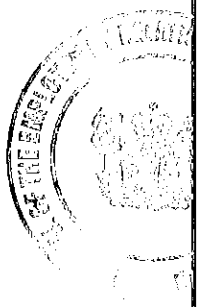
IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 440
5433068

	BETWEEN	VICKI MARTIN Applicant
	A N D	HEALTHY LIVING TRADING COMPANY LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Don Mackinnon, Counsel for the Applicant Damian Botherway, Counsel for the Respondent
Investigation Meeting:	4 June 2014
Date of Determination:	28 October 2014

DETERMINATION OF THE AUTHORITY



A. Health Living Trading Company Limited (trading as Hardy's) acted unjustifiably in dismissing Vicki Martin in reliance on a trial period in her employment agreement. Hardy's also unjustifiably disadvantaged Ms Martin by failing to properly address performance concerns with her before deciding to dismiss her.

B. Within 28 days of the date of this determination Hardy's must settle Ms Martin's personal grievance by paying her:

(i) $20,700 as reimbursement of lost wages; and

(ii) $10,000 as compensation for humiliation, loss of dignity and injury to her feelings.

C. Costs are reserved.

Employment relationship problem

[1] Healthy Living Trading Company Limited, trading as Hardy's Health Stores (Hardy's), employed Vicky Martin as a naturopath to provide advice and information for staff in its chain of stores. The stores, operated by franchisees, sell a range of health products. Ms Martin's work comprised researching and writing about various products, their use and benefits as part of the support Hardy's head office provided to staff and customers in the franchise stores. Her work was largely carried out from her home office in Auckland with occasional visits as required to meetings with Hardy's staff and store operators, at its head office in Hamilton or at other venues.

[2] Ms Martin's work for Hardy's started with an induction at its head office on 14 May 2013. She was dismissed, by email, on 2 August 2013. The email referred to a clause in Ms Martin's employment agreement allowing for a 90-day trial to assess and confirm her suitability for the position. It then told her that Hardy's was "*unable to continue our relationship*" and stated her employment was terminated "*effective*" that day.

[3] Ms Martin raised a personal grievance challenging both the validity of the trial period term and whether the company had dealt with her fairly by not bringing any perceived shortcomings in her work to her attention before deciding to dismiss her. In her application to the Authority she sought lost wages from the date of dismissal to the date of the investigation meeting, distress compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act), and an order for costs.

[4] In reply Hardy's relied on the trial period in her employment agreement to state Ms Martin was "*validly dismissed*" during it.

Investigation

[5] For the Authority's investigation written witness statements were lodged by Ms Martin, her husband David Hilliam, Hardy's Brand Manager Margaret Hardy and the Australian-based owner and sole director of Hardy's, Mark Carlson. Each witness, under oath or affirmation, confirmed their own written statement and Ms Martin, Ms Hardy and Mr Carlson also answered questions from the Authority member and the parties' representatives. There were no questions to Mr Hilliam. The representatives also provided closing submissions on the issues before the Authority.

[6] As permitted by s174 of the Act this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[7] The issues for resolution, as they emerged in the investigation, were:

(i) how to deal with some technicalities about the wording of the job offer made to Ms Martin and the effects (if any) of a mistake in her dating of the employment agreement when she signed it, a delay of some months before Mr Carlson signed it on Hardy's behalf, and the agreement stating a start date earlier than when her employment actually began; and

(ii) whether Ms Martin's employment had already begun by the time she signed the employment agreement, so that the trial period was not agreed in compliance with the requirements of the Act and her dismissal in reliance on the trial provision was unjustified; and

(iii) whether Hardy's dismissal of Ms Martin breached its notice obligations to her; and

(iv) whether Ms Martin was unjustifiably disadvantaged by how Hardy's dealt with concerns about her performance; and

(v) what remedies, if any, were due to Ms Martin; and

(vi) whether either party should contribute to the costs of representation of the other party.

Technicalities

[8] There were three technicalities arising from the particular facts of the arrangements for Ms Martin's employment that I considered should be put aside in determining the substantial merits of the case.[1]

[9] Firstly, the proposed employment agreement was sent to Ms Martin on 7 May 2013 with an unusually worded condition about the basis of the job offer. An accompanying letter from Mr Carlson said it was "*not an offer of the job applied for*"

[1] Section 157(1) of the Employment Relations Act (the Act) 2000.

but once "*the terms and conditions are agreed upon and accepted by both parties*" and after Ms Martin had signed the agreement, Hardy's would then offer her the job. However I considered the situation, at law, was that there was an offer of employment confirmed to Ms Martin when she was given a revised employment agreement on 14 May (said to have incorporated some amendments she had requested) and she had accepted that offer when she signed and handed over that document in a meeting with Ms Hardy around the middle of the day on 15 May. Any necessary legal formality in the employment arrangement was complete at that point – because the agreement she signed was objective evidence of Hardy's offer and Ms Martin's acceptance of employment and of the parties' minds having met about the certain terms on which that employment relationship was entered. No further step was required at that point from Hardy's (such as a supposed subsequent "*offer of the job*") for the mutually binding obligations of the employment relationship to come into existence.

[10] However the legal and practical reality was that Hardy's was already in an employment relationship with Ms Martin by the time she signed the agreement. She had arrived at its Hamilton offices around mid-morning on 14 May for the start of a two-day induction programme that Ms Hardy had confirmed with her the previous week. The first item on the written induction programme was described as "*Head Office welcome and introduction, uniform selection and formalities: IRD etc*". But Ms Martin did not sign her employment agreement as part of any introductory 'formalities' on the morning of 14 May. Instead Ms Hardy gave her a further copy of the proposed employment agreement, that was said to include some amendments Ms Martin had requested, and Ms Martin said she would look at it later in the day. Meanwhile the induction programme, including meeting head office staff and visiting two local Hardy's stores, continued. From the start of that induction programme Ms Martin was 'working for hire or reward under a contract of service' (making her, according to the definition of the word given in the Act, an employee).[2]

[11] A second technicality concerned the start date given in the proposed employment agreement sent to Ms Martin on 7 May and the amended version of the agreement she signed on 15 May. It described the agreement as coming into effect on 13 May 2013. However by 13 May she had not seen or signed a version of the agreement incorporating some amendments she sought. Accordingly I have accepted Hardy's submission, made in closing at the investigation meeting, that 13 May was

[2] Section 6(1)(a) of the Act.

not the 'start date' of her employment but, rather, the parties' conduct in making arrangements for her two day induction programme in Hamilton confirmed their intention that the employment started on 14 May.

[12] The third technicality concerned the dates when the parties signed the employment agreement. When Ms Martin signed it on 15 May, she wrote the date as "*15.3.13*" instead of 15.5.13 (that is giving the month as March and not May). In the following weeks arrangements were made for Ms Martin to change the date to 15 May 2013 and Mr Carlson then signed the agreement on Hardy's behalf on 17 June 2013. Although the Employment Court has identified a confirmed statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement "*signed by both parties*" (my emphasis) at the start of the employment relationship and not later, Mr Carlson's belated signature would have been an overly technical rather than substantive basis on which to resolve – in the particular circumstances of her case – Ms Martin's claim that the trial period in her employment agreement was invalid.[3] Instead that issue fell to be resolved on the basis of an analysis of her situation at the time that she signed the agreement on 15 May.

Validity of the trial period

[13] The employment agreement offered to Ms Martin on 7 May 2013, and the version she signed on 15 May, both included this clause allowing for a trial period:

> ***3.3 Trial period***
>
> *A trial period will apply for a period of 90 calendar days employment to assess and confirm suitability for the position. ...*
>
> *During the trial period the Employer may terminate the employment relationship, and the Employee may not pursue a personal grievance on the grounds of unjustified dismissal. The Employee may pursue a personal grievance on grounds as specified in sections 103(1)(b)-(g) of the Employment Relations Act (such as: unjustified disadvantage; discrimination; sexual harassment; racial harassment; duress with respect to Union membership; and the Employer not complying with Part 6A of the Employment Relations Act).*
>
> *Any notice, as specified in the employment agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the Employer or the Employee (including access to mediation services), except as specified in section 67A(5) of the Employment Relations Act.*

[3] *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111 at [47].

Two weeks notice of termination of employment may be given after completing employment reviews if the Employer considers that the Employee has failed to meet the required standards.

On successful completion of this trial and probationary period, the Employer will give written confirmation to the Employee of the Employee's position with the Employer.

[14] The agreement also included the following relevant clauses:

13.1 ***Termination of trial period N/A*** *(*meaning non applicable*)*

13.2 ***General termination***

The Employer may terminate this agreement for cause, by providing six weeks notice in writing to the Employee. Likewise the Employee is required to give six weeks notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

...

