

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 22
5292117

BETWEEN SYLVIA PARKES
Applicant

AND SQUIRES
MANUFACTURING LTD

AND SHANE SQUIRES
Respondents

Member of Authority: P R Stapp

Representatives: Mike Andrews, for the Applicant
Vicki Eades and Sharon Brennan, for the Respondents

Investigation Meeting: Whanganui 11 November 2010

Further information
received: 16, 17, 18 November 2010
4 February 2011 (telephone conference with
representatives)

Determination: 11 February 2011

DETERMINATION OF THE AUTHORITY

Outline of the employment relationship problem

[1] This is an employment relationship problem about a trial period for employment under the Employment Relations Act. Ms Parkes was employed as an “experienced” machinist/sewer by Squires Manufacturing Limited (Squires) to sew outdoor clothing.

[2] The position was advertised by Squires for an experienced machinist, although Ms Parkes says she found out about the job through a friend and former work colleague. Before being employed at Squires Ms Parkes had recently been made redundant from another job after a considerable number of years’ service.

[3] Squires has relied on a written trial period clause in the parties' employment agreement under s.67A and s.67B of the Employment Relations Act 2000 (the Act) to dismiss Ms Parkes without cause.

[4] Ms Parkes has claimed that Squires has not met the legal requirements under s.67A and s 67B of the Act to rely on a trial clause. She has claimed a personal grievance and remedies that go with that. Also penalties were sought for breaches of the employment agreement and failure to produce the wage and time records. In addition a penalty for aiding and abetting breaches has been brought against Mr Squires, a director of the company.

[5] Squires and Mr Squires denied Ms Parkes's claims and they contended that the trial period clause is valid.

The Issues

- a. Is the trial period clause in the applicant's employment agreement valid?
- b. Was the employment agreement executed properly?
- c. Was the applicant a new employee?
- d. Was proper notice given?
- e. Did the employer have fewer than 20 employees?
- f. If the trial period clause is not valid can the employer justify its action in terms of s.103A of the Act, and did it act fairly?
- g. Under the Act how much money is the applicant entitled to for any remedies (if there is a personal grievance)?
- h. Is this a matter for penalties?

[6] Both parties have claimed costs, which will be reserved. The issue with costs are as follows. Is this a matter for costs? Which party is entitled to costs and how much?

The facts

[7] Sylvia Parkes started work on Monday 28 September 2009. She had been given an intended/draft employment agreement some days earlier. She signed the employment agreement after she started work, but it was not executed by being signed off by the employer until 5 October 2009. That employment agreement contained a trial period clause that was called a “Probationary period”.

[8] Squires Manufacturing Limited employs fewer than 20 employees. It was established that the number of employees employed at the time Ms Parkes started work was 18.

[9] Ms Parkes received training on the job as to the requirements to sew outdoor garments manufactured by Squires. She was supervised while working and it was left to her to ask any questions. Previously she had sewed undergarments in her old job. The two types of garments have different manufacturing requirements. In the short time that she was employed at Squires her two supervisors, and Mr Alan Denne, the manager, became concerned at the level of her skills. Ms Parkes accepted that she made errors during this period but not to the extent claimed by her employer. She did have to unstitch some her work. Also she changed a machine footing for her comfort and ease to carry out her work and without affecting her work. Mr Denne and one of the supervisors say that this caused a change to the manufacturing requirements of the garments that Ms Parkes was working on.

[10] Ms Parkes was dismissed on Wednesday 30 September 2009 by Mr Denne. He says that he told her of the decision and he said that he told her she was not required to return to work as Squires relied on the trial period clause in the employment agreement. Mr Denne says she was told at the time that she was being dismissed it was because of her performance. Mr Denne signed off the employment agreement on 5 October 2009 after she had left. Ms Parkes was not paid her notice until 2 June 2010, and was only paid after her lawyer had intervened in the matter. Ms Parkes denied that she was given any notice.

Determination

[11] There were 18 employees employed by Squires at the time Ms Parkes commenced work.

[12] The parties had an intended or draft employment agreement that contained a trial period clause (different to the s 67 “probationary arrangement”). Although the clause was called a “probationary period” it clearly an s 67A and s 67B of the Act arrangement for a trial period.

[13] The employment agreement was never executed properly in writing before Ms Parkes had started work at Squires to the standard required under the Act, as is required: *Heather Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEMPC 111 WRC 14/10. In particular the Court said that the statutory intention was:

...that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise settled during its course...

