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## Mitchell v Calla Bridal Limited [2011] NZERA 116; [2011] NZERA Auckland 104 (16 March 2011)

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## Mitchell v Calla Bridal Limited [2011] NZERA 116 (16 March 2011); [2011] NZERA Auckland 104

Last Updated: 3 June 2011

**IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND**

[2011] NZERA Auckland 104 5308230

BETWEEN AND

Kerry-Lynn Mitchell Calla Bridal Limited

Member of Authority: Representatives:

Investigation Meeting: Determination:

Yvonne Oldfield

Ms Mitchell in person Ms Meilan Li, Director, for respondent

28 February 2011

16 March 2011

**DETERMINATION OF THE AUTHORITY**

### **Employment Relationship Problem**

[1] This matter concerns an employment relationship of very short duration. Ms Mitchell began working for the respondent as a sales consultant on Tuesday 2 March 2010. On Saturday 13 March 2010 (her day off) she was telephoned by one of the respondent's managers and told her employment was over.

[2] The employment was governed by a written employment agreement which contained a provision for a trial period. Ms Li relies on this provision in justifying Ms Mitchell's dismissal. She has identified two principal areas in which she says Ms Mitchell proved unsuitable for the position. Immediately after the dismissal Ms Li told Ms Mitchell that "we *did not feel you dealt with our customers appropriately.*" Since then (in her statement in reply and in responses to the Authority) Ms Li has also said that even after she had explained how she wanted things done Ms Mitchell would not conform to Ms Li's preferred ways of fitting, pinning and hemming garments.

[3] Ms Mitchell says that Ms Li did not formally discuss any performance concerns with her and she did not know her job was at risk. She believes her work was of a very professional standard and that she dealt appropriately with customers. For these reasons she says her dismissal was unjustified. She also claims that she did not receive the correct wages and holiday pay for the time she was employed.

## Issues

[4] Section 67A of the Employment Relations Act provides:

*"When employment agreement may contain provision for trial period for 90 days or less*

(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 as defined in subsection (4).*

(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; 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.*

*Employee means an employee who has not been previously employed by the employer.*

*Employer means an employer who, at the beginning of the day on which the employment agreement is entered into, employs fewer than 20 employees.*

[5] Calla Bridal Limited does have fewer than 20 employees. However the trial period provision in Ms Mitchell's employment agreement reads, in its entirety, as follows:

*"3.2 Trial period*

*A trial period will apply for the first 90 days of employment to assess and confirm suitability for the position."*

[6] In other words, it does not say (as required by subsection (2) (b)) that the employer may dismiss during the trial period

nor does it say (as required by subsection (2) (c)) that if the employer does so the employee is not entitled to bring a personal grievance in respect of the dismissal.

[7] Clause 3.2 of Ms Mitchell's employment agreement is not therefore a trial provision as set out in section 67A of the Employment Relations Act. Instead it must be classified as a probationary arrangement as set out in [Section 67](#) of the [Employment Relations Act 2000](#) as follows:

*"Probationary arrangements (1)*

*Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation ... after the commencement of the employment,—*

*(a)*

*the fact of the probation . period must be specified in writing in the employment agreement; and*

*(b)*

*neither the fact that the probation . period is specified, nor what is specified in respect of it, affects the application of the law relating to*

*unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation . period."*

[8] The law relating to unjustifiable dismissal applies, therefore, albeit in the context of a probationary clause. The principal issue for determination remains that set out in [Section 103A](#) of the [Employment Relations Act 2000](#), as follows:

*"The question of whether a dismissal ...was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable would have done in all the circumstances at the time the dismissal or action occurred."*

[9] In the event that the dismissal is found to be unjustified the question of remedies and of contributory conduct also fall to be determined. Finally this determination will address the alleged shortfall in wages.

## **Determination**

[10] When Ms Mitchell was first offered the position of sales consultant it was to be full time but upon starting work she was told that for operational reasons she could not initially be provided with 40 hours work. Somewhat reluctantly, because she needed full time work, Ms Mitchell agreed to a temporary reduction in hours. Further discussions about hours took place in a lunchtime meeting on Friday 5 March with the result that it was agreed that for the next two weeks Ms Mitchell would be paid for a minimum of 30 hours even if she worked less than this.

[11] There is no dispute that the hours eventually worked over the course of the employment were as agreed. They were:

Tuesday 2 March	10.00am - 5.30pm	7.5 hours
Wednesday 3 March	10.00am - 5.30pm	7.5 hours
Thursday 4 March	10.00 am- 5.30pm	7.5 hours
Friday 5 March	10.00 am - 5.30pm	7.5 hours
Sunday 7 March	10.00am- 4.00pm	6.0 hours

Monday 8 March	10.00am- 5.30pm	7.5 hours
Wednesday 10 March	10.00am- 5.30pm	7.5 hours
Thursday 11 March	10.00am- 5.30pm	7.5 hours
Friday 12 March	10.00am- 5.30pm	7.5 hours

[12] Work methods were also discussed at the lunchtime meeting on Friday 5 March. Ms Mitchell told the Authority that Ms Li told her that she:

*"needed to work the same, we must agree with her alterations and work ethic (even though they were very wrong in my eyes.) We discussed 3 particular weddings, she did not like the factor I pointed out the brides and maids dresses were not correct."*

[13] Ms Mitchell responded by telling Ms Li that she would not do any measuring and fitting and would leave it to Ms Li to attend all appointments customers made for this purpose. She recalls that Ms Li seemed happy with this but Ms Li told me that she was concerned that Ms Mitchell would not change her ways and that this was one of the eventual reasons Ms Mitchell was dismissed.

[14] Ms Mitchell told the Authority that she was left in sole charge of the shop for much of the time. She found the work stressful. The respondent's business involved taking orders for gowns which were made up in China. The gowns were then delivered for the final fitting with any necessary alterations being done here. It appears that often considerable adjustment was required at this final stage, not just to the fit but sometimes to the style as (according to Ms Mitchell) the gowns did not always match what customers had requested.

[15] Ms Li explained to the Authority that handling this process and ensuring that the customers were happy was all part of Ms Mitchell's job. She told the Authority that she was concerned that Ms Mitchell did not deal appropriately with customers and that she received feedback from customers whom Ms Mitchell had upset.

[16] It is common ground that at some stage between 8 March and 12 March a second lunchtime discussion took place at which customer complaints and working methods were again discussed. From what Ms Mitchell and Ms Li could recall of this exchange it appears Ms Li did set out her expectations of Ms Mitchell but did not tell her that her job was at risk if they were not met.

[17] The final issue arose on Thursday 11 March. Ms Mitchell had been told that Thursday was payday however she did not find her wages in her bank account that day as she expected. Several exchanges resulted between Ms Mitchell and Ms Li over the course of the Thursday and Friday in which Ms Mitchell requested that her pay be lodged as a matter of urgency. Later it transpired that a payment was made to Ms Mitchell's account after 10.00pm on the Thursday night. She says she was not able to draw on it for several days.

[18] On Saturday 12 March (Ms Mitchell's scheduled day off) she received a call from one of the shop managers telling her not to come back as Ms Li had decided that she was not suitable.

[19] As well as the payment to her bank account Ms Mitchell received a final cash payment. Together these payments totalled \$710.31.

*Unjustified dismissal*

[20] In circumstances where there is a probationary arrangement the requirements of procedural fairness and reasonableness may be less rigorous than usual<sup>[1]</sup> but certain basic obligations must nonetheless be met. The leading case on probationary arrangements under 67 of the Act is the judgement of the Court of Appeal in *Nelson Air v New Zealand Airline Pilots Association*.<sup>[2]</sup> That decision provides that the employer must:

- i. "be ready to point out shortcomings;"
- ii. "advise about any necessary improvements" and
- iii. "warn of the likely consequences if its expectations are not met."

[21] If despite all this it becomes apparent that the trial is not a success: "the *employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end.*"

[22] I am satisfied that Ms Li pointed out to Ms Mitchell that there were shortcomings in her work. These related to her dealing with customers and her refusal to follow Ms Li's preferred methods of work. There was however no evidence to suggest that Ms Mitchell was told that a failure to meet Ms Li's expectations would place her employment in jeopardy.

[23] The final question (whether there was any warning that the employment would come to an end at the conclusion of the probationary period) does not even arise. The probationary period was not allowed to run its course, and although Ms Mitchell's contract provided for two weeks notice of termination, no notice was given of termination.

[24] The key elements of a fair procedure are, in short, missing. Even on the less rigorous standards to be applied to a probationary period, the dismissal has not been shown to be justified.

#### *Remedies and Contributory conduct*

[25] [Section 124](#) of the [Employment Relations Act](#) provides that:

*"Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,-*

1. *consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
2. *if those actions so require, reduce the remedies that would otherwise have been awarded accordingly."*

[26] After hearing from both witnesses (and, since neither was represented, allowing them to question each other) I conclude that aspects of Ms Mitchell's conduct were very damaging to the newly established employment relationship. She believed her way of working was the only way and was not prepared to change it. This was despite the obvious practical difficulties that would arise if Ms Li or the manager (neither of whom were permanently based at the same shop as Ms Mitchell) had to do all the measuring and fitting. Finally she was unwilling to accept any responsibility for customer relations, reiterating several times that if customers were not satisfied, it was not her fault.

[27] As well, although it was Ms Li's responsibility to put Ms Mitchell on notice that her job was in jeopardy, Ms Mitchell's intractable attitude hindered communication between the parties and made it more difficult for Ms Li to meet her obligations.

[28] In these ways Ms Mitchell did contribute to the situation that gave rise to the grievance. I am satisfied that remedies must be substantially reduced as a result of this contributory conduct.

[29] In relation to the personal grievance Ms Mitchell sought "*compensation for emotional and financial stress*" and "*lost income*" She did not provide evidence of attempts to mitigate her loss or indicate what she had earned post dismissal. Nor did she quantify the remedies sought. Against this background and in all the circumstances of the employment relationship problem I conclude that it is best to address remedies on a global basis with a single payment of compensation pursuant to [section 123](#) of the [Employment Relations Act 2000](#). After adjusting for contributory conduct I consider an appropriate level of award to be \$4,000.00.

#### *Wages and Holiday Pay*

[30] Ms Mitchell worked 66 hours at an hourly rate of \$15.00. Gross wages payable for the hours worked therefore amount to \$990.00. Although Ms Mitchell was not provided with pay slips the respondent did advise the Authority that her gross pay was \$877.50. It follows that she is owed outstanding wages of \$112.50 gross.

[31] In addition she was entitled to holiday pay at 8% of her total gross earnings that is a further \$79.20 gross.

[32] I note that neither party was represented in the proceedings in the Authority and therefore there is no issue of costs.

#### **Summary of orders:**

[33] **Calla Bridal is ordered to pay to Ms Mitchell:**

- i. **\$112.50 gross arrears of wages;**
- ii. **\$79.20 gross holiday pay;**
- iii. **\$4,000.00 compensation pursuant to [section 123](#).**

Yvonne Oldfield

Member of the Employment Relations Authority

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[1] *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Limited* [1994] NZEmpC 92; [1994] 1 ERNZ 869, paragraph [13].

[2] [1994] NZEmpC 92; [1994] 1 ERNZ 869