IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 112
3017331

	BETWEEN	KATIE FREEBORN Applicant
	AND	SFIZIO LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Katie Freeborn, on own behalf Gregory Gregorash, for Respondent
Investigation Meeting:	16 July 2018 at Wellington
Submissions Received:	At the investigation with further input up to and including 13 August 2018
Determination:	14 December 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Katie Freeborn claims she was unjustifiably dismissed by the respondent on 21 September 2016. She also claims she was not paid for the first shift she worked on 17 August 2016.

[2] Sfizio denies the claims have validity. It accepts it dismissed Ms Freeborn but in doing so relies on a 90 day trial provision and the resulting prohibition on the taking of a personal grievance for unjustified dismissal.[1] While accepting Ms Freeborn was in the workplace on 17 August it claims she was not there as an employee but on an agreed unpaid pre work trial.

[1] Sections 67A and 67B of the Employment Relations Act 2000

[3] Sfizio's statement in reply also contains two paragraphs entitled counterclaim. It says one of its directors has taken at least a week off work to research and respond to the claim which has caused it to incur the cost of a replacement in the workplace. While not expressly said it is strongly implied the firm now seeks repayment.

[4] Ms Freeborn characterises this as a threat.

[5] There has been some confusion over the citation of the respondent. The application as originally filed cited two respondents – Curtis Gregorash and Kathy Parfitt. The Statement in Reply identified it as Wadestown Kitchen while the individual employment agreement identified the employer party as Regulatory and Compliance Solutions Limited trading as Wadestown Kitchen. Mr Gregorash and Ms Parfitt are the sole directors and shareholders thereof. After discussion at the investigation meeting it was agreed the company was the employer though by then it had changed its name to Sfizio Limited. The citation was changed by agreement.

Background

[6] Sfizio runs, as one part of its business, a suburban café. On 8 August Ms Freeborn answered an advertisement for a barista placed with student job search. An interview was arranged for 12 August at which Ms Freeborn also prepared some coffees. Mr Gregorash is of the view they were not very good but considered that was outweighed by Ms Freeborn's personality.

[7] Mr Gregorash says the interview ended with Ms Freeborn being verbally offered an unpaid pre-work test. He says she was advised its purpose was to assess whether she was …*a good fit for our organisation and at the same time assess whether we are the right employer for her*. He says it wasn't a day of work and the cafe had its regularly scheduled barista working. He says Ms Freeborn was told the day would be unpaid and explains Sfizio has never paid for a work test.

[8] The day in question was 17 August and Ms Freeborn attended. She denies she was told it would be unpaid and her first intimation that was so came when she questioned the lack of pay. She also notes she was required to sign a timesheet and suggests any reasonable person would therefore assume they would be paid. She also says she would not have agreed to a seven hour shift had she known it would be unpaid.

[9] Mr Gregorash says that while the coffees Ms Freeborn produced on 17 August were better than during the interview they were not at the standard his clients expected. Notwithstanding that he and Ms Parfitt felt Ms Freeborn had enough potential that they would *give her a go* as they could rely on a 90 day trial provision if it did not work. Mr Gregorash says Ms Freeborn was then offered the job and handed a proposed employment agreement. Nr Gregorash says it was then they discussed the 90 day trial and agreed an hourly rate. He says Ms Freeborn was also handed an employee information form covering issues such as IRD numbers and Kiwisaver. He says the two also discussed a possible commencement and agreed on 20 August.

[10] Ms Freeborn disagrees. She says the hourly rate had been discussed at the interview. She says the interview had ended with her being told the employment agreement could be e-mailed or handed over at her first shift on 17 August. She has no memory of the 90 day trial being discussed.

[11] The agreement cites 20 August as the commencement date and Ms Parfitt singed for the employer on 17 August. There is a copy which shows Ms Freeborn as signing on 27 August though Sfizio denies it was ever returned. [2] The agreement contains a clause which states it is subject to a 90 trial pursuant to ss 67A and 67B of the Employment Relations Act 2000 (the Act) with said period expiring on 17 November (90 days from 20 August).

[12] In support of its view Sfizio refers to an e-mail it sent student job search on 18 August advising it had *interviewed and trialled* Ms Freeborn and she was considering its offer.

[13] Sfizio accepts Ms Freeborn arrived and worked on 20 August. It says she was asked about the agreement and replied she had not brought it in. There was a further request for the agreement by text the following evening to which Ms Freeborn replied saying she would scan it the next day or possibly the one after. Ms Freeborn denies ever being verbally asked for the agreement but accepts texts were sent.

[14] Sfizio says it had ongoing concerns about the coffees Ms Freeborn made and arranged some training. Communications about that included a query from Ms Freeborn as to whether the training would be paid with the responses including more comment about the agreements whereabouts. Sfizio says this led to it receiving the

[2] Statement in Reply at [x]

employee information form but the same did not apply to the employment agreement. As already said in [11] above Sfizio claims the agreement was never returned.

[15] Sfizio says Ms Freeborn worked on 7, 14 and 21 September and concerns remained about the quality of her coffees. This led to her being restricted to serving and doing dishes on the second and third of those days.

[16] Shortly after the cessation of her shift on 21 September Ms Freeborn was told she was no longer needed. That was followed by a text which read:

> Hi Rose, just confirming my call just now. We wanted to thank you for coming in the last few Wednesdays. Unfortunately, you don't seem to be going well on our coffee machine. We have quite a lot going on with the new café and we don't have time to train you on our machine so I don't think it is going to work out. All the best for the future, Kathy & Curtis.

[17] Ms Freeborn then queried whether or not she would be paid a notice period to which Sfizio says it replied *It's just a trial period but you never gave the contract back. It would be one more shift if you wanted to work it*.

[18] Sfizio says there was no response and nothing more was heard till Ms Freeborn wrote on 27 September raising concerns about her treatment.

Discussion

[19] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[20] As already said Ms Freeborn claims she was unjustifiably dismissed. She also seeks payment for the work she performed on 17 August 2016.

[21] Sfizio accepts it dismissed Ms Freeborn but denies the claim can proceed by reason of a valid 90 day trial provision. It says 17 August was an unpaid trial.

[22] In *Smith v Stokes Valley* the Court said:

> … the statutory intention [was] 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 settled during its course.[3]

[23] A similar approach was taken in *Blackmore v Honick Properties Ltd* when the Chief Judge considered whether it was unreasonable to require employers to ensure a written employment agreement containing a s 67A provision was signed before the employee began working. He concluded:

> Employers have or ought to have been aware that trial periods must be agreed in writing before the affected employees begin work if they are to be regarded as not having been employed previously by the employer, which is an essential pre-condition of a trial period.
>
> It is not too onerous an expectation that employers will get the correct paper work and do things in a correct sequence. …
>
> What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss 67A and 67B must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee. This will mean in practice that trial periods in individual employment agreements must be provided to prospective employees at the same time as, and as part of, making an offer of employment to that prospective employee… It will only be when … the agreement has been accepted by the prospective employee (usually by signing), that there will be a lawful trial period effective from the specified date of commencement of the agreement, usually in practice the date of commencement of work.[4]

[24] The first question is whether or not Ms Freeborn was working or performing an unpaid trial on 17 August. If working there can be no doubt the trial period which is now being used to justify the dismissal is invalid as the employment would clearly have started before the agreement was given at the end of the day.[5] Resolution of this question will also determine the wage claim.

[25] Work is not defined by the Act though there are a number of indicators as to the type of issues I should consider in the 'sleepover' cases[6] and the *Salad Bowl*[7] decision. The determination will revolve around issue such as level of control, freedom and whether or not the workers were producing outcomes profitable to the employer.

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[3] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253 at [47]
[4] *Blackmore v Honick Properties Ltd* [2011] ERNZ 455 at [65] to [70]
[5] Refer Mr Gregorash's evidence cited in [9] above.
[6] *Idea Services v Dickson* [2011] ERNZ 192 (CA) and *Law v Board of Trustees of Woodford House and Trustees of Iona College* [2014] ERNZ 576 (EmpC).
[7] *Salad Bowl Ltd v Howe-Thornley* [2013] ERNZ 326 (EmpC)

[26] In this instance the evidence shows Ms Freeborn was performing the range of duties she would have been expected to perform as an employee with the bulk of her tasks on 17 August being the preparation and serving of product for consumption by customers. She adds there was nothing about her duties that day to make it feel like a training session and what she did felt *just like each subsequent shift*. The evidence leads me to conclude she was contributing to the employers business and its profitability which was a key factor in *Salad Bowl*.

[27] The evidence is also clear Ms Freeborn had an expectation of payment with the expectation being confirmed in her mind by the requirement she complete a timesheet for the day. Finally I have to conclude there is an onus on the employer to remove any doubt and make the existence of the unpaid trial clear. The evidence falls short of establishing that occurred.

[28] The conclusion I reach is Ms Freeborn was employed on 17 August. That means she should be paid for the day and the trial period upon which Sfizio relies when justifying the dismissal is invalid.

[29] Even it that were not the case and Ms Freeborn was on an unpaid trial on 17 August there would not be a valid 90 day trial pursuant to ss 67A and 67B of the Act. That is because the dicta in [22] and [23] above suggests there must be conclusive proof the trial was agreed prior to commencement. Here there is no such evidence as while Sfizio says it verbally advised the existence of the trial period when it handed the agreement over it makes no claim there was express acceptance prior to Ms Freeborn starting on the 20th and then Ms Freeborn denies the issue was clearly explained.

[30] Finally there is a dispute about whether the employment was casual or part-time with Sfizio asserting the former in its statement in reply. The claim the arrangement was casual is also expressed in a text Sfizio sent Ms Freeborn soon after termination. The claim is made on the grounds 'part-time' was crossed out and the rest of the clause makes it clear there were no minimum guaranteed hours.

[31] The implication is that if the arrangement was casual there could be no dismissal – simply a decision not to offer further engagements.

[32] I cannot accept the assertion this was a casual arrangement. Casual implies no regularity or certainty and that is not the case here. The provisions remaining after the

crossed out part-time include a statement the hours shall be between 10 and 20 per week. Despite Sfizio's protestation to the contrary that provides a regular gaurnatee of hours. To that I add the fact Sfizio sent a text *... confirming we've got you rostered on Weds and Sats...* Again this implies regularity and while that did not actually occur, the evidence is Ms Freeborn regularly worked each Wednesday during her brief tenure. Finally I note Mr Gregorash accepts the advertisement was for part time work and not casual.

[33] The conclusion Sfizio cannot rely on a trial period to justify the dismissal means it requires some other form of justification that meets the requirements of s 103A of the Act. Reliance on the trial means there was no attempt to offer such justification and no evidence the procedural elements of the sections requirements have been met. While Ms Freeborn accepts she knew Sfizio was dissatisfied with her coffee there is no evidence its concerns were put in a way that made it clear there was a threat to Ms Freeborn's ongoing employment; no opportunity to respond and therefore no consideration thereof.

[34] That said there is also a requirement an employer's adherence to these requirements be considered in light of its resources. That does not, in this instance, excuse what can only be considered a total failure. First I note the Court's conclusion in *Salad Bowl* that an all-encompassing failure such as occurred here is neither minor nor excusable (s 103A(5) of the Act). [8] Second I note Mr Gregorash is a qualified solicitor and his efforts in addressing this claim show he was more than capable of doing some prior research and informing his approach had he chosen to do so.

[35] The dismissal is unjustified which raises the question of remedies. Ms Freeborn seeks wages lost as a result of the grievance and compensation for hurt and humiliation pursuant to s 123(1)(c)(i) of the Act.

[36] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. There is then discretion to award a greater sum though that is not necessary as Ms Freeborn attained a new job after four weeks. While there is a question over her exact hours the evidence suggests she regularly worked one 7 hour shift a week during her short tenure ([32] above). The agreement also gave her stated there would be a minimum of ten hours a week.

[8] [2013] NZEmpC 152 at [94] and [95]

[37] I consider it is the contractual guarantee which should provide the basis on which lost wages should be calculated. Those were the agreed terms and on that basis I conclude the wage loss to be $640. That is payable.

[38] The compensation claim was not quantified and supporting evidence was weak. It was limited to an expression of stress resulting from a loss of income and chagrin at an experienced barista being told her coffees were inadequate. Even in this time of increasing awards I conclude the evidence only warrants a modest award in the order of $2,000.

[39] The conclusion remedies accrue mean I must, in accordance with s 124 of the Act, address whether or not Ms Freeborn contributed to her dismissal in a way that warrants a reduction in remedies. Notwithstanding her acceptance she was aware of Sfizio's dissatisfaction the absence of formal processes aimed at remedying the situation means the answer must be no, at least not in the way envisaged by s 124.

[40] Finally there is the issue of costs to which Ms Freeborn is entitled given she has been wholly successful. As she is self-represented these are, however, limited to reimbursement of the Authority's filing fee. That too is payable.

[41] Sfizion counterclaim relates to its costs. To have any prospect of success in that regard it first has to succeed with its defence of the claim. It didn't so its counterclaim will be considered no further.

Conclusion and Costs

[42] For the above reasons I conclude Ms Freeborn has a personal grievance in that she was unjustifiably dismissed. I also conclude she should also be paid for her work on 17 August 2016.

[43] As a result I order the respondent, Sfizio Limited, pay Katie Freeborn;

a. $640.00 (six hundred and forty dollars) gross as recompense for wages lost as a result of the dismissal;

b. and a further $2,000.00 (two thousand dollars) as compensation for humiliation, loss of dignity and injury pursuant to section 123(1)(c)(i); and

c. a further $112.00 (one hundred and twelve dollars) gross being wages payable for working 17 August 2017; and

d. a further $71.56 (seventy one dollars and fifty six cents) being reimbursements of the Authority's filing fee.

[44] PAYE should be deducted from the wage components in 43(a) and (c) above and forwarded to the Inland Revenue.

M B Loftus
Member of the Employment Relations Authority