

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 115  
5588476

BETWEEN                      ASTHA SINGH  
   Applicant  
  
AND                                ORA HQ LIMITED  
   Respondent

Member of Authority:        Robin Arthur  
  
Representatives:             David Luttig, Advocate for the Applicant  
   Christine Jonscher, Advocate for the Respondent  
  
Investigation Meeting:      14 April 2016  
  
Determination:                15 April 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Astha Singh was employed by Ora HQ Limited (Ora) as a Quality Insurance Tester on 13 July 2013. Seventy-eight days later, on 28 September 2015, she was dismissed under a 90-day trial period provision in her employment agreement.

[2] There was no dispute over whether Ora had met the requirements under s 67A and s 67B of the Employment Relations Act 2000 (the Act) to employ Ms Singh on such a trial period. She had not previously worked for Ora. She was provided with Ora's proposed agreement (including a trial period) in the week before she started work, had the opportunity to seek advice about its terms, and had signed the agreement before she began the job.

[3] What was at issue was whether Ora had complied with one of the conditions of the trial period set by clause 28.6 of its employment agreement with Ms Singh:

The Employer is not required to give you reasons for your dismissal but, in good faith, will advise you as early as practicable if the trial period is not going well.

[4] The standard form of employment agreement Ora now uses to employ new staff no longer includes a clause referring to early advice about the trial period not going well. It was however part of its contractual obligations with Ms Singh.

[5] While Ms Singh was prohibited by s 67B(2) of the Act from bringing a personal grievance in respect of her dismissal under the trial period, she was permitted by s 67B(3) to raise a personal grievance about whether she was unjustifiably disadvantaged before the dismissal. She raised such a grievance on the basis that Ora had disadvantaged her by not giving her the early advice promised by clause 28.6.

[6] In making the decision to terminate Ms Singh's employment agreement under a valid trial period, Ora was not required to comply with statutory good faith obligations found at s 4(1A)(c) of the Act. Those provisions require an employer proposing to make a decision likely to adversely affect a worker's employment to give the worker information about that proposal and an opportunity to comment on the information before the employer makes a decision.

[7] However Ms Singh's personal grievance application concerned the period before such a proposal and such a decision. In those circumstances the general duty of good faith applied.<sup>1</sup> That duty required both her and Ora to be productive, communicative, active and constructive in maintaining a productive employment relationship. Both parties were required not to do anything likely to mislead or deceive the other.

[8] Clause 28.6 of the agreement expressly recognised that obligation with its promise to advise her if the trial period was "not going well". Ms Singh said she was given no such advice, verbally or in writing, at any time before she was called to a meeting and dismissed on 28 September 2015.

[9] Ora denied the allegation. It said Ms Singh received feedback about her performance and areas of improvement on various occasions from her initial manager Andrew Wood. The feedback was said to have been largely verbal, delivered in 'stand up' meetings of the development team with which Ms Singh worked and in some one-on-one meetings with Mr Wood. Ora also produced some emails that were

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<sup>1</sup> Employment Relations Act 2000, ss 4(1) and 4(1A)(a) and (b). See *Smith v Stokes Valley Pharmacy (2009) Limited* at [69].

said to show Ms Singh was advised of where she had not met expectations, misunderstood instructions or not followed processes discussed with her.

### **The Authority's investigation**

[10] In investigating Ms Singh's personal grievance application I received written witness statements from Ms Singh, her husband Pankaj Singh, Mr Wood and Ora's Chief Technology Manager who dismissed her, David Agent. At the investigation meeting Ms Singh and Mr Agent gave further oral evidence in response to questions from me and the parties' representatives. Mr Wood, who no longer works for Ora, answered questions over a Facetime connection.

[11] The representatives also had the opportunity to make submissions on the facts and issues for determination. After hearing those submissions I gave an oral indication of preliminary findings. As permitted by s 174B of the Act the indication gave what I considered would be my "likely conclusions". Those conclusions are subject to the Authority reflecting on the evidence heard and the submissions made. In this case this written determination has confirmed my preliminary indication of a conclusion that Ora breached Ms Singh's terms of employment so that she suffered an unjustified disadvantage. However, on reflection, I have reached a different conclusion about the appropriate remedies from that expressed in the preliminary indication. The result is to the same effect, requiring a payment of an amount of money to Ms Singh, but applies different aspects of the 'basket of remedies' available to the Authority than initially indicated at the conclusion of the investigation meeting.

[12] As permitted by s 174E of the Employment Relations Act 2000 (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.

### **The issues**

The issues identified for investigation and determination were:

- (i) Whether a reference to "full and final settlement" in a notice of termination signed by Ms Singh on 28 September 2015 had any effect on her ability to pursue her claim in the Authority?

- (ii) Whether Ora had met its good faith obligations, under clause 28.6 of the IEA and s4(1A) of the Act, during the course of Ms Singh's employment and, if not, was she unjustifiably disadvantaged by any breach of those obligations?
- (iii) If actions of Ora were found to have breached its contractual and statutory obligations to Ms Singh's unjustifiable disadvantage before her dismissal, what remedies should be awarded for the consequences of her personal grievance, considering:
  - (a) Lost wages (subject to evidence of reasonable endeavours by her to mitigate her loss); and
  - (b) Compensation under s123(1)(c)(i) of the Act (subject to evidence); and
  - (c) Pro rata payment of a bonus (subject to establishing Ms Singh would have had an entitlement to the bonus); and
  - (d) Compensation for loss of a "maternity leave" benefit (subject to establishing Ms Singh would have had an entitlement to such a benefit but for the circumstances of her grievance)?
- (iv) If any remedies were to be awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Singh that contributed to the situation giving rise to her grievance?
- (v) If a breach by Ora of good faith obligations was established, should a penalty be imposed for the breaches under s 134(1) and s 4A of the Act?
- (vi) Should either party contribute to the costs of representation of the other party?

### **The signed notice of termination**

[13] At the meeting in which she was dismissed by Mr Agent Ms Singh countersigned a notice of termination on 28 September 2015 that said she would be "paid out one week's notice" in accordance with the terms of her employment agreement. It included the following paragraph:

Please sign and return a copy of this letter to confirm your acceptance and understanding of this matter and that this letter is a full and final settlement of all matters between the parties arising out of their employment relationship and neither party shall have any claim against the other.

[14] Ora did not seek to assert the paragraph had any effect on Ms Singh's ability to bring her claim. The paragraph was however likely to mislead an employee, such as Ms Singh, invited to countersign such a notice at the end of a valid trial period. While such an employee could not pursue a grievance over their dismissal, in appropriate cases they still may have rights to pursue a grievance for disadvantage, discrimination or harassment suffered during their employment.<sup>2</sup> Similarly they may still pursue claims for wage arrears and proceedings on such grounds are not prohibited by s 67B(2) of the Act. The paragraph in Ora's notice letter was, in the form used in Ms Singh's case, contrary to the prohibition against contracting out of the provisions of the Act, including the personal grievance regime.<sup>3</sup> Such a form of words should not be used except for circumstances where an employment relationship problem is raised and is then genuinely resolved by way of a properly agreed and executed full and final settlement.

#### **Advice about progress of the trial period**

[15] Ora's statement in reply accepted Ms Singh had "entirely adequate" technical skills in the testing of software that she carried out in her role. However she was said to have lacked skills in face-to-face interactions with other people in the business and "showing pro-activeness and a high level of self-management". Mr Agent, who has dismissed Ms Singh on Ora's behalf, later provided her with a personal written reference in which he highly recommended her for employment and described her as "a team player and would make a great asset to any organization".

[16] Ms Singh's allegation, and the basis of her personal grievance of unjustified disadvantage, was that Ora had not been active, constructive and communicative in telling her that her trial period was not going well.

[17] If Ora was found not to have met the requirements of its contractual obligation to give Ms Singh early advice if her trial period was not going well, its actions were subject to the statutory test of whether that breach was what a fair and reasonable employer could have done in all the circumstances at the time.

[18] One specific provision of the statutory test closely matched the contractual obligation Ora had entered with Ms Singh. Ora's contractual obligation to advise Ms

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<sup>2</sup> Employment Relations Act 2000, s 67B(3).

<sup>3</sup> Employment Relations Act 2000, s 238.

Singh “as early as practicable if the trial period is not going well” was akin to the requirement referred to at s 103A(3)(b) of the statutory test for the employer to raise any concerns with the worker before taking any action.

[19] Ora’s actions could be found unjustified if the defects in what it did and how it did so were more than minor and had resulted in Ms Singh being treated unfairly.

[20] The statutory test put the onus on Ora to establish what it did was justified. To satisfy that onus Ora had to have sufficient, reliable evidence to persuade the Authority that, more likely than not, Ora had met its general good faith and particular contractual obligations to advise Ms Singh about any concerns over her progress or performance during the trial period.

[21] Ora did not have such sufficient, reliable evidence to establish it had provided the earliest practicable advice that her trial period was not going well. I relied on the written and oral evidence from Mr Wood and Mr Agent for that conclusion.

[22] Mr Wood said he told Ms Singh on 13 August 2015 that her employment was “on the line” or words to that effect. Ms Singh accepted he had done so. Mr Wood made the comment during a one-month review he conducted with Ms Singh. Their review conversation occurred on the street outside Ora’s offices because, according to Mr Wood, no meeting rooms were free inside building at the time.

[23] Mr Wood said he was “quite blunt” about Ms Singh’s employment because Ora had, at the time of their 13 August conversation, recently terminated his own employment close to the end of a 90-day trial period. His employment was later extended, and lasted for another two months, under a fixed-term agreement he had subsequently arranged with Ora’s CEO.

[24] However Mr Wood’s evidence only established that he had made a general point to Ms Singh that her employment was vulnerable during a 90-day trial period and had suggested ways she could improve her performance during it. It did not establish that he had advised her, on Ora’s behalf, that her trial period was not going well. Rather, as he described the situation in his witness statement, Ms Singh had “progressed reasonably well” in the first four weeks of her employment. What he told her on 13 August was about doing what she did better in order to be successful in the company, not that her trial period was not going well.

[25] In the following weeks Ora had problems associated with release of some software used internally in the business, which Mr Wood described as “a significant release failure” that occurred on 24 August. Ms Singh was subsequently more engaged in work on the test and release process to reduce the prospect of further such failures. Evidence from Mr Wood and some internal emails established that he and some colleagues became concerned Ms Singh was developing tests that were too slow and complex for Ora’s business requirements. During this period Mr Wood was not as directly involved with managing Ms Singh’s work but said he recalled “still having open positive feedback from her peers”. In his oral evidence he confirmed that after 13 August he had not broached the subject of Ms Singh’s trial period again with her.

[26] Mr Agent took up his role as Ora’s Chief Technology Officer on 10 August 2015 but he was not involved in directly managing Ms Singh. He said he relied on feedback from Mr Wood for impressions he formed of her work. He accepted Mr Wood’s evidence that Ms Singh would have received both positive and negative feedback in the course of her daily work. In response to the question of how Ms Singh would be able to discern from that whether her trial period was going well, Mr Agent suggested she could do so from looking at the quantity and patterns of such feedback. Asked what he considered would be required to meet Ora’s positive contractual obligation to provide her with advice as early as practicable, Mr Agent suggested that “would go as far as highlighting issues” in her work.

[27] Neither his evidence, nor that of Mr Wood, nor any supporting documents provided by Ora, established to the necessary evidential standard (of being more likely than not) that Ms Singh had negative aspects of feedback about her work sufficiently highlighted so that she would have known or should have known that her trial period was “not going well”. Ora had not given her the early advice, as soon as it was practicable to do so, of any such view.

[28] The failure to provide such ‘highlighting’ was to her disadvantage as it denied her the opportunity to properly understand and to attempt to remedy any perceived shortcomings in her work or how she carried it out. The omission was more than a minor defect of process because it deprived Ms Singh of the opportunity or chance of doing more or working differently in order to change perceptions of her work and how she did it. The result was she was treated unfairly.

[29] It was a set of circumstances similar to that found by the Employment Court in *Smith v Stokes Valley Pharmacy (2009) Limited*.<sup>4</sup> In that case the Court found a breach by the employer of an express term of the employment agreement, during a trial period, had unjustifiably disadvantaged the worker. The term in that particular agreement committed the employer to holding regular appraisal meetings so it could ensure the worker was “notified” on her “performance and any improvements”. Those meetings did not occur. The disadvantage found by the Court was that the worker was deprived of the opportunity to do her job to a standard that may have avoided her dismissal.<sup>5</sup>

[30] Ora, having made the contractual commitment it made to Ms Singh to provide her with early advice if her trial period was “not going well”, could not fairly and reasonably have failed to do so. The disadvantage to her was consequently unjustified.

### **Remedies**

[31] For her personal grievance of unjustified disadvantage Ms Singh sought remedies of lost wages, lost benefits, and compensation for hurt and humiliation.

#### *Lost wages*

[32] There was a difficult question over whether Ms Singh was entitled to lost wages for her personal grievance of unjustified disadvantage. It concerned whether her loss of wages related to the disadvantage, for which she was entitled to remedies having established her grievance, or related to the dismissal, which she was barred by s 67B(2) of the Act from bringing a grievance about and therefore also barred from access to remedies for such a grievance.

[33] As the disadvantage related to a breach of a contractual term, an assessment of damages was arguably open on a loss of an opportunity basis. However it would have required a calculation of the chances, in the counterfactual scenario of Ms Singh being given early advice as promised, that she would then have altered aspects of her work and how she did it that would have then changed Ora’s eventual decision to dismiss her. On the evidence available it was not feasible to make such an assessment.

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<sup>4</sup> [2010] ERNZ 253.

<sup>5</sup> Above at [119]. See also *Savage v Unlimited Architecture* [1999] 2 ERNZ 40 at 51 referring to the disadvantage of depriving an employee of the opportunity to produce a different outcome.

Neither was it necessary to do so given the award, explained later in this determination, of a penalty to be paid to her for the breach. The penalty addressed the harm done so no further remedy in damages was needed.

[34] However in respect of her lost wages claim, if it could have proceeded, Ms Singh's evidence was insufficient to support an award under s 123(1)(b) anyway. She was required to show she had made reasonable endeavours to seek other work. She produced documentary evidence of having applied for one job after her dismissal. In her oral evidence she said she had contacted other prospective employers but, after disclosing she was four months pregnant, had not got any job interviews. She had not sought short-term or agency work. But for her dismissal she had anticipated working for Ora through October, November, December 2015 and into January 2016 before stopping work in advance of her expected delivery date of mid-February. In those circumstances of having expected to keep working, she had to be able to do more to show she had attempted to mitigate her loss in at least that three month period following her dismissal if an order for lost wages was to be made (or could have been made in respect of the unjustified disadvantage claim alone). Arguably also the dismissal, which could not be challenged by law as unjustified, broke the causal chain for any subsequent loss of wages.

[35] On whichever analysis was adopted, the grounds for an award of lost wages were not established.

#### *Lost benefits*

[36] Ms Singh sought two elements of compensation relating to lost benefits – firstly, a bonus referred to in her employment agreement and secondly, the equivalent of paid parental leave payments that she would have qualified for if her employment with Ora had continued to mid-January 2016 or beyond.

[37] Ms Singh's employment agreement provided for a quarterly bonus if she was still employed at the time it fell due. Her employment ended by dismissal before the first quarter so she did not qualify for the payment. Loss of the bonus related to her dismissal, not her disadvantage, so compensation for it was not available for the established disadvantage grievance.

[38] Ms Singh's claim for the equivalent value of statutory parental leave payments she might otherwise have received in 2016 was too remote. It related to a circumstance that would have applied only if she had remained in Ora's employment by mid-January, that was a further three months after her trial period was due to have ended on 10 October 2015. It was described as a claim for compensation for loss of a benefit under s 123(1)(c)(ii) of the Act. However it could also be seen as a claim for reimbursement of what was said to be "other money lost" as a result of the grievance, allowed as a remedy under s 123(1)(b) of the Act. Such losses may be recovered beyond three months, at the Authority's discretion, under s 128(3) of the Act. I was not persuaded the loss was the result of the disadvantage grievance.

*Compensation for humiliation, loss of dignity and injury to feelings*

[39] Ms Singh gave evidence of having been shocked and surprised by her dismissal on 28 September 2015. She also said she was subsequently depressed and sought medical help. However both her feelings on 28 September and afterwards related to her dismissal and how it happened. They would be relevant to an award of distress compensation if she was found to be unjustifiably dismissed but such a claim and such a finding was not open to the Authority because Ms Singh, dismissed under a valid trial period, could not bring a personal grievance in respect of the dismissal.<sup>6</sup>

[40] Ms Singh gave no sufficient, specific evidence of humiliation, injury to feelings or loss of dignity that related to the failure of Ora to act in good faith and advise her as early as practicable that her trial period was not going well. What she did experience was related to her dismissal, not her established disadvantage grievance, so no award of distress compensation could be made.

*No reduction for contribution*

[41] As no remedies have been awarded to Ms Singh under s 123 of the Act in relation to her unjustified disadvantage grievance, no consideration of reduction of remedies under s 124 of the Act was required.

**Penalty for breach of good faith and breach of the employment agreement**

[42] The evidence, taken as whole, compellingly established that Ora breached clause 28.6 of its employment agreement with Ms Singh by not providing her with

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<sup>6</sup> Employment Relations Act 2000, s 67A(2).

advice as early as practicable that, in the view of her employer, her trial was not going well. It was a breach of good faith because such an omission was likely to mislead her about the true situation. Ora was liable to a penalty under s 134(1) of the Act for the breach.

[43] Ms Singh also sought such a penalty on the grounds of the breach of the statutory duty. I was not satisfied the evidence overall was sufficiently robust to establish the elements of deliberateness or intention needed to impose a penalty for failing to comply with the duty of good faith under s 4A of the Act.

[44] Factors for consideration in awarding a penalty under s 134(1) of the Act include the harm caused by the breach, the importance of deterring Ora and other employers from breaching terms of their employment agreements with workers, and Ora's culpability.<sup>7</sup> More specific factors, within those parameters, include the seriousness of the breach, whether it was one-off or repeated, the impact on the employee, the employee's vulnerability, remorse and the range of penalties in comparable cases.<sup>8</sup>

[45] Given Ms Singh was on a trial period and was deprived of valuable information that may have improved her prospects of her ongoing employment, she was particularly vulnerable and the harm caused to her was serious. The breach, of not providing advice, was repeated through the 78 days of her employment when there were multiple opportunities for Mr Wood and Mr Agent to properly 'put her in the picture' as to the particular risk to her prospects of ongoing employment. Ora was not remorseful in any way for the breach. It denied there was one. It was entirely responsible, that is culpable, for the situation. Considering the wide range of penalties, tailored to the particular circumstances of each case, I concluded a penalty of \$7000 was appropriate to mark the harm done to Ms Singh by Ora's breach and to deter both Ora and other employers from committing such breaches.

[46] Under s 136 of the Act the Authority may order the whole or any part of a penalty be paid to any person. Ms Singh suffered the harm caused by Ora's breach of its employment agreement with her. In those circumstances I concluded the whole of

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<sup>7</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 at [47]-[48].

<sup>8</sup> *Tan v Yang* [2014] NZEmpC 65 at [32].

the penalty of \$7000 that Ora must pay should be paid to her. The order to that effect has been recorded at the end of this determination.

### **Costs**

[47] The investigation meeting took around two-thirds of a day. Applying the Authority's usual daily tariff an award of \$2000 was an appropriate contribution by Ora to Ms Singh's costs of representation, along with reimbursement of the fee of \$71.56 paid to lodge her application in the Authority.

### **Orders**

[48] For the reasons given in this determination Ora must pay the following sums to Ms Singh for the breach of her employment agreement:

- (i) \$7000.00 as a penalty under s 134(1) and s 136(2) of the Act; and
- (ii) \$2000.00 as a contribution to her costs of representation; and
- (iii) \$71.56 in reimbursement of the fee paid to lodge her application in the Authority.

Robin Arthur  
Member of the Employment Relations Authority