IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 364
5383475

	BETWEEN	MELINDA VAN MEYGAARDEN Applicant
	A N D	INTAGR8 LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Applicant in Person Stephen Mascarenhas, General Manager of Respondent
Investigation Meeting:	10 October 2012 at Auckland
Date of Determination:	15 October 2012

DETERMINATION OF THE AUTHORITY

A. I find that Ms van Meygaarden was not given a written employment agreement whilst employed by Intagr8.

B. Ms van Meygaarden is not precluded from bringing a personal grievance claim for unjustified dismissal because she was not subject to a trial period which met the requirements of s.67A of the Employment Relations Act 2000 (the Act).

C. Intagr8 Limited's (Intagr8's) summary dismissal of Ms van Meygaarden was procedurally and substantively unjustified.

D I find that Ms van Meygaarden did not contribute to the situation which gave rise to her dismissal grievance.

E Intagr8 is ordered to pay Ms van Meygaarden:

(a) $3,173.10 lost remuneration; and

(b) $5,000 distress compensation.

Employment relationship problem

[1] Ms van Meygaarden commenced employment with Intagr8 on 5 March 2012. There was some dispute about her job title but it was agreed she was employed to lead Intagr8's Provisioning Team. Ms van Meygaarden was summarily dismissed on 13 April 2012. She claims her dismissal was substantively and procedurally unjustified.

[2] Ms Meygaarden also claims she was never provided with a written employment agreement whilst employed by Intagr8 and she wants a penalty to be imposed on Intagr8 for that.

[3] Intagr8 says it provided Ms van Meygaarden with a written employment agreement two or three days after she commenced employment and that she signed and returned it but the signed version cannot be located. It alleges Ms van Meygaarden must have removed it when she was dismissed.

[4] Intagr8 also says Ms van Meygaarden was dismissed under the 90 day trial period clause in her employment agreement so s.67B of the Employment Relations Act 2000 (the Act) prevents her from bringing a personal grievance claim in respect of her dismissal.

[5] Intagr8 believes Ms van Meygaarden was unsuitable for the position it employed her to do so if it cannot rely on the trail period provision it says was in her employment agreement then it seeks to justify her dismissal on the grounds of poor performance.

Issues

[6] The following issues require determination:

(a) Was Ms van Meygaarden provided with a written employment agreement whilst employed?

(b) If not, should a penalty be imposed on Intagr8?

(c) Was Ms van Meygaarden subject to a trial period which met the requirements of s.67A of the Act?

(d) Was Intagr8 entitled to rely on a trial period provision to end Ms van Meygaarden's employment without her having recourse to the personal grievance procedures for unjustified dismissal under the Act?

(e) If not, was Ms van Meygaarden's dismissal justified?

(f) If not, what remedies should be awarded?

Was Ms van Meygaarden provided with a written employment agreement whilst employed?

[7] There is a substantial conflict in the evidence regarding the provision or otherwise of a written employment agreement which cannot be reconciled. The Authority must therefore determine this issue on the balance of probabilities by assessing which version of events it considers is more likely to be correct.

[8] Intagr8 says it gave Ms van Meygaarden a written employment agreement two or three days after she started work. None of its witnesses could recall the day or date that occurred. Intagr8 says Ms van Meygaarden must have signed and returned it directly to the accountant in order for her first pay to be processed, but again no-one could say when or how that had occurred. The accountant did not provide a statement or attend the Authority's investigation meeting.

[9] Mrs Helen Taylor, Intagr8's Manager for Human Resources and Accounts, says she found the signed employment agreement on her desk and filed it away in her office. Intagr8 allege Ms van Meygaarden must have removed it from her personnel file which is why a signed version cannot be produced.

[10] Ms van Meygaarden strongly denies that allegation. I consider that if there was a signed employment agreement it was unlikely Ms van Meygaarden would have removed it from a file in Mrs Taylor's office. Her dismissal was completely unexpected and she was very distressed by it. Intagr8 asked her to complete a handover immediately after she was dismissed, which she did. There was no evidence

Ms van Meygaarden went near Mrs Taylor's office or that there was any opportunity for her to have removed anything from the office.

[11] Ms van Meygaarden impressed me as an honest witness and her actions, both during her employment and after receiving a copy of her purported employment agreement (which she says occurred after she raised her dismissal grievance), were consistent with her position that she had not been given an employment agreement whilst employed.

[12] Upon receipt of the purported employment agreement which was attached to a letter dated 18 May 2012 sent by Intagr8 to Ms van Meygaarden's then representative, Mr Max Whitehead, he immediately posed a number of questions to ascertain the facts around the alleged provision of the purported employment agreement to her. Intagr8 did not respond to these questions which were then repeated in the Statement of Problem. Intagr8 also failed to address these questions in its Statement in Reply.

[13] It was not until Intagr8 provided Ms van Meygaarden with copies of its witness statements for the Authority's investigation meeting that she was made aware of the circumstances in which she was allegedly provided with a written employment agreement.

[14] I consider it weighs against Intagr8 that it did not respond to the legitimate questions raised by Mr Whitehead, particularly when this omission was highlighted and the same questions were repeated in the Statement of Problem. I consider it likely an employer which genuinely believed it had provided a written employment agreement would take steps to provide the information it said supported its view about that as soon as possible. I would expect that to have occurred before it submitted its witness statements to the Authority.

[15] Overall I found Ms van Meygaarden's evidence to be more credible than the evidence of Intagr8's witnesses. I viewed Mrs Taylor's evidence with caution because she is married to Intagr8's sole director and shareholder. Mrs Taylor's evidence that she reviewed Ms van Meygaarden's employment agreement with Mr Mascarenhas the week before she was dismissed also contradicted his evidence that he had never seen an employment agreement which had been signed by Ms van Meygaarden. This important discrepancy undermines my confidence in their evidence.

[16] Ms Jenny Marinis, Finance/Billing Manager, is Mrs Taylor's sister in law, so I have also viewed her evidence with caution due to her family connection to Intagr8. I also have concerns about the extensive duplication of evidence which appeared in the statements of Ms Marinis and Mr Mascarenhas. Their responses to the concern I raised with each of them about the similarities in their evidence did not alleviate those concerns.

[17] Ms Marinis and Mr Mascarenhas both assured me they had prepared their own witness statements and that their respective statements reflected their own evidence recorded in their own words. They both denied being influenced by each other's evidence. Mr Mascarenhas also denied he had copied and pasted his evidence from Ms Marinis' statement. I find that denial hard to accept. Such actions undermine a witnesses credibility

[18] Paragraphs 2-9 of Ms Marinis' and Mr Mascarenhas' statements were word for word identical[1]. They even made the same date error in paragraph two of their statements. I do not accept that such extensive similarities in their statements could be a mere coincidence as they would have me believe. The more likely explanation is that they either prepared their evidence together or one of them copied and pasted the other's evidence and then passed it off to the Authority as their own.

[19] When assessing credibility I was also influenced by their evidence that they had together undertaken a formal performance management/monitoring process for Ms van Meygaarden. I do not accept that evidence, which was strongly disputed by Ms van Meygaarden.

[20] There was not one document produced to support their contention that Ms van Meygaarden had been formally performance managed. Ms Marinis and Mr Mascarenhas were both unable to provide details of specific performance concerns, or the dates on which these concerns had arisen, or the actions they had taken to address their concerns. Neither of them could remember the date(s) on which the alleged performance disciplinary meetings with Ms van Meygaarden had occurred.

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1 The only minor exception was that they each referred to the other by their respective names when stating who had attended a meeting they had both been at.

[21] Both Ms Marinis and Mr Mascarenhas told me they had rejected Ms van Meygaarden's explanation that other people were responsible for the customer complaints they had received after fully and properly investigating it. However, they could not explain what investigation they had undertaken; or even identify what complaints they had investigated, what information they had obtained, or what information they had relied on when concluding that Ms van Meygaarden was responsible for the problems they believed had occurred.

[22] I consider these matters tend to undermine their overall credibility so that has led me to prefer Ms van Meygarden's evidence where there has been a conflict in the evidence that cannot be reconciled without a finding on credibility being made.

[23] Mr Ryan Good (Ms van Meygaarden's supervisor) and Ms Jordan Tremayne (her colleague) both admitted they had assumed Ms van Meygaarden had been given an employment agreement and that they had not actually seen a written employment agreement for her themselves. These two witnesses are both new Intagr8 employees[2] so I consider Ms van Meygaarden's suggestion that their evidence may have been influenced by concern about their ongoing job security could potentially have some merit.

[24] For these reasons, I consider it more likely than not that the first time Ms van Meygaarden received an employment agreement from Intagr8 was when Mr Whitehead passed on to her the copy which had been attached to the letter Intagr8 sent him dated 18 May 2012.

[25] I therefore find that Ms van Meygaarden was not provided with a written employment agreement whilst employed.

Should a penalty be imposed on Intagr8 for its failure to provide a written employment agreement?

[26] The Authority does not have jurisdiction to impose the penalty sought because the penalty claim has not been made by a Labour Inspector, as required under s.65(4) of the Act.

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[2] Mr Good started at Intagr8 in December 2011 and Ms Tremayne on 05 March 2012.

Was Ms van Meygaarden subject to a trial period which met the requirements of s.67A of the Act?

[27] An employer may only rely on a trial period provision which fully and properly complies with each of the specific requirements of s.67A of the Act.

[28] Section 67A(1) requires a trial period to be contained in a written employment agreement and Ms van Meygaarden did not have a written agreement. She was therefore not subject to a trial period during her employment, so Intagr8 is unable to rely on s.67B(2) of the Act to preclude Ms van Meygaarden from pursuing her dismissal grievance.

[29] Even if Intagr8's evidence that it gave Ms van Meygaarden a written employment agreement two or three days after she had started work is correct, then it still would not be able to rely on the trial period to preclude her from pursuing a dismissal grievance.

[30] If for argument's sake Intagr8's evidence was accepted (and it was not), by the time Ms van Meygaarden received the agreement she had already worked at least two or three days so she was not a new employee. The s.67A trial period provisions only apply to new employees.

[31] Because Ms van Meygaarden had already started work before being given her employment agreement she did not fall within the definition of *employee* in s.67A(3) of the Act, which means *an employee who has not previously been employed by the employer*.

[32] The Employment Court in *Smith v. Stokes Valley Pharmacy (2009) Ltd* [3] held that an employee who commences employment, albeit for a short period of time, before receiving a written employment agreement is therefore not an *employee* as defined in s.67A(3) of the Act.

[33] That decision means that, even if I had preferred Intagr8's evidence on the issue of whether Ms van Meygaarden was given an employment agreement while employed, that would not have prevented Ms van Meygaarden bringing this dismissal grievance.

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[3] [2010] NZEmpC 111.

Was Ms van Meygaarden's dismissal justified?

[34] Justification falls to be determined in light of the justification test in s.103A of the Act as it applies from 1 April 2011. This requires the Authority to objectively determine whether Intagr8's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Ms van Meygaarden was dismissed.

[35] Intagr8 failed to produce any documentation in support of its alleged performance concerns. It also admits that it did not provide Ms van Meygaarden with any written documentation in support of the alleged performance concerns. Intagr8's witnesses were unable to be specific about the nature of their concerns, including when they arose, what they consisted of, why they were considered to be Ms van Meygaarden's responsibility, or even the names of the customers who had allegedly complained.

[36] In applying the justification test, the Authority must consider the four tests in s.103A(3) of the Act. The full Court of the Employment Court in *Angus & McKean v. Ports of Auckland Ltd* [4] held that failure to meet all four tests would result in a dismissal being unjustified. I find Intagr8 is unable to meet any of the tests in s.103A(3) of the Act.

[37] I find that Intagr8's actions and how it acted were not what a fair and reasonable employer could have done in all the circumstances.

[38] Intagr8 failed to inform Ms van Meygaarden that her ongoing employment was in jeopardy, it did not provide her with any specific concerns, it breached its statutory good faith requirements to provide her with information relevant to her ongoing employment and an opportunity to comment on it[5]. It did not put specific performance concerns to her and it did not give her an opportunity to take advice or prepare a response to its concerns.

[39] Intagr8 failed to follow even the most basic procedural fairness and natural justice requirements. Ms van Meygaarden was never given any warning prior to her dismissal which is an essential requirement prior to a poor performance dismissal. Intagr8 was unable to identify any training or support it had given Ms van

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4 [2011] NZEmpC 160.

5 Section 4(1A) ERA.

Meygaarden prior to her dismissal and she was not given a reasonable opportunity to improve, in the event that Intagr8's performance concerns had substance[6].

[40] I also consider Intagr8 failed to provide Ms van Meygaarden with clear performance expectations which meant that she did not know what she was doing wrong, or why, or what she was required to do to address Intagr8's concerns, or how long she had to do so. Intagr8 also failed to explain to Ms van Meygaarden how and when her performance would be reviewed or what the likely outcome would be if it concluded she still did not met the required standard of performance after being given a reasonable opportunity to do so. Her dismissal was therefore *a bolt out of the blue* to her.

[41] I find that Ms van Meygaarden's dismissal was substantively and procedurally unjustified.

What remedies should be awarded?

Contribution

[42] Having found that Ms van Meygaarden has a dismissal grievance, s.124 of the Act requires me to consider whether she contributed to the situation which gave rise to her dismissal grievance, and if so, to reduce remedies accordingly.

[43] A reduction in remedies requires a finding that there has been blameworthy conduct, which must be established on the balance of probabilities. The limited and predominantly non-specific criticisms raised by Intagr8 during the Authority's investigation did not meet that standard required so I am not satisfied Ms van Meygaarden engaged in any blameworthy conduct.

[44] I therefore find that she did not contribute to the situation which gave rise to her grievance, and remedies should not be reduced.

Lost remuneration

[45] Ms van Meygaarden obtain a new job three weeks after her dismissal. The parties agreed that three weeks' lost remuneration amounted to $3,173.10. I award her $3,173.10 under s.128(2) of the Act.

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[6] The evidence did not establish Intagr8 had valid concerns about her performance.

Distress compensation

[46] Ms van Meygaarden gave compelling evidence of the humiliation, loss of dignity and injury to feelings that she suffered as a result of her harsh and unjustified dismissal. She describes being required to conduct a hand-over with another employee immediately after her dismissal. It was not in dispute that she spent a large amount of that time very distressed and crying.

[47] Ms van Meygaarden says she was shocked and horrified to be dismissed for performance issues. She considers herself a diligent and committed employee and does not accept her performance fell below the required standard.

[48] Ms van Meygaarden described it as a personal low having to apply for the emergency unemployment benefit at WINZ and she describes her health as suffering immediately after her dismissal. Ms van Meygaarden was obviously still distressed by the time of the Authority's investigation meeting. It was clear that Intagr8's allegation Ms van Meygaarden had removed her employment agreement from its premises after being dismissed also increased her distress.

[49] I consider that $5,000 is appropriate in order to compensate Ms van Meygaarden for the humiliation, loss of dignity, and injury to feelings she suffered as a result of her unjustified dismissal.

Outcome

[50] I find that Intagr8:

(a) Failed to provide Ms van Meygaarden with a written employment agreement whilst she was employed;

(b) Cannot rely on a trial period provision to end Ms van Meygaarden's employment without her having recourse to the dismissal grievance procedures in the Act;

(c) Is unable to justify Ms van Meygaarden's dismissal which I consider was substantively and procedurally unjustified.

[51] Intagr8 is ordered to pay Ms van Meygaarden:

(a) $3,173.10 lost remuneration pursuant to s.128(2) of the Act; and

(b) $5,000 distress compensation pursuant to s.123(1)(c)(i) of the Act.

Costs

[52] Although Ms van Meygaarden represented herself at the Authority's investigation, she has previously been assisted by an employment advocate and has presumably incurred costs as a result of that. If that is the case, then she may be entitled to recover some of the actual costs she has incurred.

[53] The parties are encouraged to resolve costs by agreement. If that is not possible, then Ms van Meygaarden has 14 days within which to apply for a costs order, and Intagr8 has 14 days within which to respond should it wish to do so. Proof of actual costs incurred by Ms van Meygaarden will be required if she applies for costs.

Rachel Larmer
Member of the Employment Relations Authority