

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 418
5418758

BETWEEN

YULIYA KAGADIY
Applicant

A N D

PRESTIGE PACIFIC (NZ)
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
Mr Izzy Dugan, Director of Respondent

Investigation Meeting: 10 September 2013

Date of Determination: 16 September 2013

DETERMINATION OF THE AUTHORITY

- A. The applicant, Ms Yuliya Kagadiy was not employed pursuant to a valid trial period.**
- B. Ms Kagadiy was unjustifiably dismissed by the respondent, Prestige Pacific (NZ) Limited (“Prestige”).**
- C. Prestige is ordered to pay the sum of \$640 gross to Ms Kagadiy being one week’s notice.**
- D. Prestige is ordered to pay Ms Kagadiy the sum of \$3000 compensation for hurt and humiliation suffered as a result of her dismissal pursuant to section 123(1)(c)(i) of the Act.**
- E. No order as to costs.**

Employment relationship problem

[1] The respondent, Prestige Pacific (NZ) Limited (“Prestige”) provides building warrant of fitness consultancy and property management services.

[2] Ms Kagadiy was employed by Prestige as an office administrator on 5 March 2013. Ms Kagadiy was not provided with a written employment agreement prior to employment. On 26 March 2013, Ms Kagadiy’s employment was terminated by Prestige without notice. Ms Kagadiy was provided with a written employment agreement containing a “*3 month probationary period*” on the day of her dismissal but refused to sign it. Ms Kagadiy says she was unjustifiably dismissed without notice and seeks payment of notice by Prestige, together with compensation for the hurt and humiliation she has suffered as a result of her dismissal.

[3] Prestige claim that Ms Kagadiy was informed at interviews for the position that she would be employed pursuant to a trial period and that if within one month of her commencement of employment with it, it was decided she was not suitable, Prestige was able to terminate her employment. Further, Prestige claim a 90 day trial period applied to Ms Kagadiy’s employment, that Ms Kagadiy was dismissed well within the 90 day period and she is therefore precluded from bringing a claim of unjustified dismissal.

[4] The parties attempted to resolve Ms Kagadiy’s employment relationship problem by way of mediation but this was not successful.

Issues

[5] The Authority must determine the following issues:

- a. Was Ms Kagadiy’s employment subject to a valid trial period?
- b. If Ms Kagadiy’s employment was not subject to a valid trial period, was her dismissal on 26 March by Prestige justified?

First Issue

Was Ms Kagadiy's employment subject to a valid trial period?

[6] On 9 February 2013, an advertisement was placed on the Trade Me website by Prestige seeking a fulltime office administrator *who is experienced and industrious to join our friendly team for our building compliance company in Greenlane*. The advertisement set out in brief the required duties and skills. Ms Kagadiy saw the advertisement and decided to apply. On 11 February 2013, Ms Kagadiy sent an email to Prestige with a brief overview of her skills and experience and attached a copy of her curriculum vitae.

[7] Ms Kagadiy was invited to an interview approximately one week after applying for the position. Ms Kagadiy was interviewed by Mr Israel (Izzy) Dugan, the Director and Manager of Prestige and Ms Jacqui Lee, the Office Manager at Prestige's offices in Greenlane. At the interview, Ms Kagadiy was asked about her qualifications and experience but was not asked to provide references or contact details for referees. Ms Lee explained to Ms Kagadiy that the office administrator position was primarily to assist her as Office Manager with all her tasks, the role was a busy one and multitasking and attending to matters urgently was important. Ms Kagadiy was told that the position was a fulltime permanent position, that Prestige wanted a reliable person willing to commit to staying with the Company for at least 2 years because Prestige would be looking to invest 6 months in training the new person.

[8] Mr Dugan explained the conditions of employment to Ms Kagadiy including the rate of pay and holidays and that it was standard practice for small companies in New Zealand to employ staff on a 90 day trial period and that the position would be subject to a 90 day trial period. Mr Dugan also said that if after one month of employment they felt that she was not suitable, they reserved the right to terminate her employment. Ms Kagadiy says she accepted these terms but expected that a written employment agreement if she was offered the position. Ms Kagadiy was not provided with a written employment agreement by Prestige before she started her employment, one was provided to her on the date of her dismissal on 26 March 2013.

[9] On Saturday, 26 February 2013 Ms Kagadiy had a second interview with Ms Lee and Mr Dugan at which time she was asked to undertake a test on the

computer to ensure her English was up to standard. Ms Kagadiy received no negative feedback about the test and on Monday, 28 February 2013 was contacted by Ms Lee and offered the fulltime office administrator position which she accepted. Mr Dugan says he decided to employ Ms Kagadiy because she was a new immigrant in New Zealand and as an immigrant himself he knew the difficulties and challenges she would face. Mr Dugan wished to give her a chance and did not check her references because based on her CV, he felt Ms Kagadiy had the skills for the job.

[10] Ms Kagadiy says that she did not have an IRD number because she had recently arrived from overseas. So, in the week before she started at Prestige, Ms Kagadiy contacted the Inland Revenue Department in order to obtain an IRD number.

[11] On 5 March 2013, Ms Kagadiy began work at Prestige. Ms Kagadiy says that she worked closely with Ms Lee who was very busy and could not spare her a great deal of time to train her in the new position. Ms Kagadiy says she hardly ever saw Mr Dugan who spent a lot of time attending to business out of the office.

[12] On 19 March, two weeks after starting, Ms Kagadiy was asked to attend a meeting with Ms Lee and Mr Dugan. The meeting was casual. Ms Kagadiy was asked how she was getting on in the role and whether she had any concerns. Ms Kagadiy says she explained she was comfortable with the tasks but wanted to take notes when Ms Lee was explaining tasks to her. Ms Kagadiy says Ms Lee was not happy with her taking notes. Ms Lee told Ms Kagadiy that she had trained a number of people over the years and she felt Ms Kagadiy was quite slow in undertaking her tasks. Ms Kagadiy agreed she was slow but told Mr Dugan and Ms Lee that she had only been in the job for two weeks and she felt that she would improve. Mr Dugan was supportive, agreed Ms Kagadiy had only been with Prestige for 2 weeks and that she should take notes of tasks if that would assist her.

[13] At the conclusion of the meeting, Mr Dugan told Ms Kagadiy that it was standard practice that another meeting would be held with her in two weeks time to see how she was progressing.

[14] One week later at 5.15 pm 26 March 2013, Mr Dugan asked Ms Kagadiy to attend a meeting with him and Ms Lee who was waiting in the meeting room. Ms Kagadiy attended the meeting but did not know what the meeting was about. Mr Dugan referred to the previous meeting on 19 March 2013 and reminded her that at

the initial interview he had told her that if they felt she was not suitable for the position, they reserved the right to terminate her employment within a month. Mr Dugan also referred to the 90 day trial period discussed at the interview.

[15] Mr Dugan then asked Ms Lee to provide feedback on Ms Kagadiy's performance to date. Ms Lee also referred to the previous meeting and explained that in her opinion it was going to take a long time to fully train Ms Kagadiy and she did not believe that she could leave her unsupervised when she was away from the office.

[16] Ms Lee was about to go on holiday over the Easter break. Ms Kagadiy told Mr Dugan and Ms Lee she felt that she was becoming more confident with the tasks that she was performing and felt she was improving. However, Ms Kagadiy agreed that things were not working as well as she would like, largely in her view because she did not like Ms Lee's management style which she described as aggressive and micromanaging. Ms Kagadiy offered to discuss a mutual termination of her employment at Prestige including being given proper notice. Mr Dugan told Ms Kagadiy no notice period was required because she had been employed pursuant to a 90 day trial period. Mr Dugan then produced a written employment agreement dated 18 March which he asked Ms Kagadiy to sign. Mr Dugan says he had been too busy to give Ms Kagadiy the written employment agreement but asked her to sign it on the day of her dismissal because he knew all employees needed written employment agreements. Ms Kagadiy read the employment agreement but refused to sign it.

[17] The written employment agreement referred in its recital to a probationary period as follows:

You will be on a Probationary Period of three (3) Months from your commencement date (Tuesday 5th March 2013). However should we feel that you are not suitable within a month of your commencement date we are able to advise you that you are no longer required and therefore the offer of this position will be terminated.

Any time after the Probationary Period has passed (5th June 2013) if we are not happy with your performance we can terminate your employment giving you one week's notice. This will apply if you wish to terminate your employment with us you are required to give us one week's notice.

[18] Standard terms of employment were also included. The standard terms included a probationary period of employment which states:

6. **Probationary Period of employment**

- (a) *If you are a new Employee you are engaged on a Probationary Period for the Term specified above.*
- (b) *This clause does not apply to existing Employees; Consultation and Reviews; - during the Probationary Period we will review your employment with you. This will be done on a regular basis where required. These reviews are intended to consider performance, conduct, compatibility, fit and any other issues relating to your employment.*
- (c) *Where any of the issues set out above are unsatisfactory they may result in termination of your employment. Such termination may be summary where serious or on notice where less serious or at the expiry of the Probationary Period if any matter remains unsatisfactory.*
- (d) *Instead of the notice period set out in your Individual Terms your employment may be terminated during the Probationary Period by either Party giving one week's notice.*
- (e) *Any matter which is raised as unsatisfactory during any review shall be deemed as notice that the matter may result in termination if it remains unsatisfactory at the completion of the Probationary Period.*

[19] When Ms Kagadiy refused to sign the employment agreement she was asked by Mr Dugan to leave the premises immediately and not to return. On 27 March 2013, Ms Kagadiy reported for work but was not allowed to work. On the same day, Ms Kagadiy wrote a letter to Mr Dugan recording she had attempted to go to work and requesting that she be paid one week's notice. Mr Dugan did not reply. On 4 April 2013, Ms Kagadiy sent a further letter to Mr Dugan raising a personal grievance claim and seeking reinstatement to her position. Ms Kagadiy sent a separate letter on the same day to Mr Dugan requesting reasons for being dismissed without notice.

[20] On 10 April 2013, Mr Dugan sent a letter in response to Ms Kagadiy enclosing a cheque for the two days worked by her on 25 and 26 March 2013 and stating in response to her request for one week's notice that:

It was stated in your Contract and we made it quite clear in both interviews we had with you before you commenced that you would be on a trial period of three months. However, if we felt that you were not suitable, we could terminate your employment within one month. At the time of both Interviews you acknowledged and accepted this. An employer is only obliged to give one week's notice after your trial period has ended. Therefore we have paid all moneys owing to you.

[21] It is accepted by the parties that Ms Kagadiy was employed as an Office Administrator by Prestige on 5 March 2013 and that at her interviews she was told that there would be a 90 day trial period. It is also accepted that Ms Kagadiy did not receive a written employment agreement until the date of her dismissal on 26 March 2013 which she refused to sign. Ms Kagadiy was dismissed on 26 March 2013 without notice. Mr Dugan says he considered Prestige was entitled to rely on the trial period provision contained in the unsigned written employment agreement to terminate Ms Kagadiy's employment without notice and that she was not entitled to raise a personal grievance claim.

[22] Sections 67A and B of the Employment Relations Act ("the Act") are relevant. These provisions allow for trial periods but on strict conditions. The trial period must be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship. The trial period applies to "new" employees not existing or previous employees.¹ If the trial period was valid and had complied with the above provisions of the Act then Ms Kagadiy would have been precluded from claiming an entitlement to notice and from bringing a personal grievance against Prestige. However, Ms Kagadiy was never presented with a written employment agreement containing a trial period until the date of her dismissal. Ms Kagadiy had been employed for 3 weeks by then. Ms Kagadiy refused to sign the employment agreement. Therefore, there was no valid trial period under the Act which could be relied upon by Prestige when terminating Ms Kagadiy's employment. The answer to the first issue is that the trial period was not valid.

[23] Even if the employment agreement had been signed by both parties before Ms Kagadiy commenced her employment at Prestige, the terms of the trial period did not comply with sections 67A and B of the Act and therefore would not have been valid and could not have been relied upon by Prestige. The "trial" period referred to in the recital to the employment agreement and the "trial" period in clause 6 do not comply with s.67A of the Act. Section 67A requires the "trial provision" to be in writing stating that there is:

- A trial period for a specific period- not more than 90 days
- That during that period the employer may dismiss the employee and;

¹ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 at paras [47] and [50].

- That if the employer does so, the employee can not bring a personal grievance.

The clauses referred to above referred to a 3 month period and did not state the employee could not bring a personal grievance if dismissed during that time.

Second Issue

If Ms Kagadiy's employment was not subject to a valid trial period, was her dismissal on 26 March by Prestige justified?

[24] It is for Prestige to establish that Ms Kagadiy's dismissal was justified pursuant to s.103A of the Employment Relations Act 2000 (the Act). Section 103A(2) states –

103A Test of justification

(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.*

[25] Section 103A was considered by a Full Court of the Employment Court in *Angus v. Ports of Auckland*². The following findings of the Full Court are relevant:

[36] *The most important change to former section 103A is that by use of the word "could" in substitute for the former "would" Parliament has indicated that there may be more than justified sanction available to an employer in any given situation in employment which might result in the employee's dismissal or in disadvantage to the employee in his or her employment.*

[37] *The effect of new section 103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified.*

[38] *The test requires the Authority in this matter, to determine whether on an objective basis dismissal was within the range of responses open to a fair and reasonable employer. If dismissal is within the range then it will be justified.*

[26] Ms Kagadiy had been employed for less than one month when she was requested to attend a meeting on 26 March 2013 at which she was dismissed without notice. Mr Dugan claimed that notice was not required as Ms Kagadiy was on a trial period. I have already found that Ms Kagadiy was not employed pursuant to a valid trial period and so this could not be relied upon by Prestige. Mr Dugan confirmed that there had been one meeting with Ms Kagadiy on 19 March 2013 at which time there was discussion about her performance. I find that the discussion on 19 March was a general *“how is it going discussion?”* with a new employee. Mr Dugan did not issue Ms Kagadiy with a verbal or written warning, nor was there any suggestion of a warning by Mr Dugan that Ms Kagadiy’s employment may be in jeopardy at that time.

[27] Approximately one week later, on 26 March 2013, Ms Kagadiy’s employment was terminated without notice. Mr Dugan claims he was able to terminate Ms Kagadiy’s employment without notice within the 90 day trial period and that because of the trial period Ms Kagadiy could not bring a personal grievance against Prestige. I have found the trial period not to be valid.

[28] Mr Dugan claims Ms Kagadiy did not perform in the role and did not have the skills to do the job as presented at the interview. Ms Kagadiy attended 2 interviews, undertook a test, provided a full CV with details of her previous employment. Mr Dugan did not check Ms Kagadiy’s references and employed her because she was a *“new immigrant”* and he *“wanted to give her a chance”*. Within 3 weeks of employing her, Mr Dugan summarily dismissed Ms Kagadiy without sufficiently raising concerns and giving Ms Kagadiy the opportunity to respond.

[29] Section 103A(3) of the Act requires the Authority, when deciding if a dismissal is unjustified, to consider whether before dismissal the employer:

- a. Sufficiently investigated the allegations;
- b. Raised concerns it had with the employee;
- c. Gave the employee a reasonable opportunity to respond to the employer’s concerns;
- d. Genuinely considered the employee’s explanation.

[30] I am not satisfied that Prestige undertook any investigation regarding its concerns about Ms Kagadiy's performance. The meeting on 19 March 2013 was a general discussion about how things were going. Ms Lee told Ms Kagadiy she thought her work was slow, but this was not raised in a manner which alerted Ms Kagadiy that unless there was improvement her job was in jeopardy.

[31] No concerns were raised with Ms Kagadiy, no verbal or written warnings were issued. The next meeting on 26 March 2013 was again a meeting without any notice to Ms Kagadiy. Ms Kagadiy was not told the purpose of the meeting and was not offered the opportunity to have a support person. Ms Lee told Ms Kagadiy that she believed it would take far too long to fully train her and that she did not feel she could leave Ms Kagadiy unsupervised. Mr Dugan dismissed Ms Kagadiy and refused to pay her notice because he believed he could rely on the trial period. I find that a fair and reasonable employer would not have taken the action Prestige did in all the circumstances at the relevant time. I find that Ms Kagadiy was unjustifiably dismissed.

Remedies

[32] Ms Kagadiy is seeking payment of one week's notice. I order Prestige to pay Ms Kagadiy one week's notice of \$640 gross.

Compensation

[33] In determining the level of any compensation awarded under section 123(1)(c)(i) of the Act, I have taken into consideration the full extent of all the circumstances at the time. Ms Kagadiy agreed that the employment relationship was not working out and attempted to resolve this amicably with Mr Dugan. Mr Dugan refused to pay any notice because he believed he could rely on the trial period. Ms Kagadiy came back to work the day after her dismissal and then wrote 3 letters to Mr Dugan which were not responded to until 10 April. Mr Dugan paid Ms Kagadiy two days wages for 25 and 26 March but nothing further. An appropriate award of compensation in the circumstances is \$3,000.

[34] I am required under section 124 of the Act to consider the issue of any contribution that may influence the remedies ordered. I find no contributory conduct on the part of Ms Kagadiy.

Costs

[35] The parties were unrepresented and therefore there will be no order as to costs.

Anna Fitzgibbon
Member of the Employment Relations Authority