IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 68
5467943

	BETWEEN	YANINA MENDEZ Applicant
	AND	RETRO ESPRESSO LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	David Prisk, Advocate for Applicant John Schlooz, Counsel for Respondent
Investigation Meeting:	9 March 2015 at Auckland
Submissions received:	9 March 2015 from Applicant and from Respondent
Determination:	10 March 2015

ORAL DETERMINATION OF THE AUTHORITY
Delivered on 9 March 2014

Employment Relationship Problem

[1] The Applicant, Ms Yanina Mendez, claims that she was unjustifiably dismissed by the Respondent, Retro Espresso Limited (Retro), on 23 June 2014 when the director of Retro, Mr Brent Gore, telephoned her and advised her that her employment was terminated with immediate effect.

[2] Retro denies that Ms Mendez was unjustifiably dismissed in accordance with clause 3.2 of the individual employment agreement (the Employment Agreement) with which she had been provided which stated that her employment was subject to a 90 day trial period.

Issues

[3] The issues for determination are whether Ms Mendez was justifiably in accordance with a 90 day statutory trial period or whether she was unjustifiably dismissed by Retro.

Background Facts

[4] Retro operates a café and also some standalone caravan coffee outlets at Auckland airport, employing approximately 14 employees on a roster basis at the airport caravans. At the time Ms Mendez's employment commenced, Mr Joe Joslin was the Manager responsible for the airport operation.

[5] Ms Mendez applied for a position as a Barista with Retro and was interviewed by Mr Joslin. During the interview, she said that the terms and conditions of employment had been discussed, and that these may have included a trial period.

[6] Ms Mendez commenced employment on 24 April 2014 following an initial training period, but said that she was not provided with the Employment Agreement until approximately a week and a half after she commenced employment, despite requesting it several times from Mr Joslin.

[7] After she had been provided with the Employment Agreement, Ms Mendez said that she had taken it home and read it. When she had returned it, she and Mr Joslin had signed it.

[8] The Employment Agreement has been initialled on each page by Mr Joslin and Ms Mendez and at paragraph 19 has been signed by them both and dated 6 May 2014. Clause 3.2 of the Employment Agreement was entitled: "***Trial Periods***" and stated:

> *A trial period will apply for a period NOT EXCEEDING 30 CALENDAR DAYS of employment to assess and confirm suitability for the position. Parties may agree to a trial period if:*
>
> *(i)* *The employer employs fewer than 20 employees at the beginning of the day the employment agreement is entered into; and*
>
> (ii) *The employee has not previously been employed by the employer. …*

[9] On Friday 20 June 2014 at approximately 9.00 p.m. Ms Mendez advised Mr Gore, and subsequently Mrs Theresa Gore, joint owner of Retro, that she was unwell and unable to attend for work the following morning.

[10] Mr Gore said that he had tried to contact Ms Mendez at various times over that weekend, but had been unable to make contact.

[11] Prior to 20 June 2014 Mr Gore said that he had been concerned about Ms Mendez's time-keeping and unreliability and he had verbally raised this issue with her, but had taken no formal disciplinary action against her prior to 23 June 2014.

[12] On Monday 23 June 2014 Mr Gore said he had received a text message from Ms Mendez and had telephoned her, advising that she was dismissed in accordance with a statutory 90 day trial period as set out in the Employment Agreement.

Determination

Trial period

[13] The Employment Relations Act 2000 (the Act) makes provision for trial periods at ss 67A and 67B. The Act states at s 67A:

> *(1)An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.*
>
> *(2)* ***Trial provision*** *means a written provision in an employment agreement that states, or is to the effect, that –*
>
> *(a) For a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period*

[14] In the Employment Court case of *Blackmore v Honick Properties Ltd*[1] the Chief Judge addressed the issue of trial periods, stating:[2]

> *[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 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*

[1] [2011] NZEmpC 152
[2] Ibid at paras [69] & [70]

> *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.*

[15] Mr Gore stated that he believed that Ms Mendez would have been provided with the Employment Agreement prior to commencing employment as that was Mr Joslin's normal practice.

[16] There is no documentary evidence to support this statement, and although another employee, Mr Peter Medwed, attests to the fact that he was provided with a written employment agreement prior to his commencing employment, I note that although he states that he brought it back on the first day of his employment, it was not signed by him and Mr Joslin before his employment commenced and in fact it currently remains unsigned. On this basis, I do not consider it can safely be concluded that Mr Joslin invariably followed a strict process.

[17] Accordingly at the time when Ms Mendez and Mr Joslin signed the Employment Agreement, I find that Ms Mendez was an existing employee and in those circumstances the trial period does not apply.

Unjustifiable Dismissal

[18] Ms Mendez was dismissed on 23 June 2014. Retro was under a duty of good faith towards her pursuant to s 4 of the Employment Relations Act 2000 (the Act) which required it, in a situation in which it was proposing to terminate her employment, to provide her with access to information relevant to the continuation of her employment, and an opportunity to comment upon it before a decision was made.

[19] In addition the Test of Justification in s103A of the Act states:

> ***S103A Test of Justification***
>
> *i. 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).*
>
> *ii. 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.*

[20] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Retro must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[21] Mr Gore's evidence was that although he had verbally raised her timekeeping and attendance as an issue with Ms Mendez, he had not taken any formal disciplinary action or advised her that her employment was in jeopardy as a result.

[22] Whilst I accept that Retro is a small employer and as such lacks the resources normally available to a larger employer when dealing with disciplinary matters, I consider that there were major rather than minor flaws in the procedure adopted by Retro in terminating Ms Mendez's employment which cannot be explained merely by the fact that Retro is a smaller employer.

[23] In particular:

- Ms Mendez had not been advised that her poor timekeeping and unreliability might result in the termination of her employment;
- There was no formal meeting held with her to discuss these issues;
- She had not been advised of her right to have a support person present at a formal meeting since one was not held; and
- There is no evidence that Mr Gore genuinely considered Ms Mendez's explanation as she was given no opportunity to present one.

[24] I determine that Ms Mendez was unjustifiably dismissed by Retro.

Remedies

Reimbursement for Lost Wages

[25] Ms Mendes has been unable to obtain alternative employment. In these circumstances I find that she is entitled to lost wages.

[26] Ms Mendez is to be reimbursed for lost earnings for a period of 3 months pursuant to s 128(2) of the Act.

[27] I order that Retro pay Ms Mendez the sum of $8,840.00.00 gross (calculated as $17.00 per hour x 40 x 13 weeks pursuant to s. 128 (2) of the Act.

[28] During the course of the Investigation Meeting, Mr Mendez withdrew any claim in respect of unpaid holiday or statutory leave entitlement.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[29] Ms Mendez claims that she suffered significant stress and anxiety in her written witness statement although however she provided little evidence of this during the Investigation Meeting.

[30] However I accept that all employees suffer some degree of hurt and humiliation when unjustifiably dismissed.

[31] I order Retro pay Ms Mendez the sum of $1,500.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

[32] Ms Mendez is also to be reimbursed the filing fee of $71.56.

Penalty Claims

[33] Ms Mendez is seeking a penalty for a breach of good faith, and the failure to produce wage and time records.

[34] I have already found that Retro breached the duty of good faith it owed Ms Mendez by unjustifiably dismissing her. I make no separate order for a penalty to be awarded against it.

[35] The Act and the Holidays Act 2003 require employers to maintain wage, time, and holiday records and to make these available to employees, their unions and MBIE's Labour Inspectors when requested to do so.

[36] Ms Gore said that she had provided all records which she had been requested; however I find that these had not been provided in the required format under the Act. As a result Ms Mendez was unable to check exactly how she had been paid.

[37] Whilst I accept that due to the automated payroll system used by Retro, Ms Mendez suffered no financial loss, I find that the failure to provide the payroll records in the required form left her at a disadvantage.

[38] Accordingly I order that Retro pay a penalty of $500.00 for the non-provision of accurate payroll records and that this is paid to Ms Mendez.

Costs

[39] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority