with Mr Gu and discussed her need, due to issues involving dropping her child off early at school, to commence at 8:30 am. Ms Berea says Mr Gu had no problem with this – Mr Gu denied the phone conversation.

[9] Then, in an email of Monday, 13 January Ms Berea indicated that she accepted the "current offer" and stated that she was willing to start on "50k for the trial period and 52k/year afterwards (as stated in the original offer) as long as this figure will be reviewed periodically according to my performance". Ms Berea indicated that she could commence on Thursday, 16 January and that her hours would be "8.30AM to 5PM with flexibility when needed (earlier start, earlier finish)" and that she was looking forward to signing the employment agreement.

[10] In responding by email of 14 January, Mr Gu thanked Ms Berea for accepting the offer and he attached a "draft" employment agreement for Ms Berea "to review". Mr Gu

suggested that Ms Berea commence work on 17 January allowing her more time to review the draft agreement.

[11] I find that given Mr Gu's 14 January email response was silent on Ms Berea's preference to commence work at 8:30 am and that his earlier email had indicated that he was relaxed about this starting time, it is more likely than not that he had agreed to this change.

[12] An email exchange between the parties of 15 January established that Ms Berea would start work on 17 January (with Ms Berea again stating this would be 8:30am). Ms Berea also indicated that she would review the employment agreement that day and asked for a copy with a 17 January starting date – Mr Gu indicated that he would print one off for her to sign when she came in on 17 January.

[13] By email of 16 January, Ms Berea asked for a discussion when she arrived at work seeking clarity on what goals she was expected to achieve in her first three and six months and what was the expectation and arrangements for her working on occasional Saturdays. Mr Gu did not respond.

[14] The upshot was, that although Ms Berea had not identified any issues with the employment agreement's essential terms and had emailed on 16 January, indicating "I have read the contract and I am happy with it", the agreement remained unsigned before Ms Berea commenced employment.

[15] Ms Berea described arriving at work on Friday 17 January at 8:30 am and finding the gate to the work premises locked so she had to wait a few minutes until, the Quality Manager let her in. The Quality Manager confirmed this and that he had no knowledge of Ms Berea being hired and in what capacity. He also confirmed Mr Gu then arrived at around 9 am and it was accepted that after a short discussion in which Mr Gu did not engage on the issues Ms Berea had sought clarity on, they executed the employment agreement shortly after 9 am.

The brief employment relationship and dismissal

[16] Ms Berea recalls on her first day being asked to assist with a presentation for a visiting Chinese delegation who were being shown around the factory the next day (Saturday) and working on such until 4pm when Mr Gu advised her that the visit had been postponed.

[17] On Monday 20 January Ms Berea worked a full day (commencing 8:30 am) and recalls being frustrated with IT/email connection issues and being asked to write content for BHF's website. Ms Berea says she asked for a briefing on BHF and what materials were available to assist with her assigned task but Mr Gu told her to simply check out on line what other companies were doing and adapt content.

[18] On 21 January, Ms Berea recalls having a meeting at 9 am with Mr Gu and his co-director, Yali Li and being told her work was 'basic' and she had until the end of the day to produce more acceptable content. Mr Gu was concerned that Ms Berea had provided copy with a basic error that miss-described the benefits of BHF's products and that the copy was not solely focused on infant formula.

[19] At the end of 21 January, Ms Berea was asked to meet Mr Gu at 4:30 pm and at this short meeting Mr Gu advised that he was unhappy with Ms Berea's work and that she was not needed any further. Ms Berea collected her belongings and left the workplace. Ms Berea says that she was in tears and recalls ringing her husband.

[20] Mr Gu said that given the small size of his company (14-15 employees) that he needed someone to 'hit the ground running' and that he was unimpressed by Ms Berea's expectation of IT support and her writing skills and that he made an early decision to end the employment relationship based on a belief that a valid 90 day trial period was in place.

[21] Mr Gu then forwarded a letter by email to Ms Berea at 5:44 pm that purported to give Ms Berea notice of her employment being terminated on Saturday 25th January 2020 and it indicated "[W]e are paying for the next three working days, but you don't need to come to work for us".

[22] Ms Berea was then paid forty seven and a half hours pay described as being inclusive of three days' pay in lieu of notice.

Personal grievance

[23] Ms Berea then engaged an advocate, Mr Brown, and raised a personal grievance in a letter of 27 January 2020; claiming that the 90 day trial period had no effect as Ms Berea was an existing employee before she signed the employment agreement. Mr Brown also contended that the dismissal was procedurally and substantively unjustified. Ms Berea's

statement of problem lodged on 19 May 2020 was consistent with the sole contention that she had already commenced employment before executing her employment agreement and thus the trial period was invalid.

The Law on threshold issue

[24] Section 67A and 67B of the Act are the relevant governing provisions they state:

> ***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—
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> (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.
>
> (4) [*Repealed*]
>
> (5) To avoid doubt, a trial provision may be included in an employment agreement under section 61(1)(a), but subject to section 61(1)(b).
>
> **67B Effect of trial provision under section 67A**
>
> (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.
>
> (3) Neither this section nor 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 (j).
>
> (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.

[25] Mr Brown's submission was that case law in this area is well-established and that Ms Berea was not bound by the trial period because when she signed the employment agreement she was already an existing employee and exempted from the coverage of the trial period clause in the employment agreement she signed shortly after commencing employment by dint of s 67A(3). To support this proposition and to explain the meaning and application of s 67A, Mr Brown relied upon two previous authorities - *Smith v Stokes Valley Pharmacy (2009) Ltd* and *Blackmore v Honick Properties Ltd* [1].

[26] The oft quoted passage of *Stokes Valley Pharmacy* is Chief Judge Colgan's observation of Parliamentary intent and what that means in practice when the trial provision was enacted is that:

> [46] During the Bill's second reading in the House, the Minister said:
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> "This bill is a moderate bill. It has been prepared to protect the rights of employees. It has been prepared and drafted to give new employees the opportunity to say 'Give me a go; I will prove myself.' and to get their foot in the employment door. …
>
> …
>
> … This bill applies only to new employees. It will not affect existing employees, and the trial period is established only by agreement. So it is up to the new employee to say 'Give me a trial period.' The bill will not affect the rights of existing employees.
>
> …
>
> … We have specifically provided, in our bill, that an employee is one who has not been previously employed by that employer."
>
> [47] These passages confirm the statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise

[1] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253; *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152, [2011] ERNZ 445.

> settled during its course. Employees affected are to be new employees. Such clauses contain a balance of employee protective elements as well as facilitating hiring and firing.
>
> [48] Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.

Discussion: validity of the trial period?

[27] The problem for Ms Berea is that Mr Brown did not distinguish the facts of her situation from *Smith* and *Blackmore* and apply further case law that has developed since (discussed below). The key difference is in both the latter cited authorities, where the employees' involved had a trial period imposed after they had commenced employment - Ms Smith had received a 'draft' agreement containing a trial period clause prior to commencing work but had not signalled assent and then only signed such a day after commencing work whence she raised a concern about the trial period and Mr Blackmore was unaware of any proposed trial period clause until he was presented with an agreement that he signed one hour after he commenced employment.

[28] Ms Berea's situation is significantly different in that email exchanges between the parties evidence that 'offer and acceptance' of all terms had been completed prior to Ms Berea commencing employment. The sequence being:

(i) Following the interview on 11 January, Mr Gu emailed offering the job to Ms Berea with a proposed starting date, salary, hours of work and days to be worked and said "[A]s usual, there will be a 90-day trial period".

(ii) Ms Berea responded on 13 January accepting the terms outlined saying she could start on 16 January and saying "I am looking forward to sign the employment contract/agreement".

(iii) Mr Gu then thanked Ms Berea for accepting his offer and provided a 'draft' employment agreement by email of 14 January that contained a valid trial provision and offered to allow a further day for contemplation of the agreement (i.e. that Ms Berea not start until 17 January).

(iv) By email of 16 January, Ms Berea said "I have read the contract and I am happy with it" apart from seeking "to discuss" what can only be regarded as non-essential terms that would not usually be recorded in an employment agreement (what prior notice she would get when working occasional Saturdays and goals/expectations around performance).

Finding

[29] I find that given the above, the point of the formation of the employment agreement was prior to the commencement of actual employment with no essential concerns being raised by Ms Berea and that the later signing of the agreement does not create a situation where the trial period is invalidated. This finding is consistent with an alternative scenario Chief Judge Colgan outlined in *Blackmore* - that a trial period could be agreed before employment commences. Judge Smith affirmed this proposition in *Roach v Nazareth Care Charitable Trust Board* explaining that:

> However, the purpose of s 67A(3) can be ascertained from s 62A(2)(a). In *Blackmore* the Court explained that the words used in this subsection (starting at the beginning of the employee's employment) allow for the trial period to begin on the day work starts which may be some time after the employment agreement was entered into. The purpose is to allow the employee to be assessed while working. Neither party has suggested that *Blackmore* is wrong in that respect. An interpretation of s 67A(3) that is consistent with s 67A(2)(a), as explained in *Blackmore* , means that what is being referred to by an employee having been "previously employed" is where there has already been an opportunity to assess the employee's suitability for the work. Nothing in that approach would allow an employer to impose a trial on an existing employee who has started work or on those employees who have worked for that employer before. [2]

[30] Whilst Chief Judge Colgan in *Blackmore* detailed a strict approach and the reasons for such, which is evidently to prevent trial periods being imposed post commencement of employment, I have departed in this decision from the requirement that an agreement must be both in writing and signed prior to the actual commencement of employment. [3] That is because in Ms Berea's specific circumstances, the subsequent signing of the agreement made no practical difference to the 'bargain' the parties had already struck. The agreement was inclusive of a trial period that Ms Berea had not objected to.

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[2] *Roach v Nazareth Care Charitable Trust Board* [2018] ERNZ 355 at [45].
[3] At [47].

[31] The facts here, are distinguished from existing authorities including *Smith Crane and Construction Ltd v Hall* which involved pre-employment conditions being agreed through acceptance via a signed 'letter of offer' but then an employment agreement being executed after Mr Smith commenced employment containing a trial period not alluded to in the letter of offer. [4]

[32] Also, in *Kumara Hotel Ltd v McSherry*, Chief Judge Inglis, reviewing *Blackmore*, recognised that a binding employment agreement based upon acceptance of an offer of essential terms communicated and accepted by return email (in this case without a 90 day trial being agreed), could be relied upon for the purposes of s 67A of the Act and could create an employment relationship before work had commenced. [5] This reasoning, in very limited circumstances, I find obviates the need for an agreement to be signed before coming into effect provided as in Ms Berea's case, all legitimate terms of offer and acceptance are in place.

[33] Chief Judge Inglis in *McSherry* referred to the proposition in *Blackmore* that:

> … a trial period can be agreed upon in an individual employment agreement signed before the commencement of work but which trial period is expressed to begin on the day of commencement of work. The phrase in s 67A(2)(a)' … starting at the beginning of the employee's employment … ' means when the employee begins work, not when the parties agree (offer and acceptance of work) that the employee will work for the employer as from a future date.
>
> So the trial period agreed in these terms simply becomes one of a number of terms and conditions of employment that will take effect at a future date when the job starts. [6]

The alternative of estoppel

[34] In *Smith Crane* the Court also considered whether Mr Hall was estopped from claiming relief on an argument in part, that he had created an expectation that he was bound by a 90-day provision provided to him in a draft agreement. The Court affirmed estoppel was a legitimate cause of action in employment law [7] but in conducting an analysis found Mr Hall

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[4] *Smith Crane and Construction Ltd v Hall* [2015] NZEmpC 82.
[5] *Kumara Hotel Ltd v McSherry* [2018] ERNZ 60 at [45] – [47].
[6] At [52] – [53].
[7] At [61].

had not created an impression at any time before commencing work that he had agreed the trial period.[8]

[35] In Ms Berea's situation it is arguable that she is estopped from claiming the trial period has no effect as she communicated acceptance of all terms including the trial period that had been specifically brought to her attention prior to commencing employment and Mr Gu for BHF placed reasonable reliance on this concurrence, it would be to BHF's detriment if that agreement was ignored and arguably in the circumstances, it would be unconscionable to rule that Mr Gu should depart from this belief.

Notice given to Ms Berea

[36] To complete an analysis of the situation although not claimed as deficient, I note that Mr Gu whilst terminating the employment summarily, sought to comply with the notice provision in the employment agreement by paying Ms Berea an in lieu of notice payment. The relevant clause in Ms Berea's employment agreement stated:

> During the trial period, your employment may be terminated with three days' notice by either party, or payment in lieu of such notice.