[14] The employment agreement was never executed properly because:

- a. Ms Parkes signed the employment agreement after she had started work on 28 September 2009.
- b. The agreement was not signed off by Mr Denne for Squires until 5 October 2009 after Ms Parkes’s employment had ended.
- c. Mr Denne and Ms Parkes had to sign the employment agreement off at the commencement of the employment relationship to enable the trial period clause to apply.

[15] Although Ms Parkes received the employment agreement for consideration and had the opportunity to get independent legal advice before starting work, once she started work, the terms, other than the trial (because of the statutory requirements), are able to be inferred from the employment agreement by her signing it. The fact that she signed the agreement after lunch on her first day means she had accepted the terms, including the trial period clause, without any changes. This would fit within what the Court called the commencement of the employment relationship and it is difficult to accept that the employer would have made any further changes before signing it off. In this regard there were no further negotiations to settle the agreement anticipated by both parties.

[16] I conclude that as the terms of the trial clause had to be in writing and in an agreement that had to be signed off at the commencement of the employment relationship (and not inferred as an “intended” or draft agreement) the trial clause was not in compliance with s 67A of the Act. Mr Denne clearly signed off the agreement to give retrospective application to it, I hold. Thus, his action was beyond what the commencement of the employment relationship would be, I hold.

[17] Save for the above, the terms of the trial period clause met the requirements of s 67A (2) of the Act:

- a. The clause specified a 90 day trial.
- b. The clause specified that during the trial period the employer would be able to dismiss the employee.
- c. The clause spelt out that the employee was not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[18] Next there is the matter of notice. The Act requires notice to be given, but does not specify how or the period of notice: (s 67B of the Act). Mr Denne says he told Ms Parkes that she was dismissed and she would be paid one week’s pay in lieu of notice. The “intended” agreement made provision for this period of notice, but it also provided that such notice would be in writing prior to the intended date of termination. It was not provided in writing at the time Mr Denne informed Ms Parkes of her dismissal. The Court has held that notice has to be more than simply the advice of dismissal, as it was in this case. Ms Parkes’s employment ended immediately and was conveyed verbally. She denied getting any notice. The notice was not paid until 2 June 2010, and I was informed that this happened because of an oversight. A lawyer’s intervention was required for it to be paid. The terms of s 67B of the Act have therefore not been complied with in regard to notice, because it is unclear that any notice was given (given the conflicting evidence). Even if Ms Parkes was informed of her dismissal and was told to leave at the end of the day, this is not reasonable notice under the terms of Squires’ intended employment agreement where the notice had to be in writing.

[19] Therefore, the trial clause can not apply because Squires has not met the requirements of s67A and 67B of the Act and it has not complied with the inferred term of the employment agreement to provide notice in writing, I hold.

[20] As Ms Parkes had started work without the employment agreement being properly executed in writing by having it signed by both parties at the commencement of the employment relationship it follows that she was an existing employee, albeit she had been working for a very short time before she signed the agreement. Mr Denne did not sign it until after she had left. Ms Parkes's circumstances did not meet what the Court referred to in terms of s 67A (3) of the Act as an employee "who has not been previously employed by the employer". In this regard the Court has required an employment agreement to be properly entered into (that is both parties have to sign it off before the commencement of the employment relationship) and in the absence of that, Ms Parkes would not therefore be an employee as defined by s 67A (3). As there had been no written agreement signed off and by the time Mr Denne finally signed it Ms Parkes's more accurately was a former employee of Squires. As Mr Denne signed the employment agreement off retrospectively after she had been dismissed she was an existing employee at the time of her dismissal. Although the facts can be distinguished from those in *Heather Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEMPC 111 WRC 14/10 the same principles apply.

[21] It further follows that s 67A and s 67B can not apply because she was an existing employee. Squires can not therefore rely upon the 90 day trial clause in the "intended" employment agreement at the time she was employed.

[22] I have to add, (because I have noted the employer's indignation and surprise about the line of reasoning, especially when they say they got verbal advice from the Department of Labour that they could apply the trial clause), that the Employment Court has held in *Heather Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEMPC 111 WRC 14/10:

[48] Sections 67A and 67B remove longstanding protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in and dismissals from, employment. Legislation that removes previously

available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.”

[23] I can not give any weight to what the Department of Labour said because there is nothing in writing about what it was asked and what information it was given to provide an opinion on, and there is no written advice of any opinion. No evidence from the department was called.

[24] I further add that the law commenced from 1 March 2009 and the Court’s judgment in August 2010 applies that law. Squires is not exempt from the law just because the facts relate to the period before the Court’s judgment.

[25] I now turn to Ms Parkes’s claim for unjustified dismissal. The decision to dismiss Ms Parkes was made before she was informed that she was going to be dismissed. This is not the action a fair and reasonable employer would have taken, I hold. The decision to pay her notice in lieu was made without any consultation and the notice was not put in writing. A fair and reasonable employer would have consulted and put the notice in writing in terms of the employment agreement. Furthermore, Ms Parkes was not paid in the lieu for the period of notice at the time. The reasoning for the decision to dismiss Ms Parkes related to her performance and she had no opportunity to improve in an agreed timeframe and upon proper notice of the employer’s requirements and standards, as would normally apply in any performance matter. Squires excluded any options because it was not prepared to give her any training more than necessary for what it considered was needed for an experienced machinist. That may be understandable given Squires advertised and interviewed for an experienced machinist. Indeed the decision to appoint Ms Parkes was made on the basis of her experience. However, there was no proper scrutiny (other than observations and correcting her work) into what the problem was with Ms Parkes’ performance and why Ms Parkes was not meeting the requirements and for her to have some opportunity to improve.

[26] The failure to allow Ms Parks any input as to any options and to discuss the situation before the decision was made to pay her out in lieu was also not the action of a fair and reasonable employer.

[27] Ms Parks has a personal grievance for unjustified dismissal.

[28] I now turn to remedies. First Ms Parkes has established her lost wages on the basis of \$500 gross per week and that she was not able to obtain further work immediately after her dismissal. She has claimed \$11,250. Her pay at Squires ceased from 30 September 2009. She started new work on 8 March 2010 and this lasted until about 22 October 2010 when she needed to look after her ill husband. The question I have to ask is whether or not Ms Parkes would have continued to work at Squires but for her dismissal. I hold that there was no guarantee of continuing work for the length of her claim when she got a new job. There was also an acceptance by Ms Parkes that she did make errors in her work. It is likely that the errors did exist to cause concern for Mr Denne and at least one of the supervisors. They were very decisive and emphatic about this and it that make it probable that Ms Parkes's employment may have lasted for a shorter period than she has claimed. Mr Denne and the supervisor made a decisive decision based on their experience of her work and the manufacturing requirements in a very short time. This was supported by the evidence that Ms Parkes did have to unpick some of her work, that she was sewing very different garments from her previous experience and that the change of footing she made did make a difference in the sewing of the garments that gave rise to performance issues. Also, Ms Parkes clearly understood she was being employed on the basis of her experience and ability to do the work. Therefore, I have limited her award to 13 weeks wages because of the level of mistakes referred to. I have also had regard in equity and good conscience that Ms Parkes signed off her employment agreement that accepted a ninety day trial period, although the agreement was not properly executed. This suggests that the work may not have lasted much beyond the thirteen weeks. She did attempt to mitigate her loss by looking for other employment, which she listed in her evidence, although she was unsuccessful until 8 March 2010. I assess her lost wages in the sum of \$6,500.

[29] Second Ms Parkes has claimed \$15,000 compensation for hurt and humiliation. I accept that she knew that her performance would be monitored on the basis of a trial, albeit now invalid. I accept there has been an impact on her feelings and that she was hurt and humiliated because of the abrupt nature of the dismissal and how it was handled by the employer. She had to see the rest of the day out at work until she went home. She had to tell her partner and explain what had happened. She was upset and teary. This supports her sense of hurt and humiliation, I hold. I have also heard evidence of a colleague's belief that Ms Parkes expected her dismissal, and

was relieved by it, which was denied by Ms Parkes. I have put this aside due to the inconclusive nature of the evidence and where the above evidence establishes that Ms Parkes is entitled to some compensation. I award her \$5,000 compensation for hurt feelings and humiliation.

[30] Ms Parkes did not contribute to the situation giving rise to her personal grievance. This was a process entirely managed by her employer. The employer is bound by its assessment of Ms Parkes's experience at the time of the decision to employ her.

[31] The matter of penalties was not pursued by the applicant and dispensed with at the investigation meeting. For completeness even although the wage and time records were not produced when requested there has been no disadvantage and or prejudice. It would be entirely inappropriate to use penalties as a remedy when the applicant has claimed a personal grievance on the basis of an invalid trial clause. The claim against Mr Squires for aiding and abetting is also dismissed.

[32] Costs will be reserved as requested.

Orders of the Authority

[33] Squires Manufacturing Limited is to pay Sylvia Parkes:

- a. \$6,500 lost wages for 13 weeks lost wages.
- b. \$5,000 compensation for hurt and humiliation.

[26] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority