



and a new manager was accordingly required. The head chef, who was also in charge of the bar/restaurant, was required to engage a replacement. He hired Ms Walsh, in what was said to be an ongoing job for 40-60 hours per week. Ms Walsh commenced on 9 December, but it was not until 19 December that she signed an individual employment agreement, which contained amongst other things, a three week probationary period.

[3] Despite only becoming aware of the condition after she started, Ms Walsh accepted that when she signed the employment agreement she knew that there was a risk that her employment might end at the conclusion of the probationary period, but she did not consider it a real risk because she had already been working for 10 of the 21 days involved and had been receiving only positive feedback on her performance from the head chef.

[4] There is no doubt that the employment agreement was backdated to the commencement of her employment because although Mr Reipen signed the agreement and dated it 9 December, he was overseas at that time.

[5] Other relevant terms of the employment agreement included that Ms Walsh was to be paid \$18 per hour for work on roster, which was expected to vary between 40 and 60 hours per week. Clause 9 of the employment agreement provides a formal disciplinary procedure to deal with substandard performance or misconduct. Clause 9(c) provides that:

*Before any warning or dismissal, we will meet with you to discuss the concerns or problem. You have the right to bring a representative with you to this meeting and any other subsequent meeting.*

[6] Unfortunately for Ms Walsh, when Mr Reipen returned from holiday just before Christmas, he took a near instant personal dislike to her. In his evidence he stated that when he first saw her working he did not like the standard of her work and that he didn't like her, noting that this was his personal feeling. This was apparent to Ms Walsh from when she first went to introduce herself to Mr Reipen, who declined even to shake her hand when proffered.

[7] Mr Reipen approached the head chef and asked him why he had employed her and advised that he did not like her. The chef's response was that she was a good worker. When the head chef informed Mr Reipen that Ms Walsh was on a

probationary period Mr Reipen asked him to cancel the contract, which he believed was his right as the employer.

[8] On 23 December Ms Walsh was handed a letter by a junior staff member, which stated (verbatim):

*We hereby give you notice that the abovementioned contract will expire on 30 December 2008 as your notice period will start on 23 December 2008 and will determine on 30 December 2008 at Mountain House, Stratford.*

[9] In the week before she left Ms Walsh approached Mr Reipen and asked him why she had been sacked. His response was that he didn't know. In his evidence Mr Reipen gave the reasons as above, but also added that he had been told by another worker that Ms Walsh had asked that other worker to add hours to her time sheet as she (Ms Walsh) herself had done, because Mr Reipen would never find out about it. That worker, like the chef, was not called to give evidence, as either Mr Reipen could not contact them and/or did not want to involve them.

[10] It was Ms Walsh's evidence that the other worker had applied for her job and having been unsuccessful was simply making trouble. Given that it is a serious allegation to make against Ms Walsh and there is no direct evidence in support of it, I conclude, on the balance of probabilities, that the complaint has not been made out. In any event, it was not the reason for the termination of Ms Walsh's employment. That reason was Mr Reipen's reaction to Ms Walsh when he first observed her work, and his belief that he could cancel the agreement without any involvement with Ms Walsh, or reference to her.

### **Determination**

[11] Clearly this is an unjustified dismissal. The law at the time permitted employees and employers to enter into probationary periods, but made it clear that the law relating to unjustified dismissal is not affected where the employer dismisses an employee at the end of the probationary period in reliance on it. This has always been the law in any event.

[12] In *Slater v. Smith* [1994] 1 ERNZ 869 at 872 it was held:

*What did the parties intend by their agreement to a trial period?  
They meant that Mr Smith and his work would be assessed during and*

*at the conclusion of that period. They intended that if it was regarded as unsatisfactory at the end of the time or it was otherwise open to be terminated for cause during the period, this would be the employer's decision and might occur at that time. But it cannot be implied into the employment contract that such a decision might be made by the employer by exercise of a completely unfettered discretion or arbitrarily in abrogation of even the most basic entitlements of fairness, objectivity, and reasonableness.*

*The parties had an employment contract. Decided cases are all clearly to the effect that implied terms of fair process, now well established, apply as much to the trial or probationary periods of such contracts as they do after their expiry. The detail or stringency of such implied requirements may differ in cases of trial periods but I reject the notion that an employer may, without more, summarily and unilaterally terminate the contract either during the trial period, as here, or at its end.*

[13] The parties' agreement provides for a disciplinary process in clause 9. Mr Reipen ignored that because of his incorrect understanding that he was entitled to simply terminate the agreement at the end of the probationary period without any reference to Ms Walsh.

[14] Therefore the law and the employment agreement require that before reliance is made on the probationary period as a way of justifying dismissal, as held in *NZ (with exceptions) Food processing etc IUOW v. Unilever* [1990] 1 NZILR 35, there must be:

- (a) notice of the specific allegation and its likely consequences; and
- (b) a real opportunity for explanation; and
- (c) an unbiased consideration of such explanation.

[15] In this case, Mr Reipen made no effort whatsoever to involve Ms Walsh in the process that led to Mountain House terminating her employment at the end of the probationary period. To the contrary, apart from the reaction from Mr Reipen at the time he first met Ms Walsh, Ms Walsh had no reason to consider that her employment was at risk. She had received nothing but positive feedback from her direct boss, the head chef.

[16] Furthermore, other than Mr Reipen's initial reaction about the standard of her service and his personal impression of her, there was no good cause to terminate Ms Walsh's employment. Mr Reipen simply took an instant dislike to Ms Walsh and given that he would not have employed her if he had been involved in the

appointment process, together with his belief that he could terminate her employment without any comeback during her first three weeks, he proceeded to unjustifiably dismiss her.

[17] There was no good cause in law that would permit him to do so, especially as Ms Walsh's direct boss, the head chef, was happy with her work. Ms Walsh had already been employed by his company whether Mr Reipen liked it or not. Mr Reipen had an opportunity to deal with his concerns in the proper way, through the provisions of clause 9(c) of the agreement, but through ignorance of the law did not do so.

### **Remedies**

[18] Ms Walsh was unable to get another job until 9 February 2009. She was in effect paid until 5 January 2009. She was therefore off work for five weeks without any income other than the unemployment benefit, which she may now have to account to the Department of Social Welfare over. She then got a new job at \$12.20 per hour, until her rate was increased to \$12.50 per hour on 1 April.

[19] Subject to mitigation and contributory fault, the law requires the minimum reimbursement of lost remuneration resulting from the grievance, or for three months ordinary time remuneration. During her five weeks out of work, at a minimum of 40 hours per week, Ms Walsh lost \$5,040.00 gross. In the period until 1 April she lost a further \$2,320 (being the difference between \$12.20 and \$18.00 per hour). Finally, for the few days in April completing the three month period, she lost a further \$220.

[20] Lost remuneration over the three month period is therefore \$7,580.00. I am satisfied that the remuneration lost by Ms Walsh was as a result of her grievance. She had no reason to consider that her employment would end at the conclusion of her probationary period and therefore she had a reasonable expectation that it would continue on for at least another three months. I decline to order lost remuneration for any further period because of the short period of her employment and the possibility that her employment at Mountain House would not have been long lasting.

[21] Ms Walsh was significantly affected by this dismissal, which came out of the blue without her being involved in the process at all, as she should have been. She was shocked to receive a letter from a junior member of staff simply terminating her employment on a week's notice. During that period Mr Reipen would not engage with her as to the reasons for the dismissal.

[22] Ms Walsh has since been given various reasons why her employment ended, yet it appears that it was simply a matter of personal dislike by Mr Reipen, who would not have hired her in the first place. Those other reasons have not been able to be substantiated in evidence before the Authority, despite every opportunity being given to Mr Reipen to do so. To his credit he withdrew one of the reasons that involved alleged misconduct by Ms Walsh at the investigation meeting and openly stated that it was his choice, because he took an instant dislike to her and would never have employed her.

[23] Ms Walsh's evidence was that her Christmas had been ruined. She could not stop crying and felt utterly demoralised. She has been forced to take a position at a lower rate of pay that is not in her preferred field, the hospitality sector. She had never been sacked before and after many years of working she now has to travel a great distance to do a job with less pay and less responsibility.

[24] I conclude that she has been significantly impacted by this dismissal, which came out of the blue and it has affected her greatly, knocking her confidence and impacting negatively on her financial security.

[25] Compensation of \$6,000 is therefore appropriate given the impact on Ms Walsh, even when taking into account the short length of her employment as a mitigating factor.

[26] The Authority must also consider the extent to which the actions of Ms Walsh contributed towards the situation that gave rise to the personal grievance, and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[27] In this case there was nothing Ms Walsh could have done about Mr Reipen's near instant dislike to her. She had been taken on by the head chef (who she reported to directly) and had met all his expectations. There was, as noted above, one allegation Mr Reipen made against Ms Walsh that allegedly took place during her employment, which was very serious and would have justified dismissal if proven after a proper investigation. However in this case it is not clear whether Mr Reipen relied on that allegation at the time, or whether it came to his attention later. Furthermore, if it had come to his attention before he decided to dismiss Ms Walsh, he never put it to Ms Walsh for any comment or explanation.

[28] At the investigation meeting Mr Reipen accepted that the allegation was simply hearsay from another worker, whom he had not had any recent contact with and did not wish to try and contact to involve her by way of giving evidence. Ms Walsh denied the allegation and gave a reasonable explanation as to why the person making it may have been motivated by malice. I therefore can not take that issue into account as the allegation has not been proven.

[29] It therefore follows that there is no grounds for reducing any remedies awarded to Ms Walsh.

[30] Ms Walsh has also incurred the cost of a filing fee of \$70, which she is entitled to claim for.

### **Conclusion**

[31] Ms Walsh was unjustifiably dismissed by the Mountain House without good cause and in mistaken reliance on the probationary period clause in the parties' employment agreement.

[32] I therefore order the respondent, Mountain House Adventures Ltd, to pay to the applicant, Ms Therese Walsh, the following sums:

- \$7,580.00 gross in lost remuneration;
- \$6,000 in compensation; and
- \$70 in expenses.

**G J Wood**  
**Member of the Employment Relations Authority**