

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 98
5371369

BETWEEN	SUS-AN STIRLING Applicant
AND	CITY TOWING NZ (2010) LIMITED trading as PORIRUA CITY TOWING Respondent

Member of Authority:	Michele Ryan
Representatives:	Graeme Ogilvie, Advocate for the Applicant Gary Cox, for the Respondent
Investigation Meeting:	16 August 2012
Submissions Received:	16 August 2012 for the Applicant 22 August 2012 for the Respondent
Submissions in reply:	26 August 2012 for the Applicant in Reply
Determination:	3 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Sus-An Stirling commenced employment with City Towing NZ (2010) trading as Porirua City Towing on 21 November 2011. Ms Stirling says that she was not provided with an employment agreement until 2 December 2011, and terms and conditions of employment were not agreed until 23 December 2011. Ms Stirling says she was unjustifiably dismissed on 21 January 2012.

[2] Mr Gary Cox on behalf of Porirua City Towing says Ms Stirling was dismissed in accordance with ss.67A and 67B of the Employment Relations Act 2000. He says Ms Stirling was dismissed pursuant to the 90 day trial period provisions (“the

trial period provisions”) within Ms Stirling’s employment agreement and therefore she is not entitled to bring a personal grievance in respect of the dismissal.

[3] Contained within the respondent’s statement in reply and confirmed by Mr Gary Cox at the time of the Authority’s investigation, is an acknowledgment that if the trial period is unenforceable then Ms Stirling’s dismissal was not carried out in accordance with procedural requirements as set out at s.103A of the Employment Relations Act.

Summary of relevant facts

[4] Mr Gary Cox is one of two directors of European Brokering Company Limited, which is a parent company to City Towing NZ (2010) Limited, a company which trades as Porirua City Towing.

[5] In or about late October 2011 Porirua City Towing advertised for a person to assist with its dispatch and accounts. Ms Stirling applied for the role and on 4 November 2011 attended an interview with Mr Cox.

[6] There is some dispute between Ms Stirling and Porirua City Towing as to material facts and events relevant to the Authority’s investigation. The Authority received three versions of a draft employment agreement. Each recorded a different name as the employer. Ms Stirling and Mr Cox dispute as to when these documents were provided to Ms Stirling and the chronological order in which they were given. Each of the various employment agreements contained trial period provisions which conform in content with ss. 67A(2)(a) to (c) of the Employment Relations Act.

[7] One of the agreements was silent as to a commencement date and the other two recorded the date of commencement as 19 November 2011. Before the Authority both Ms Stirling and Mr Cox agreed that Ms Stirling commenced her employment on 21 November 2011.

Ms Stirling’s position

[8] In her written evidence Ms Stirling said she was offered and accepted an employment position during an interview with Mr Cox on 4 November 2011.

[9] On questioning Ms Stirling acknowledged that she met with Mr Cox again on one occasion sometime between 4 November 2011 and 19 November 2011 as she

wanted to discuss an increase to the hourly rate proposed by Mr Cox during the interview on 4 November 2011. Ms Stirling conceded it is more likely that offer and acceptance of the employment position occurred during this meeting although the date of that meeting is uncertain.

[10] Ms Stirling says she was not provided with a draft employment agreement until 2 December 2011, almost 2 weeks after she commenced her employment. Ms Stirling says that on receipt of that draft agreement she met with a friend, a practising solicitor, and had him review the agreement. He advised that the trial period provisions recorded within the employment agreement would not apply as she had already commenced her employment with Porirua City Towing.

[11] Ms Stirling says that the following day she raised with Mr Cox a variety of concerns she had as regards the contents of the draft employment agreement and in particular –

- (i) the correct spelling of Ms Stirling's name;
- (ii) an appropriate title for the position;
- (iii) the provisions of the clause relating to hourly rate;
- (iv) concerns about health and safety issues.

[12] Ms Stirling acknowledged that when she raised her issues with Mr Cox she did not refer to the trial period provisions as being no longer applicable. She says that following her friend's advice she regarded the trial provisions as irrelevant and did not think she was required to advise Mr Cox of that information.

[13] Ms Stirling says Mr Cox agreed to amend the employment agreement as regards the correct spelling of her name and to record that the agreed hourly rate would increase automatically following one months' employment as opposed to on review of performance.

[14] Ms Stirling acknowledges that she advised Mr Cox that she considered the role should be titled "*Officer Manager*" and a cell phone should be provided but Mr Cox did not consent to these requests.

[15] Ms Stirling says she did not receive the amended agreement until 8 December 2011. She says she did not agree to the amended agreement as it continued to incorrectly reflect the commencement date and spelling of her name, and did not provide for an increase to remuneration as she understood had been agreed. She says that she received a third draft employment agreement on 23 December 2011 which both she and Mr Cox signed on that day.

[16] Ms Stirling says that her assessment as to the correct dates on which she received draft employment agreements is to be preferred as on receipt of each of the documents she used a “received” stamp and inserted within the stamp markings the date she received it.

[17] Ms Stirling described a verbal altercation which occurred between her and another employee during December 2011 and to a dispatch job that “*went wrong*” in January 2011. Ms Stirling agrees she has a series of meetings with Mr Cox and/or with the Operations Manager during December 2011 and in January 2012 which she describes as “*normal discussions about day to day work matters*”. She says that at no time were any performance concerns raised with her.

[18] At approximately 11.30am on Saturday 21 January 2012 Mr Cox approached Ms Stirling and said “*things aren’t working out*” and that Ms Stirling had not gained the respect of drivers employed by Porirua City Towing. Ms Stirling was advised that she was dismissed with immediate effect pursuant to the trial period provisions of her employment agreement. The evidence is that she protested Porirua City Towing’s ability to dismiss her under the trial period provisions. There was some evidence of a discussion between Mr Cox and Ms Stirling but no resolution was agreed between them.

[19] Ms Stirling’s dismissal was confirmed in a letter dated 21 January 2012 which advised, amongst other things, that she would be paid two weeks wages in lieu of notice. On 31 January Ms Stirling raised a personal grievance as to her dismissal.

Porirua City Towing’s position

[20] In contrast to Ms Stirling’s account of events, Mr Cox says that he met with Ms Stirling on three occasions prior to Ms Stirling commencing employment. Mr Cox is unsure as to exact dates but says that during the second meeting with Ms Stirling he discussed terms and conditions of employment including a trial period

provision. He says that he told her that she may perform some work for parent company, European Brokering Company Limited, and so may be employed by that company instead of Porirua City Towing. Mr Cox said he provided Ms Stirling with a standard draft employment agreement and told her that it would need to be altered so as to reflect her proper position, as would the hourly rate, but that the remainder of the terms and conditions contained in the agreement would be the same. Mr Cox's evidence is that Ms Stirling took the draft agreement away to "*have someone look over*". He says he assumed that this would be a lawyer.

[21] Mr Cox says that a few days later Ms Stirling came to see him and wanted to discuss an increase to the proposed hourly rate. He says he agreed to amend her employment agreement to reflect an increase in her hourly rate to \$20 per hour following one month's employment.

[22] Ms Stirling commenced her employment with Porirua City Towing at 8am on 21 November 2011. Mr Cox says later that day, in the afternoon, he and Ms Stirling discussed the contents of the employment agreement.

[23] He says Ms Stirling advised that she believed they had previously reached an agreement that her wage rate would increase to \$20 per hour automatically after a month of work, whereas Mr Cox had recorded the wage increase as dependent on Ms Stirling's performance. Mr Cox says that after some discussion it was agreed that he would correct this aspect of the employment agreement and it was noted that Ms Stirling's name was incorrectly spelt on the agreement.

[24] Mr Cox referred to handwritten contemporaneous notes as evidence that his assessment is correct as to when the terms of employment were agreed between Ms Stirling and Porirua City Towing. Mr Cox says that in his view, at this point, on 21 November the parties had discussed and agreed the terms of the employment agreement and Ms Stirling had not raised with him that she did not accept the trial period provisions. Mr Cox says he provided a copy of the employment agreement with the agreed changes on 22 November 2011.

[25] On 28 November 2011 Ms Stirling told Mr Cox that the proposed employment agreement still contained a misspelling of her name and that the salary increment was not explicit within the agreement. Mr Cox suggested that Ms Stirling make handwritten changes to the document and that both could then initial those changes.

Mr Cox says that Ms Stirling refused that proposal as she wanted a clean copy of the agreement.

[26] Mr Cox says that on 1 December 2011 Ms Stirling was provided with a third employment agreement, albeit still containing a misspelling of her name in the body of the document. He says that he again asked Ms Stirling to just "*pen the changes*" into the document and initial the changes. He says Ms Stirling again requested that she have a clean copy of the employment agreement.

[27] Mr Cox acknowledges that some time went by before Ms Stirling's requested changes were incorporated in the document, but says that on 13 December 2011 he provided her with the final employment agreement.

[28] It is common ground between the parties that Ms Stirling did not sign the intended employment agreement with Porirua City Towing until 23 December 2011.

[29] Mr Cox says that there were issues with Ms Stirling's performance which were canvassed by him and the Operations Manager with Ms Stirling over the course of her employment. Mr Cox referred to handwritten notes signed by Ms Stirling on 12 January 2012 which recorded operational issues Ms Stirling was required to address and the action required. Mr Cox concedes that Ms Stirling was not explicitly told her performance was not acceptable nor was a plan to improve performance improvement raised with her.

[30] Mr Cox says that by 20 January 2012 he had become concerned that Ms Stirling was unable to perform the requirements of the role. He discussed aspects of the job with Ms Stirling that day and considered her responses overnight. He formed a view that Ms Stirling was not suitable for the position.

[31] Mr Cox says that the following day, 21 January 2012, Ms Stirling forwarded a client matter to him which he considered she should have been able to deal with herself. This event served to confirm his view that Ms Stirling was unsuitable for the role and he decided to terminate her employment under the trial provisions of her employment agreement.

[32] Mr Cox largely accepts Ms Stirling's account as to how she was dismissed. In evidence Mr Cox agreed that he did not follow a performance improvement processes because he did not think he was required to under the trial period provisions.

Issues

[33] The Authority is required to determine:

- a. whether the trial period provisions contained in Ms Stirling's employment agreement are enforceable and prevent Ms Stirling from progressing a claim for unjustified dismissal?
- b. if the trial period provisions are not enforceable, does Ms Stirling have a personal grievance claim for which she should be awarded remedies?

Discussion and determination

Enforceability of trial periods

[34] Porirua City Towing seeks to distinguish on the facts two pivotal cases¹ of the Employment Court as regards to the enforceability of ss67A and 67B.

[35] It says the findings in *Smith v Stokes Valley Pharmacy*², were that trial period provisions should not apply to current employees. Porirua City Towing says Ms Stirling was a "new" employee and had not been employed by Porirua City Towing prior to 21 November 2011.

[36] As regards *Blackmore v. Honick Properties Ltd*³, Porirua City Towing says in that case the applicant was not provided with an employment agreement prior to commencing his employment and was unaware that a trial period provision was a term and condition of his employment. Porirua City Towing says Ms Stirling had been provided with a copy of the employment agreement prior to commencing her role, had been advised of the trial period provisions and had been given and taken, an opportunity to seek independent advice. It says further that Ms Stirling did not raise the trial period provisions as an issue.

[37] In reaching a determination on this matter, the Employment Relations Authority is bound to apply the law as interpreted by the Employment Court.

¹ *Smith v Stokes Valley Pharmacy* [2010] NZEmpC 111; and *Blackmore v. Honick Properties Ltd* [2011] NZEmpC 152,

² *Ibid*

³ *Ibid* at 1.

[38] The Employment Court has adopted a strict approach on the enforceability of trial period provisions. In *Smith v Stokes Valley Pharmacy (2009) Ltd*⁴ the Court stated at para. [48]:

Sections 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act and it otherwise deals with issues of disadvantage in, and dismissal from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that is clearly articulated.

Did Ms Stirling agree to trial period provisions prior to commencing employment?

[39] The inference from Porirua City Towing's submissions is that Ms Stirling agreed to the trial period provisions prior to commencing her employment by virtue of her failure to protest the inclusion of them in its draft employment agreement.

[40] I note that neither Ms Stirling nor Mr Cox were able to produce evidence to definitively support either of the dates each separately purport that the draft written employment agreement was first given to Ms Stirling. The friend who gave Ms Stirling advice as to the contents of the employment agreement provided a sworn affidavit which recorded that he met with Ms Stirling in "either late November or early December". This time frame includes both dates each of parties say the draft agreement was introduced and this evidence was not able to determine the matter.

[41] Even if I accept Mr Cox's evidence that Ms Stirling was provided with a draft employment agreement prior to beginning her employment, the terms within that agreement provided were incomplete at best. The draft agreement did not record the name of the correct employer, nor the name of the employee as required within parts of the agreement, or when commencement of employment was to occur.

[42] Section 63A(2) requires when bargaining with an employee as to terms and conditions of an individual employment agreement the employer must (a) provide to the employee a copy of the intended agreement under discussion; and (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and (c) give the employee a reasonable opportunity to seek that advice; and (d) consider any issues that the employee raises and respond to them.

⁴ Ibid at 1

[43] I do not consider that a draft template form of an employment agreement with the deficiencies previously identified could reasonably be regarded as an “intended agreement” which a prospective employee would or should regard as sufficient so as to be able to properly consider, seek and obtain independent advice, and respond to. It was incumbent on Porirua City Towing to provide an employment agreement which contained the full terms of employment it wished to offer Ms Stirling. In this respect it is unreasonable of Porirua City Towing to conclude that that its incomplete employment agreement established agreed terms and conditions of employment between Ms Stirling and Porirua City Towing but for those clauses Mr Cox has identified as needing finalisation.

[44] I find in these circumstances Ms Stirling did not agree to the draft employment agreement including the trial period provisions prior to commencing work with Porirua City Towing.

[45] Further, although Ms Stirling and Mr Cox dispute the timing of their discussions as to terms and conditions of employment, it is accepted by both parties that negotiations for agreed terms and conditions of employment occurred after Ms Stirling’s employment began and that Ms Stirling did not sign an employment agreement until 23 December 2011.

[46] The decisions of the Employment Court in *Smith* and *Blackmore* make it clear that that a trial period contained in an employment agreement can only be enforceable when it is recorded in writing and signed prior to the employee commencing work⁵. In *Blackmore* the Court stated:

What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss.67A 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 legislation then requires that the prospective employee be given a reasonable opportunity to seek advice about the terms of the offer of employment (including the trial period provision) pursuant to section 63A(2)(c). And it will only be when that opportunity has been taken or has otherwise passed, any variations to the proposed employment agreement has been settled, and the agreement that

⁵ Ibid at 1.

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 commencement of work⁶.

[47] I find that the trial period provisions contained in Ms Stirling's employment agreement are not enforceable as they were not agreed by Ms Stirling prior to her commencement of employment with Porirua City Towing.

[48] Ms Stirling is entitled to raise a personal grievance within the provisions of the Employment Relations Act and to seek compensation if her dismissal is found to be unjustified.

Does Ms Stirling have a personal grievance claim for which she should be awarded remedies?

[49] Mr Cox advised that Porirua City Towing is a small to medium enterprise which employs 11 staff. Mr Cox said he did not access external HR or legal advice in regards to Ms Stirling's dismissal but his evidence is that he has previous and extensive history in employment as a HR Manager.

[50] Porirua City Towing concedes that it did not raise with Ms Stirling that it considered there were performance concerns or allow her an opportunity to respond those concerns before making a decision to dismiss. In this respect Porirua City Towing acknowledges that it did not comply with minimum requirements of procedural fairness required pursuant to s.103A of the Employment Relations Act.

[51] Porirua City Towing was unable to justify its decision to dismiss Ms Stirling and I find Ms Stirling has a personal grievance of unjustified dismissal.

Remedies

Lost wages

[52] Ms Stirling seeks lost wages from the date of her dismissal to the date of this determination, approximately 32 weeks in total.

[53] I accept that Ms Stirling sought to mitigate her loss. She provided a folder comprising of a significant number of positions she has made applications for. She

⁶ *Blackmore v. Honick Properties Ltd* [2011] NZEmpC 152 at [70]

says that on average she has applied for 2 to 3 jobs a week following her dismissal including registering with four recruitment agencies.

[54] When a personal grievance has been upheld, section 128(2) of the Act requires the Authority to order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Section 128(3) provides that the Authority may use its discretion and order compensation beyond three months remuneration. However, given the short length of Ms Stirling's her employment (two months) and evidence that Porirua City Towing was dissatisfied with Ms Stirling's performance, there was no guarantee that Ms Stirling's employment would have continued beyond three months. In these circumstances I decline to award reimbursement of remuneration beyond that prescribed at s128(2).

[55] Ms Stirling's average weekly earnings were \$850.00 (gross). I award reimbursement of \$11050.00 (gross) minus PAYE being equal to three months' wages (nett).

Compensation for humiliation, loss of dignity, and injury to the feelings

[56] I accept Ms Stirling evidence that she was shocked and distressed by her dismissal. She says she has lost her self confidence as a result. In support of her claim for \$8000 in compensation Ms Stirling advised that she had been placed on a common anti-anxiety medication by her doctor. On questioning however it appears her medication was prescribed at least four months after her dismissal. Without further information I do not consider there is sufficient nexus between the events of her dismissal in January 2012 and her subsequent requirement for medication.

[57] The humiliation, loss of dignity and injury to his feelings as a result of her dismissal by Porirua City Towing should be compensated by an award of \$5000 under s123(1)(c)(i) of the Act.

Contribution

[58] I accept that Porirua City Towing had concerns about Ms Stirling's ability to perform the role and that largely influenced Porirua City Towing's decision to dismiss. However I do not find that Ms Stirling contributed to the situation giving rise to her grievance in circumstances where she was unaware of her employer's concerns and therefore unable to make attempts to remedy those. I cannot conclude

that Ms Stirling contributed to the personal grievance in a blameworthy way such that her remedies should be reduced.

Costs

[59] Costs are reserved.

Summary of Orders

[60] City Towing NZ (2010) Limited trading as Porirua City Towing is to pay Ms Stirling:

- i. pursuant to s.128(2) the sum of \$11050.00 (gross) minus PAYE being equal to three months' wages (nett).
- ii. City Towing NZ (2010) Limited is to pay Ms Stirling pursuant to s.123(1)(c)(i) the sum of \$5000 as compensation for humiliation, loss of dignity and injury.

Michele Ryan
Member of the Employment Relations Authority