[37] In *Ioan v Scott Technology NZ Ltd (t/a Rocklabs),* Judge Holden distinguished *Stokes Valley* and held that "notice" in s 67B (1) of the Act requires notice in accordance with the applicable employment agreement rather than a statutory provision distinct from the contractual notice provision so that employers may give notice but at the same time pay employees in lieu of them working out their notice, where such payments in lieu are permitted by the employment agreement. [9]

Impact of no notice

[38] Ms Berea's situation however can be distinguished from *Ioan* as her employment agreement had no requirement to give notice in writing and the alternative of paying a sum in lieu of notice was imposed.

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[8] At [63] – [64].
[9] *Ioan v Scott Technology NZ Ltd (t/a Rocklabs)* at [43] – [44].

[39] The problem for BHF, unlike the case of Mr Ioan, is that no notice written or otherwise, was given to Ms Berea until after she had been dismissed at the brief meeting on 21 January 2020 and she had been 'sent away' from the workplace.

[40] It is my view that s 67B (1) of the Act clearly envisages the giving of notice prior to the ending of an employment relationship. Giving notice after the point of dismissal is defective notice. The dictionary definition of 'notice' is to provide an indication of a future event or "advance notification or warning". [10]

[41] The Court of Appeal that upheld the Employment Court in *Ioan* affirmed a strict approach to s 67B but that should not mean Parliament intended terminations "that would at general law constitute termination on notice to be classified as summary dismissals for the purpose of s 67B and so outside its scope." and that:

> The general law regarding the effect of a payment in lieu of notice is well established. The mere fact of a payment in lieu of notice does not itself prevent a termination from being a summary dismissal. It is not an alternative to providing notice as required by the agreement. Nor will the fact of a payment cure a defective notice, including a notice that is defective because it is ambiguous or not in accordance with the contract because, for example, the period of notice is too short. If, however, the payment is simply an alternative to the employer requiring the employee to work out the correct period of notice which has been conveyed in clear and unambiguous terms, then that is a termination on notice. [11]

Finding

[42] Exercising the discretion I have under s 122 of the Act that the nature of the grievance may be found to be of a different type to that alleged, [12] I find here that the payment in lieu of notice although permitted by the employment agreement, did not cure a defective notice – the notice given was not ambiguous or short - it was non-existent and unlike in Mr Ioan's case, Ms Berea had no options placed before her. Even if I was to accept from Mr Gu's submission, that the notice communicated by his early evening, emailed letter of 21 January

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[10] Catherine Soanes and Angus Stevenson, *Concise Oxford English Dictionary* (11th ed), Oxford University Press Inc. , New York, 2004.

[11] *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386, CA 142/2018 at [28] - [29].

[12] Section 122 Employment Relations Act 2000 provides "Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than alleged.

as the point of dismissal, I would still have concluded that this was insufficiently short notice to meet the requirement of s 67B of the Act.

[43] Judge Perkins succinctly stated it in *Farmer Motor Group Ltd v McKenzie* as:

> Payment in lieu is not an alternative to providing notice whether oral or written as the agreement provides, but simply an alternative to the employer requiring the employee to work out the period of notice which is given. [13]

[44] Judge Smith in *Roach* affirmed the above approach [14] and in referencing *Stokes Valley Pharmacy* he reiterated a strict approach to interpretation that was required when a right to bring a personal grievance was compromised. [15]

[45] In the circumstances I find that Ms Berea was summarily dismissed and nothing in Ms Berea's employment agreement (exempting serious misconduct) or arguably s 67B of the Act, provides for summary dismissal without requisite prior notice being given.

[46] I find that with the failure to give prior notice, BHF is unable to rely upon s 67B (1) to justify its decision to summarily dismiss Ms Berea. The lack of prior notice in this context renders the trial period inoperable.

Was Ms Berea unjustifiably dismissed?

[47] Given my finding that BHF cannot rely on a valid trial period I now have to consider whether Ms Berea's dismissal was unjustified.

[48] Ms Berea's claim is that BHF dismissed her in a procedurally and substantively unjustified manner that cannot satisfy s 103A of the Act.

[49] The test in s 103A (2) of the Act is whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Section 103A (3), requires that I consider a number of factors, including whether concerns were raised by the employer with the employee before dismissing the employee, whether a reasonable opportunity to respond to those concerns was given, and

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[13] *Farmer Motor Group Ltd v McKenzie* [2017] NZEmpC 98. See also *David Appleyard v Corelogic NZ Limited* [2020] NZEmpC 107 at [15].
[14] At [57].
[15] Ibid.

whether the employer genuinely considered the employee's explanations (if any) before dismissal.

[50] Mr Gu for BHF contended that the dismissal proceeded because he became immediately concerned about both Ms Berea's demonstrated skill level after viewing a piece of her work and lack of what he perceived to be a 'can do' or flexible attitude.

[51] By contrast, Ms Berea said she found BHF to be disorganised having not set up her workstation and attended to basic IT needs and, when she asked for assistance to get familiar with what was expected of her little was forthcoming.

Assessment

[52] Given that the employment lasted just less than three days, I find that BHF gave Ms Berea an insufficient orientation and time to demonstrate her skill level. The manner of the dismissal was abrupt with no practical opportunity for Ms Berea to obtain representation or have any input into the decision. Section 103A of the Act and good faith considerations were absent in the decision to dismiss. The procedural defects were no minor and did result in Ms Berea being treated unfairly.

[53] I have considered that BHF is a small company with no human resource support but I find that this did not impact upon the duty to fairly investigate the concerns held about Ms Berea's performance. I find that BHF provided insufficient time for Ms Berea to understand the role she had been assigned and no tangible support was provided. Mr Gu as the decision-maker and Ms Berea's manager, did not spend enough time with her to assess why she was initially struggling to meet his expectations in what was an unfamiliar work environment.

[54] No fair and reasonable employer could have concluded that summary dismissal on performance grounds was warranted in these circumstances.

Finding

[55] I find that Ms Berea was unjustifiably dismissed.

Remedies

Lost wages

[56] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Ms Berea should I find that she has established a personal grievance and, s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration. Here I find Ms Berea's lost remuneration was attributed to the personal grievance. Ms Berea provided documentary evidence that she secured alternative employment commencing on 31 January 2020.

[57] BHF is ordered to pay Ms Berea three weeks' and two days lost wages in the sum of $3,774.58 gross (a sum including holiday pay but reduced by Ms Berea's three days in lieu of notice payment).

Compensation for hurt and humiliation

[58] Ms Berea gave compelling evidence of the impact of the summary dismissal and the affect upon her self-confidence and sleep patterns. She explained that she was shocked by the hurried and sudden nature of the dismissal, felt belittled and was in tears for several days with a subsequent strain on her relationship with her partner.

[59] With some justification, Ms Berea felt BHF dispensed with her services in a callous and peremptory fashion and that Mr Gu was unwilling to discuss the situation or listen to her perspective of the situation. I find Ms Berea was afforded no dignity and she suffered significant humiliation as a direct result of how she was summarily dismissed.

[60] I am convinced that at the time, Ms Berea suffered humiliation, loss of dignity and injury to feelings but that she quickly found alternative employment and was able to put this unfortunate experience behind her.

[61] Taking into account the circumstances and awards made by the Authority and Court in similar situations and the manner by which BHF effected this dismissal, I consider Ms Berea's evidence warrants compensation of $12,000 under s 123(1)(c)(i) of the Act.

Contribution

[62] Section 124 of the Act states that I must consider the extent to what, if any, Ms Berea's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedies granted should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*[16].

[63] Given the extremely short period or employment involved and the fact that the dismissal was ostensibly for unidentified performance issues I do not see any issues of contribution from Ms Berea. I observe that her attempts to get further clarity on her role and suggestions that she receive more guidance were entirely reasonable.

[64] The hasty decision to dismiss in context was a wholly disproportionate response and any reasonable employer would have easily perceived that they had overreacted. I cannot therefore objectively deem Ms Berea's conduct to have been 'culpable'.

[65] I find that no reduction in the remedies I have awarded is justified.

Summary

[66] **I have found that:**

a. Roxanne Berea was unjustifiably dismissed from her employment with Best Health Foods Limited.

b. Best Health Foods Limited must pay Ms Berea the sums below:

(i) $3,774.58 gross lost wages;

(ii) $12,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Act.

[16] *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Costs

[67] Costs are at the discretion of the Authority but here Ms Berea established her predominant claim that she was unjustifiably dismissed and has obtained compensatory remedies in an investigation meeting that took just under a day.

[68] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[69] If no agreement is achieved, Ms Berea has fourteen days following the date of this determination to make a written submission on costs and Best Health Foods Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority