

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 481  
3201539

BETWEEN SHARON LENOEL  
Applicant

AND WAIKATO WINDOWARE  
LIMITED  
Respondent

Member of Authority: Nicola Craig

Representatives: Dave Cain, advocate for the applicant  
Meredith McKenzie, advocate for the respondent

Investigation Meeting: 30 May 2023 in Hamilton

Submissions [and further Information] Received: At investigation meeting from the applicant  
At investigation meeting from the respondent

Date of Determination: 25 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] For a short time in mid-2022 Sharon Lenoel worked as a curtain track assembler/general hand at Waikato Windoware Limited (WWL or the company).

[2] WWL is a small company supplying and installing curtains and outdoor shade products.

[3] Ms Lenoel says that she was unjustifiably dismissed by her employer. WWL argues that Ms Lenoel is prevented from bringing a dismissal grievance claim by a trial period in her employment agreement.

## **The Authority's investigation**

[4] An investigation meeting was held in Hamilton on 30 May 2023. In addition to written witness statements, evidence was heard under oath or affirmation from Ms Lenoel, WWL's owner Shane Bold and two other employees Kaesharq Westrupp (Curtain Track Technician/Team Leader) and Sarie Booth (Administration Manager). Ms Booth was unwell and so did not attend in person but felt able to answer questions over the telephone. Submissions were heard at the meeting with the applicant also providing written submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

## **The issues**

[6] The issues for investigation are:

- (a) Is Ms Lenoel prevented from bringing an unjustified dismissal personal grievance claim by reason of a trial period provision?
- (b) If not, was Ms Lenoel unjustifiably dismissed by WWL?
- (c) If so, what remedies, if any, should she receive?

## **Ms Lenoel's appointment**

[7] The WWL assembler job was advertised on Facebook. Ms Leonel had not previously carried out that kind of work but expressed an interest.

[8] On around Friday 3 June 2022 Mr Bold interviewed Ms Lenoel. He refers to harping on at interviews, including this one, about the importance of a good attitude and accuracy, rather than speed, of work. There is no suggestion that a trial period was mentioned at the interview.

[9] Ms Lenoel was shown around the WWL premises and introduced to Ms Westrupp, the other person working on the assembly line. Mr Bold emphasises that Ms Lenoel saw exactly what was involved and was asked if she was able to do the role or if anything looked difficult. The thorough explanation and demonstration were a standard part of

interview sessions. This was the result of some previous new staff not being sufficiently able to undertake the physical aspects of the job. Ms Lenoel seemed happy with everything and confident she would be good at the role.

[10] At 12.53pm on Sunday 5 June 2022 Mr Bold messaged Ms Lenoel telling her that they would like to offer her the position. She messaged back accepting and Mr Bold replied that he would email a contract through. At 1.23pm Mr Bold sent Ms Lenoel an email offering her the job. Attached was an employment agreement.

[11] Mr Bold messaged that he had sent the agreement and by 1.26pm Ms Lenoel responded that she was out and would have a look at the agreement that evening. She received the email on her home computer but denies looking at it. She did not have email access on her cell phone.

[12] Despite being home on Monday, Ms Lenoel describes being too busy, including organising her son's day care, to look at the employment agreement. Ms Lenoel was excited about getting the job but did not think about the agreement. She had signed employment agreements previously but for larger companies, so did not understand about 90 day (trial period) provisions.

[13] Although Mr Bold asked her to print the agreement off, she did not have a printer and took no other steps to get herself a paper copy.

[14] Ms Lenoel recalled messaging Mr Bold on Facebook Messenger to say that she could not start on 7 June as proposed but would start on 8 June. She was unable to find that message when asked by the Authority. She recognised that she could have emailed him but denied accessing her computer.

[15] On 8 June Ms Lenoel arrived at WWL about 8am. There is some dispute whether Ms Lenoel started training under Ms Westrupp in the time Mr Bold went to talk to the outdoor workers or she just sat as directed waiting for his return. She did not sign the agreement until Mr Bold returned, called her into the office and went through the agreement with her.

## **Trial period**

[16] As trial periods restrict what would otherwise be an employee's right to challenge their dismissal as unjustifiable, the requirements must be strictly met.<sup>1</sup>

[17] These include that under s 63A(2) of the Act the employer advises the employee they are entitled to seek independent advice about the intended employment agreement and gives a reasonable opportunity for that to happen.

[18] Here there was no letter or email accompanying the intended agreement which told Ms Lenoel about her right to seek independent advice. The declaration she signed at the bottom of the agreement had her declaring that she had been offered the opportunity to take independent advice. The Employment Court has found that a declaration at the end of an employment agreement, with no accompanying advice, does not meet the requirement of s 63A(2)(b) of the Act – specific advice is required.<sup>2</sup>

[19] Even if Ms Lenoel had been advised there was also a question whether sufficient time was allowed. Ms Lenoel received the agreement on a Sunday. Advice would not have been readily available on that day. She was to start work on Tuesday but ended up beginning on Wednesday.

[20] I do not need to deal with the issue of whether Ms Lenoel began her job by undertaking a period of training before Mr Bold ran through the agreement and she signed it.

[21] In the absence of WWL properly advising Ms Lenoel that she was entitled to seek independent advice, the trial period is not valid. Ms Lenoel is able to pursue her personal grievance claim for unjustified dismissal.

## **The work**

[22] Ms Lenoel enjoyed working with and learning from Ms Westrupp but had difficulties working with Mr Bold, who made what she perceived as snarky comments to her if she made mistakes.

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<sup>1</sup> *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111.

<sup>2</sup> *Senate Investment Trust Through Crown Lease Trustees Limited v Cooper* [2021] NZEmpC 45 at [37].

[23] From Mr Bold's point of view there were multiple difficulties with Ms Lenoel's conduct and performance, at least some of which he raised with her informally.

### **Recording of shifts**

[24] WWL's time records were based on staff entering their own hours through an app. Ms Booth then processed the pay run. She notes reliance on staff honesty.

[25] Ms Lenoel had trouble with the app. She could not get into it, then she found it hard to operate. Ms Westrupp provided some guidance.

[26] Ms Booth put Ms Lenoel's hours in manually with approval for the first couple of weeks due to the difficulties with Ms Lenoel operating the app and then losing her phone.

[27] Ms Booth noticed multiple instances where start times and break times were incorrectly recorded by Ms Lenoel. Ms Booth told the Authority Ms Lenoel seemed to always record the same (standard) hours even if she had started a little late or taken an extended break. Ms Booth had not given Ms Lenoel any specific instructions about use of the app other than that the hours worked should be entered.

[28] It was not Ms Booth's role to have final approval of hours claimed and times paid. Mr Bold had said they would pay Ms Lenoel and see what happened. Staff informed Mr Bold that Ms Lenoel's breaks were longer when he was not there.

[29] Ms Lenoel describes totally forgetting about checking some entries. She accepts Mr Bold told her not to put the wrong times down again.

### **Eyesight issue**

[30] The work required the measuring and cutting of curtain track. At some point Ms Lenoel found that she was having difficulty seeing the lines on the ruler.

[31] Ms Westrupp had recently got glasses herself and became concerned about Ms Lenoel's ability to do the work. She arranged an appointment at a local optometry store for Ms Lenoel. On 15 June Ms Lenoel went to the appointment and ordered some contact lenses but they had not arrived by the time of her dismissal. She intended to get glasses but had not ordered them due to the cost.

[32] Ms Lenoel told Mr Bold she would feel more comfortable doing things with the saw and measuring after she got glasses. He was unimpressed that Ms Lenoel did not mention any eyesight issue at her interview when accuracy was emphasised and she was taken through the assembly process.

[33] In addition Ms Lenoel mentioned that her maths skills were not the best. She described in her witness statement that this made some of the calculations tough. Mr Bold's evidence was that calculations were done on a computer programme and all that was required was to measure and cut at the length indicated from a printed-out instruction sheet. He did not see much maths skill being required.

[34] Ms Westrupp told the Authority that due to the eyesight problem Ms Lenoel was not able to continue with making roman blinds or cutting the tracks.

