

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 512
5419277**

BETWEEN CINDY BLACK
Applicant

AND TRISTAM WHIMP as TRUSTEE
FOR THE DOME TRUST t/a MY
FLATPACK
Respondent

Member of Authority: Eleanor Robinson

Representatives: Judith Moore, Counsel for Applicant
Tristam Whimp, Advocate for Respondent

Investigation Meeting: 21 October 2013 at Auckland

Submissions received: 21 October 2013 from Applicant
30 October 2013 from Respondent

Determination: 12 November 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Cindy Black, claims that she was unjustifiably dismissed by the Respondent, Mr Tristam Whimp as Trustee for the Dome Trust t/a Myflatpack (the Dome Trust).

[2] Ms Black further claims that she was unjustifiably disadvantaged by the Dome Trust failing to set out the changes necessitated by the change in her position from Sales Assistant to Auckland Manager and by failing to provide her with any training in her position as the Auckland Manager.

[3] The Dome Trust denies that it unjustifiably dismissed Ms Black, and states that she abandoned her employment as a result of 3 working days' continuous absence pursuant to clause 34 of the individual employment agreement with which she had been provided and had signed.

Issues

[4] The issues for determination are whether or not Ms Black was:

- unjustifiably dismissed by the Dome Trust or whether
 - she was unjustifiably dismissed in accordance with a 90 day trial provision; or
 - she abandoned her employment
- unjustifiably disadvantaged in her employment by the Dome Trust.

Background Facts

[5] The Dome Trust is an independent business retail outlet for IKEA furniture which is imported from Melbourne, having a head office in Christchurch and one retail outlet in Auckland (the Retail Outlet).

[6] Ms Black said she had replied to an advertisement for a part-time sales assistant at the Retail Outlet and had been recruited and appointed to the position by the then Manager, Ms Nicole Horstmann.

[7] Ms Black commenced employment at the Retail Outlet on or about the middle of June 2012 as a part-time salesperson, working four days per week. Ms Black and Ms Horstmann had signed the Employment Agreement on 15 July and 20 July 2012 respectively.

[8] Ms Black said she met Mr Tristram Whimp, sole Trustee and General Manager of the Dome Trust, a few weeks after she had commenced employment.

[9] Mr Whimp said that Ms Horstmann had spoken well of Ms Black's performance, and he had given Ms Black a salary increase at that time as he had wished to retain her services.

[10] Ms Black explained that Ms Horstmann had started to give her additional responsibility, including providing her with the Retail Outlet keys and allowing her to lock up the Retail Outlet at the close of the day. Ms Horstmann had also shown her how the staff rosters were compiled and subsequently the payroll details.

[11] Ms Black said that Mrs Horstmann had resigned and left the Dome Trust on or about the end of October 2012.

Auckland Manager Position

[12] Ms Black said she had not considered applying for the position of Auckland Manager when Ms Horstmann had resigned as it had been her observation that Ms Horstmann had been subjected to pressure by Mr Whimp whom she regarded as a 'tough' employer. However she had reconsidered when she had been contacted by Ms Leanne Miles, Administration Manager, who had discussed the possibility of her applying for the position.

[13] Mr Whimp said he had flown to Auckland on 3 December 2012 and had been collected at the airport by Ms Black who had discussed with him the possibility of her becoming the Auckland Manager on the drive to the Retail Outlet.

[14] Mr Whimp said it had been a general conversation about the Auckland Manager position and the fact that Ms Black would like to apply for it. During the conversation he had expressed his reservations about Ms Black's ability to undertake the position due to her lack of administrative and managerial experience, however Ms Black had responded by stating that she believed she was capable of undertaking the responsibilities of the position, and would prove it if given a 90 day trial period in the role.

[15] Mr Whimp said, and Ms Black confirmed, that he had told her that he would need to discuss her proposal with Ms Miles, and with Ms Frosini Konidares, who assisted with the Dome Trust Christchurch Head Office based management.

[16] On 5 December 2012 Mr Whimp received an email from Ms Black in which she applied for the Auckland Manager position, stating:

Now, further to our conversation on Monday, please be assured that I will give 100% of myself to a full-time role. Realistically the amount of responsibility that I'm expecting will demand a huge commitment of me and I'm absolutely ready to take that on. Plus if given a three-month trial period, I'd need to be rearing to go to make a success of it.

[17] Mr Whimp and Ms Miles had flown to Auckland on 11 December 2012 and formally interviewed Ms Black. During the interview Mr Whimp said that it had been stressed by him that the Auckland Manager position was mainly administrative in nature, and he had stated that it was believed that the position would be beyond Ms Black's capabilities.

[18] Mr Whimp said that job descriptions had been discussed and Ms Black had agreed to draft a job description for the Auckland Manager position.

[19] Mr Whimp said it had been decided to provide Ms Black with the opportunity to take on the Auckland Manager position and an amended individual employment agreement (the Employment Agreement) had been sent to her which she had signed on 26 December 2012, and he had signed on 28 December 2012.

[20] The Employment Agreement, which stated that it came into effect on 11 December 2012, included a 90 day trial period provision at clause 5, and an abandonment provision at clause 34:

5. 90 Day Trial Period

5.0 The employer and employee agree to and adopt a 90 day trial period for new employees, which mean the employer can dismiss the employee without the employee being able to take a personal grievance for reasons of unjustified dismissal. If the employee is dismissed during the 90 day trial period, the employee agrees not to bring a grievance against the employer.

34. Abandonment of Employment

34.0 Where the Employee is absent from his or her place of work for a continuous period of three (3) working days the Employee shall be deemed to have abandoned their employment.

[21] After signing the Employment Agreement Ms Black said she had drafted job descriptions not only for the Auckland Manager position, but for all the staff positions in the Retail Outlet, and had sent the copies to Mr Whimp.

[22] Mr Whimp stated that they had discussed the drafted job descriptions at length and on 3 January 2013 he had advised Ms Black that the job description for the Auckland Manager position was correct.

[23] Ms Black said that she had received no feedback on the drafted job description and she had therefore performed the Auckland Manager position from her practical understanding of what it entailed. Ms Black said that she had received no guidance from Mr Whimp, and had not been provided with any training in or for the role.

[24] Mr Whimp denied that Ms Black had not been provided with guidance, stating that he had offered to assist Ms Black with any queries and repeatedly offered her help and support, both verbally and by email.

9 January 2013

[25] On 9 January 2013 Ms Black attended a staff meeting at which the staff had been instructed by Mr Whimp to implement a new system for processing customer orders, however there had been no procedure manual provided in connection with the new system, only verbal instructions from Mr Whimp.

[26] Mr Whimp said that the new system for processing customer orders had been a simple system which he considered would make the process easier for the staff and would eliminate much of the paperwork associated with customer orders. He denied that he had provided only verbal instructions, and said that there had been a printed and laminated one page instruction sheet provided for staff use.

[27] Ms Black said that Mr Whimp had also directed her to move a computer from the showroom into the office as he had wanted her to spend more time in the office and less time in the showroom.

[28] Mr Whimp said he had instructed Ms Black to move the computer into the office because the Auckland Manager position was an administrative role and required a quiet area away from the showroom.

10 January 2013

[29] Ms Black said that as 10 January 2013 had been a very busy trading day for the retail outlet, she had been unable to implement the new system for processing customer orders, or to move the computer as previously instructed as it had been padlocked and she did not know where to find the key for it.

[30] Ms Black said that Mr Whimp had telephoned and emailed her during the day to ask if the new system for processing customer orders had been implemented, and if the computer had been moved. When she had informed him that the computer had not been moved because it had been padlocked, he had instructed her to have a locksmith cut and remove the padlock.

[31] Mr Whimp said that moving the computer should have been a simple job, and he could not understand why Ms Black had not completed the task as instructed.

[32] Ms Black said that she had noticed during the telephone call that Mr Whimp had been demanding and had not been pleased that she had not followed the instructions regarding implementing the new system for processing customer orders, or moving the computer

[33] Ms Black said that Mr Whimp had also instructed her to complete a stocktake which he and Ms Konidares had started on 9 January 2013. Ms Black said she had undertaken completion of the stock take by recording the stock manually with the assistance of another member of staff and having a third employee enter the data on to a spreadsheet which had been emailed to Mr Whimp.

[34] Ms Black, who confirmed at the Investigation Meeting that she had been shown how to carry out a stock take by Mr Whimp with one person counting and a second person inputting the data, explained that she had not been able to electronically record the stock take information using the iPad provided as it had not been charged as a result of her having left the charger at her home.

[35] Mr Whimp said he had not been satisfied with the method of conducting the stock take by Ms Black which had resulted in mistakes. In particular stock on the stolmen shelves had not been included in the stock take, and when he had raised this issue with Ms Black she had apologised and said she would remedy it.

[36] Ms Black said she had received emails from Mr Whimp raising the stock take stolmen shelves issues with her on 12, 15 and 16 of January and again on 13 and 14 February 2013 although she had considered the issue dealt with on 11 January 2013.

[37] Mr Whimp explained that he had sent the repeat emails to Ms Black as she had failed to address outstanding issues connected with the stock take.

14 January 2013

[38] Ms Black said that Mr Whimp had telephoned her early on 14 January 2012 because Ms Miles had received an enquiry about an order from a customer. Ms Black said that she had not been aware that the order had not been processed as she had instructed as she had been rostered off the previous day, and she had not had time that day to debrief her staff due to the early timing of the call.

[39] Ms Black said Mr Whimp had been irate and had accused her of not being aware of what the staff of whom she was in charge were doing, with which she had agreed on the basis that she had not had time to debrief her staff at that time.

16 January 2013

[40] Ms Black had received a telephone call on 16 January 2013 from Mr Whimp who was in Melbourne. She said Mr Whimp had been irate that customers were not being contacted as soon as possible, and had criticised her practices and had been verbally aggressive and accusatory.

[41] Mr Whimp said at the time of the telephone call he had been feeling frustrated as a result of having asked Ms Black to obtain tenders for painting the back wall of the Retail Outlet which she had failed to do. As a result he had been frustrated with her seeming inability to progress that matter.

[42] Ms Black said that during the telephone call Mr Whimp had also queried why she had been working after the normal hours of 9 a.m. to 5 p.m. as indicated on the time sheets she had submitted for payment and thereby exceeding the contractual hours associated with the Auckland Manager position.

[43] Following the telephone conversation Ms Black said she had decided to make a list of concerns to address with Mr Whimp when he returned from Melbourne.

[44] On 20 January 2013 Ms Black said she had worked unpaid in the office updating all files, collections, pre-orders and transfers. Mr Whimp had contacted her and queried why she had not dismissed an employee as she had been instructed to do. Ms Black said she had responded by saying that the employee had been hard-working, however she had subsequently actioned the instruction she had been given by Mr Whimp.

[45] Mr Whimp said he had not requested Ms Black to work any unpaid hours, and had always paid her for the hours she had recorded on her timesheets, even though these had exceeded the contractual hours.

[46] Mr Whimp explained that the employee Ms Black had been instructed to dismiss had been a casual employee whose performance had not been satisfactory prior to the Christmas break, and whom he had instructed Ms Black not to re-engage following the Christmas break.

[47] Ms Black said that Mr Whimp had telephoned her on 29 January 2013 criticising her again for working when she had been rostered off.

1 February 2013 Meeting

[48] Ms Black said that Mr Whimp and Ms Konidares had been present at the Retail Outlet on 31 January 2013 and had asked her to meet with them the following day, 1 February

2013. Ms Black said she had been given no advance warning of this meeting, or any details as to what was to be discussed.

[49] During that meeting Ms Black said that Mr Whimp had informed her that he did not think she was coping with the responsibilities associated with the Auckland Manager position, particularly in respect of the administrative aspect of the position. Ms Konidares had also told her that the Dome Trust was looking for someone to replace her.

[50] Mr Whimp, who said that the meeting held on 1 February 2013 had been a general meeting which was held regularly, confirmed that he had told Ms Black that her role as Auckland Manager was not working from an administrative perspective.

[51] Ms Konidares said that she had also endorsed the view that Ms Black was not competent at the administration required of the role of Auckland Manager, but said she had acknowledged Ms Black's strong interpersonal skills and passion for sales.

[52] Ms Black said that Mr Whimp, who advised her that she was not going to be dismissed, had suggested that she consider reverting to a senior salesperson position.

Events after 1 February 2013

[53] On 12 February 2013 Mr Whimp said he had become aware of piles of paper in the Retail Outlet office and it had occurred to him that Ms Black had neglected the majority of the administration work which might mean that customer orders and records might contain errors. As a result he had worked until the early hours of the following day tidying and sorting out the paperwork, and had reached the conclusion that Ms Black had not been fulfilling the requirements of the Auckland Manager position.

[54] Ms Black said that she had arrived at work the next day, 13 February 2013, to find the office in disarray, and she had queried this with Mr Whimp when he arrived at the Retail Outlet; however he had not provided her with an answer.

[55] Later that morning Ms Black said Mr Whimp had called her into a meeting and criticised her work, informing her that he was giving her two weeks' notice and that she would no longer be employed as Auckland Manager.

[56] Ms Black said she had left the meeting and during her lunch break sent a text message to her husband saying that she had been given two weeks' notice. On returning to the Retail Outlet after the lunch break, she had also told two of the other employees that she had been given two weeks' notice.

[57] Mr Whimp said that he told Ms Black that she was to relinquish the Auckland Manager position in accordance with the trial period provision in the Employment Agreement.

[58] Ms Black said she had been telephoned by Mr Whimp on 14 February 2013 and after revisiting the issues and problems with her, he had asked her to call him the following day with a leaving date. When she had queried this request on the basis that she had understood she was not being dismissed but only relinquishing the Auckland Manager role, Mr Whimp had told her to take a break and think about her life.

[59] Mr Whimp agreed he had suggested that Ms Black take a break, but said his expectation had been that Ms Black would continue in employment with the Dome Trust as a salesperson.

[60] Following the telephone call, Ms Black said she had contacted another employee, Ms Angela Wei, at the Retail Outlet and asked her to find a replacement for her for the following day as she had been feeling unwell.

[61] Ms Black telephoned Ms Wei on 15 February 2013 and asked her to find a replacement for her on 16 and 17 February 2013, however she did not telephone Mr Whimp, Ms Konidares or Ms Miles to inform them that she was absent from the workplace.

[62] Ms Konidares said that she had only realised Ms Black had been absent when she had contacted the retail outlet over the weekend of 16 February 2013.

[63] Mr Whimp said he had telephoned and emailed Ms Black in connection with her absence but had been unable to obtain a response, and on 17 February 2013 he had emailed her stating:

Dear Cindy,

We have become increasingly aware that the role as showroom manager is simply not for you. You fail to meet minimal standards when it comes to administration and task completion.

As I mentioned when we spoke during the week, Frosini and I extended our Auckland visit to enable us to sort out aspects of administration that had been neglected. We worked until after midnight each day. You would agree that this situation is far from ideal for a woman who is seven months pregnant.

I understand that you didn't work on Friday, Saturday or today. Why did you not inform me or head office? Why did you think it sufficient to only inform one of your sales staff?

Under the terms of your 90 day employment contract, we will be terminating your employment as of today. As an act of good faith, we will pay you up to the end of Wednesday, 20th February.

[64] On 13 May 2013 Ms Black filed a Statement of Problem with the Authority. The parties subsequently attended mediation; however that did not resolve matters.

Determination

Was Ms Black unjustifiably dismissed by the Dome Trust?

[65] Ms Black had been dismissed by the Dome Trust on 17 February 2013. The Test of Justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[66] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. The Dome Trust must therefore establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[67] In accordance with s 103A (3) of the Act the Authority must also consider whether:

(b)... the employer raised the concerns that the employer had with the employee ...

(c)...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...

[68] The Dome Trust was entitled to set standards for Ms Black's performance as the Auckland Manager, but I find that the fair and reasonable employer would have given Ms Black clear objectives and have reviewed the attainment of these on a regular basis.

[69] In particular, and especially in view of Mr Whimp's evidence that he had expressed his reservations to Ms Black regarding her lack of administrative and managerial experience, I would have expected Mr Whimp to have made Ms Black fully aware of the expectations he had in regards to her performance, the standards which he had expected of her, to have provided her with training and guidance, and to have monitored her progress on an immediate and regular basis..

[70] I do not consider that verbally informing Ms Black that the job description she had drafted for the Auckland Manager position was correct, or to have been sufficient to ensure that Ms Black knew what was expected of her in the Auckland Manager's position, or to have replaced the need for training and guidance.

[71] In the situation in which he had considered Ms Black to have fallen short of the standards he required, I consider that Mr Whimp as a fair and reasonable employer should have provided her with a performance improvement plan accompanied by guidance and assistance to assist her in obtaining the standards expected within a specified time frame.

[72] However, although Mr Whimp had made Ms Black aware at the meeting held on 1 February 2013 that he not been satisfied with her performance as the Auckland Manager, he had not provided her with any of the associated support as set out in the preceding paragraph in order for her to achieve the required standard expected of her.

[73] The fact that Ms Black had suggested that her employment in the position of the Auckland Manager be subject to a trial period I do not consider to have lessened the responsibility on the Dome Trust to provide her with the requisite support to assist her fulfil the requirements of the position.

Was Ms Black justifiably dismissed in accordance with the 90 Day Trial Period Provision?

[74] The Act makes provision for trial periods at ss 67A and 67B. The Act states:

*S 67A(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

[75] The Employment Court case *Smith v Stokes Valley Pharmacy (2009) Ltd*¹ established the principle that the trial period provisions as set out in ss 67A and 67B of the Act do not apply to an applicant who at the time of entering in to the trial period was already an employee.

[76] I find that because Ms Black commenced employment with the Dome Trust on or about 12 July 2012, she was already an employee at the time the trial period provision was agreed to, and therefore ss 67A and 67B of the Act do not apply.

[77] I determine that Ms Black was not justifiably dismissed in accordance with the trial period provision set out at clause 5 of the Employment Agreement.

Did Ms Black abandon her employment?

[78] The Employment Agreement which had been issued to Ms Black and which she agreed she had read and understood had contained an abandonment clause at clause 34.

[79] In the letter from the Dome Trust to Ms Black dated 17 February 2013 Mr Whimp sought to rely on this clause when confirming his view that Ms Black had terminated her employment by reason of abandonment.

[80] The Court of Appeal in *E N Ramsbottom Ltd v Chambers*² accepted a submission that an employer must be cautious in drawing the inference that an employee has abandoned their employment and that it faces a high threshold if contending that the employment ended at the employee's initiative.

[81] I accept that Ms Black, as the Auckland Manager, ought to have contacted a member of the management team rather than a junior employee of the Retail Outlet, to explain her reasons for her absence from work. Clause 4.6 of the Employment Agreement contains a specific requirement that the employee personally advise his or her manager if he or she is unable to attend for work, and clause 12.4 requires that the employee notifies the employer of the need to take sick leave.

[82] However there is no evidence that Ms Black did not intend to return to work following her sickness. Ms Black had informed Ms Wei of her absence by reason of sickness on 14 and 15 February 2013 and had made arrangements for her absence to be covered via Ms Wei.

¹ [2010] NZEmpC 111

² [2000] 2 ERNZ 97

[83] On this basis I do not find that Ms Black had abandoned her employment, or that it was safe for Mr Whimp to conclude that she had done so without making further enquiries.

[84] Having fully considered the issues, I find that at the meeting held on 1 February 2013, and the meeting on 13 February 2013 when Mr Whimp had informed Ms Black that he was giving her two weeks' notice that she would no longer be employed as the Auckland Manager, the Dome Trust did not adhere to the principles of procedural fairness.

[85] I determine that Ms Black was unjustifiably dismissed by the Dome Trust.

Was Ms Black unjustifiably disadvantaged in her employment by the Dome Trust?

[86] Ms Black is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable the disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[87] The elements of s 103(1)(b) are:

- a. An action
- b. The action was unjustifiable
- c. The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[88] I find that the Dome Trust acted unjustifiably in not providing Ms Black with support and guidance in the position of Auckland Manager, and that this resulted in a disadvantage to her, namely the termination of her employment.

[89] I determine Ms Black was unjustifiably disadvantaged in her employment.

Remedies

[90] Ms Black has been unjustifiably dismissed and unjustifiably disadvantaged in her employment and she is entitled to remedies.

Lost Wages

[91] Employees are under a duty to mitigate their loss. Ms Black said that she had been unable to seek work for a period of three months as a result of stress suffered as a result of the loss of her job at the Dome Trust.

[92] Ms Black provided supporting evidence in the form of a letter from Kereu Psychotherapy Services Limited which indicated that Ms Black had attended counselling sessions throughout March, April, May and June 2013. On this basis I am prepared to accept that Ms Black was unable through mental health issues to make any efforts to mitigate her loss for some time after her employment with the Dome Trust ended..

[93] I order that the Dome Trust pay Ms Black the sum of \$11,960.00 gross, calculated as 13 weeks at \$920.00 per week, pursuant to s 128(2) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[94] Ms Black is also entitled to compensation for humiliation and distress. I observe that Ms Black stated that she had suffered from distress following her dismissal.

[95] I find that in respect of both matters giving rise to a personal grievance, these being the disadvantage grievance and the dismissal grievance, Ms Black suffered distress.

[96] In respect of the disadvantage and dismissal grievances, the Dome Trust to pay Ms Black the sum of \$6,000.00, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[97] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[98] In the position of Auckland Manager Ms Black had been issued with several specific instructions by Mr Whimp, including implementing a new system for processing customer orders, undertaking the stocktake in a certain manner, not exceeding her contractual hours, and not re-engaging a casual employee.

[99] I find that these were reasonable instructions made by her manager. Ms Black had failed to follow these instructions and whilst she had provided reasons for these failures at the Investigation Meeting, she had not advised and discussed these reasons with Mr Whimp prior to each event and he had only become aware that his instructions had not been adhered to after the event.

[100] I find that this behaviour on the part of Ms Black had the effect of contributing to Mr Whimp's conclusion that she could not continue in the Auckland Manager position.

[101] I further note that Ms Black had read and signed two individual employment agreements with the Dome Trust, both of which contained clauses 4.6 and 12.4 which dealt with notification to the employer in the event of absence by an employee. Ms Black failed to contact her manager, Mr Whimp, and explain her anticipated and continuing absence, instead relying on having informed a junior employee.

[102] I find that by not following the correct procedure, Ms Black contributed to, and/or confirmed, Mr Whimp's assumption that she had abandoned her employment.

[103] I find contributory fault on the part of Ms Black and reduce the compensation awarded for hurt and humiliation by 70%.

Costs

[104] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority