

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 333
3143861

BETWEEN	TYLA ROBERTS Applicant
AND	SIMPLY GIRLS PAINTERS AND DECORATORS LIMITED First Respondent
AND	KATHERINE COURTENAY- ROE Second Respondent

Member of Authority: Pam Nuttall

Representatives: Rachel Webster counsel for the Applicant
Katherine Courtenay-Roe for the Respondents

Investigation Meeting: 24 May 2022

Submissions received: 1 June 2022 from Applicant

Determination: 19 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tyla Roberts claims she was unjustifiably dismissed from her employment with Simply Girls Painters and Decorators Limited (Simply Girls) and that her employer breached the employment agreement between them by terminating her employment without reasonable cause and without a fair process. She further claims that Simply Girls has breached the implied term of mutual trust and confidence in the employment agreement.

[2] Ms Roberts also claims that Katherine Courtenay-Roe, as director and sole shareholder of the employing company, was a person who incited, instigated, aided and

abetted the breach of the employment agreement by Simply Girls. She seeks to have penalties imposed on the company and the director.

[3] Simply Girls and Ms Courtenay-Roe deny these claims and deny the Authority's jurisdiction because they say that Ms Roberts' grievance has been raised out of time.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Ms Roberts and from Al Haggard, Ms Courtenay-Roe's business advisor, and two employees of Simply Girls. Of these potential witnesses, only Ms Roberts appeared at the investigation meeting, which was conducted by AVL (Zoom), to answer questions under affirmation from me and the parties' representatives. The remaining witness statements were not given under affirmation, could not be tested by questioning and were not otherwise independently verified or authenticated.

[5] Ms Courtenay-Roe also responded to questions from me and from Ms Roberts' counsel on the basis that the statement in reply be regarded as her witness statement, and this was affirmed as such. There were closing written submissions from Ms Roberts, lodged on 1 June 2022.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination were:

- (a) Was Ms Roberts' personal grievance claim raised within the statutory 90 day period?
- (b) Was there a valid and operative 90 day trial period?
- (c) Unjustified dismissal: was the decision of Simply Girls to dismiss Ms Roberts and the way in which that decision was reached, what a fair and reasonable employer could have done in all the circumstances at the time?
- (d) Was Ms Roberts' employment agreement breached by Simply Girls?

- (e) If so, did Ms Courtenay-Roe incite, instigate, aid or abet Simply Girls' breach of the employment agreement?
- (f) If Simply Girls' actions were not justified in respect of dismissal, what remedies should be awarded, considering compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (g) If breaches of the employment agreement are established and if Ms Courtenay-Roe incited, instigated, aided or abetted the breaches should penalties be awarded against Simply Girls and Ms Courtenay-Roe under section 134(2) of the Act?
- (h) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Roberts that contributed to the situation giving rise to her grievance?

Background

[8] Ms Roberts started working for Simply Girls in late May of 2020. She was engaged as a casual worker but was not given any written employment agreement.

[9] Ms Roberts was also employed in a part-time job elsewhere and was not always available to work the hours Simply Girls requested.

[10] Ms Roberts was offered a permanent position as a Brush Hand with a minimum of 20 hours per week so she could leave her other job and work only for Simply Girls.

[11] An employment agreement to this effect was signed by Ms Courtenay-Roe for the company on 3 August 2020 and by Ms Roberts on 6 August 2020.

[12] The agreement included the following clauses:

Trial period

The first 90 days of employment will be a trial period, starting from the first day of work.

During the trial period, the employer may dismiss the employee. Notice must be given within the trial period. Depending on how long the notice period is, the last day of employment may be before, at, or after the end of the trial period.

During the trial period, the employer's normal notice period doesn't apply. Instead, either the employee or the employer may end this agreement by giving 2 weeks notice before the trial period ends. The employer might decide to pay the employee not to work. For serious misconduct, the employee may be dismissed without notice.

If dismissed during the trial period, the employee cannot bring a personal grievance or other legal proceedings about the dismissal. They may still bring a personal grievance if they feel the employer has treated them unfairly for other reasons, eg discrimination, harassment or unjustified disadvantage.

During the trial period, the employer and employee must treat each other in good faith.

Ending employment

The employer might end the employee's job if there's a good reason (also called reasonable cause), and they follow a fair process in deciding to end employment.

[13] Some issues arose as to the quality of the work Ms Roberts was producing and these concerns were raised and discussed either during or at the end of an open staff meeting in late September or early October 2020.

[14] On 2 November 2020 Ms Roberts received the following email message from Ms Courtenay-Roe as director of Simply Girls:

We hereby inform you we are giving you 2 weeks notice to end your employment under the 90 day trial period in your contract that was signed and dated at the 3/08/2020. Your last working day will be the 13/11/2020 the end of the pay week.

[15] Ms Roberts responded to Ms Courtenay-Roe on the same day stating that she believed she had been unjustifiably dismissed as the 90 day trial was not valid since she was working as an employee prior to 3 August 2020.

[16] A personal grievance for unjustified dismissal was raised in a more formal letter to Ms Courtenay-Roe on 7 December 2020.

Was the personal grievance for unjustified dismissal raised within the statutory 90 day period?

[17] The documentation produced to the Authority clearly showed that the personal grievance for unjustified dismissal was raised in compliance with s114 (2) of the Act and within the time frame specified in s114(1) of the Act. Ms Courtenay-Roe's insistence that the grievance had been raised out of time arose from a misunderstanding of legal advice she received following Ms Robert's dismissal. The issue of whether a grievance had been raised within the statutory time frame as discussed in this legal advice referred to a claim for unjustified disadvantage which was subsequently withdrawn by Ms Roberts.

[18] Because the personal grievance for unjustified dismissal was raised within the required statutory time frame the Authority has jurisdiction to investigate this claim.

Was there a valid and operative 90 day trial period?

[19] The Act provides in s67A as follows:

When employment agreement may contain provision for trial period for 90 days or less

- (1) An employment agreement containing a trial provision may be entered into by a small-to-medium-sized employer and an employee who has not previously been employed by the small-to-medium-sized employer.

[20] Ms Roberts had already been employed by Simply Girls when she entered into the employment agreement which contained the trial period clause. Consequently the trial period provision did not meet the requirements of the Act and Ms Roberts could not be dismissed under its terms.

Was Ms Roberts unjustifiably dismissed?

[21] The Act requires at s103A(2), that an employer must justify a decision to dismiss an employee. In doing so the Act requires the Authority to objectively assess whether the employer's actions and the way it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. At s103A(3), the Act sets out the minimum fair process requirements which the employer's decision making must satisfy. The Authority must consider:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[22] This process was not followed prior to Ms Roberts' dismissal. Though concerns about the standard of her work had previously been raised, this occurred in the context of a general staff meeting and not with any indication that a disciplinary process was being undertaken or that termination of Ms Roberts employment was being considered.

[23] Under questioning from the Authority, Ms Courtenay-Roe conceded that she had relied entirely on the assumption that the trial period in the employment agreement was valid and operative to dismiss Ms Roberts. Ms Courtenay-Roe's evidence was that she sought advice from her business advisor in these terms: "She's signed this contract-there's a 90 day period can I use that?" and was told: "well she's signed it."

[24] Where no fair process has been followed the employer cannot be said to have any substantive justification for dismissing the employee. In *Madden*, the court has stated that:

An employer who has failed to give its employee an adequate opportunity of being heard prior to a dismissal...cannot be said to have any valid reason to reach a conclusion adverse to the employee and therefore is treated as if it had not reached it.¹

[25] Accordingly I find that Ms Roberts was unjustifiably dismissed.

Was there a breach of the employment agreement?

[26] Ms Roberts has argued that there is a breach of a term of the employment agreement that "[t]he employer might end the employee's job if there's a good reason (also called reasonable cause), and they follow a fair process in deciding to end employment." Given the reasons supporting my finding that Ms Roberts was unjustifiably dismissed, there could be no contractual basis for the dismissal given that a fair process was not followed to establish "good reason" or "reasonable cause".

[27] Ms Robert's written submissions also ground the claim for breach of contract on an argument that the implied term of mutual trust and confidence has been breached by the manner of the termination of her employment.

[28] Inevitably an unjustified dismissal which does not follow a fair process must involve the breach of a term in the employment agreement which requires that a fair process is followed to establish a good reason to dismiss. Similarly the duty of mutual trust and confidence will not have been fulfilled in this situation.

¹ *Madden v New Zealand Railways Corp* (1991) 2 ERNZ 690 (EmpC).

Remedies

[29] Since no claim for lost wages has been made, the remedy sought is compensation under s123(1)(c)(i) of the Act.

[30] Ms Roberts' evidence is that:

This has brought on a lot of stress in my life which has affected me negatively due to health conditions flaring up very badly when put under stress. Katherine doing this has also hurt me especially how she lied to my face about her plans after giving me a contract knowing I was going to be quitting my other job since I wasn't going to be on a causal contract where I can be let go like this.

I had no idea why Katherine decided to get rid of me...

It is really hurtful to me that Katherine won't take responsibility for this. It was her decision to dismiss me, and she continued with it even when I pointed out to her that the trial period wasn't valid. She didn't care at all about the law or the impact her deceit had on me. Since I've raised the personal grievance all she has done is try to belittle me, belittle my lawyer and try and do things to avoid liability.

[31] In light of the effect on Ms Roberts of her unjustified dismissal I award \$12,000 compensation under the heads of humiliation, loss of dignity, and injury to the feelings pursuant to s123(1)(c)(i) of the Act.

Contribution?

[32] No submissions were made to me in relation to contribution by Ms Roberts and there was no evidence indicating any blameworthy conduct by Ms Roberts that contributed to the situation giving rise to her grievance.

Penalties?

[33] Ms Roberts seeks penalties against Simply Girls and Ms Courtenay-Roe for breach of the employment agreement and breach of implied term of mutual trust and confidence. However, the remedy awarded to Ms Roberts is sufficient. Given the nature and extent of the breaches, penalties in my view would be disproportionate.

Summary

[34] The personal grievance for unjustified dismissal was raised within the required statutory time frame and the Authority had jurisdiction to investigate this claim.

[35] There was no valid and operative trial period clause in the employment agreement.

[36] Ms Roberts was unjustifiably dismissed.

[37] There was a breach of the employment agreement and the implied term of mutual trust and confidence, but penalties are not awarded.

[38] Ms Roberts is awarded \$12,000 compensation under the heads of humiliation, loss of dignity, and injury to the feelings pursuant to s123(1)(c)(i) of the Act.

Costs

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[40] If they are not able to do so and an Authority determination on costs is needed Ms Roberts may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Simply Girls would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[41] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[42] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Pam Nuttall
Member of the Employment Relations Authority

² <<https://www.era.govt.nz/determinations/awarding-costs-remedies>>.