

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 72/09
5098983

BETWEEN YURINDA VAN DER BEL
 Applicant

AND KIDS ART SPACE LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Michael McFadden, advocate for Applicant
 No appearance for Respondent

Investigation Meeting: 26 February 2009

Determination: 6 March 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the personal grievance claim Ms Yurinda van der Bel raised with her employer Kids Art Space Limited after the company terminated her employment in August 2007. Her claim is that she was unjustifiably dismissed.

[2] The employer did not attend the Authority's investigation meeting, formal notice of which had been served on the company and its directors Mr Alan Blackwell and Ms Noeline Rachinger.

[3] Mr Blackwell responded with advice that he and Ms Rachinger had no intention of returning from the USA for the investigation. He asked that the Authority consider written submissions earlier provided setting out a defence to the claim. Mr Blackwell also advised that Kids Art Space Ltd had stopped trading and had no assets.

[4] The regulatory Notice of Investigation Meeting warns that if a respondent party does not attend an investigation meeting the Authority may without that party's evidence issue a determination in favour of the applicant party, who in this case is Ms van der Bel.

[5] She and her fiancé attended the investigation meeting with Mr McFadden an advocate, and they provided information to the Authority in support of the application. Although they were unsupported by any evidence, the written submissions earlier made by Mr Blackwell have been considered.

[6] From all the Authority has been given I find that Ms van der Bel was employed from 30 July 2007 to be a PA to Mr Blackwell and Ms Rachinger, on a salary of \$50,000. She worked for Kids Art Space Limited for only three weeks until 22 August 2007, when she was called to meet Mr Blackwell who abruptly dismissed her without any notice.

[7] Ms van der Bel had found the new job arduous to begin with and acknowledges that some performance issues were raised with her by email on 20 August 2007. She was also asked to attend a meeting that afternoon at 4pm, but this was later cancelled by Mr Blackwell. Ms van der Bel says that the meeting had not been notified as being a disciplinary one and that after its cancellation she tried to have it take place at another time.

[8] On the following day she was required to arrange for a DVD to be couriered from the company's office but was not told that the delivery needed to be in the morning. Consequently, after she had dealt with it in the afternoon, she received an email expressly warning her about the delayed delivery. Ms van der Bel states that this email came out of the blue without a hearing and therefore without her being given a chance to explain what had happened.

[9] The next day, 22 August, she was called to meet with Mr Blackman who almost straight away summarily dismissed her. She believes the circumstances leading up to this were that the day before she had been required to write letters with unique identifier codes printed on them, for posting out to prospective clients. In producing the letters displaying the data given to her, she found that the font of the code was not clear and she accidentally typed the numeral 1 instead of the letter I onto

some of the letters. She did not notice this difference when comparing what she had typed with what was on a spreadsheet the codes were taken from.

[10] When she met Mr Blackwell the following day he questioned her about the mistake and Ms Van der Bel explained what had happened. Mr Blackwell then said that the employment relationship was not working out and could not continue. He asked Ms van der Bel to pack her things and leave, which she did before 10am that day.

[11] Since the dismissal Mr Blackwell has claimed that Ms van der Bel misrepresented her qualifications and experience when she applied for the PA position. The CV she supplied with the job application however made no reference to her having been employed in that position but shows her prior experience as being mainly in sales and administration. Ms van der Bel says that to her knowledge Mr Blackwell did not contact any of her referees for a check before she was employed. I find there was no deceit on the part of Ms van der Bel in obtaining the PA position.

[12] There is no suggestion from the employer's written submissions that there was some form of misconduct by Ms Van der Bel during her brief period of employment that led to her dismissal. Any problems in the employment relationship were performance issues.

[13] I am satisfied that under s 103A of the Employment Relations Act 2000 the dismissal was unjustified. In particular there was no compliance or attempt at compliance with the term of the written employment agreement that provided for a trial period of three months from the date of commencement, 30 July 2007. As stated in that comprehensively worded provision, the purpose of the probationary period was to allow the employer an opportunity to assess the suitability of the employee over the term of it.

[14] The Trial Period clause further provided:

The employer will raise with the employee any concerns it has about the employee's performance or conduct during the probationary period. The employer will identify clearly the areas of concern and the improvement required. The employer will give the employee a chance to respond to this, and a reasonable time to make the required improvements. The employer will provide reasonable assistance and support to assist the employee to improve.

If the employee fails to make the required improvements the employee may be terminated at the end of the probationary period. Before the employer makes any decision about this, it will advise the employee of how their performance or conduct is considered unacceptable and give them an opportunity to take advice and make representations to the employer.

If the employer terminates the employment at the end of the probationary period 1 week notice period shall be given. Either party can terminate the employment during the probationary period in which case one week's notice of the termination of employment shall be given.

Determination

[15] The ability of the employer to terminate during the trial or probation period must obviously be read as being subject to the earlier requirements of the provision being met.

[16] In a number of significant respects the Trial Period provision of the employment agreement was breached by Ms van der Bel's employer, whose actions were not therefore those of a fair and reasonable employer. The trial was curtailed prematurely before Ms van der Bel was offered assistance and given a reasonable time to improve her performance.

[17] I find that the dismissal was unjustified and Ms van der Bel is entitled to the remedies available to an employee under the Act in bringing a successful claim of personal grievance. She has claimed to recover lost earnings and compensation, under s 123.

[18] The claim for lost earnings is for six months' salary less Ms van der Bel's actual earnings during that period. Compensation of \$15,000 is claimed.

[19] When Ms van der Bel lodged her application with the Authority she sought compensation for income lost over a period of three months after the dismissal, but she later amended the claim upwards to six months.

[20] The sudden dismissal after only a short time in the position was a shock to Ms van der Bel when she had committed to the new job by putting in very long hours. She also worked in her new PA position at night while finishing the period of notice given to her previous employer.

[21] There were severe consequences to her health from the sudden dismissal, which required Ms van der Bel to seek treatment for the condition she developed and which prevented her from working for a number of weeks afterwards.

[22] In my view the amount that is to be awarded for lost wages must take some account of the probationary period that Ms van der Bel had been subject to at the time of the dismissal. She had worked for three weeks by that date. It is possible that if the employer had genuine concerns about her performance and if it had addressed those properly under the agreement, the employment might have been terminated justifiably at the end of the three month probationary period and might not have lasted for six months.

[23] Although through her illness Ms van der Bel could not work for several weeks, her medical condition was I find directly caused by the dismissal which was carried out in a way lacking fairness and justice. The illness did not arise from an existing condition or was one she was predisposed to suffer. Wages were therefore lost by her directly as a result of her grievance and she is entitled to recover those under s 123(1)(b) of the Act. I fix the amount as three months ordinary time remuneration in accordance with s 128(2) of the Act. From this must be deducted \$2,572 earned from contract work in November 2008. The total amount to be paid for lost wages is \$9,928.

[24] The serious affects of the dismissal on her health for several months undoubtedly increased the distress suffered by Ms van der Bel as a consequence of being unjustifiably dismissed. She was unable to work or function normally. For this harm I fix \$7,000 as compensation under s 123(1)(c)(i) of the Act.

[25] Kids Art Space Limited is therefore ordered to pay those amounts. Costs will be reserved for Mr McFadden to notify the Authority of any claim in that regard.