

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 37
3017931

BETWEEN CAROLYN LANG
 Applicant

AND GOURMET FOODS LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Roland Samuels for Applicant
 Bryce Cole for Respondent

Investigation Meeting: 1 February 2018

Oral Determination: 1 February 2018

Record of Oral
Determination: 2 February 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. The Authority has jurisdiction to investigate Ms Lang’s personal grievance.**
- B. Ms Lang was unjustifiably dismissed. Gourmet Foods Limited is ordered to pay the following remedies within 28 days of the date of this determination:**
- **Lost wages of \$1,989 gross under s 123(1)(b) of the Employment Relations Act; and**
 - **\$8,000 under s 123(1)(c)(i) of the Employment Relations Act.**

C. Gourmet Foods Limited is ordered to pay costs of \$1,000 to Ms Lang within 28 days of the date of this determination.

Employment relationship problem

[1] After working for Gourmet Foods Limited for nearly two weeks, Ms Carolyn Lang was dismissed. Ms Lang challenges her dismissal which she says is unjustified. Gourmet Foods says the Authority does not have jurisdiction to investigate and determine Ms Lang's claim for unjustified dismissal because her employment was subject to a 90 day trial period under ss 67A and 67B of the Employment Relations Act 2000 (the Act).

[2] In addition to her claim of unjustified dismissal Ms Lang claims one or more conditions of her employment were affected to her disadvantage by unjustified actions of Gourmet Foods and has asked the Authority to impose a penalty for a breach of good faith bargaining.

Issue

[3] In order to resolve Ms Lang's employment relationship problems I must determine the following questions:

- a) Is Ms Lang barred from taking a personal grievance for unjustified dismissal?
- b) If the answer to a) is no, was Ms Lang unjustifiably dismissed?
- c) Were one or more conditions of Ms Lang's employment affected to her disadvantage by the unjustified actions of Gourmet Foods?
- d) What, if any remedies should be awarded?
- e) Did Gourmet Foods breach its duty of good faith when bargaining?

[4] As permitted by s 174E of the Act this determination has not recorded all the evidence received from Ms Lang and Gourmet Foods but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Is Ms Lang barred from bringing a personal grievance claim for unjustified dismissal?

[5] Gourmet Foods says the provisions of s 67B of the Act bars Ms Lang from pursuing a personal grievance for unjustified dismissal. Gourmet Foods says its employment agreement with Ms Lang included a valid and binding term that provided for a 90 day trial.

[6] Section 67A of the Act allows for written employment agreements to provide for a trial period of 90 days or less. The trial provision must be in writing and must state:

- a) That for a 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.

[7] Section 67B of the Act applies where an employer terminates an employment agreement containing a trial provision by giving notice of the termination of employment prior to the end of the trial period.

[8] The obligations set out in ss 67A and 67B of the Act are to be interpreted strictly. This is because these provisions of the Act remove a right of access to justice.¹

[9] Ms Lang started working for Gourmet Foods on 21 June 2017 as a Customer Service Representative. Ms Lang accepted an offer to undertake a trial in the Gourmet Food's office starting on 21 June 2017 for three days. The role was a step down from the roles she had previously undertaken and Gourmet Foods wished to be sure Ms Lang was a good fit for the role.

¹ Ibid at [82].

[10] While there was no clear agreement between the parties, I find on balance that Ms Lang expected to be paid for the work she undertook during the work trial.

[11] The trial was successful and on 26 June Ms Lang was offered and accepted a part time role working three days each week from 8 am to 11 am each day. It was agreed that until Ms Lang became confident in undertaking the role she would work 5 days a week. It was expected this would take only one week.

[12] An employment agreement was provided to Ms Lang. The agreement was signed by both parties on 27 June and was backdated to 21 June to account for the work Ms Lang had undertaken during the work trial. The employment agreement contained a trial period provision mirroring the words of the Act.

[13] Section 67A allows employers and employees to agree to enter into an employment agreement containing a trial provision. Section 67A(3) defines an employee as an employee who has not been previously employed by the employer.

[14] As stated by the Court in *Blackmore v Honick Properties Limited*, employers wishing to avail themselves of the opportunities afforded by ss 67A and 67B must ensure trial periods are mutually agreed in writing before a prospective employee becomes an employee and before work is intended to begin.²

[15] Ms Lang signed her employment agreement after she had already completed two days' paid employment and therefore does not meet the test of being an employee who has not previously been employed by the employer.

[16] Gourmet Foods is not able to rely on section 67B of the Act and Ms Lang is entitled to have her personal grievance claim investigated by the Authority.

Unjustified dismissal

[17] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Gourmet Foods' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

² [2011] NZEmpC 152 at [70] and [73].

[18] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Gourmet Foods sufficiently investigated allegations, raised the concerns with Ms Lang, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal.

[19] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Ms Lang being treated unfairly.³ A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

[20] Gourmet Foods say that after Ms Lang signed the employment agreement she was late to work on two days, showed a lack of interest in learning the role and failed to meet important deadlines.

[21] Ms Lang's start time was 8 am. I have accepted the evidence of Ms Lang that it was agreed that she would start at 8.30 on 27 June due to a prior commitment she had made and that this was the only day she would need to start late. It was common ground that Ms Lang was late to work on 29 June due to the weather and a consequent build up of traffic. Ms Lang says she was six minutes late. This was not disputed by Gourmet Foods.

[22] Ms Sharon Love told me Ms Lang did not demonstrate an interest in learning the job. Ms Love told me Ms Lang wanted to leave work just after 11 am on 29 June despite the Office Manager wanting to teach her a new task. Ms Lang disputes she left at 11 am and says it was closer to 12 midday and that she had to leave as she had a parent teacher interview at 1 pm. Ms Lang had advised the Office Manager of this appointment the day before so was aware of why she needed to leave.

[23] Ms Love told me Ms Lang failed to meet important deadlines in completing orders. Orders for product are received by telephone, email and through Gourmet Food's website. It is a critical part of the business that all orders for the South Island are processed by 10 am so that they can be packed and despatched. Orders for the North Island must be processed by 11 am.

³ Employment Relations Act 2000 (the Act), s 103A(5).

[24] On 28 June general comments were made by both Ms Love and the Office Manager reminding all staff that orders had to be processed on time and that with the additional staff there was no reason for not meeting the deadlines. On 29 June Ms Lang advised the Office Manager that she had not processed all of the orders by 11 am. Ms Lang says she was still learning the job and was taking time to ensure everything she processed was done correctly. This means she was slower than others and simply could not get through the processing as quickly as others.

[25] After Ms Lang left work for the day, Ms Love sent her a text message asking her to text her when she had some time to talk and Ms Love would ring her. Instead of texting, Ms Lang rang Ms Love. Ms Love advised Ms Lang during the phone conversation that things were not working out and Ms Lang was not a good fit for the position. It was common ground that this call resulted in the ending of the employment relationship by dismissal.

[26] The process leading to Ms Lang's dismissal was defective. There is no evidence Gourmet Foods met any of the mandatory considerations set out in s 103A(3). Gourmet Foods had not raised its concerns about Ms Lang's performance prior to making the decision to dismiss her. There was no opportunity for Ms Lang to respond to any concerns before dismissal and therefore no genuine consideration of any explanation. The dismissal was immediate and abrupt. These defects were not minor and resulted in Ms Lang being treated unfairly.⁴

[27] The actions of Gourmet Foods and how it acted were not the actions an employer acting fairly and reasonably could take. Ms Lang's dismissal was unjustified and she is entitled to a consideration of remedies.

Unjustified disadvantage

[28] Ms Lang says one or more conditions of her employment were affected to her disadvantage by the unjustified actions of Gourmet Foods. Ms Lang says the disadvantage arose when Gourmet Foods failed to provide her with an opportunity to discuss the issues Ms Love had with her performance. As a result of not raising these issues Ms Lang says she had no idea there were areas of concern that required improvement.

⁴ The Act at s 103A(5).

[29] The actions giving rise to Ms Lang's unjustified disadvantage claim are also those matters which I have found led to her being unjustifiably dismissed. Those aspects of Ms Lang's claims have been adequately addressed in the remedies ordered in Ms Lang's favour. Where causes of action rely on the same facts there is no entitlement to two separate streams of relief.⁵

Remedies

[30] Ms Lang seeks reimbursement of lost wages and compensation for her personal grievance.

[31] There was a mutual understanding that the employment relationship was to be for a period of about 2 months and that Ms Lang was employed to cover for another employee who was taking a period of leave. The employee taking the leave left late July, early August and returned on or about 4 September. It was common ground that the employment agreement was not a fixed term agreement. This is because there was an expectation that there may be an opportunity for Ms Lang to continue in the employment beyond the two months.

[32] Ms Lang has now obtained alternative employment which she started in December 2017. I have been provided with a list of the jobs Ms Lang applied for together with the evidence of the applications. I am satisfied Ms Lang has taken adequate steps to mitigate her loss. She is entitled to three months lost wages which I have calculated on the basis of 3 hours of 3 days a week for 13 weeks at \$17 per hour.

[33] Gourmet Foods Limited is ordered to pay to Ms Lang the sum of \$1,989 gross under section 123(1)(b) of the Act within 28 days of the date of this determination.

[34] Ms Lang seeks compensation for humiliation, loss of dignity and injury to feelings. She told me the dismissal had a direct impact on her relationship with her mother with whom she has lived for the past 12 years. Her mother blames her for the dismissal and her inability to secure alternative employment and has resulted in Ms Lang having to find alternative accommodation for herself and her children at a significant cost.

⁵ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71at [110].

[35] While Ms Lang was living with her parents she was contributing to the costs of the mortgage on the house. Since the breakdown of her relationship with her mother her parents are no longer able to afford the mortgage payments and the house is now on the market.

[36] Ms Lang told me she struggled to find alternative employment because she had to be honest and tell prospective employers she had been dismissed. Ms Lang has produced medical certificates to support her evidence that she suffered from stress related conditions including lack of sleep and heightened anxiety.

[37] In all the circumstances of this case and taking into account awards in similar cases an appropriate award of compensation is \$8,000. Gourmet Foods Limited is ordered to pay Ms Lang the sum of \$8,000 under section 123(1)(c)(i) within 28 days of the date of this determination.

[38] Having determined Ms Lang has a personal grievance I must consider the extent to which her actions contributed towards the situation that gave rise to the personal grievance. I must reduce the remedies if Ms Lang's actions contributed in some blameworthy way.⁶

[39] I am not satisfied Ms Lang contributed in any blameworthy way to the situation giving rise to the personal grievance such that the remedies should be reduced.

Breach of good faith bargaining

[40] Ms Lang has not established this claim and her application for a penalty is declined.

Costs

[41] At the date of the investigation meeting Ms Lang had not incurred any costs associated with this matter. She has entered into an arrangement with her representative that she would pay a \$250 base fee plus 24% of any monetary awards made in her favour.

⁶ Employment Relations Act 2000, s 124.

[42] The monetary awards made in this determination amount to \$9,989. If Ms Lang is required to pay 24% plus \$250 her total costs will amount to \$2,647.36. This investigation was undertaken without the requirement of the parties to provide written witness statements or formal submissions. This means the extent of the work required by Ms Lang's representative has been limited to lodging the statement of problem, attending a case management call and attendance at the investigation meeting.

[43] The investigation meeting took less than half a day. The reasonableness of the costs incurred must be proportionate to Ms Lang's success. The usual practice of the Authority is to order a contribution to costs on a daily tariff basis. In this case that tariff would amount to \$2,250.

[44] The tariff has been set to recognise that a variety of representatives appear in the Authority including qualified, registered professionals who are required to adhere to a professional code of conduct and unregulated advocates who have no such obligations. Ms Lang's representative is an unregulated advocate and as such does not have the expenses and obligations of his qualified and registered counterparts.

[45] Taking all of the circumstances into account I consider a reasonable contribution to Ms Lang's costs is \$1,000.

[46] Gourmet Foods Limited is ordered to pay costs of \$1,000 to Ms Lang within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority