IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2023] NZERA 278
3152905

	BETWEEN	TRACY TAITE Applicant
	AND	J AND R (2019) LIMITED (T/A VILLAGE GREEN CAFÉ) Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Dave Cain, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	29 November 2022
Submissions (and further information) Received:	29 November 2022, 7 December 2022, 29 February 2023, and 8 May 2023 from the Applicant
Date of Determination:	30 May 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem.

[1] Tracy Taite was employed as a head chef at the Village Green Café from 10 January 2021 to 21 February 2021 when she was dismissed under a 90-day trial clause in the individual employment agreement (IEA) between the parties. Joga Singh Chamber, also known as Jimmy, is the sole director and shareholder of J and R (2019) Limited, trading as the Village Green Café (Village Green).

[2] On Sunday 21 February 2021, Mr Chamber sent Tracy Taite a letter as follows:

End of employment under 90-days trial period

> Since starting your employment with us, we have had and noticed a lot of wastage of food. We thought this was a once-off thing but it has since continued. We have also had a lot of complaints from the customer and noticed a vast change in style and quality of food. On Sunday 07/02/2021, you were given the final warning. This letter is to inform you that your employment with J & R (2019) Limited, trading as Village Green Café, will end as of Sunday 07/03/2020. Your last payslip and pay will be paid on Tuesday 09/03/2021.

[3] Ms Taite asked for further information and received an email from the Village Green confirming employment ended by way of the 90-day trial period. That email also touched on a number of further issues additional to food wastage and customer complaints, such as making a cake at work for a family member and leaving the oven on all night.

[4] Ms Taite says her dismissal was unjustified because the 90-day clause could not be relied on, and if she was incorrect about that and her dismissal was for misconduct, she says none of the issues set out in the letter were raised with her or investigated. She had no knowledge of the final warning referred to in the email dismissing her.

[5] In response Ms Taite advised by email that for health reasons, due to upcoming surgery, she would not be working out her notice. Village Green did not respond. Then by email Ms Taite raised a personal grievance with Village Green on 4 March 2021 which is within the statutory timeframe raising grievances.

The Authority's investigation

[6] For the Authority's investigation Ms Taite lodged a written witness statement and answered questions under oath or affirmation from me and her advocate gave closing written and oral submissions.

[7] There was no attendance by Village Green at the investigation meeting but it had earlier lodged a statement in reply attaching a statement from Bhupinder Kaur (Pinder), café manager at Village Green. After lodging the statement in reply, Village Green was represented until the representative withdrew prior to the investigation meeting.

[8] On the day of the investigation meeting, the start of the meeting was delayed allowing time for an Authority Officer to contact Mr Chamber on behalf of Village Green. Mr Chamber

answered his phone and told the Authority Officer he would not be attending the investigation meeting.

[9] I am satisfied that the Notice of Investigation Meeting was served correctly on Village Green in accordance with the rules about service.[1] I also note that on more than one occasion Village Green was informed in writing that if it did not attend the investigation meeting, the Authority may, without hearing the evidence from Village Green, issue a determination in favour of the applicant.[2]

Two employment agreements

[10] There were two employment agreements. The first was dated 4 January 2021 with employment to commence on 10 January 2021 having an hourly rate of $22.00 per hour. The second was dated 19 January 2021 with an hourly rate increase to $24.00 per hour and a commencement date of 19 January 2021. Ms Kaur says the intention (of the second agreement) was to reflect the hourly rate change. It appeared to be her understanding that the first employment agreement remained in force.

[11] The statement in reply records Village Green's view that Ms Taite was rightfully dismissed under the 90-day trial clause which appeared in both employment agreements and therefore an unjustified disadvantage or dismissal claim is "unwarranted".

[12] Ms Taite's evidence conflicted with Ms Kaur's written statement in that Ms Taite says she signed both agreements at the same time in early February several weeks after she had started work. Ms Taite is certain she did not record the date she signed, only her signature. She recalls Ms Kaur provided both agreements to her in the middle of a busy workday and she signed in a hurry. She says the commencement dates were instead 6 January 2021 and 23 January 2021. She also says the handwritten dates on the signature pages of both agreements is not her handwriting.

[13] The commencement dates referred to by Ms Taite were typed into the schedule attached to both employment agreements and for that reason I prefer Ms Taite's evidence in relation to commencement dates.

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[1] Employment Relations Authority Regulations 2000, clause 16(3)(b)(v).
[2] Employment Relations Act 2000, schedule 2, clause 12.

[14] There is also a conflict in the evidence about whether the agreements were signed at the same time or not and an assertion that someone other than Ms Taite inserted and/or changed the date on the signature page on agreements. I do not need to resolve those conflicts because I have found below that regardless of the difference in the statements of the parties about when the agreements were signed, the 90 day trial period cannot have been operative in either agreement.

Was there a valid 90 day trial period in operation?

[15] A 90-day trial period clause appears in both agreements stipulating in bold in the heading of the clause that this provision only applied to new employees, consistent with the legislative requirement that only new employees can be subject to a trial period.[3] Despite that Village Green says in the written material lodged with the statement of reply, that although a second agreement was in existence, the trial period for new employees in the first agreement was operative because the only change the second agreement intended to make was the increase in Ms Taite's hourly rate.

[16] However, regardless of when it was signed, the second contract is not a variation of the first agreement. It is a new agreement with the new hourly rate and a new commencement date and it is signed by Ms Taite so the second agreement must have overtaken the first agreement such that the trial period (in the first agreement) was no longer in operation. That means neither the first nor the second employment agreement could be relied on to dismiss Ms Taite under the 90-day trial provision.

[17] The alternative analysis, if I prefer Ms Taite's evidence, that she signed both employment agreements approximately three weeks after she had started work, also means the trial period clause cannot be relied on by Village Green to justify the dismissal. This is because Ms Taite was already an employee by that stage. Only new employees can be subject to a trial period.[4]

Complaints, food wastage and a final warning

[18] The letter of termination records in addition to the trial period, that food wastage was an issue and Ms Taite received a warning about that. Ms Taite said she had no knowledge of

[3] Employment Relations Act 2000, s 67A(1).
[4] Above n3.

any significant issues with her work other than several low level conversations about how they wanted things done as Ms Taite settled into the role. She notes they were happy with her progress as evidenced by the increase in her hourly rate after several weeks at work.

[19] An example of such a conversation was one about a slice Ms Taite made that did not work out. On another occasion Ms Kaur did not want garnish put on top of food as it went out. Ms Taite said Ms Kaur pulled the garnish off the food that was plated up and ready to go saying the garnish was a waste of the product. Ms Taite, on the other hand, said that she took pride in her work and she was a trained chef and presentation was very important to her.

[20] Ms Taite's written and oral evidence was that no food wastage issues were raised with her directly, and although food safety was discussed, there was never a direct conversation with her. The other reason for the dismissal in the termination letter was complaints from customers and a vast change in the style and quality of the food. Ms Taite says she was not notified of any complaints about the food, or the issue of the birthday cake. In regard to the oven being left on, she says others were responsible for that but she was never asked to provide a response to that concern because it was never raised with her.

[21] Ms Taite's evidence was that no warning was given to her. I note Ms Kaur's statement provides no detail about the warning. Her written statement simply provides that on Sunday 7 February, Ms Kaur and Mr Chamber gave Ms Taite a final warning and told her that any further non-compliance would lead to immediate dismissal. Ms Kaur goes on to say that no improvements were being noticed so it was decided to terminate Ms Taite's employment under the 90-day trial period and she was given her termination notice on Sunday 21 February by email.

Dismissal justifiable?

[22] If the dismissal was in relation to the additional concerns set out in Village Green's emails to Ms Taite, Village Green would have been required to act as a fair and reasonable employer when it addressed any concerns. When I compare the test in s 103A of the Act and how the employer acted towards Ms Taite, it is my conclusion, even if Village Green had those concerns at that time, the steps taken and decisions made were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Village Green could have been expected to raise concerns with Ms Taite, give her an opportunity to respond and genuinely consider any response from Ms Taite before making any decisions.

[23] It would also be necessary for Village Green to be satisfied that the conduct of concern was sufficiently serious to warrant dismissal. It seems more likely Village Green relied on the trial period as the basis for the dismissal, which might explain why very few steps were taken that would be expected of an employer in relation to the conduct concerns including about food wastage and customer complaints. It is also unlikely that the matters raised were serious enough to justify dismissal even if the correct process was followed.

[24] Ms Taite also claims she was disadvantaged, and those disadvantages were two-fold. Firstly, no issues were raised with her at the time in relation to the matters set out in the termination letter and secondly, there was a complete lack of process. Those matters form part of the factual picture that led to the conclusion Ms Taite's dismissal was not justified. I have therefore not considered them as separate claims.

[25] I find Ms Taite's claim that her dismissal was unjustified has been successful. The trial period clauses in the employment agreements were either not valid or could not operate to justify Ms Taite's dismissal.

Remedies

Compensation

[26] Ms Taite seeks an award of compensation under s123(1)(c)(i) of the Act in the range of $15,000.00 to $20,000.00 for humiliation, loss of dignity and injury to feelings. The evidence supports that Ms Taite was impacted under each aspect that requires consideration.

[27] This was Ms Taite's first employment after a significant period of time out of the workforce due to serious health issues from a cancer diagnosis. The prospect of returning to full time work in a role that she thoroughly enjoyed represented a fresh start for her and she was thrilled about the opportunity. Her evidence was that her mental health went downhill very quickly. She never expected her job to end so suddenly after such a short period of time. She felt she was doing well and had positive feedback. She found this to be a humiliating experience. Ms Taite said her health declined and she had to seek medical assistance to cope with the situation she found herself in.

[28] Given my findings above, considering the distress experienced, the impact on Ms Taite's health and the general range of awards in similar cases, an appropriate award of compensation under s 123(1)(c)(i) of the Act is $20,000.00 for the unjustified dismissal.

Lost wages

[29] Lost wages were also claimed and due to the suddenness of the dismissal Ms Taite found it difficult in the immediate aftermath of the dismissal to look for work because of the impact on her health. However, it was not clear whether Ms Taite will be able to clearly show loss as a result of the grievance due to a number of additional factors and the need for further medical information. In the circumstances of this case, I consider it appropriate to reserve leave for Ms Taite to come back to the Authority specifying what is sought, if required.

Contribution

[30] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance. In this case, in the context of a dismissal under a 90 day trial clause that was not able to be justified, and where the process followed was so flawed it resulted in unfairness to Ms Taite, I do not find Ms Taite's conduct contributed to the situation or was sufficiently blameworthy to warrant a reduction.

Costs

[31] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Taite 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 the Village Green 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.

[32] 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.[5]

Sarah Kennedy-Martin
Member of the Employment Relations Authority

[5] For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1