

(b) **\$1,728 gross in lost remuneration under s128 of the Act.**

D. Costs are reserved.

Employment relationship problem

[1] The applicant, Ms Kelly Welch, was employed by Auckland Glass Limited (Auckland Glass) from 19 April 2017 until 4 May 2017.

[2] Ms Welch says she did not like the work environment and found the managing director, Mr Mac Paki, moody and unapproachable. After a week with Auckland Glass, Ms Welch decided to look for another job.

[3] Ms Welch resigned from Auckland Glass on 2 May 2017 giving two weeks' notice of her resignation. On 4 May 2017, Mr Paki decided to "release" Ms Welch from her employment at Auckland Glass before the expiry of her notice period, on the grounds she had committed "an act of serious misconduct" and had caused "damage to the business of the company".

[4] The letter from Mr Paki concluded by stating "I will be happy to attend a hearing when required".

[5] Ms Welch says she was not told what the "serious misconduct" was despite asking. Ms Welch was escorted off the premises in front of the other staff which she says was extremely humiliating.

[6] Ms Welch says she was dismissed by Auckland Glass while she was working out her 2 week notice period and that the dismissal was unjustified. Ms Welch seeks remedies accordingly.

Reply from Auckland Glass

[7] Auckland Glass denies dismissing Ms Welch. It says Ms Welch resigned. It decided not to require her to work out her notice period which it was entitled to do. Auckland Glass elected to release Ms Welch prior to the expiry of her notice period because it was concerned about the security of its client information and Ms Welch's interference with it.

[8] Auckland Glass says even if it did dismiss Ms Welch, she is barred from bringing a personal grievance claim against it because the employment agreement she signed contained a valid trial period under s.67A of the Act.

Investigation Meeting

[9] As permitted under s.174E of the Act, this determination has not set out all the evidence required. The determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

[10] The investigation in the Authority took almost one full day. Ms Kelly Welch filed a witness statement. For Auckland Glass, Mr Mac Paki, the managing director, Ms Janie Tong, the accountant/Mr Paki's secretary and Ms Nancy Stasis, supervisor each filed a witness statement.

[11] Each witness confirmed on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

Issues

[12] The issues for the Authority to determine are as follows:

- (a) Was Ms Welch dismissed by Auckland Glass?
- (b) If Ms Welch was dismissed was it unjustifiable?
- (c) If Ms Welch was unjustifiably dismissed is she barred from bringing a claim because her employment agreement contained a valid trial period under s.67A of the Act?
- (d) If the trial period was not valid, and Ms Welch was unjustifiably dismissed, what remedies is she entitled to?

First Issue

Was Ms Welch dismissed by Auckland Glass?

Application for job at Auckland Glass

[13] On about 10 March 2017, Ms Welch saw an advertisement on the internet recruitment website SEEK¹ for a sales position at Auckland Glass. Ms Welch applied for the role, and following telephone discussions and interviews with the managing director, Mr Paki, was offered and accepted the job.

Employment Agreement

[14] Ms Welch was given an employment agreement on 4 April 2017 which she and Mr Paki signed on 12 April 2017. Ms Welch says she was not aware the employment agreement contained a trial provision, it was never mentioned to her by Mr Paki during the interview process or when she signed the employment agreement. Ms Welch says she did not have time to read the employment agreement thoroughly, she skim read it and did not see the trial period provision.

[15] Even though Ms Welch signed the declaration in the employment agreement stating that she had read the employment agreement, fully understood the terms and conditions and accepted them, she says she had not done so.

[16] When it came to signing the employment agreement, Ms Welch says it was a rush. Mr Paki was busy and needed it to be signed and so she did. Mr Paki says he did not point the trial period out to Ms Welch but gave her the employment agreement to take away and read. Before, Ms Welch signed it, Mr Paki says he asked her if there were any matters she wished to discuss and as there were none, they both signed the employment agreement.

Commencement of employment

[17] Ms Welch began work at Auckland Glass on 19 April 2017. Ms Welch says she worked more hours than expected and she found Mr Paki moody. Ms Welch says in the first week of work she had to leave work early to pick her sick daughter up. Ms Welch says Mr Paki became very angry and aggressive. He put his head in his

¹ www.seek.co.nz

hands and banged the desk. Ms Welch was shocked. Ms Welch says she attempted to talk to Mr Paki privately about the matter but was not able to.

1 May 2017- left work early

[18] Ms Welch says the second time she asked to leave work early was on 1 May 2017. Her daughter had been very ill and she had taken her to Accident and Emergency, the previous day, Sunday, 30 April 2017. Ms Welch went in to work on Monday, 1 May 2017, stayed until 2pm and left to pick her daughter up. When Ms Welch rang to speak to Mr Paki about it he became angry and said it was not looking good and he was not happy.

Resignation – 2 May 2017

[19] It was this incident on 1 May 2017 that led to Ms Welch's decision to resign. Ms Welch sent an email to Mr Paki resigning. The letter of resignation was sent at 9.26am on 2 May 2017. The subject heading was "*Resignation for Kelly Welch*" and stated:

Good morning,
I am handing in my resignation. Last day will be 17/05/17. This is
two weeks' notice.
Kelly Welch
Customer Service

[20] Ms Welch says when Mr Paki received her resignation, he talked to her about it and accepted it. Mr Paki denies this and says he was not aware of the resignation until 3 May 2017.

[21] Mr Paki says he did not read Ms Welch's resignation on 2 May 2017 and that he became aware of her resignation at the meeting on 3 May 2017. As soon as he became aware he says he called an end to the meeting, there was no further need to discuss matters.

[22] Mr Paki's evidence at the Authority's investigation meeting was inconsistent and at times was in conflict with his own witness statement and written evidence to the Authority. Mr Paki told the Authority he is not involved with day to day matters, he relies on Ms Tong. Mr Paki's signed undated note giving an account in chronological order of events with Ms Welch states that on Tuesday 2 May 2017 he was informed that Ms Welch "*had written me a letter of two weeks' notice*". I prefer

Ms Welch's evidence about when Mr Paki became aware of her resignation and regarding events leading up to the termination of her employment. I find that Mr Paki was aware that Ms Welch had resigned on 2 May 2017.

Meeting on 3 May 2017

[23] On 3 May 2017, Mr Paki asked Ms Welch to attend a meeting with him and the accountant, Ms Janie Tong. Mr Paki did not seem to recall why he called the meeting on 3 May 2017, he says he thought it may have been because Ms Tong was upset with Ms Welch. Ms Welch asked Mr Paki if she needed a support person and was told this was not necessary as Ms Tong was present. Ms Welch says she told Mr Paki she wanted a support person. Ms Welch asked one of her co-workers, Clarissa to attend the meeting with her.

[24] Ms Welch says she was told by Mr Paki that he was standing her down. When Ms Welch asked what that meant she was told that she needed to continue to attend work and sit at her desk but was not to touch her mobile phone or work computer. Ms Welch said for the rest of the day she sat in the middle of the office, in front of her co-workers with nothing to do. Ms Welch says this was distressing and humiliating.

Events on 3 May 2017

[25] Mr Paki agrees that he asked Ms Welch on 3 May 2017 to attend work but not to use the computer or mobile phone. Mr Paki says he was concerned about security issues and so was not prepared to allow Ms Welch to access the work computer or make phone calls.

[26] Mr Paki says later in the day he was told by his staff that Ms Welch had been seen tearing pages from her work diary which contained Auckland Glass's information. Ms Welch agrees she tore pages from the work diary. However, Ms Welch says she understood the work book was hers to use, she had made personal notes in the diary and simply removed those pages. Ms Welch says she did not remove any confidential information or information belonging to Auckland Glass.

Ms Welch's final day 4 May 2017

[27] On 4 May 2017, Mr Paki approached Ms Welch about some work. Ms Welch says she had set up an appointment at 10am because she had been given no work to do at Auckland Glass.

[28] Ms Welch went to her appointment and returned just after midday. When Ms Welch returned she was asked by Mr Paki to attend a meeting. Ms Welch attempted to have an external support person at the meeting but was unable to. A meeting was held and Ms Welch had an advisor, Ms Emma Moss on the phone.

[29] Mr Paki was at the meeting with Ms Tong. Mr Paki read out a letter as follows:

Dear Kelly Welch,
It is with regret that I have to inform you that I am releasing you from attendance at Auckland Glass due to your committing an act of serious misconduct and causing damage to the business of the company. You may inform the New Zealand Employment Office that I will be happy to attend a hearing when required.
Regards,
Mac Paki

[30] Ms Welch says the letter read out by Mr Paki included the following:

As a result of Kelly committing serious misconduct the owner was terminating her employment effective immediately.

[31] Ms Welch says she asked what the serious misconduct was but was not told.

[32] Ms Welch says she was marched off the premises which was extremely humiliating.

[33] Mr Paki says he was told by staff that Ms Welch had permanently deleted emails from her computer and tore pages from her work notebook which pertained to customers of Auckland Glass. Mr Paki says he decided to "release" Ms Welch from working out the remainder of her notice period. Mr Pollak for Auckland Glass submits Auckland Glass did not dismiss Ms Welch; she was released early from her notice obligations after she had resigned and therefore there cannot be a personal grievance. Alternatively, if Ms Welch was dismissed, she cannot raise a personal grievance because of the provisions contained in her employment agreement in clause 20.2, namely that she was on a trial period which complied with the provisions of s.67A(2) of the Act.

[34] It is my view that Ms Welch resigned on 2 May 2017. Following her resignation, Mr Paki, who was unhappy with information that he was receiving from other staff that Ms Welch was deleting emails and removing information from the office, decided to dismiss her for serious misconduct.

[35] It is more likely than not on the evidence that Mr Paki referred in his letter to Ms Welch of 4 May 2017, to “an act of serious misconduct”, “causing damage to the business ...”, to “the New Zealand Employment Office” and to “attend a hearing”, because he had dismissed Ms Welch. It is my view that Ms Welch was dismissed by Auckland Glass on 4 May 2017.

Second Issue

If Ms Welch was dismissed was it unjustifiable?

[36] Mr Paki did not investigate claims from staff that Ms Welch was destroying and interfering with company property. Mr Paki took their word. Ms Welch’s explanation regarding the workbook has already been referred to. Ms Welch says with regard to the computer, while she was working on it, it was lagging and so she deleted old emails to increase its speed.

[37] Mr Paki did not talk to Ms Welch about these issues or get her side of the story. Mr Paki made no attempt to have the computer forensically examined to retrieve the emails. No attempts were made to investigate the allegations about Ms Welch’s alleged interference with Auckland Glass’s property. Ms Welch was dismissed summarily and marched off the premises.

[38] Dismissal was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.²

[39] I conclude that Ms Welch was unjustifiably dismissed.

² Section 103A of the Act

Third Issue

If Ms Welch was unjustifiably dismissed is she barred from bringing a claim because her employment agreement contained a valid trial period under s.67A of the Act?

[40] The employment agreement provided to Ms Welch does include a trial period. However, in my view, the trial period is buried in the general provisions contained in the final clause of the employment agreement, Clause 20.3, which states:

20.3 A trial period of 90 days (s.67A Employment Relations Act 2000) applies to all new employees. During the 90 day trial period, the Employer may dismiss the employee and the employee will not be able to take a personal grievance or other legal proceedings on the ground of unjustified dismissal.

[41] The trial period in the employment agreement had to comply with the requirements of ss 67A and 67B of the Act in order to be valid and enforceable. The Employment Court has confirmed those statutory provisions are to be strictly interpreted and applied.³ The Court has summarised the effect of that interpretation as follows:⁴

[65] Employers have or ought to have been aware that trial periods must be agreed in writing before the affected employers begin work if they are to be regarded as not having been employed previously by the employer, which is an essential pre-condition of a trial period.

[66] ... it is not too onerous an expectation that the employer will get the correct paperwork and do things in a correct sequence ...

[69] Parliament's intention is clear that neither a former nor an existing employee of an employer can be put onto a trial period. Such a provision is only permissible where a "prospective employee" (to use the words of the extended definition of employee in s.63A(7) has neither worked previously for the employer nor, at the time that a trial period is entered into or at such later time as it commences, as an existing employee of the employer").

[70] What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss67A and 67B must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee. This will mean in practice that trial periods in individual employment agreements must be provided to prospective employees at the same time as, and as part of, making an offer of employment to that prospective employee. The

³ *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111 at [47]

⁴ *Blackmore v Honick Properties Limited* [2011] NZEmpC 152

legislation then requires that the prospective employee be given a reasonable opportunity to seek advice about the terms offer of employment (including the trial period provision) pursuant to s 63A(2)(c). It will only be when that opportunity has been taken or has been accepted by the prospective employee (usually by signing), that there will be a lawful trial period effective from the specified date of commencement of the agreement, usually in practice the date of the commencement of work...

[75] All these factors point to the importance, especially in cases of trial periods, of getting the formalities completed in a lawful sequence and in good time.

[42] On behalf of Ms Welch, Ms Moss says the trial period provision is not valid and enforceable as it does not comply with the requirements of s.67A of the Act, specifically it does not set out the period from which the trial period commences. Ms Moss relies on a recent determination of Member Larmer in support of her submission⁵. Mr Pollak submits that the trial period states it applies for a 90 day period and the date of commencement in the employment agreement is 19 April 2017, therefore it does comply.

[43] Mr Paki's evidence at the Authority's investigation was that he did not insert the commencement date in the employment agreement rather, after it was signed, it was inserted by Ms Tong. At the date that both Mr Paki and Ms Welch signed the employment agreement there was no date of commencement although both were aware that the employment relationship was to start on 19 April 2017.

[44] In my view the omission of the commencement date on the date of signing renders the trial period invalid as it does not comply with the steps clearly set out in s.67A of the Act.

[45] Even if I am incorrect in that view, I agree with Member Larmer's analysis of s.67A(2) of the Act. As Member Larmer states, the material dispute in the case that she was investigating was whether a particular clause in the employment agreement states or "*is to the effect*" (as per s.67A(2)(a) of the Act) that the trial period provision starts at the beginning of her employment. This is the same issue in this particular case. Ms Moss for Ms Welch says that clause 20 is not clear and does not specify the commencement date of the trial provision. On a plain and ordinary reading of clause 20, it makes no reference to the date on which the ninety day trial period commences.

⁵ [2016] NZERA Auckland 281

It simply states that a trial period of ninety days applies to all new employees. There is no cross-reference to the commencement date in clause 4, although it was open to have included such a cross-reference. However, even if there was a cross-reference, no date had been inserted in clause 4 of the employment agreement, so that would not have assisted the parties in understanding when employment commenced.

[46] I consider the failure of clause 20.3 to specify when (or include words to that effect) the trial period was to start means that Ms Welch was not effectively advised of the date on which the trial period would commence. There is reference, as in the determination that Member Larmer issued, to the fact that in relation to the trial period there is reference to s.67A of the Act in clause 20.3 but I do not accept that Ms Welch could reasonably be expected to have known that. For the reasons referred to earlier in this determination, clause 20 is buried in the general provisions of the employment agreement, there was no date of commencement inserted into the employment agreement on the date the employment agreement was signed, and there is no specific commencement date in the employment agreement. For all these reasons it fails to comply with s.67A of the Act which is prescriptive.

[47] Auckland Glass is precluded from relying on the trial period provision in clause 20.3 of Ms Welch's employment agreement on the grounds that it does not meet the requirements of s.67A(2)(a) of the Act because it failed to state or contain words "*to the effect that*" the trial period commenced on the first day Ms Welch started work..

[48] Accordingly, as I have found that Ms Welch was unjustifiably dismissed from her employment I will now assess remedies.

Fourth Issue

If the trial period was not valid, and Ms Welch was unjustifiably dismissed, what remedies is she entitled to?

[49] Ms Welch is seeking compensation of \$10,000 under s.123(1)(c)(i) of the Act for the distress caused to her by her unjustified dismissal and the manner in which it was carried out. Ms Welch gave evidence of her humiliation and distress at being dismissed. In particular, Ms Welch said being escorted off the premises in front of both the office and factory staff was extremely humiliating.

[50] Taking into account Ms Welch's particular circumstances including the short period of her employment, I conclude \$5,000 to be the appropriate sum at which compensation for her humiliation, loss of dignity and injury to feelings should be set. Auckland Glass is to pay Ms Welch the sum of \$5,000 within 21 days of the date of this determination.

[51] Ms Welch found another job and started on 5 June 2017. Ms Welch is entitled to lost remuneration under s.128 of the Act. Ms Welch is entitled to reimbursement of lost income from 18 May 2017 until 2 June 2017. Ms Welch claims 40 hours a week based on her employment agreement. This amounts to a loss totalling \$1,728 gross. Auckland Glass is to pay Ms Welch the sum of \$1,728 gross within 21 days of the date of this determination.

Contributory Conduct

[52] As required by s.124 of the Act I am required to consider whether the evidence established any conduct by Ms Welch, of a sufficiently blameworthy nature which may have contributed to the situation giving rise to her personal grievance. I do not consider Ms Welch contributed to her personal grievance.

Costs

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, and an Authority determination on costs is needed, Ms Welch may lodge a memorandum as to costs within 14 days of the date of this determination. From the date of service of that memorandum, Auckland Glass has 14 days within which to lodge any reply memorandum.

[54] If the Authority is to determine costs, the parties should expect that it will do so on its usual daily tariff basis, unless particular circumstances or factors require an adjustment upwards or downwards⁶.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁶ *PBO Ltd v. Da Cruz* [2005] ERNZ 808