IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 06/10
File Number: 5275410

	BETWEEN	Tikaokao McClutchie Applicant
	AND	Shane Parore t/a The Thirsty Dog Bar & Café Respondent
Member of Authority:	Denis Asher	
Representatives:	Michael McAleer for Ms McClutchie No appearance by or for Mr Parore	
Investigation Meeting	Napier, 12 January 2010	
Submissions Received	From the applicant on 12 January	
Determination:	14 January 2010	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Ms McClutchie took up employment with Mr Parore at the latter's bar, as his day duty manager on 6 April 2009. On 1 June she telephoned Mr Parore who said he was going to have to let her go: the applicant says she was thereby unjustifiably dismissed. In his response to Ms McClutchie's advice of a grievance, Mr Parore relied on *"the National Government (09) guidelines* (to release employees under) *a 90 day*

window" (letter dated 17 June attached to statement of problem). The issues to be decided therefore are: was Ms McClutchie unjustifiably dismissed or does s. 67A of the Employment Relations Act 2000 protect the respondent's actions? If unjustifiably dismissed, what if any remedies are payable to Ms McClutchie and did she contribute to her grievance?

[2] Ms McClutchie is legally aided.

The Investigation

[3] Mr Parore did not accept the applicant's invitation to undertake mediation (Mr McAleer's notice of grievance dated 4 June), nor has he cooperated with this investigation.

[4] Notice of the application was served on Mr Parore at his Napier home address on 30 October (Mr McAleer's advice of 2 November).

[5] Telephone messages to the respondent's mobile by Authority support staff have gone unanswered.

[6] Despite initially answering his phone, the Authority's attempts to ensure Mr Parore's continued participation in the telephone conference on 21 December were unsuccessful (refer to the memo of that date). I concluded that conference by directing this problem to an investigation in Napier on 12 January 2010.

[7] Mr McAleer confirmed he served notice of the investigation on Mr Parore personally.

[8] My telephone call to, and message left on, Mr Parore's answerphone on the morning of the investigation has – at the date of completing this determination – gone unanswered by the respondent.

[9] Mr Parore's conduct and his unexplained non-participation in particular raise serious questions as to whether he has acted in good faith or not.

Applicant's Uncontested Evidence

[10] Ms McClutchie commenced working for Mr Parore, initially part time, at his Napier bar, the Thirsty Dog Bar and Café on Monday 6 April 2009.

[11] At the time her employment was terminated Ms McClutchie was employed by the respondent as a full time day manager.

[12] The parties signed off an employment agreement on 12 May (attachment to statement of problem).

[13] Ms McClutchie accepts that on 21 May she was given a verbal warning for making personal phone calls during working hours but says her actions were prompted by news her mother-in-law's cancer was no longer in remission and it was necessary to notify her three children's schools.

[14] During her employment Ms Parore experienced consistent problems of being short paid and issues about her extended hours of work.

[15] On 28 May the parties talked about Mr Parore needing to work more hours at the bar and consequential changes to the applicant's hours. Ms McClutchie queried the security of her employment but was told not to worry: Mr Parore undertook to provide an amended work roster, but failed to do so.

[16] Because of her uncertainty about her hours of work, Ms McClutchie telephoned Mr Parore on 1 June: he told her he was going to have to let her go. A heated exchange followed. Mr Parore rang back later and said Ms McClutchie was not being made redundant but that he was sacking her: he said she either had to work out two weeks notice or commit to the National Government's 90-day trial period. Ms McClutchie refused these options and said she would see the respondent in court.

[17] Ms McClutchie's subsequent and extensive efforts to find employment in the Hawkes Bay were unsuccessful; from October she went on to a sickness benefit.

[18] Ms McClutchie disputes some of the allegations set out in Mr Parore's letter of 17 June, in particular that she operated her partner's security business from the respondent's bar: she says her partner and Mr Parore would often meet there as both men operated security businesses, and the respondent would hire her partner from time to time as well as advise him about the business.

[19] As alleged by Mr Parore, the applicant accepts she would read the paper at work but only if all her duties were up to date, no or few customers were present and it was necessary to be present in the bar – including during break periods when she was not relieved – to ensure its security.

[20] Ms McClutchie agrees there was an issue about signing off a payout from the gaming lounge but only because Mr Parore had failed to advise her of his procedures and how he wanted the job done.

[21] As indicated above, Ms McClutchie accepts she did use her employer's landline and portable phone but at a time when she was the only staff on duty, no relief was available and the matter involved a significant family crisis.

Discussion and Findings

Section 67A of the Act

[22] Ms McClutchie's employment agreement, signed off on 12 May, provided for, amongst other things, the following:

PROBATIONARY PERIOD

1. *We will review your employment within one month to assess whether you are likely to be a satisfactory permanent staff member.*
2. *If we conclude that you are unlikely to be satisfactory we will give you the opportunity to respond to our concerns.*
3. *...*
4. *We may not terminate this agreement under clause 3 … unless, at least one week before the review, we have told you of any improvements in your performance or*

behaviour that are necessary and warned you that we may terminate this agreement if you do not improve sufficiently before the review occurs.

…

[23] Section 67A of the Act provides as follows:

> ***When employment agreements may contain provision for trial period for 90 days or less***
>
> *(1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer as defined in subsection (4).*
>
> *(2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect that-*
>
> > *(a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and*
> >
> > *(b) during that period the employer may dismiss the employee; and*
> >
> > *(c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*

(underlining added for emphasis)

[24] In this instance the stated period was one month. No performance review appears to have been conducted and Ms McClutchie was dismissed on 1 June.

[25] Can Mr Parore rely on s. 67A of the Act?

[26] There is no evidence of Mr Parore employing 20 employees or more (ss. 67A (4)) and therefore being unable to seek the benefits of s. 67A. of the Act.

[27] Mr McAleer submitted that Mr Parore was in breach of s. 67A as there was no reference in his client's employment agreement to that section. He also argued that Mr Parore had not complied with the poor performance requirements set out in Ms McClutchie's employment agreement, in particular that the alleged verbal warnings did not comply with the requirement on the agreement's 4th page that if a decision was

taken to issue a warning it would be put in writing, and no such warnings existed. Mr Parore's offer of a two-week notice period was also in breach of a requirement also on the 4th page that either party might end the agreement by giving four weeks notice in writing.

[28] I accept those submissions but only in part. While Ms McClutchie's employment agreement refers to a *"Probationary Period"* (2nd page), and s. 67A refers to a *"trial period"*, I find that nothing swings on the different wording as the two terms are clearly synonymous. And, as ss 67A (2) makes clear, a ***Trial provision*** *means a written provision in an employment agreement that states, or is to the effect, that ... the employee is to serve a trial period* (underlining added for emphasis).

[29] However, Ms McClutchie commenced her employment with Mr Parore on 6 April. The employment agreement was signed off on 12 May. Should the probationary or trial period of one month be calculated from 6 April or 12 May?

[30] An application of the Act makes the answer clear: ss 67A (2) (a) provides that the trial provision is not for a specified period, not exceeding 90-days, *"... starting at the beginning of the employee's employment"*. In Ms McClutchie's case, that must mean from 6 April and the applicant is not, as claimed by Mr Parore, statute-barred from bringing her grievance.

[31] I find that the calculation date is properly from 6 April for the following, additional reasons:

[32] Ms McClutchie's terms and conditions, including her trial period, applied from the earlier date.

[33] It would be unfair to permit a breach of the Act in one area while allowing Mr Parore the benefit in another. That is because ss. 63A (2) of the Act states employers *…* ***must*** *… provide an employee a copy of the* ***intended agreement*** *... Every employer who fails to comply with this section is liable to a penalty imposed by the Authority* (emphasis added).

[34] Ms McClutchie's uncontested evidence is that she was handed a contract to view on 5 May (par 8), i.e. she was not given a copy of the intended agreement, but received it only after commencing her employment. On the evidence before the Authority, although not claimed by the applicant, Mr Parore has breached s. 63 of the Act and (while not sought) is liable to a penalty.

[35] Under the circumstances it is only fair and reasonable to date the intended probation period from the time all other terms and conditions took effect, i.e. from the commencement of the employment relationship, not the date it was signed. To approach the matter differently would permit Mr Parore to approach the Authority without clean hands.

Unjustified Dismissal

[36] In *Air New Zealand Ltd* v *V* (unreported, Colgan C J, Travis, Shaw and Couch JJ, AC 15/09, 3 June 2009) at para [37] it was made clear that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[37] Ms McClutchie was unjustifiably dismissed: no reason was initially given as to why Mr Parore had to let her go. In a second call he relied on what I understand to be s. 67A of the Act. As is clear from the above, he cannot rely on that section. Mr Parore gave the applicant neither warning nor any opportunity to respond. Subsequent claims Ms McClutchie's work performance was deficient were in breach of the parties' employment agreement: it required warnings to be put in writing (and an opportunity for the employee to improve her performance) and that did not happen.

[38] Mr Parore's actions, objectively measured, were not those of what a fair and reasonable employer would have done in all the circumstances.

Remedies

[39] Ms McClutchie seeks 4-months lost wages, i.e. the period between her summary dismissal and receiving a sickness benefit in October: she calculates that

amount as $6,400 ($400 per week X 16) nett, less casual earnings of $1,252, i.e. $5,148 nett.

[40] Her evidence of repeated but unsuccessful efforts to find work was compelling, particularly that negative word had got around the Hawkes Bay bar and tavern industry of her dismissal, making her task of finding fresh employment that much harder.

[41] It is appropriate in the circumstances, including that the applicant's probationary period had concluded, to apply ss 128 (3) of the Act and award compensation of the amount sought.

[42] Ms McClutchie also claims $2,000 compensation for hurt. Again, her evidence was compelling of the stress she experienced, particularly in the context of having 3 school age children that she shares responsibility for with her partner (from whom she is separated).

[43] I am satisfied, in all the circumstances, that an award of that amount is appropriate.

Contributory Fault

[44] There is no evidence of any action by Ms McClutchie that contributed toward the situation that gave rise to her personal grievance.

Determination

[45] Mr Parore unjustifiably dismissed Ms McClutchie. He is to pay her the following compensation:

a. $5,148 nett (five thousand, one hundred and forty eight dollars) for lost wages; and

b. $2,000 (two thousand dollars) for hurt and humiliation.

[46] Costs are reserved. Mr McAleer said his client's costs were $2,000 plus GST. While the investigation was concluded within half a day, and subject to submissions from Mr Parore, I can indicated that costs sought are realistic and within the range typically awarded for cases such as this.

Denis Asher

Member of the Employment Relations Authority