

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 201
3014831

BETWEEN

ANGELA STOJANOVICH
Applicant

A N D

REMEMBRANCE FUNERALS
LIMITED
Respondent

Member of Authority: Peter van Keulen
Representatives: Paul Matthews, Advocate for Applicant
Investigation Meeting: 23 November 2017 at Christchurch
Submissions Received: 23 November 2017 for Applicant
Date of Determination: 23 November 2017

ORAL DETERMINATION OF THE AUTHORITY

This determination is a written record of an oral determination delivered on 23 November 2017.

- A. Remembrance Funerals Limited unjustifiably dismissed Angela Stojanovich.**
- B. In satisfaction of Ms Stojanovich's personal grievance Remembrance Funerals Limited is to pay Ms Stojanovich, the following amounts:**
 - a. \$15,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;**
 - b. \$2,076.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128(2) of the Employment Relations Act 2000.**

C. Remembrance has also failed to pay Ms Stojanovich her final pay and must pay Ms Stojanovich \$726.69 (gross) for wage arrears and holiday pay owing at the termination of Ms Stojanovich's employment.

D. Remembrance must pay Ms Stojanovich \$3,500.00 as contribution to her costs together with \$71.56 for the filing fee on her claim.

Employment relationship problem

[1] Remembrance Funerals Limited operated Poppy Funerals for a short period from around August 2016 through into 2017. Angela Stojanovich worked for Remembrance, in the Poppy Funerals business, from 23 January 2017 until 9 February 2017.

[2] Ms Stojanovich's employment came to an end when Jasmin Teague, a shareholder and director of Remembrance, called her on the morning of 9 February 2017. Ms Teague discussed an incident that had occurred the previous day and then concluded that Poppy Funerals was not for her and she might be better suited to working at a larger funeral business such as John Rhind. Ms Teague then terminated Ms Stojanovich's employment.

[3] Ms Stojanovich says that any dismissal could not have been justified, as there was no valid trial period provision to rely upon - the trial period provision not being valid as she signed her employment agreement after she commenced work – and there was no process followed by Remembrance in coming to the decision to dismiss. As a result of the unjustified dismissal she seeks compensation for the injury to her feelings and reimbursement of lost wages.

[4] The issues I must consider are:

- (a) Was there a valid trial period provision which prevents Ms Stojanovich from bringing an unjustified dismissal claim;

(b) If not, was Ms Stojanovich's dismissal justified, considering both the process that brought about the dismissal and the substantive basis for the decision to dismiss; and

(c) If the dismissal was unjustified, what remedies is Ms Stojanovich entitled to?

Preliminary matter

[5] The statement of problem in this matter was served on Remembrance by recorded deliveries to its registered office and the home address for its directors 18 July 2017.

[6] Despite being served with the statement of problem, Remembrance did not lodge a statement in reply.

[7] The Authority advised Remembrance by email, to the business email address for Poppy Funerals on 15 August 2017 that a case management conference would be held by conference call on 17 August 2017 at 9:30 am. This advice was also set out in a letter delivered to the registered office of Remembrance and the home address for the two directors.

[8] On 17 August 2017, the Authority called Ms Teague on her mobile telephone but she did not answer. As the Authority was unable to contact a representative for Remembrance and because it had not advised the Authority of its availability or who to contact, I decided that it did not want to participate in the conference call and proceeded without it.

[9] As a result of the conference call, I issued directions for an investigation meeting to take place on 24 November 2017.

[10] The directions were recorded in a notice of direction and notice of investigation meeting and these were served on Remembrance on at its registered office and the address of its directors on 25 August 2017. Both deliveries were signed for as being received, including one signed by Matthew Teague, the other director and shareholder of Remembrance.

[11] The notice of investigation meeting advised Remembrance of the investigation meeting and stated further that *“If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.”*

[12] The statement of problem, notice of direction, notice of investigation meeting and the witness evidence lodged on behalf of Ms Stojanovich were all delivered to Remembrance and its two directors by courier on 11 October 2017.

[13] Despite receiving all of the information that is relevant to this matter, Remembrance has chosen not to attend today and has not contacted the Authority to explain why it could not or would not attend. There was no apparent reason why this matter could not continue today in its absence. I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

Trial period provision

[14] Ms Stojanovich started working at Poppy Funerals on 23 January 2017. Remembrance did not have an employment agreement for Ms Stojanovich prior to her starting work nor was one presented to her on the morning she started. In fact, Remembrance only provided an employment agreement to Ms Stojanovich on 25 January 2017, which Ms Stojanovich signed on 26 January 2017.

[15] That employment agreement contained a trial period provision, which on the face of it complies with the requirements for trial period provisions set out at s 67A of the Act. However, s 67A(3) of the Act states that a trial period provision can only be entered into by an employee who has not been previously employed by the employer, i.e. a new employee. The Employment Court has made it clear¹ that where an employee signs an employment agreement after he or she commenced employment that employee is no longer a new employee for the purposes of s 67A and therefore the trial period provision is not valid.

¹ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 and *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152

[16] In this case, Ms Stojanovich signed the employment agreement three days after she commenced employment with Remembrance and was therefore not a new employee. As a result, the trial period provision is not valid and Ms Stojanovich is not prevented from bringing an unjustified dismissal claim.

Unjustified Dismissal

[17] For an unjustified dismissal claim there are two broad issues to consider:

- (a) Did the employer follow a fair disciplinary process in coming to the conclusion to dismiss; and
- (b) Was the decision to dismiss substantively justified?

[18] Sections 4(1A) and 103A of the Act inform the question of whether Remembrance conducted a fair disciplinary process. The matters I must consider are:

- (a) Did Remembrance investigate the issue it was seeking to take disciplinary action over, sufficiently;
- (b) Did Remembrance advise Ms Stojanovich of her rights in regard to any disciplinary process it was undertaking including the consequences of any adverse finding;
- (c) Did Remembrance then outline any allegation and give all the information it had that was relevant to the allegation to Ms Stojanovich for her to consider and respond to;
- (d) Did Remembrance give Ms Stojanovich a reasonable opportunity to respond to the information and the allegation;
- (e) Did Remembrance consider properly any explanation given by Ms Stojanovich before it made its decision that her performance justified dismissal;
- (f) If there were any failings by Remembrance in the steps outlined above, does that render the disciplinary process unfair?

[19] The issue I must consider on the question of substantive justification is was the gravity of the poor performance including any effects of it and the circumstances of the poor performance such that dismissal was a decision a fair and reasonable employer could have come to.

[20] It appears that Ms Teague had an issue with Ms Stojanovich's work on 8 February 2017. There was a misunderstanding between Ms Stojanovich and Ms Teague's mother, who was also working at Poppy Funerals, over who would do a certain task.

[21] The next day Ms Teague met with her mother to discuss the incident and then called Ms Stojanovich before she was due to start work. Ms Teague explained very little about the incident the day before and any issue she had with it. Ms Teague said that she hated to have to be the one to do this but they would have to let Ms Stojanovich go. Ms Teague then made some vague references to Ms Stojanovich being better suited to a larger funeral business where she may be able to learn embalming.

[22] Ms Teague concluded by asking Ms Stojanovich to return Remembrance's property later that morning.

[23] Ms Stojanovich went to Remembrance at 11:00 am and met Ms Teague. There was some discussion around the validity of the dismissal in terms of relying on a 90 day trial period provision and what actually occurred the day before. Ms Stojanovich rightly withdrew from that conversation as she was not properly prepared for it, for example, she did not have a support person with her.

[24] The end of that meeting confirmed Ms Stojanovich's summary dismissal.

[25] On this account of what occurred, which I accept, Remembrance has failed to follow a fair process:

- (a) It may have investigated the allegation of poor work performance but that was reasonably simple and potentially inadequate.

- (b) After that, it failed to advise Ms Stojanovich adequately of a pending disciplinary process, her rights in respect of that process and the consequences of any adverse finding.
- (c) It then failed to outline the issue to Ms Stojanovich properly, in particular explaining its concerns and why there was an issue. Remembrance also failed to provide the necessary information such as a statement from Mrs Teague about the work incident.
- (d) Remembrance then failed to give Ms Stojanovich a reasonable chance to consider the allegation nor did it give her a proper opportunity to respond to the allegation.
- (e) Finally, it did not consider any explanation Ms Stojanovich did provide.

[26] It is also the case that a one off incident regarding performance of work duties, particularly where there appears to have been a misunderstanding about who was responsible for the work, cannot justify summary dismissal.

[27] This is a clearly an unjustified dismissal.

Remedies

[28] As Ms Stojanovich has been successful with her grievance, I must consider what remedies, if any, she is entitled to.

Compensation

[29] First, I will consider compensation for humiliation, loss of dignity and injury to feelings pursuant s 123(1)(c)(i) of the Act.

[30] Ms Stojanovich gave evidence of the impact of the dismissal, as did her partner, Scott Curtis. The evidence shows that as a result of her dismissal:

- (a) Ms Stojanovich was angry, upset and felt betrayed by her dismissal;

- (b) She was very stressed for some weeks, with concerns over finding new work and financial worries which impacted on plans for her wedding and placed pressure on her relationship;
- (c) She became tearful and emotional, and she felt helpless and as if her world had crumbled around her;
- (d) Ms Stojanovich became depressed, describing this as a downward spiral. Although there is no medical evidence to support a clinical diagnosis of depression I am satisfied that this was reasonably severe, causing Ms Stojanovich to withdraw from those around her and avoid going out;
- (e) She also felt let down by Remembrance, and distraught at how she had been treated not just when dismissed but after that when she struggled to get her personal belongings returned, failed to get paid and received many assurances of resolution of these issues that were never met.

[31] I accept that Ms Stojanovich was only employed for a short period of time and was able to find new employment relatively quickly but the evidence of the impact on her was clear, credible and compelling. I accept that Ms Stojanovich suffered severely from the unjustified dismissal.

[32] Based on the evidence and the recent guidance from Chief Judge Inglis in *Waikato District Health Board v Kathleen Ann Archibald*², I assess compensation for humiliation, loss of dignity and injury to feelings pursuant s 123(1)(c)(i) of the Act to be \$15,000.00.

Reimbursement

[33] Second, pursuant to s 123(1)(b) of the Act I may provide for reimbursement to Ms Stojanovich of any wages or other money she has lost as a result of her grievance.

² [2017] NZEmpC 132

[34] If I am satisfied that Ms Stojanovich did lose remuneration because of her grievance, pursuant to s 128 of the Act I should award the lesser of three months ordinary time remuneration or her actual loss.

[35] Ms Stojanovich was without work for just under three weeks so she has lost remuneration because of her grievance. Ms Stojanovich's actual loss was \$2,076.00 (gross). This is less than three month's ordinary time payment so I award her this amount.

[36] Ms Stojanovich did not receive her final pay due to her in the sum of \$519.00 (gross) plus holiday pay of 8% on her total earnings which I calculate to be \$207.69 (gross). So, I also award Ms Stojanovich \$726.69 (gross) for wage arrears and holiday pay.

Contribution

[37] Finally, pursuant to s 124 of the Act I must consider whether Ms Stojanovich contributed to her grievance in such a way that I should reduce the remedies that I have awarded.

[38] When assessing if Ms Stojanovich's actions contributed to the situation that gave rise to her grievance I am looking for a causal link between her actions and the situation that gave rise to her dismissal. If I am satisfied that there is a link then I must consider whether the behaviour was culpable or blameworthy, which would require a reduction in remedies³.

[39] There are no actions here by Ms Stojanovich that contributed to her grievance and no reduction is required at all.

Costs

[40] As Ms Stojanovich has been successful in her claim, she is entitled to a contribution to her costs. My starting point is to apply the daily tariff and then

³ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

consider whether this should be adjusted based on the principles in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*⁴, and *Davide Fagotti v. Acme & Co Ltd*⁵.

[41] The investigation meeting took a half day so the starting point is \$2,250.00 being half of the applicable daily tariff.

[42] I am prepared to raise the daily tariff because there was an offer of settlement that Ms Stojanovich bettered in this determination and because there was an acceptance by Remembrance of offers made by Ms Stojanovich on two occasions creating two separate agreed settlements of this matter that Remembrance failed to honour. This represents two things, first Remembrance accepts some obligation toward Ms Stojanovich in terms of her claim – possibly even an admission of liability – and second, despite this it failed to pay on the agreed terms causing Ms Stojanovich to have to pursue this matter through the Authority and incur costs that should have been avoided.

[43] I will raise the tariff so that Remembrance must pay \$3,500.00 as a contribution toward Ms Stojanovich's costs. Ms Stojanovich is also entitled to receive the filing fee for her statement of problem, being \$71.56.

Determination

[44] Remembrance unjustifiably dismissed Ms Stojanovich.

[45] In satisfaction of Ms Stojanovich's personal grievance Remembrance is to pay Ms Stojanovich, the following amounts:

(a) \$15,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and

(b) \$2,076.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128(2) of the Employment Relations Act 2000.

⁴ [2005] 1 ERNZ 808

⁵ [2015] NZEmpC 135

[46] Remembrance has also failed to pay Ms Stojanovich her final pay and must pay Ms Stojanovich \$726.69 (gross) for wage arrears and holiday pay owing at the termination of Ms Stojanovich's employment.

[47] Remembrance must pay Ms Stojanovich \$3,500.00 as contribution to her costs together with \$71.56 for the filing fee on her claim.

Peter van Keulen
Member of the Employment Relations Authority