### **Performance problems**

[35] Mr Bold's evidence was that Ms Lenoel made multiple mistakes and had to be restricted to the start of the assembly line so Ms Westrupp could catch her mistakes. Mr Bold felt Ms Lenoel came up with excuses for not doing things.

[36] Ms Westrupp got on well with Ms Lenoel but did experience her making multiple errors. These included sending the wrong brackets with orders and mismatching end caps with tracks. This resulted in additional trips for installation or delays with completing installation. Increased costs and unhappy clients resulted. Ms Westrupp acknowledged that a few errors were expected when new staff were training but in Ms Lenoel's case they kept happening. She thought Ms Lenoel was not taking in the instruction sheets and struggled with the tools. Ms Westrupp was so concerned that she decided to talk to Mr Bold. A team meeting was held about how to stop the errors.

[37] Ms Lenoel denied having extensive difficulties with the work but accepted she had put some tracks in the wrong pickup area.

### **Sick leave, lateness and extended breaks**

[38] Mr Bold was concerned about the amount of sick leave Ms Lenoel took. She had at least five sick days in five weeks. This encompassed time when her pre-schooler was sick and when she herself had an accident and was off work for a brief period.

[39] Mr Bold also saw Ms Lenoel as taking extended breaks. Ms Westrupp identified breaks as being extended if the staff were interrupted during their break time or social discussion morphed into a work meeting. Ms Lenoel's impression was that Mr Bold was rather relaxed about punctuality and breaks. She thought he allowed staff a long smoko regardless of whether they were interrupted. Similarly with lunch breaks, she would go down the road, come back and staff would still be at the break table. In her mind, the lunch breaks were over an hour.

[40] Mr Bold told the Authority that after staff indicated to him that Ms Lenoel was taking long breaks, he timed her breaks as on two occasions being over 20 minutes – longer than the 15 minutes allowed. He did not formally raise this with her.

[41] Another thing which concerned Mr Bold was Ms Lenoel arriving late to work. She recognises that she was late about four times in her month or so at WWL. A couple of texts from her indicate she notified WWL she would be late but offered no explanation.

### **Trade Me access**

[42] The situation was taken to a whole new level from Mr Bold's perspective by what he believed to be improper use of the office computer and access to his Trade Me account.

[43] At that time the computer did not have a lock screen on it. It was primarily used by Ms Booth but Mr Bold sometimes worked on it, especially if Ms Booth was out of the office. Mr Bold was disturbed about access to the computer as WWL's accounts and banking were available on it, along with communications from the company's accountant. Some might say it was unwise to have this level of information available on a computer which had no lock but it was a small workplace with only four people usually in the building, not counting the outdoors staff who were in an adjacent building. Mr Bold has taken additional security steps since then.

[44] There was no reason for Ms Lenoel to use the office computer. There was another computer associated with the production line which she had access to. Generally there was no need for Ms Lenoel to go into the office.

[45] On about 7 July 2022, Mr Bold went to log in to his work Trade Me account on the office computer. He hit “S” and two of Ms Lenoel’s email addresses came up as prompts. A photo was provided to the Authority of this screen. On looking for his previous Trade Me searches for security cameras he found the history of those had been wiped.

[46] Mr Bold emailed Ms Booth on the subject but got no immediate reply. She was not in the office and was dealing with a family issue.

[47] At some point Mr Bold phoned a local computer store and was told that an email address would only come up later as a prompt if the sign in had been successful.

[48] On 8 July Mr Bold emailed Ms Booth asking if there was any reason to explain the Trade Me log in photo and whether she had let Ms Lenoel onto the computer at all. Ms Booth replied that there was “None at all”.

[49] That afternoon Mr Bold called Ms Lenoel into the office. He told her what he had found and indicated he was very concerned. Ms Lenoel described herself as shocked and confused. Mr Bold recalled her being tearful and upset. Ms Lenoel denied having accessed the computer, saying she would never log in to her Trade Me account from his office. During the course of the discussion Ms Lenoel raised the possibility of workmates having her email addresses.

[50] Ms Lenoel’s explanation was that someone who knew her email addresses put them on the Trade Me sign in page on purpose so there was an excuse to fire her. Ms Lenoel asked if Mr Bold could get a computer expert to prove her innocence. She expressed certainty that they would tell him that she did not log in. Ms Lenoel accepted to the Authority that no one at WWL had her password to Trade Me.

[51] There was no substantiation of Ms Lenoel’s assertion that the addresses were there to set her up. Ms Westrupp’s assessment of Mr Bold who she had worked with for a few years was that he was quite upset about the Trade Me issue. She referred to trust being a very big thing at WWL.

[52] Mr Bold says that Ms Lenoel asked if she was going to lose her job and he replied that he was not sure. Ms Lenoel denies having asked this but I conclude it more likely than not that she did. Her distress may have dented her recall. The question was also consistent

with Ms Westrupp's evidence that Ms Lenoel repeatedly told her shortly afterwards that she was felt she might lose her job. This was when Ms Westrupp was comforting Ms Lenoel.

[53] Ms Lenoel wanted to leave the premises but finished her shift.

[54] Mr Bold suggests that there was further discussion back and forth that afternoon between himself and Ms Lenoel. To the extent this implies that a thorough investigation and disciplinary process occurred, it is overstated. Mr Bold did talk to Ms Westrupp at the end of the day about Ms Lenoel's work quality.

### **Dismissal**

[55] Ms Lenoel was hoping to talk to Ms Booth. On Saturday 9 July she messaged Mr Bold that she did not feel comfortable coming in on Monday but would come on Tuesday when Ms Booth would be there. She passed on advice from a family member that once an email address is put into a computer it will keep coming up. Ms Lenoel comments that she would have to be dumbest person to go in where she should not have (ie the office) and go on Trade Me when she could have done that at home or on her phone.

[56] Mr Bold saw Ms Lenoel's refusal to come in to work with him as a sign that the relationship had broken down. Without further discussion, on Sunday 10 July Mr Bold emailed Ms Lenoel advising that WWL had chosen to exercise its right under the trial period of the employment agreement to terminate her employment. The company noted it was required to give a week's notice and therefore Ms Lenoel's last day would be Friday 15 July. She was paid in lieu of notice.

### **Unjustified dismissal grievance**

[57] The termination letter relies on the trial period and does not identify any reason for the dismissal. However, WWL argues in the alternative to a valid trial period, that summary dismissal was justified on the basis of the computer access and Trade Me situation. Mr Bold identifies this as a massive breach of confidentiality, privacy and trust.

A sufficiently fair process is submitted to have occurred, with any procedural defects being minor and not resulting in Ms Lenoel being treated unfairly.<sup>3</sup>

[58] In situations such as this it is not the Authority's role to decide whether Ms Lenoel did actually access the office computer and log into a Trade Me account. Rather I must look at whether WWL took proper steps to investigate the issue, along with putting its concerns to Ms Lenoel, giving her a chance to reply and considering her response.<sup>4</sup>

[59] WWL's House Rules, as incorporated into Ms Lenoel's employment agreement, refer to breach of confidentiality as an example of serious misconduct. There was no IT policy or other written rule banning access to the computer in the office but she recognised that she should not use it.

[60] A proper investigation is needed to ensure the employer can establish a genuine belief that misconduct took place. The employee needs to be informed about the information on which the employer is relying in order to have a chance to respond to it.<sup>5</sup>

[61] I have assessed the limited availability of resources to WWL given its small size. It certainly did not employ a human resources advisor. However, I do not consider it was beyond the company to notify Ms Lenoel in writing that it wanted to meet with her about the computer issue and/or have an additional meeting after it had advised that her employment was in jeopardy. The WWL House Rules identified that allegations of serious misconduct will be fully investigated and the employee given the chance to "explain, refute or mitigate before the employer makes an unbiased decision". The section regarding other misconduct specifies that allegations will be investigated in the same manner as serious misconduct.

[62] There was it some discussion with Ms Westrupp which could be seen as part of the investigation but this was after Ms Lenoel was spoken to and focused on work quality. Ms Booth was not spoken to with Mr Bold relying on her three word email response.

[63] It was clear from Mr Bold's evidence that he also took into account Ms Lenoel not arriving on the designated first day, lateness, absenteeism, long breaks and her indicating

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<sup>3</sup> The Act, s 103A(5).

<sup>4</sup> The Act, s 103A.

<sup>5</sup> The Act, ss 4(1A)(c) and 103(3)(b) and (c).

that she did not want to work with him. These matters were certainly not discussed on 8 July and only some were raised to a limited extent during Ms Lenoel's time with WWL.

[64] Prior to the meeting WWL did not advise Ms Lenoel that her employment may be in jeopardy. It did not tell her about discussion with a computer shop staff member. Mr Bold's discussion with Ms Westrupp occurred after his discussion with Ms Lenoel. At the close of 8 July the future of Ms Lenoel's employment seemed up in the air.

[65] Then Mr Bold became exasperated at Ms Lenoel's text message that she did not feel comfortable coming in on Monday and would wait until Tuesday when Ms Booth was in (as she would know what happened). He saw that as Ms Lenoel indicating she did not want to work for him. In other situations, advice had been sought by the company. But here Mr Bold acted in the weekend by dismissing Ms Lenoel.

[66] WWL took some steps towards completing a fair process but ultimately did not do enough to bring its actions within what a fair and reasonable employer could have done. Any further investigation or discussion of concerns or explanation was cut off by the negative reaction to Ms Lenoel's reluctance to come in before Ms Booth was present. That was not discussed with Ms Lenoel. I am not persuaded that the defects can be seen as minor and not resulting in Ms Lenoel being treated unfairly.

[67] WWL unjustifiably dismissed Ms Lenoel.

### **Remedies**

[68] Lost wages are sought until Ms Lenoel started other work in October 2022. WWL paid Ms Lenoel until 17 July by way of notice. As noted below, Ms Lenoel's mental health was significantly impacted by her dismissal and she was unable to start looking for other work for some time. Ms Lenoel suffered lost wages over a period of 12 weeks before her new job commenced. Twelve weeks of weekly wages of \$787.50 gross totals \$9,450 gross. The question of whether a deduction should be made for Ms Lenoel's contribution to the situation is considered below.

[69] Compensation for humiliation, loss of dignity and injury to feelings is also sought. I accept that Ms Lenoel found her dismissal very distressing and it had a major impact on her. There was financial pressure. Ms Lenoel struggled to manage taking care of her

children with coping with her dismissal. She made unhealthy choices to help her cope and after some time suffered a serious mental health crisis.

[70] Ms Lenoel seeks \$15,000 compensation under s 123(1)(c)(i) of the Act. Before consideration of contribution that is a reasonable amount.

### **Contribution and orders**

[71] Ms Lenoel did not have a good start to her new employment with WWL. She did not arrive on what was to be her first day and there appears to have been no communication of a request to start the following day. She had more than one sick day a week on average and was late occasionally. She was not reliably recording her work hours and took longer than permitted breaks. Mistakes were made. Finally Ms Lenoel told Mr Bold she could not come into work with Mr Bold at least until Ms Booth was in the office.

[72] I do not have sufficient evidence on which to conclude that Ms Lenoel used the office computer so do not take that into account.

[73] I conclude that Ms Lenoel did act on occasions in a way that was blameworthy and contributed to Mr Bold's view of her which fed into his decision to dismiss. A deduction of 30% should be made for her contribution to the situation.

[74] Waikato Windoware Limited is ordered to pay Sharon Lenoel the following sums regarding her unjustified dismissal, within 28 days of the date of this determination:

- (a) \$6,615.00 gross as lost wages; and
- (b) \$10,500 as compensation for humiliation, loss of dignity and injury to feelings.

### **Costs**

[75] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so Ms Lenoel should lodge and serve a memorandum on costs within 14 days from the date of this determination. From the date of service of that memorandum WWL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[76] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would be considered.<sup>6</sup>

Nicola Craig  
Member of the Employment Relations Authority

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<sup>6</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).