

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 454
3303680

BETWEEN WAYNE GILLARD
Applicant

AND SOUTHSORE MARINE
LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: David Balfour, advocate for the Applicant
Michael Hill, for the Respondent

Investigation Meeting: 18 March 2025

Submissions received: 7 April 2025, 28 April 2025.

Determination: 28 July 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Gillard claims he was unjustifiably dismissed by his former employer (SSM). He says SSM was unable to dismiss him based on an agreed 90 day trial period which if valid precludes an employee from bringing proceedings in a grievance for unjustified dismissal.¹ Mr Gillard says either the notice of termination was not given within the time frame of the 90-day trial period because it lacked a clear timeframe from start to finish, the notice was not in writing, and that he was told his employment was coming to an end because the business was being sold. Mr Gillard says he had to cope with the uncertainty about when his employment would end after being told it verbally would. He says he suffered both financially and personally

¹ Employment Relations Act 2000, s67A (2)(c).

after what he considered was permanent employment that he relocated to Christchurch for just four months prior.

[2] Mr Gillard also claims that SSM breached its duties of good faith to him and unjustifiably disadvantaged him in his employment based on the same situation being the uncertainty about when his employment would end, and that SSM allegedly communicated incorrectly to WINZ² that his employment came to an end as a result of performance issues which had never been raised with him. This, Mr Gillard says adversely affected the more immediate support he could obtain from WINZ. Mr Gillard's claims of disadvantage remain unaffected by any valid termination under a 90-day trial period which only prevents an employee bringing a challenge to the dismissal³.

[3] Mr Gillard claims compensation, lost wages and costs for the unjustified dismissal. He claims compensation for the disadvantage and various penalties against SSM. He seeks to have any penalties partly paid to him.

[4] The co-directors of SSM are husband and wife Michael David Hill and Gaye Vivienne Hill⁴. SSM operates a commercial business focused on the fishing industry which includes as an adjunct, on the same business site, a small retail shop selling recreational fishing supplies. Mr Gillard was employed to work in the shop as a sole charge 'Retail Manager.' He had applied for the role, was interviewed and was offered the role. At Mr Gillard's suggestion, SSM applied successfully for a government wage subsidy for the first thirteen weeks of the employment.

[5] While SSM says there was an overseas party interested in buying the commercial business at the time Mr Gillard was working in the shop, this had nothing to do with the dismissal of Mr Gillard which SSM says was legitimately based on a 90-day trial period. Mr Hill says that neither the commercial business, nor the retail shop has been sold. Mr Hill says he was being 'kind' to Mr Gillard when SSM gave him more time before ending his employment under the 90 day trial period.

² Work and Income Te Hiranga Tangata: www.workandincome.govt.nz.

³ Employment Relations Act 2000, s 67B(3).

⁴ <https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/429352>.

The Authority's Investigation process

[6] I held an investigation meeting for half a day in this matter. I asked under oath and affirmation questions of Mr Gillard based on his evidence lodged as directed, and Mr Hill and Ms Hill for SSM on the basis of material already submitted because SSM did not lodge any evidence as directed. Mr Balfour appearing by AVL asked clarifying questions of Mr Gillard and cross examined the Hills, particularly Mr Hill. Mr Hill had no questions for Mr Gillard. I then timetabled for written submissions which I received. I reserved my determination on 28 April 2025.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions as necessary to dispose of the matter and make appropriate orders. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination are:

- a. Was any notice of termination given by SSM to Mr Gillard that his employment was to end under the 90-day trial period invalid in that SSM was not clear as to the termination date and or because the notice was not in writing?
- b. If so, could SSM rely on the 90 day trial period to have dismissed Mr Gillard in that there could be no challenge to the dismissal through a grievance?
- c. If SSM was not able to rely on the 90 day trial period to end Mr Gillard's employment, was it justified to dismiss Mr Gillard?
- d. If not what is SSM ordered to pay to Mr Gillard as remedies for the unjustified dismissal for:
 - i. Compensation under s 123(1)(c)(i) of the Act;
 - ii. Lost wages under s 123(1)(b) of the Act.

- e. Has Mr Gillard been disadvantaged in his employment by any actions of SSM and if so what if any remedies are SSM ordered to pay in relation to compensation under s 123(1)(c)(i) of the Act?
- f. Under s 124 of the Act are any remedies to be reduced for employee contribution to the grievance(s)?
- g. Are any of the penalties claimed to be considered and then if so, ordered with a portion to paid to Mr Gillard?
- h. Are costs one to the other to be ordered?

Was any notice of termination given by SSM to Mr Gillard that his employment was to end under the 90-day trial period invalid in that SSM was not clear as to the termination date and or because the notice was not in writing?

If not, can SSM rely on the 90-day trial period to have dismissed Mr Gillard in that there could be no challenge to the dismissal through a grievance?

[9] It is not in dispute that a 90-day trial period was agreed to in an IEA signed on 12 September 2023 by the parties before Mr Gillard commenced work as an employee for SSM on 9 October 2023, the commencement date recorded in the IEA.

[10] The IEA included the following agreement that Mr Gillard's employment was subject to a 90-day trial provision as allowed under ss 67A and 67B of the Act. Having heard from Mr Gillard I am satisfied he was familiar with what this meant. I set out the relevant part of the IEA as follows (the bold words replicating the document copy before me):

3.2 Your employment is subject to the satisfactory completion of an initial **90-day trial period** in accordance with 67A and 67B of the Employment Relations Act 2000.

3.2.1 During this trial period, we may terminate this agreement at any time by giving you one week's notice of termination. That notice can be worked, or paid in lieu, at our complete discretion.

3.2.2 So long as notice of termination is given to you during this 90-day period, the actual termination of the agreement may take effect after the expiry of the trial period.

3.2.3 You agree that if your employment is terminated under the provisions above you are not entitled to raise a personal grievance or other legal proceedings in respect of the dismissal.

[11] I accept that the IEA does not express when the trial period is to commence. However, I find it commenced on 9 October 2023 consistent with the commencement date in the IEA, the date from which there was work being performed to trial. This interpretation is consistent with the position that has been taken before in the Employment Court⁵ when dealing with whether the trial period commenced on the date when a person signed their employment agreement or when they actually started. The Court concluded that while an employee can be defined as someone ‘intending to work’ under the Act,⁶ it was the latter that was the date from which a 90 day trial period began.

[12] I accept the submission for Mr Gillard that the 90-day trial period would have concluded on 6 January 2024 counted chronologically as 90 days from 9 October 2023. According to cl 3.2.2 in the IEA as set out above, this means that SSM would have had to give notice of termination under the 90-day trial period by 6 January 2024.

[13] I now consider the dispute about whether the notice under s 3.2.1 of the IEA was adequately given in that it was not in writing, as well as whether notice was given at all.

[14] It is not in dispute that there was a verbal discussion between Mr Gillard and Mr Hill in December 2023 about Mr Gillard’s employment either coming to an end or potentially coming to an end. Mr Hill agrees in his oral evidence there was no *written* notice given to communicate that the employment was coming to an end and when. He said in oral evidence that the IEA is silent about this, or he made a mistake that this was required. He confirmed in cross examination that the company had sought advice about using the 90-day trial period.

[15] Nothing was written down to record the discussion(s) likely had in December 2023 between Mr Hill and Mr Gillard. Each give conflicting versions of what was said and or meant and also of the problems in the employment relationship up to that point. Mr Gillard says the reason given to him for ending his employment in December 2023 was because Mr Hill said

⁵ *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152.

⁶ Employment Relations Act 2000, s6(1)(b)(ii).

the business was being sold but there was no clear date yet. Mr Hill says that he did have an interested party at the time, but it was for the commercial part of the business and not the retail shop and in the end nothing came of this.

[16] I agree with the submission for Mr Gillard that while the IEA clause 3.2.1 refers to one weeks’ notice which is silent (as is the Act⁷) about it having to be in writing, the IEA otherwise includes a plain interpretation that the notice is to be in writing:

17.1 Either party may terminate this Agreement on giving notice in writing to the other party such notice being that set out in Appendix 1.

...

Appendix 1:⁸

...

TRIAL PERIOD	90 Days
Notice of Termination	___ 2 __ Weeks
Notice of Termination (Redundancy)	___ 2 __ Weeks

[17] Despite what appears to be an inconsistency between one weeks’ notice and two weeks’ notice to be provided to terminate under a 90-day trial period, I find that read together clause 3.2.1, clause 17 and Appendix 1 shows me an agreement that the notice was to be in writing. Any ‘notice’ given here was not in writing. I also find that any verbal discussion was not recorded as to what was meant or understood about the basis upon which the employer was unilaterally ending it.

[18] While SSM says it relies on being able to have had an end date of employment beyond the end of the trial period⁹ I also accept the submission for Mr Gillard that until February 2024 (beyond the date the 90 day trial period expired on 6 January 2024) there was no clarity as to the end date for the employment, the termination date. That date according to a handwritten note from Mr Gillard in mid-February 2023 to Ms Hill shows me he was the one trying to get certainty to the end of his employment as to the termination date in any event. I do not accept as reasonable the submission for SSM that somehow Mr Gillard asking to end his employment

⁷ Employment Relations Act 2000, s67B(1).

⁸ Reproduced as relevant.

⁹ Clause 3.2.2 of the IEA.

in late February 2024 meant he was generously paid ‘extra wages’ beyond the end of his previously advised termination date. In short SSM has not provided any evidence of having given such a date. This further supports inadequate notice or likely no notice given of termination under cause 3.2.1 by SSM. In these circumstances it is not a stretch to conclude that notice of termination has not been given.

[19] The Courts have taken a strict approach to interpreting the use of 90-trial periods in that an employer needs to comply with a ‘specific series of steps¹⁰’ to rely on the ability to take away the terminated employee’s right to bring a grievance for unjustified dismissal.¹¹ The absence of written notice that was agreed to in an IEA has previously also defeated an employer wanting to rely on termination under a 90 day trial period. Equally the Employment Court when examining the requirements on the employer giving notice of termination under a 90-day trial period has said that:

...in the context of trial periods, that where termination of employment may occur over a span of time, notice of termination must be more than simply advice of dismissal and should advise when, in future, the dismissal takes effect.¹²

[20] Based on the above I find that SSM cannot rely on having unilaterally terminated Mr Gillard’s employment under a 90 day trial period. The notice was not in writing as agreed in the IEA and there was no clarity about when the employment would end. Accordingly, Mr Gillard is able to bring his grievance for unjustified dismissal.

Was SSM justified to dismiss Mr Gillard?

[21] As noted above, both parties have included different reasons why they were unhappy with the way the employment relationship had been operating. Mr Gillard includes in his evidence that he felt the directors did not talk to him, that he had little to do in his employment but clean what he claimed was a dirty workplace and or play with the Hills’ dog. He refers to his impression that the Hills were unhappy that he served customers beyond closing time if they turned up late.

¹⁰ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 at [83].

¹¹ As above and *Ioan v Scott Technology NZ Ltd (t/as Rocklabs)* [2019] NZCA 386.

¹² *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 at [61].

[22] Mr Hill's oral evidence on the other hand includes that Mr Gillard in his view was not doing the stock and admin side of the job as was expected and that he tried many times to talk to him or show him about this, but things did not improve. The problem with Mr Hill's evidence here that it was vague and more importantly there is nothing to show me that SSM followed any process or substantive reason that would have justified these issues being used to terminate Mr Gillard's employment.

[23] Under s 103A of the Act, the test for whether an employer is justified to dismiss an employee is based on what a fair and reasonable employer could have done in all the circumstances at the time. The circumstances at the time were that Mr Gillard was only a few months into his employment and SSM was not new to business and in its own submissions it refers to having employed staff before. Mr Hill, a co-director gave oral evidence that SSM had access to advice. Mr Hill explains he was trying to pull back from years of business towards retirement and SSM has never had employment problems before. However, with no evidence that SSM followed any fair process of raising performance, conduct or capacity issues with Mr Gillard, SSM has not proved it was justified to dismiss Mr Gillard.

Remedies for unjustified dismissal

Compensation under s 123(1)(c)(i) of the Act

[24] I accept Mr Gillard's evidence that there was real uncertainty for him through a lack of communication by SSM and, as found above, a lack of clear notice in relation to whether his employment was to end. I accept this likely caused him distress and humiliation from at least the beginning of 2024 onwards. I further accept Mr Gillard was left worrying about getting ongoing employment and a source of income being at an age that was in the later end of his working life.

[25] I find it plausible that Mr Gillard was concerned to have a continuity of earning with the additional stress he had relocated to Christchurch for the role where his rent became higher than when living in a smaller town. I also accept Mr Gillard had to answer to WINZ as to why his employment that was so recently obtained on a 13 week subsidy had ended. WINZ had also paid Mr Gillard a grant of \$10,000.00 to relocate for the job so it was understandable the Government body would ask questions about cause. WINZ file notes that Mr Gillard has

provided show me that the directors of SSM are recorded as saying to a case worker in January 2024 that there were problems in the employment and as a result they terminated Mr Gillard's employment 'with a view to closing the business down.' Given my findings here that the dismissal was unjustified I find this likely communication would at least at the time have impacted on further immediate assistance to Mr Gillard even if this was later backdated and rectified. I note further that SSM's evidence includes that the shop was no shut down. Mr Gillard says he worried about having to repay the \$10,000.00 although in the end confirms this was not required.

[26] Mr Gillard's WINZ records also show he reported enjoying the job at the end of October 2023 to his case officer. This was just after he would have started in the role. It was recorded that he was enjoying a job in an industry (recreational fishing) that he was 'passionate' about. This note is consistent with Mr Gillard's own explanation about how he felt about the job. I accept that this job had meant he could come off a benefit and enjoy the certainty of employment albeit subject to the fact known to all that there was a 90-day trial period. To have his employment end unjustifiably in the above circumstances so soon after commencement could only have had an element of humiliation and hurt feelings for which compensation under the Act is intended.

[27] The employment was short lived, but I accept there was hurt and humiliation associated with the unjustified dismissal. I order SSM to pay Mr Gillard \$12,000.00 compensation.

Lost wages under s 123(1)(b) of the Act for the unjustified dismissal.

[28] It is submitted for Mr Gillard that he should be paid three months of wages less benefits received during this time. Benefits are not counted into lost wages' remedies. I accept that Mr Gillard did not obtain further employment in those three months. SSM is accordingly ordered to pay lost wages of \$1160 (based on 40 hours at the contracted \$29.00 gross per hour) x 12 weeks which is a total of \$13,920.00 gross.

Has Mr Gillard been disadvantaged in his employment by actions of SSM and if so what if any remedies are SSM ordered to pay in relation to compensation under s 123(1)(c)(i) of the Act?

[29] I consider that Mr Gillard has been compensated for the same factual matrix he has presented under the head of unjustified dismissal and have not considered this grievance further nor a separate compensatory remedy.

Under s 124 of the Act are any remedies to be reduced for employee contribution to the grievance(s)?

[30] I do not consider I have anything before me to support reducing remedies under s 124 of the Act.

Penalties

[31] On Mr Gillard's behalf penalties for breach of good faith have been applied for under s 4 and 4 (1A) of the Act and then for what appears to be the first time in submissions for Mr Gillard, penalties under s 134 of the Act for breach by SSM of the IEA in relation to not providing written notice of the 90 day trial period and under s 134(2) that the director or directors 'aided and abetted' this breach.

[32] The circumstances relating to penalties seem to mostly be part of the same factual matrix I have already considered above in the grievance claims. I accept that SSM breached its duty of good faith to have constructively communicated with Mr Gillard in relation to matters that were involving the end of his employment. Based on the above that should be evident.

[33] I take from the submissions for Mr Gillard that there was deliberateness in the actions of the directors of SSM in breaching its duty of good faith. It is further submitted that the way that SSM misinterpreted the way to implement the 90-day trial period was a 'flagrant misconstruction of the intention of trial periods' under the Act. I take this to be towards the alleged breach of the employment agreement as it relates to 90- day trial periods. I am not greatly persuaded there was a level of intentional 'flagrant' behaviour. While the directors have not sensibly participated in providing evidence to the investigation as directed, I find some likelihood, having heard from them both at the investigation meeting that they attended, and mostly Mr Hill, that they have been naively blind as to an employer's responsibility in relation to the strict interpretation of 90-day trial periods. I find that this determination in itself will be a lesson to them when employing staff in the future against a 90-day trial period, and also in relation to the way communication with employees needs to be open and constructive. I find

nothing to show that SSM has received penalties before. Any secondary liability under s 134(2) must hinge on the liability of SSM for a penalty. I am not satisfied this is a suitable situation to award penalties against SSM which, had I considered otherwise, would not be likely have been apportioned to Mr Gillard. He has already been awarded compensation above.

Summary of outcome

[34] South Shore Marine Limited is to pay Wayne Gillard the following:

- a. Compensation of \$12,000.00 gross under s 123(1)(c)(i) of the Act;
- b. Lost wages of \$13,920.00 gross under s 123(1)(b) of the Act

Costs

[35] Costs are reserved. The parties are strongly encouraged to resolve any issue of costs between themselves.

[36] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Gillard may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum SSM will then have 14 days to lodge any reply to memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[37] It has been submitted for Mr Gillard that he should be paid his 'full and actual' costs. However, this is not the starting point for costs in the Authority. As is well known, the parties can anticipate the Authority will determine costs, if asked to do so, on its usual 'daily tariff' basis unless circumstances or factors, require an adjustment upwards or downwards.¹³ This matter took half a day. On the tariff starting point that would be \$2,250.00 plus the filing fee of \$71.55.

Antoinette Baker
Member of the Employment Relations Authority

¹³ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1