13.3 ***Termination for serious misconduct***

Notwithstanding any other provision in this agreement, the Employer may terminate this agreement summarily and without notice for serious misconduct on the part of the Employee. Serious misconduct includes, but is not limited to:
(i) Theft;
(ii) Dishonesty;
(iii) Harassment of a work colleague or customer;
(iv) Serious or repeated failure to follow a reasonable instruction;
(v) Deliberate destruction of any property belonging to the Employer;
(vi) Actions which seriously damage the Employer's reputation.

[15] The trial period term in the agreement had to comply with the requirements of ss 67A and 67B of the Act in order to be valid and enforceable. The Employment Court has confirmed those statutory provisions are to be strictly interpreted and applied.[4] The Court has summarised the effect of that interpretation in this way:[5]

[65] ... 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 precondition of a trial period.

[66] It is not too onerous an expectation that employer will get the correct paper work and do things in a correct sequence. ...

[69] Parliament's intention is clear that neither a former nor an existing employee of an employer can be put onto a trial period. Such a provision is only permissible where a "prospective employee" (to use the words of the extended definition of employee in s 63A(7)) has neither worked previously for the

[4] *Smith*, above, at [48].
[5] *Blackmore v Honick Properties Limited* [2011] NZEmpC 152.

employer nor, at the time that a trial period is entered into or at such later time as it commences, is an existing employee of the employer.

[70] 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. The legislation then requires that the prospective employee be given a reasonable opportunity to seek advice about the terms of the offer of employment (including the trial period provision) pursuant to s 63A(2)(c). It will only be when that opportunity has been taken or has otherwise passed, any variations to the proposed employment agreement have been settled, and 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.

[71] It might be said that the parties' individual employment agreement was executed only about an hour or so after Mr Blackmore began work for HPL so that he could not really be said to have worked for the company previously when the agreement was entered into. However, certainty and predictability for employers wishing to use trial periods are important. This will ensue if they are careful that such agreements are entered into before, and not after (even shortly after), work commences. ...

...

[73] This analysis also points to the importance of employers wishing to engage employees on trial periods of ensuring that a proposed agreement containing such a clause is made available to the prospective employee a sufficient time before work is intended to begin. This will both allow for compliance with the statutory obligations of consideration, advice and bargaining, and ensure that an employee to be subject to a trial period does not fall into the category of a "previous" employee.

[74] Indeed, it is good employment practice to do so even if a proposed individual employment agreement does not contain a trial period. It is tempting fate to postpone formalising an employment agreement, by signing a written individual employment agreement, until after work has commenced. What if the new employee declines to agree to the written terms and conditions proposed by the employer if these differ from those previously agreed orally and/or are inconsistent with those being worked? An employer in these circumstances may be on unsure ground, insisting upon execution of such an agreement. Equally, if not more risky, may be the consequences of either disadvantaging the employee in employment or purporting to dismiss, in effect, because the employee declines to vary a current employment agreement.

[75] All these factors point to the importance, especially in cases of trial periods, of getting the formalities completed in a lawful sequence and in good time.

[16] Hardy's submitted that a message on 13 May from Ms Martin about her employment agreement that "*all seems fine*" and then delay by her on 14 May, so that she did not sign the agreement until 15 May, meant she was not entitled to deny the

validity of the agreement on the basis that she was already an employee by then. Hardy's had, it submitted, done all it could (through Ms Hardy) once Ms Martin was given an amended version of the agreement on the morning of her arrival at its head office and Hardy's could not, in good faith, force her to do any more, any quicker.

[17] I have not accepted that submission as a correct description of either the facts or Hardy's legal obligations at the time.

[18] Hardy's suggested Ms Martin had said she would print out the agreement and would bring it with her but had not done so and had said that was because of a problem with her printer. Ms Martin denied she gave that excuse.

[19] However, even if she were incorrect in her recall, Ms Martin did not receive a version of the employment agreement incorporating any of the amendments – that she had sought and to which Hardy's had agreed – before she arrived to start work on 14 May. Her employment was already underway when Ms Hardy gave her the amended version of the agreement for signature and before she had the opportunity to check and consider it. Even at that point it must (legally) still have been open for discussion and possible amendment.

[20] In response to the proposed agreement given to her on 7 May Ms Martin had set out what she called "*some points for consideration and discussion*" in an email sent to Ms Hardy during the night of Sunday, 12 May. Her email included questions and requests concerning terms on hours, overtime, internet security, and reimbursement of expenses for software and subscriptions. Ms Hardy had sent a reply email in the morning of 13 May after consulting with Mr Carlson. Ms Martin then sent an email raising a further item (concerning the cost of internet use on her telephone bill) for what she referred to as "*that discussion list re the Employment Contract*". Ms Hardy then replied with a question as to whether Ms Martin had any comments on her response to the earlier queries. Ms Martin responded by email at 3.15pm on 13 May with this sentence: "*Can I discuss these with you tomorrow Marg, just another uni deadline at the moment. But on a brief read all seems fine*".

[21] When Ms Hardy gave Ms Martin a copy of the revised agreement during the morning of 14 May, Ms Martin said she would look at it during the day. In the early evening Ms Hardy again asked Ms Martin about the agreement when they met in a hotel lobby to go out for dinner but Ms Martin said she had not looked at it because

she was too tired. It was not until after a lunch break on 15 May that Ms Hardy and Ms Martin sat down together to discuss whether Ms Martin was content to sign the agreement and she did so. My later analysis of the copies lodged for the Authority investigation showed the changes between the initially proposed agreement on 7 May and the one Ms Martin signed on 15 May included Hardy's agreeing to pay for software upgrades on Ms Martin's home computer, remote access for IT support, and the installation of anti-virus software; provision for recording of hours and a time-in-lieu system for hours worked in excess of 20 hours each week; and an expenses payment for an internet connection.

[22] Measured against the Court's description of the requirements for strict interpretation and application of the statutory provisions for trial periods, Hardy's was responsible for ensuring Ms Martin had a completed agreement and had signed it before starting work on 14 May. Having failed to do so, Hardy's could not validly exercise the significant advantages of the trial provisions in the agreement signed the next day. Accordingly its action in terminating her employment in reliance on those provisions, as it did on 2 August 2013, was not what a fair and reasonable employer could have done in all the circumstances at the time and, consequently, Ms Martin's dismissal was unjustified.

Failure to provide proper notice

[23] Hardy's also acted unjustifiably in failing to provide Ms Martin with a proper period of notice of her dismissal. The email sent to her at 3.31pm on 2 August stated the termination of her employment was "*effective*" that day. Even if the trial period provisions in the employment agreement were valid, Hardy's action plainly failed to comply with the term providing for two weeks' notice of termination of employment during the trial period.

[24] Hardy's subsequently paid Ms Martin for two weeks in lieu of notice. However the only provision allowing such a discretion for the employer to pay in lieu of notice was in the general termination clause. That clause referred to "*this*" notice period, being the six weeks period of notice set for general termination, not the two week set for notice of dismissal during the trial period.

[25] The only provision for dismissal on a summary basis – that is immediate and with the opportunity to work out a notice period – was in the employment

agreement's term on serious misconduct. Hardy's accepted that Ms Martin was not dismissed for serious misconduct and the term did not apply. Instead the dismissal related to work performance concerns that the law has "*traditionally treated as giving grounds for dismissal on notice rather than summarily*".[6]

Failure to properly raise performance concerns

[26] A further aspect of Hardy's unjustified action towards Ms Martin was evident from how it dealt with performance concerns that were the reason for its decision to dismiss her. What it did, and how it did it, did not meet the requirements of the employment agreement or Hardy's obligations under s4 of the Act.

[27] The trial period notice provision referred to "*completing employment reviews*" as part of making a decision over whether the employee had met the employer's required standards. While Mr Carlson and Ms Hardy gave evidence about how they had considered Ms Martin's progress in the job, discussed between themselves how she was doing and had sought information from other staff and store operators on their views, there was no 'employment review' of the type suggested by the use of that phrase in the agreement. Objectively assessed, 'employment review' implies some form of involvement or feedback from the employee (even if there is input and information from others considered in the 'review'). No such review was conducted with Ms Martin.

[28] While s67B(5) (a) of the Act excluded a requirement for Hardy's observe the good faith requirement at s4(1A)(c) of the Act to give Ms Martin information and an opportunity to comment before a decision was made about the continuation of her employment, Hardy's was not (even if the trial period had been valid) entitled to either directly or indirectly do anything likely to mislead or deceive Ms Martin. The employment agreement also expressly undertook that Hardy's would "*deal with the Employee in good faith in all aspects of the employment relationship*".

[29] Hardy's failed to properly observe those statutory and contractual good faith obligations to Ms Martin. While Ms Hardy, Mr Carlson and some other staff developed some concerns about Ms Martin's ability to work to the deadlines and to deliver the volume of output that Hardy's expected, those concerns were never put squarely or plainly to Ms Martin during her 11 weeks of employment. Ms Hardy

[6] *Smith*, above, at [107].

accepted, in answer to a question from Ms Martin's counsel, that Ms Martin was never told her job was at risk. Instead Ms Hardy said her style was to "*nurture, not criticise*" so she and others provided positive feedback to Ms Martin about the quality of her writing and material she produced. In turn, as Ms Martin's evidence established, the feedback she received proved to be misleading as to how she was doing and whether she was meeting Hardy's expectations. The result was that her dismissal came as a shock and an unexpected blow.

[30] Accordingly the failure to properly address performance concerns with Ms Martin was an unjustified disadvantage to her. It was not something that a fair and reasonable employer could have done – even if the trial period provisions had been valid and enforceable.

Remedies

Reimbursement of lost wages

[31] I concluded Ms Martin was entitled to an award of $20,700 in reimbursement of lost wages under s123(1)(b) and s128 of the Act. She had sought an award of $33,300 for the 10 month period, less two weeks' pay (around $1660) she had received in lieu of notice and less a further $10,924.80 she had earned from part-time and contract work over the period of loss claimed. I was satisfied her claim was an accurate assessment of her actual loss. Her evidence of her job search and her earnings during that period demonstrated she had made reasonable endeavours to mitigate her loss.

[32] In making that assessment I also considered the potential impact of the 'contingencies of life'.[7] There was a possibility that, had Hardy's dealt with the matter properly, Ms Martin's employment could have ended some time during that 10-month period anyway as a result of dissatisfaction either by her or Hardy's with the work and how it was going. There was one possible indication in the evidence that Ms Martin might not have been entirely surprised by the news of her dismissal. Less than two hours after receiving news by email of her dismissal, Ms Martin sent Ms Hardy this text message:

> *Sorry Marg. I'm a bit too upset to speak to you. Your phone, info folder and clothing are in the mail to you already. You don't have to explain. I understand*

[7] *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 (CA) at [76] and [81].

my work is not up to scratch. You will have all the work you require by Monday. I will forward timesheets and invoice also.

[33] However the evidence from Ms Hardy, Mr Carlson and Ms Martin did not confirm to a sufficient level of proof that any real performance concerns – if they had been addressed on an open, good faith basis – were definitely incapable of remedy and that the employment, more likely than not, could not have continued. The concerns involved matters such as Ms Martin having been excused from attending a Hardy's franchisees' conference because she needed extra time to work on material required for an upcoming deadline and having been so tired that she fell asleep at one meeting. Ms Hardy and Mr Carlson were also quite clear in their evidence, however, that the standard of Ms Martin's writing and research was at a level that met their expectations.

[34] There was some health information about Ms Martin, relevant to her claim for distress compensation, that I also considered in relation to whether her health was a contingency that should shorten the assessed period of loss. I concluded it was not sufficient to justify making such a reduction.

Compensation under s123(1)(c)(i) of the Act

[35] Ms Martin sought an award of $15,000 as compensation for the distress caused to her by her unjustified dismissal and the manner that it was carried out.

[36] She was shocked by the sudden news of her dismissal, delivered by email and without any real forewarning of its prospect or likelihood. I considered that her text message – referred to above – about understanding that her work was not 'up to scratch', was as likely to be a statement of humility and acquiescence rather than an indication that she was properly aware of any performance concerns and the likelihood of dismissal during her trial period.

[37] The impact of the dismissal on her was confirmed by the evidence of her husband and a report from a clinical psychologist to whom she was referred by her doctor. She experienced depression and insomnia in the following months. While her sensitivity to the circumstances of her dismissal may have been heightened by the experience of having been made redundant from two previous jobs in a two-year period, I did not consider that should lessen the award of distress compensation as the employer had to take Ms Martin as it found her. Ms Hardy said the decision to tell

Ms Martin of her dismissal by email was made because she thought Ms Martin has a "*fragile temperament*" and was "*an emotional person who would not handle it well*".

[38] Considering Ms Martin's particular circumstances and the general range of awards, I concluded $10,000 was the appropriate sum at which compensation for her humiliation, loss of dignity and injury to feelings should be set.

Contributory conduct

[39] As required by s124 of the Act I considered whether the evidence established any conduct by Ms Martin, of a sufficiently blameworthy nature, had contributed to the situation giving rise to her personal grievance. I concluded it had not, so no reduction was required from the remedies awarded to her.

Costs

[40] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Martin 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 Hardy's 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. The parties could expect the Authority to determine costs, if asked to do so, on its usual daily tariff basis, unless particular circumstances or factors required an adjustment upwards or downwards.[8]

Robin Arthur
Member of the Employment Relations Authority

[8] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.