

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 291
5405559

BETWEEN PRASANNA PATEL
Applicant
A N D KANGNAI FOOTWEAR
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon
Representatives: Danny Gelb, Advocate for Applicant
Ling Ke , Director of Respondent
Investigation Meeting: 26 June 2013 at Auckland
Submissions received: 01 July from Applicant
03 July from Respondent
Date of Determination: 08 July 2013

DETERMINATION OF THE AUTHORITY

- A. Ms Patel was unjustifiably dismissed by Kangnai Footwear Limited (“Kangnai”) on 4 December 2012.**
- B. Kangnai is ordered to pay the sum of \$6,000 compensation to Ms Patel pursuant to s123(1)(a) of the Employment Relations Act (“the Act”) for humiliation, loss of dignity and injury to feelings suffered by her as a result of her unjustified dismissal;**
- C. Kangnai is ordered to pay Ms Patel the sum of \$6,656 gross being reimbursement of wages lost by Ms Patel as a result of the dismissal pursuant to s.128(2) of the Act;**

- D. Kangnai is ordered to pay interest at the rate of 5% per annum on lost wages of \$6,656 gross from the date of determination which will continue to accrue until payment is made to Ms Patel.**
- E. Kangnai is ordered to pay Ms Patel holiday pay of 8% per annum on wages earned by Ms Patel during her employment by Kangnai from 30 August 2012 to the date of dismissal on 4 December 2012.**
- F. Costs are reserved.**

Employment relationship problem

[1] Kangnai Footwear Limited (Kangnai) owns shoe shops in the Auckland central business district, one of which is called "*Aphrika*" and is located in High Street, Auckland CBD at which the applicant, Ms Prasanna Patel, worked. The other store is located in the Chancery shopping precinct, Auckland CBD.

[2] Mr Ling Ke whose English name is Justin, is the sole director of Kangnai.

[3] Ms Patel was employed by Mr Ke as a fulltime retail assistant at *Aphrika* on 30 August 2012 at an hourly rate of \$16 gross. Mr Ke initially provided Ms Patel with a written employment agreement as a Shop Assistant for the Chancery Store which was not correct as Ms Patel was to be employed at *Aphrika* in High Street.

[4] After approximately 3 months, on 26 November 2012, Mr Ke provided Ms Patel with another written employment agreement ("the agreement") in respect of her employment at *Aphrika* and which stated the agreement would commence on 30 August 2012 and end on 30 November 2012. The agreement further stated that a trial period of 90 days applied in order to assess her suitability.

[5] On 29 November, Mr Ke and Ms Patel signed the written employment agreement. At a meeting on 30 November 2012, Mr Ke informed Ms Patel that her employment agreement had ended because the trial period had expired. Mr Ke offered Ms Patel a part time role working 25 hours per week. Mr Ke says he reduced Ms Patel's hours because of her poor performance during the three month trial period.

[6] There were further discussions between Mr Ke and Ms Patel about Ms Patel's employment situation and on Tuesday, 4 December Mr Ke confirmed Ms Patel's trial period of employment had come to an end.

[7] Ms Patel claims she was dismissed on 4 December when she was told her trial period had come to an end and she refused to accept the part time role. Ms Patel says her dismissal was unjustified. Mr Ke claims Ms Patel was employed for a trial period, he was unhappy with her performance and so terminated her employment lawfully at the end of the trial period. Mr Ke says he offered Ms Patel part-time employment with reduced hours when the trial period expired but Ms Patel refused.

[8] Mr Ke refers to a text message that he says he received from Ms Patel which he found insulting and to a number of performance issues such as reading magazines while at work, not being able to use the EFTPOS machine as justifiable reasons for his decision to terminate Ms Patel's employment at the end of the trial period and his decision to offer Ms Patel reduced hours of employment following the expiry of the trial.

Issues

[9] The issues for the Authority to determine are:

- (a) Was Ms Patel dismissed?
- (b) If Ms Patel was dismissed, was her dismissal justified?
- (c) If Ms Patel was unjustifiably dismissed, what are the remedies?

First Issue

Was Ms Patel dismissed?

[10] Ms Patel was employed by Kangnai on 30 August 2012. Despite a number of requests by Ms Patel she was not provided with a correct written employment agreement in respect of her role at *Aphrika* until 26 November. Mr Ke and Ms Patel signed the written employment agreement on 29 November.

[11] Mr Ke says that he began having issues with Ms Patel's performance in the first three month period of her employment. Mr Ke says Ms Patel was not able to properly operate the EftPos machine, says Ms Patel read magazines during work hours and on one occasion in late October sent him a text message which he found insulting. Mr Ke says

on each occasion he raised the matter with Ms Patel and issued her with a verbal warning. Mr Ke says he told Ms Patel on each occasion that he “*would take action*” if she repeated the behaviour concerned. Mr Ke never told Ms Patel what action he intended taking. No written warnings were ever issued.

[12] Following a business trip to China in late September 2012, Mr Ke says he became concerned at the fact that there had been no sales whatsoever while he had been away for three days.

[13] Mr Ke says he raised these issues with Ms Patel and “warned” her. Ms Patel says she never received any verbal or written warnings. Matters raised by Mr Ke with her were always discussed at the time and resolved. Mr Ke says because of his concerns over Ms Patel’s performance, he decided that he would ask her to sign a written employment agreement for a 3 month period and which contained a 90 day trial period. The written employment agreement was given to Ms Patel on 26 November.

[14] Mr Ke says he decided he would terminate the employment agreement on 30 November and offer Ms Patel a new employment agreement with reduced hours. Mr Ke says the termination of the employment agreement on 30 November and the offer of future employment at reduced hours was because of Ms Patel’s poor performance. Mr Ke did not inform Ms Patel of his concerns or of his intentions with regard to her employment. On 29 November, Mr Ke and Ms Patel signed the written employment agreement which stated it would “*commence on 30/08/12 and will end on 30/11/12.*” The agreement also stated there was a 90 day trial period so that there could be an assessment for suitability for the position. Mr Ke accepted that he should have provided Ms Patel with the written employment agreement prior to her starting work.

[15] Clause 3 of the written employment agreement stated:

3. ***Nature and Terms of the Agreement***

This agreement will commence on 30 August 2012 and will end on 30 11 2012.

Trial periods

A trial period will apply for a period of 90 days employment to assess and confirm suitability for the position. The parties may only agree to a trial period if the employee has not previously been employed by the employer. 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 s.103(1)(b)-(g) of the Employment Relations Act 2000 (such as: unjustified disadvantaged; discrimination; sexual harassment; racial harassment; duress with respect to union membership; and the employer not complying with Part 6A of the Employment Relations Act 2000).

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 s.67A(5) of the Employment Relations Act 2000.

[16] Mr Ke says he had his lawyer prepare the written employment agreement but later in his evidence says he obtained the document from the Department of Labour website and filled in the gaps.

[17] Ms Patel says that on 30 November 2012 at about 4.45pm Mr Ke asked for a meeting with her. Ms Patel thought the meeting was going to be a review of her work over the previous three months. Instead, Mr Ke told Ms Patel her trial period had ended and he was going to reduce her hours to 25 hours per week. There was no discussion about Ms Patel's performance. Mr Ke asked Ms Patel to let him know whether she was going to agree to the new hours of employment by Monday, 3 December. Ms Patel says she was confused because she had just signed what she believed to be a permanent employment agreement. At the suggestion of her mother, Ms Patel contacted the Department of Labour to obtain advice about her situation.

[18] On Monday, 3 December, Ms Patel asked to speak to Mr Ke about her employment and his decision to reduce her hours. Ms Patel told Mr Ke that she had contacted the Department of Labour about the conversation that they had had on 30 November because she did not believe Mr Ke could reduce her hours as he proposed. A heated argument ensued. Later in the afternoon, Mr Ke informed Ms Patel that she did not have an employment agreement with him and as such she was working "illegally".

[19] Ms Patel came back to work the next day as she was confused about her employment situation. Again, there was a heated discussion between Ms Patel and Mr Ke about Ms Patel's employment with Kangnai. Mr Ke told Ms Patel the trial period had ended and was told to leave.

[20] Ms Patel sent an email to Mr Ke at 1.19pm on 4 December as follows:

Dear Justin,

This email is regarding my Employment Agreement with aphrika (shoe shop) and some of my concerns which I have tried to discuss with you. As you do not want to address them I have no alternative but to take my concerns to the ERA (employment relations authority).

- *trial contract which is my employment contract/agreement was given to me three days before my trial period ended*
- *the hours in my trial contract stated full time (no mention that the hours would be changed to part time)*
- *disagree that I should seek advice regarding my employment from the Labour Department*
- *sending me home without any notice (basically terminating my employment)*

I want to try and resolve the problems with you, and come to some agreement through mediation. If you could get back to me as soon as possible, by the end of the day, this would be great, so we can get this under way and solved, if you choose not to then matters will be left to the Employment Relations Authority.

*Regards
Prasanna*

[21] Mr Ke responded as follows:

Dear Prasanna,

I will get back to you tomorrow after meeting my lawyer. Thanks and regards.

[22] Mr Ke sent a further email to Ms Patel shortly after his last email as follows:

Dear Prasanna,

- *Hours in the contract is full. Its only for trial period. Not for any further contract after trial.*
- *[Inaudible] and advise you to seek professional advice regarding you employment from the Labor Department. I also have been to Department of Labor and ERA by myself to sort this issue out (The Lady works at ERA reception desk could be the evidence for this case)*
- *The reason of sending you home is there is no proper contract between you and my company. Trial period is finished. It is illegal if we still keep you in the business.*

I will be absolute cooperative for the mediation from Labor Department or any other actions you are going to take with ERA.

Thanks and regards

[23] Mr Ke sent another email to Ms Patel on Wednesday, 5 December at 10.29am. Mr Ke referred to issues about Ms Patel's performance including use of the internet, reading magazines and eating during working hours. The email ends as follows:

I wanted to give you 25 hours after the trial and see if you would improve yourself and performance. But now I'm not going to offer you any further contract. I will bring letters from Julie and Diana to the Department of Labor and ERA.

[24] Toward the end of December, the parties attempted to resolve matters between themselves, Mr Ke apologised in an email dated 27 December at 2.16pm for providing Ms Patel with a trial employment agreement three days before the trial term expired. However, the parties were unable to resolve their issues.

[25] Mr Ke accepted he had terminated Ms Patel's employment following the expiry of the trial period because of her "*poor performance*". The above emails confirm in my view that Ms Patel was dismissed by Kangnai on 4 December. The dismissal was confirmed by Mr Ke in his further email on 5 December.

Second Issue

Was Ms Patel's dismissal justified?

[26] Mr Ke claims he repeatedly warned Ms Patel about her performance, there was no improvement and so he was justified in terminating Ms Patel's employment during the 90 day trial period. Ms Patel says she never received any warnings, oral or written. Any issues, for example, the reading of magazines were sorted out at the time.

[27] There were a number of conflicts in the evidence between Mr Ke and Ms Patel. Findings of credibility are required.¹

[28] Credibility can be assessed by considering a number of factors including:

- Demeanour at the investigation meeting;
- Inconsistencies and contradictions;
- Prevarication;

¹ *RNZAF Museum Trust Board v Hunter* (Employment Court, Wellington WC11/00, 1 March 2000 at p 6.

- Reasons to lie.²

[29] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.

[30] Mr Ke was not credible. In support of his claim that Ms Patel performed poorly in the role and he was justified in terminating her employment, Mr Ke produced a letter of complaint from a customer which he says was about Ms Patel. The original letter was not provided, nor produced to the Authority by the relevant witness. The letter was not addressed to Mr Ke, to the Manager of *Aphrika* or to anyone at Kangnai, as one would expect if it was a complaint about service at a retail store. There was no reply to the phone number at the bottom of the letter. The letter stated;

To whom it may concern:

I bought a pair of shoes at aphrika, 59 Hight st, on the 5th November 2012. I thought I bought a pair of Bianca size 40 though having worn the shoes for approximately 6 weeks I found them to be different sizes; I had one size 40 and one size 39. The smaller size shoe caused me pain as well as my toe to swell which was when I realized the shoes were different sizes. I find this to be very unprofessional and would not expect this of a high end shoe shop. The sales assistant serving me on the day I bought the shoes I remember to be tanned and of Indian ethnicity. I would like a full refund for the pair of shoes as well as compensation for inconvenience. Please do not hesitate to ask any further questions and I look forward to hearing from you.

022...

Ellie Ding”

[31] Mr Ke’s evidence was inconsistent and contradictory about how he received the letter, about the number of meetings he had with the customer and where the meetings were held. Mr Ke’s responses when questioned about the similarities in the name of the customer “*Ellie Ding*” with that of his estranged wife’s English name of “*Ellie*” also caused me to doubt the genuineness of the letter. It is my view the letter of complaint by “*Ellie Ding*” is not genuine.

[32] Mr Ke was asked questions about his estranged wife’s English name and her involvement in the business. Mr Ke said he had little to do with his estranged wife from

² See *Brook v Macowan* [2013] NZERA Auckland 15 at pp 7-8.

whom he had divorced some time ago. Mr Ke claimed not to know some significant details about his estranged wife such as her English name being “*Ellie*” and where she attended High School. These details are on his former wife’s Facebook page but Mr Ke said he did not have a Facebook account and was not aware of these matters.

[33] The Companies Office records show that Kangnai Footwear Limited was incorporated under the Companies Act 1993 on 16 May 2011. Kangnai’s registered office is listed as 9 Janway Avenue, Flat Bush, Manukau 2016. Mr Ke and his estranged wife, Ms Ye Chen, are listed as joint shareholders. The addresses listed for both Mr Ke and Ms Chen as shareholders are the same as that for Kangnai’s registered office.

[34] Mr Ke is also sole director of a company called Ellie Felix Trading Limited (“Ellie Felix”) which was incorporated on 25 February 2013 and has its registered office at 9 Janway Avenue, Flat Bush, Manukau 2016, being the same as that of Kangnai. Ms Ke and his estranged wife who is listed in Ellie Felix’s company records as “*Ye Ellie Chen*” are joint shareholders. The addresses for both Mr Ke and Ms Ye are listed as 9 Janway Avenue, Flat Bush, Manukau 2016. Mr Ke and Ms Chen have a son whose English name is Felix.

[35] It is my view that Mr Ke is not a credible witness, he and his estranged wife as recently as February 2013 incorporated a company by the name of Ellie Felix of which they are joint shareholders.

[36] It is my finding that Mr Ke did not issue Ms Patel with any verbal or written warnings during the course of her employment by Kangnai. Mr Ke decided to provide Ms Patel with a written employment agreement on 26 November which was signed by the parties on 29 November. Mr Ke terminated the agreement on 30 November, one day after signing it. Mr Ke then attempted to reduce Ms Patel’s hours of work because of her alleged poor performance.

[37] The agreement appears to be for a fixed period. However, Mr Ke did not claim he had employed Ms Patel on a fixed term employment agreement. Even if Mr Ke had made such a claim, the agreement did not comply with section 66 of the Act.

[38] Section 66(6) of the Act says:

- (1) *An employee and employer may agree that the employment of the employee will end –*

- (a) *at the close of a specified date or period; or*
 - (b) *on the occurrence of a specified event; or*
 - (c) *at the conclusion of a specified project.*
- (2) *Before an employee and an employer agree that the employment of the employee will end in a way specified in sub-section (1), the employer must –*
- (a) *have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
 - (b) *advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*
- ...
- (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in sub-section (1), the employee’s employment agreement must state in writing –*
- (a) *the way in which the employment will end; and*
 - (b) *the reasons for ending the employment in that way.*
- ...
- (5) *Failure to comply with sub-section (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.*
- (6) *However, if the employer does not comply with sub-section (4), the employer may not rely on any term agreed under sub-section (1) –*
- (a) *to end the employee’s employment if the employee elects, at any time, to treat that term as ineffective; or*
 - (b) *as having been affected to end the employee’s employment, if the former employee elects to treat that term as ineffective.*

[39] Mr Ke did not comply with the provisions of s 66. Ms Patel was not told the reasons why her employment was to end on 30 November and there were no reasons specified in the agreement. Ms Patel by challenging Mr Ke’s actions in terminating her employment on 30 November elected in my view, to treat the ‘*fixed*’ term as ineffective.

[40] For similar reasons Mr Ke is not able to rely on the “*trial period*” in the agreement.

[41] Section 67A of the Employment Relations Act (the Act) provides as follows:

- (3) ***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 a dismissal.*

[42] It appears Mr Ke tried to rely on this provision of the Act. However, s.67 of the Act provides as follows:

- (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 probationary period.*
- ...
- (3) *... If the employer does not comply with subsection (1)(a), the employer may not rely on any term agreed under subsection (1) that the employee serve a period of probation if the employee elects, at any time, to treat that term as ineffective.*

[43] Ms Patel did not accept that Mr Ke could terminate her employment agreement and require her to accept employment at reduced hours following the expiration of the trial period. It is my finding that Ms Patel elected to treat the trial period in the written employment agreement as being ineffective. Further, even if the 90 day trial period was valid and complied with the Act, Mr Ke attempted to rely on the trial period after it had expired. The 90 day trial period specified in the agreement expired on 28 November, Mr Ke and Ms Patel signed the agreement on 29 November and Mr Ke terminated the agreement on 4 December.

[44] Mr Ke, while attempting to rely on the trial period in the written employment agreement, did not give Ms Patel any reasons for terminating her employment. Ms Patel was not aware until she challenged Mr Ke about his actions that he had any concerns over her performance. It is my finding that no warnings were issued by Mr Ke to Ms Patel and her performance was not a matter raised by him when terminating Ms Patel's employment at the expiration of the "trial" period. Ms Patel was a permanent employee of Kangnai.

[45] I have found that Ms Patel was dismissed. I have also found that Kangnai could not rely on the agreement being for a fixed term and could not rely on the trial period.

[46] Kangnai must establish that its dismissal of Ms Patel was justified. The statutory test for justification is contained in s.103A of the Act. That section states:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *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.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
 - (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[47] Those provisions were considered by the Full Court in *Angus v Ports of Auckland Ltd*³. The Court emphasised that the role of the Court is not to substitute its view for that of the employer, it is to assess on an objective basis whether the actions of the employer fell within the range of what the fair and reasonable employer could have done in all the circumstances at the time.

[48] It is my finding, that Mr Ke terminated Ms Patel's employment without giving her any reasons at the time. Even if Mr Ke did inform Ms Patel that the reason for terminating her employment was because of her poor performance, her actions would hardly justify dismissal in my view. It is my finding that Ms Patel was unjustifiably dismissed by Kangnai.

Third Issue

Remedies

[49] Ms Patel's evidence was that Mr Ke's actions in dismissing her were "*very upsetting, stressful and now very depressing ...*" Ms Patel says that she was financially affected by the dismissal, she had no income, was unable to pay her student loan and other expenses which caused her embarrassment. Ms Patel says that she applied for a number of jobs but the time of year made it difficult for her to obtain employment which caused her further hurt and humiliation and financial stress.

[50] I consider an award of \$6,000 appropriate to compensate Ms Patel pursuant to s123(1)(c)(i) of the Act for the humiliation, loss of dignity and injury to feelings she suffered as a result of her unjustified dismissal.

[51] Ms Patel suffered a loss of remuneration from the date of dismissal on 4 December 2012 until she obtained a new job on 14 February 2013. This totals 52 working days at 8 hours per day at \$16 gross an hour. This totals \$6,656 gross. Ms Patel is entitled to lost remuneration of \$6,656 gross pursuant to s.128(2) of the Act.

[52] Ms Patel is entitled to interest on the loss of remuneration above of \$6,656 gross pursuant to Schedule 2, clause 11(1) of the Act. Interest as prescribed by the Judicature Amendment Act 1908 is 5% per annum and will accrue, due from the date of this determination until Kangnai reimburses Ms Patel for loss of remuneration.

³ [2011] NZEmpC 160, (2011) 9 NZELR 40.

[53] Ms Patel was not paid holiday pay. I order Kangnai to pay Ms Patel holiday pay at a rate of 8% of remuneration earned by Ms Patel from 30 August 2012 and up until the date of dismissal on 4 December.

Contribution

[54] Having determined Ms Patel has a personal grievance claim, s.124 of the Act requires me to assess whether she contributed to the situation which gave rise to her grievance and if so, reduce remedies accordingly. Contribution denotes blameworthy conduct by the employee which must be proved on the balance of probabilities.

[55] I do not consider Ms Patel engaged in blameworthy conduct. Remedies will not be reduced.

Costs

[56] Ms Patel, as the successful party, is entitled to a contribution to her actual costs. A memorandum as to costs is to be filed by Ms Patel within fourteen days from the date of this determination. Mr Ke is to file a memorandum as to costs in reply within fourteen days of receipt of Ms Patel's memorandum as to costs.

Anna Fitzgibbon
Member of the Employment Relations Authority