IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 342
3165668

	BETWEEN	CHLOE CATANACH-HESSELL Applicant
	AND	THE BUTCHERS MISTRESS 2021 LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Kirsten Westwood, counsel for the Applicant Jonathan Blease, representative for the Respondent
Investigation Meeting:	5 October 2022
Submissions Received:	19 October 2022 from the Applicant Up to 24 May 2023 from the Respondent
Date of Determination:	29 June 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Chloe Catanach-Hessell was employed by The Butchers Mistress 2021 Limited (TBM) on 30 August 2021 to work in its butchery primarily as a shop assistant.

[2] TBM was unhappy with Ms Catanach-Hessell's performance at work and on 8 October 2021 TBM dismissed Ms Catanach-Hessell relying on the trial provision in her employment agreement.

[3] Ms Catanach-Hessell says the trial provision in her employment agreement was not valid and could not be relied on to bring her employment to an end. As a result, her dismissal was unjustified.

[4] TBM refutes this and says the trial provision was valid and Ms Catanach-Hessell's dismissal was justified.

The Authority's investigation

[5] Ms Catanach-Hessell raised a personal grievance for unjustified dismissal. The parties were unable to resolve this grievance and Ms Catanach-Hessell lodged a statement of problem in the Authority claiming unjustified dismissal.

[6] So, I investigated Ms Catanach-Hessell's claim for unjustified dismissal.

[7] I investigated this claim by receiving written evidence and documents, holding an investigation meeting on 19 October 2022 and assessing the written submissions of the parties' representatives.

[8] I received witness statements from Ms Catanach-Hessell and her mother Maree Atkinson-Catanach and Jonathan Blease and Deborah Leggett of TBM. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statements and gave oral evidence in answer to questions from myself and the parties' representatives.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Issues

Unjustifiable dismissal

[10] The first issue to resolve is whether the trial provision in Ms Catanach-Hessell's employment agreement was compliant with the requirements of the Act and therefore valid.

[11] If the trial provision was valid, then Ms Catanach-Hessell's claim must fail as she is unable to bring a personal grievance or legal proceedings in respect of the dismissal.[1]

[12] If the trail provision was not valid, then Ms Catanach-Hessell's claim can proceed and I must decide if her dismissal was justified or not.[2]

Analysis

Ancillary matters

[13] At the outset of my analysis, I want to address matters raised by Ms Catanach-Hessell about Mr Blease's conduct at work, in terms of comments he is alleged to have made to her. The matters raised were unsubstantiated and I did not find Ms Catanach-Hessell's evidence to be particularly reliable on this. In contrast I found Mr Blease's response to the matters raised to be credible and he was genuinely upset by the allegations made.

[14] The key point is the matters raised by Ms Catanach-Hessell do not impact on the claim, i.e., they do not inform the decisions I must make in regard to the issues outlined, so I could simply leave the evidence unaddressed as ancillary and unnecessary.

[15] However, given the importance to Mr Blease in defending himself from the allegations I will provide my conclusion – Mr Blease did not say the comments alleged and in fact overall, from the evidence I heard, I believe Mr Blease to be a very thoughtful and considerate person whose attitude to, and interaction with, TBM employees was entirely appropriate.

The trial provision – the issue

[16] The trial provision in Ms Catanach-Hessell's signed employment agreement is set out at as follows:

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

[1] Section 67B(2) of the Act.
[2] Applying the test for justification at s 103A of the Act.

> 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.
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> 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 two 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 on notice.
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> 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.

[17] The problem with the trial provision is that it fails to specify the number of days that the trial period will last.

[18] Ms Catanach-Hessell's claim is based on this trial provision being invalid, as it does not specify the period of time for the trial, and therefore it cannot be relied on by TBM. And, without a trial provision Ms Catanach-Hessell's dismissal was unjustified.

[19] On this point TBM says:

(a) Mr Blease and Ms Leggett had discussed a trial period provision being in the employment agreement with Ms Catanach-Hessell in her interview so she knew it would be in the agreement.

(b) Mr Blease completed the employment agreement using an online agreement builder. And this included a trial provision with a 90 day period and a two week notice period.

(c) So, the employment agreement given to Ms Catanach-Hessell must have had 90 days in it for the length of the trial period in the first sentence.

(d) Ms Catanach-Hessell signed and returned the employment agreement but TBM did not check it at that time. It was only when Ms Catanach-Hessell disputed the validity of the trial provision that TBM checked its copy of the signed

agreement and discovered that 90 days was no longer recorded in the trial provision.

(e) Given the events giving rise to the employment agreement being produced, given to Ms Catanach-Hessell to sign and then returned, Ms Catanach-Hessell must have removed the reference to 90 days in the trial provision before she signed the agreement.

(f) On this basis I should find there was a valid trial provision and the termination of Ms Catanach-Hessell's employment based on this was justified.

What happened?

[20] Mr Blease and Ms Leggett interviewed Ms Catanach-Hessell for a role with TBM on 24 August 2021. Ms Atkinson-Catanach attended the interview with Ms Catanach-Hessell.

[21] Mr Blease and Ms Leggett say that amongst other things, they discussed the trial provision with Ms Catanach-Hessell in terms of advising her that there would be a trial period because of TBM's circumstances and because she was a new, inexperienced employee.

[22] In contrast Ms Catanach-Hessell and Ms Atkinson-Catanach say the opposite was discussed; Mr Blease and Ms Leggett did discuss a trial provision with her in her interview but they told her there would not be one.

[23] Mr Blease drafted the employment agreement using an online employment agreement builder. He says he wanted to include a trial provision so he selected for a trial provision to be put into the agreement and he says he put in 90 days for the period of time. He also says he had to add the notice period of two weeks.

[24] Mr Blease delivered a hard copy of the employment agreement to Ms Catanach-Hessell on 25 August 2021. A copy had been emailed the day before, after the interview, but Ms Catanach-Hessell was unable to print it. Mr Blease did not check the employment agreement that he printed and provided to Ms Catanach-Hessell.

[25] When Ms Catanach-Hessell received the employment agreement with the trial period in it, she says she was confused at first but then noticed there was no time frame so she assumed this meant there was no trial period; this being consistent with what she was told in the interview.

[26] Ms Catanach-Hessell signed the employment agreement on 26 August 2021.

[27] Neither Mr Blease nor Ms Leggett checked the signed employment agreement when it was returned to them by Ms Catanach-Hessell. And neither of them checked it when they sought to rely on the trial period to terminate Ms Catanach-Hessell's employment on 8 October 2021.

[28] The disputed aspects of the events outlined in the evidence I heard include:

(a) What was discussed about a trial provision in the interview?

(b) Did the employment agreement provided to Ms Catanach-Hessell have the reference to 90 days in the trial provision?

(c) If so, did Ms Catanach-Hessell remove the reference to 90 days in the trial provision before she signed it?

[29] When faced with disputed accounts of events in witness evidence I must decide which evidence I prefer based on an assessment of credibility. As I have done in the past when assessing credibility, I have relied on the guidance provided by Judge Harding in the District Court in *R v Biddle* that was cited with approval on appeal to the High Court.[3] And the guidance from the Employment Court in *Lawson v New Zealand Transport Agency* and *Cornish Truck & Van Limited v Gildenhuys*.[4]

[30] In terms of the question of what was discussed about a trial provision in the interview on 24 August 2021, I prefer the evidence of Mr Blease and Ms Leggett:

(a) Their evidence on this point was consistent.

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[3] *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].
[4] *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165; and *Cornish Truck & Van Limited v Gildenhuys* [2019] NZEmpC 6.

(b) Their evidence was supported by contemporaneous documents – the employment agreement had a trial provision in it, which Mr Blease would have elected to put in. If TBM was not going to have a trial provision in the agreement it would not have put one in. In contrast, if TBM did not in fact want a trial provision, it makes no sense to include a trial provision but not put in a time frame; it would be more logical to not put the clause in at all.

(c) Their evidence is consistent with their subsequent actions – TBM sought to rely on a trial period and it would not have done so if it did not believe it had one in the employment agreement.

(d) Overall, their evidence makes more sense and hangs together in terms of the narrative.

[31] So, I am satisfied that Ms Catanach-Hessell was told, in the interview, that there would be a trial provision in her employment agreement.

[32] I also accept that Mr Blease drafted the employment agreement on this basis, including the trial provision and Mr Blease believed he had put in the required inputs; the number of days for the trial period and the amount of notice to be provided.

[33] However, despite preferring Mr Blease's evidence I cannot conclude that the employment agreement provided to Ms Catanach-Hessell had the reference to 90 days in the trial provision:

(a) Neither Mr Blease nor Ms Leggett checked the employment agreement that TBM sent to Ms Catanach-Hessell, so neither can say with certainty that the reference to 90 days was in the agreement.

(b) Ms Catanach-Hessell and Ms Atkinson-Catanach both gave evidence under oath stating there was no reference to the 90 days in the trial provision in the employment agreement that Ms Catanach-Hessell received.

(c) Ms Catanach-Hessell and Ms Atkinson-Catanach's subsequent actions were consistent with this view. They attended the meeting on 8 October 2021 and after Mr Blease had advised that Ms Catanach-Hessell was being "let go"

under the trial period they asserted that there was no valid trial provision and TBM's actions were illegal. Ms Atkinson-Catanach had already sought advice and told Mr Blease this and that TBM would be hearing from their lawyer.

(d) The signed copy of Ms Catanach-Hessell's employment agreement did not have the reference to 90 days in the trial provision. So, the alternative fact scenario, if the reference to 90 days was in the trial provision of the agreement given to Ms Catanach-Hessell, is that Ms Catanach-Hessell deleted it. However, this is not logical as Ms Catanach-Hessell received a printed version of the agreement, which she signed, and her evidence was that she did not have the ability to print the email copy she had received.

[34] To complete my account of the facts established by the evidence, I record that I find that Ms Catanach-Hessell was aware that the trial provision in the employment agreement provided to her did not have the reference to 90 days. And, despite what she said in her evidence I believe that when she saw it she was ambivalent about what that meant and she simply signed the agreement without correcting it or bringing this potential flaw to TBM's attention. I believe her explanation given in evidence that the absence of the reference to 90 days was, in her view, consistent with being told there would be no trial provision, is wrong. I think that her memory of what she thought at the time is informed by her desire not to look surreptitious or blameworthy – this is despite the fact that any mistake was not her fault and not her obligation to correct.

Is the trial provision valid?

[35] So, the question is, where Ms Catanach-Hessell was told there would be a trial provision in her employment agreement, yet the agreement failed to reference 90 days in the trial provision, is that a valid and enforceable clause.

[36] Section 67A of the Act sets out the requirements for a provision for a trial period of 90 days or less. Specifically s 67A(2) defines a trial provision as follows:

> **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; and
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> (b) during that period the employer may dismiss the employee; and
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> (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[37] The Employment Court has recently discussed the requirements of certainty around trial provisions included in employment agreements in *Watt & Hughes Construction Limited v Philip de Buyzer*.[5] In this case the trial provision had omitted to include a start date for the trial period. In analysing whether the trial period was valid and enforceable Judge Holden said:

> [13] Section 67A does not require any particular form of words in the trial provision. The inclusion of "to the effect that" in s 67A(2) means a provision in an employment agreement complies with the section if the provision has the same general meaning and leads to the same result as specified in the section. The clause in Mr de Buyzer's employment agreement did not say the trial period started at the beginning of his employment. The issue is whether the clause in Mr de Buyzer's employment agreement was to the effect that, for the first 90 days of his employment, he was subject to a trial period.
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> [Footnotes omitted]

[38] So, the issue here is whether the trial provision clause in Ms Catanach-Hessell's employment agreement was to the effect that, for the first 90 days of her employment, she was subject to a trial period.

[39] The problem with the trial provision in Ms Catanach-Hessel's employment agreement is that there is no time period and 90 days as the trial period cannot be assumed or accepted as a default period; the Act describes it as a period not exceeding 90 days, i.e., any period up to 90 days. It follows that the parties must agree how long the trial period will be (up to 90 days) and then the trial provision must record that.

[40] A failure to record a time period means the trial provision in Ms Catanach-Hessell's employment agreement does not conform with the Act and is therefore invalid. The provision

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[5] *Watt & Hughes Construction Limited v Philip de Buyzer* [2019] NZEmpC 116.

cannot be relied on to justify the termination of Ms Catanach-Hessell's employment and she is not prevented from claiming unjustified dismissal.

Was Ms Catanach-Hessell's dismissal justified?

[41] In a claim for unjustified dismissal, once it is established that the employee has been dismissed the employer must prove that the dismissal was justified, in line with the test for justification and the duty of good faith set out in the Act.[6]

[42] The test for justification applies to two aspects of the dismissal:

(a) The process by which the employer established what happened and whether dismissal should be the outcome; and

(b) The substantive rationale for the decisions made by the employer as to what happened and then the decision to dismiss.

[43] In this case there is no dispute over the fact that Ms Catanach-Hessell was dismissed.

[44] In terms of justification it is important to note that TBM did have concerns about Ms Catanach-Hessell's performance at work and this prompted its decision to dismiss her. If it was going to take steps to address performance at work, without using a trial provision, then it would need to conduct a performance process. A performance process would involve establishing whether there were in fact performance issues and if so, putting in place a plan to help Ms Catanach-Hessell improve her performance. It is only after a plan has been put in place and attempts made to improve performance that an employer can consider dismissal and only if performance has not improved.

[45] TBM did not meet any of the procedural requirements or expectations for a performance process.

[46] Because there was no performance process there was no basis for TBM to assert there were justifiable conclusions that it reached about Ms Catanach-Hessell's performance at work and therefore there is no basis for it to be able to substantively justify dismissal.

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[6] Sections 103A and 4 of the Act.

[47] As a result, TBM's dismissal of Ms Catanach-Hessell was unjustified both from a procedural fairness aspect and a substantive basis.

[48] In some respects, the decision that TBM's dismissal of Ms Catanach-Hessell was unjustified may seem harsh. But the reality is that trial provisions are onerous provisions that provide employers with significant and almost unchallengeable power to dismiss an employee. In order to exercise this power an employer must get it right. In this case TBM's failings were that it did not check Ms Catanach-Hessell's employment agreement when it provided it to her, when it received the signed version and again when it sought to rely on it. And, unfortunately for TBM, the consequences are that it's dismissal of Ms Catanach-Hessell was unjustified.

Conclusion

[49] TBM unjustifiably dismissed Ms Catanach-Hessell.

Remedies

[50] As Ms Catanach-Hessell has been successful with her claim I must consider what remedies she may be entitled to. I may award any of the remedies provided for under s 123 of the Act.

Compensation

[51] Ms Catanach-Hessell seeks $20,000.00 in compensation. Compensation is an award for the humiliation, loss of dignity and injury to feelings that an employee suffers as a result of the unjustified acts (in this case dismissal) and is made pursuant to s 123(1)(c)(i) of the Act.

[52] When assessing compensation my task is to quantify the harm and loss caused by any humiliation, loss of dignity and injury to feelings arising out of the unjustified actions (dismissal).[7] In this case I must consider the effect of the dismissal on Ms Catanach-Hessell and establish what that shows in terms of the harm caused to her and the loss she suffered as a result. Then I must quantify that harm and loss. This is done by assessing that harm and loss

[7] *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

against others who have been unjustifiably dismissed and establishing where that sits compared to the range of compensation awarded.[8]

[53] Ms Catanach-Hessell's evidence of the effect of the dismissal on her included that she was shocked and felt let down by what happened, then she became withdrawn suffering from shame and low self-esteem. This is evidence of harm and loss that is loss of dignity through her diminished self-esteem and harm to her emotional health through shock, disappointment and feeling embarrassed by what had happened.

[54] Comparing this loss and harm to other cases of unjustified dismissal and the amounts of compensation awarded I quantify Ms Catanach-Hessell's loss and harm at $12,000.00.

Reimbursement

[55] As Ms Catanach-Hessell has a personal grievance and as she has lost remuneration as a result of that grievance, then pursuant to sections 123 and 128 of the Act, she must be awarded the lesser of her lost remuneration or three months ordinary time remuneration. [9]

[56] Three months ordinary time remuneration for Ms Catanach-Hessell was $10,400.00 (gross). Ms Catanach-Hessell's actual loss was $7,127.81 (gross).[10]

[57] So I quantify Ms Catanach-Hessell's lost remuneration entitlement to be $7,127.81 (gross).

Contribution

[58] As I have awarded remedies to Ms Catanach-Hessell, I must now consider whether she contributed to the situation that gave rise to her grievance.[11] This assessment requires me to determine if Ms Catanach-Hessell behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievance.[12]

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[8] *Richora Group Ltd v Cheng* [2018] NZEmpC 113.
[9] Noting that there is a discretion to award an amount up to an applicant's actual loss if this is greater than three months ordinary time remuneration under s 128 of the Act.
[10] Calculated by taking four months remuneration – Ms Catanach-Hessell stopped looking for new employment in February 2022 – and setting off what income Ms Catanach-Hessell earned in this four month period.
[11] Section 124 of the Act.
[12] *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

[59] There is no factual basis for me to conclude that Ms Catanach-Hessell behaved in a manner that was culpable or blameworthy and contributed to her grievance. This means I do not need to reduce the remedies I have awarded.

Summary

[60] The Butchers Mistress 2021 Limited unjustifiably dismissed Chloe Catanach-Hessell. In settlement of this grievance The Butchers Mistress 2021 Limited must pay Chloe Catanach-Hessell:

(a) $12,000.00 for compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

(b) $7,127.81 as reimbursement of lost remuneration pursuant to sections 123(1)(b) and 128 of the Employment Relations Act 2000.

Costs

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and a determination on costs is needed, Ms Catanach-Hessell may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum TBM will 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.

[62] If I am asked to determine costs, the parties can expect me to apply the Authority's usual daily rate for costs unless particular circumstances or factors require an upward or downward adjustment of that tariff.[13]

Peter van Keulen
Member of the Employment Relations Authority

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