

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 587
3215319

BETWEEN KIM TEPANIA
 Applicant

AND HAVEN FALLS FUNERAL
 HOME LIMITED
 Respondent

Member of Authority: Jeremy Lynch

Representatives: Dave Cain, advocate for the Applicant
 James Duckworth, counsel for the Respondent

Investigation Meeting: 19 September 2023 at Auckland

Submissions Received: At the investigation meeting

Date of Determination: 11 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Kim Tepania commenced work with Haven Falls Funeral Home Limited (Haven Falls) in Auckland in July 2022, and worked as a funeral director until notice of her dismissal was given on 3 October 2022.

[2] Ms Tepania says her dismissal was unjustified and seeks remedies including reimbursement of lost wages, compensation for her humiliation, loss of dignity and injury to feelings, together with an order for costs.

[3] Haven Falls says Ms Tepania was not unjustifiably dismissed, because the parties' employment agreement contained a 90-day trial period provision which was a binding term, and that Ms Tepania was lawfully dismissed within this trial period.

The Authority's investigation

[4] For the Authority's investigation, a written witness statement was lodged by Ms Tepania. For Haven Falls, witness statements were lodged by Michelle Pukepuke, Renee Te Tai, and Isaac Clarkson. Under oath or affirmation, all witnesses answered questions from the Authority and from the parties' representatives. The representatives made closing submissions at the conclusion of the evidence.

[5] 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

[6] Issues requiring investigation and determination are:

- (a) Is Ms Tepania prevented from bringing an unjustified dismissal personal grievance claim by reason of a trial period in her employment agreement with Haven Falls?
- (b) If Ms Tepania is able to pursue her personal grievance, was she dismissed by Haven Falls?
- (c) If Ms Tepania was dismissed, was her dismissal unjustified?
- (d) If Ms Tepania's dismissal is found to be unjustified, is she entitled to a consideration of remedies sought including:
 - (i) lost wages under s 123(1)(b) of the Act?
 - (ii) compensation under s 123(1)(c)(i) of the Act?
- (e) Should any remedy awarded be reduced (pursuant to s 124 of the Act) for blameworthy conduct by Ms Tepania which contributed to the circumstances which gave rise to her grievance?
- (f) Should either party contribute to the costs of representation of the other party?

[7] In its statement in reply, Haven Falls commenced a counterclaim against Ms Tepania in respect of a company branded polo shirt and an ID card it claimed had not

been returned by Ms Tepania at the end of her employment. Haven Falls also sought interest and legal costs arising from its counterclaim.

[8] At the commencement of the investigation meeting, Haven Falls confirmed that all outstanding property had been returned to it and it no longer wished to pursue its counterclaim.

Background

[9] Haven Falls is co-owned and operated by Ms Pukepuke and her husband Allen Pukepuke, and carries on business as a funeral home in Auckland.

[10] In addition, Ms Pukepuke and her husband own and operate four other companies, all of which also carry on business as funeral homes at other North Island locations. These include sites at Whangārei (Haven Falls Funeral Home ki Whangārei Limited) and Rotorua (Haven Falls Funeral Home ki Rotorua Limited).

The initial interview

[11] On 11 July 2022 Ms Tepania attended an interview at Haven Falls with Ms Pukepuke and her husband for the position of funeral director/embalmer.

[12] It is common ground that Ms Tepania was invited to attend Haven Falls again the following day, 12 July 2022. There is no dispute that Ms Tepania did attend Haven Falls on 12 July 2022.

Ms Tepania attends Haven Falls on 12 July 2022

[13] Haven Falls says the purpose of Ms Tepania's attendance on 12 July 2022 was so that she could meet the team and have a look around the premises.

[14] In her witness statement, Ms Pukepuke says that on 15 July 2023, staff at Haven falls were advised that Ms Tepania would be "...onsite at some stage the following week... to observe/shadow the team prior to her starting on 25th July."

[15] In response to questions from the Authority, Ms Pukepuke said it was Haven Falls' policy that all candidates were asked to come in to observe the team working. She said this was to ensure that due to the nature of the work, candidates had a good understanding of the type of tasks expected of them.

[16] Ms Tepania disputes this and says that her employment with Haven Falls commenced on 12 July 2022. Ms Tepania says that when she attended Haven Falls on 12 July 2022, she performed cleaning duties around the funeral home including dusting and cleaning the bathroom, as well as assisting in preparing a reception lounge to receive guests. She does not recall what time she attended Haven Falls on 12 July 2022, nor the duration of her attendance.

[17] She was not paid for her attendance on 12 July 2022. There is no wage arrears claim before the Authority in respect of Ms Tepania's attendance on this date.

[18] Haven Falls disputes that Ms Tepania performed any work on 12 July 2022.

[19] The Authority is not required to make any findings as to the nature of Ms Tepania's attendance on 12 July 2022 in order to dispose of this matter.

The employment agreement

[20] Following Ms Tepania's attendance on 12 July 2022, at 4.58 pm that afternoon, Ms Pukepuke sent Ms Tepania an email which attached an unsigned employment agreement.

[21] The employment agreement contains the following relevant clauses:

1.4 Type of employment agreement

The employee will start working for the employer on 25/07/22 and continue until either the employer or the employee ends this relationship.

...

1.5 Trial period

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

During the trial, the employer may dismiss the employee...

If dismissed during the trial period, the employee cannot bring a personal grievance or other legal proceedings about the dismissal...

[22] In addition, the employment agreement provides at paragraph 8.5:

8.5 Ending employment: serious misconduct

If, after following a fair process, the employer concludes that the employee has engaged in serious misconduct, the employee may be dismissed without notice.

[23] Paragraph 8.6 of the employment agreement provides:

8.6 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.

[24] Two slightly different versions of Ms Pukepuke's 12 July 2022 email were lodged by Haven Falls. One attached to its statement in reply, and one attached to Ms Pukepuke's witness statement. Only the latter version shows the employment agreement attached as a PDF.

[25] In Ms Pukepuke's email to Ms Tepania of 12 July 2022, there is a paragraph drawing her attention to the 90-day trial provision contained within the attached employment agreement.

[26] The Authority is satisfied that the employment agreement attached to Ms Pukepuke's email was an intended employment agreement, as the term is used in s 63A(2) of the Act.

[27] Ms Pukepuke's evidence is that during her attendance at Haven Falls on 12 July 2022, the key terms of the employment agreement (including the 90-day trial provision) had been explained to Ms Tepania, and Ms Tepania had verbally accepted all such key terms (including the 90-day trial provision).

[28] Ms Tepania disputes this and says that there had been no mention of a 90-day trial period during her attendance at Haven Falls on 12 July 2022.

[29] In addition, Ms Tepania disputes that she received Ms Pukepuke's 12 July 2022 email attaching the employment agreement. She says she has checked her inbox, her deleted items folder, and her junk folder, and there was no email from Haven Falls sent to her on 12 July 2022.

[30] Under cross examination, Ms Tepania confirmed that Haven Falls' email to her attaching the employment agreement was correctly addressed.

[31] Nothing turns on whether or not Haven Falls' email was received by Ms Tepania. However, from the evidence before it, the Authority records that it was more

likely than not that Haven Falls did send this email, and that it was received by Ms Tepania.

Ms Tepania further attends Haven Falls

[32] Following Ms Tepania's attendance at Haven Falls on 12 July 2022, an invitation was extended for Ms Tepania to further attend Haven Falls for the purposes of observing the funeral director team working, prior to the commencement of her employment.

[33] Although Ms Pukepuke and her husband were going to be out of the country for the week commencing 18 July 2022, it was agreed that Ms Tepania would attend Haven Falls during that week to observe the team.

[34] This is evidenced in a text message exchange on the evening of 12 July 2022, in which Ms Tepania advises that she will be attending Haven Falls on 18 July 2022, and Ms Pukepuke confirms this. A copy of this is attached to Ms Pukepuke's witness statement. There is no reference to the intended employment agreement or the 90-day trial provision in the exchange.

[35] It is common ground that no specific times or dates had been agreed for Ms Tepania's observation period to occur. Instead, both parties agree that it was at Ms Tepania's discretion as to when, and for how long, she would attend.

[36] Renee Te Tai is the daughter of Ms Pukepuke and is employed as the Human Resource and Administration Manager for Haven Falls. As Ms Pukepuke was going to be away, she informed Ms Te Tai that Ms Tepania would be coming into Haven Falls to observe, at some point prior to 25 July 2022.

[37] Ms Te Tai's evidence is that on Wednesday 20 July 2022 she returned to Haven Falls after a period of absence of ten days due to Covid-19. On the morning of her return, she noticed Ms Tepania was present for the morning team briefing meeting. After the briefing meeting had finished, Ms Te Tai spoke with Ms Tepania. During the course of this conversation, Ms Tepania advised Ms Te Tai that she had been at Haven Falls from 8.30 am to 5.00 pm on Monday 18 July 2022, and Tuesday 19 July 2022. Ms Tepania asked Ms Te Tai if she could remain at Haven Falls for the remainder of the week. She explained she was enjoying the experience so much and had cleared her

personal schedule in order that she could get as much experience as possible of the working environment, prior to 25 July 2022.

[38] Ms Te Tai says that learning that Ms Tepania had already completed two full days at Haven Falls and was wanting to complete a further three full days, came as somewhat of a surprise. Ms Te Tai's understanding was that Ms Tepania may be attending Haven Falls just "to get a feel for the place", rather than attending for a full week.

[39] Ms Te Tai then spoke with members of the funeral director team to obtain their feedback as to Ms Tepania's attendance over the last two days. Ms Te Tai's evidence is that the feedback from the funeral director team was "very favourable" with the funeral directors stating that Ms Tepania "...had been a great help and was happy to muck in and help in all areas".

[40] In her witness statement Ms Te Tai sets out that she observed that Ms Tepania was indeed being very helpful to the team. In response to questions from the Authority, Ms Te Tai confirmed that she had either seen for herself, or accepted reports from other Haven Falls employees, that Ms Tepania had been performing some of the duties of a funeral director on 18, 19, and the morning of 20 July 2022.

[41] Similarly, when questioned by the Authority, Ms Pukepuke confirmed that she had been told by Haven Falls employees that during this period, Ms Tepania had performed such duties as cleaning around a casket, general cleaning and tidying, providing general help and assistance to the Funeral Director Team, and had greeted a family.

[42] Ms Pukepuke accepted that these duties were consistent with the duties expected of a funeral director.

[43] Before she responded to Ms Tepania's request to remain at Haven Falls for the remainder of the week, Ms Te Tai telephoned Ms Pukepuke. Ms Te Tai's evidence is that during this telephone conversation she explained to Ms Pukepuke that she considered that there were benefits to the team in having Ms Tepania remain on site for the remainder of the week.

[44] Ms Te Tai's evidence is that during their telephone discussion, Ms Pukepuke advised that she wanted to provide some form of compensation to Ms Tepania for her time. Ms Pukepuke ruled out providing Ms Tepania with petrol vouchers, as she considered this would not appropriately cover the time that Ms Tepania had invested. Instead, it was decided that Haven Falls would give Ms Tepania the option of bringing forward the commencement date of her employment (which was set out in the intended employment agreement as 25 July 2022).

[45] Ms Pukepuke instructed Ms Te Tai to present this option to Ms Tepania and suggest that the start date set out in the intended employment agreement be amended to Monday 18 July 2022 (that is, two days prior to 20 July 2022, the date on which the changes were being proposed). The reason for this being that it would allow Haven Falls' payroll system to be able to process a payment for Ms Tepania's time for 18 and 19 July 2022. Ms Te Tai's witness statement sets out that in doing so "...this would mean [Ms] Tepania could be loaded into payroll etc and be financially compensated for the mahi that she had done that week".

Signing and backdating the employment agreement

[46] Ms Tepania agreed with this suggestion. Ms Te Tai's evidence is that following a discussion, Ms Tepania advised her that she was grateful for the opportunity of being able to remain at Haven Falls for the rest of the week, and was happy to backdate the employment agreement to 18 July 2022.

[47] Ms Te Tai's evidence is that she asked Ms Tepania if she had received the employment agreement attached to Ms Pukepuke's email of 12 July 2022. Ms Te Tai says that Ms Tepania confirmed that she had received the employment agreement. Ms Te Tai says Ms Tepania then advised that she:

...had had a good read of it and no, she did not have any questions, and she stated she was happy with the terms of employment... I then asked [Ms] Tepania if she had had a thorough read of the agreement and specifically the trial period, travel, pay and induction to which she responded yes... I stated to [Ms] Tepania that this was excellent that she had been through everything however I still wanted to cover these specifics with her as part of our induction korero to ensure everything is fully understood.

[48] Ms Tepania's evidence is that at no stage had she received a copy of the employment agreement. Ms Tepania's evidence is that the first time she saw a written

employment agreement was on the morning of 20 July 2022, when Ms Te Tai provided her a copy of it during the course of their discussion about backdating Ms Tepania's start date.

[49] However, it is common ground that neither party signed the employment agreement until some time on the morning of 20 July 2022. Ms Te Tai's evidence is that this was between 9.00 am and 10.00 am that morning, following the morning briefing meeting which commenced at 8.30 am.

[50] Ms Te Tai's evidence is that she and Ms Tepania sat down and went over the employment agreement together, with Ms Te Tai explaining its key provisions including the trial period provision, as well as the provisions around remuneration and travel.

[51] In her witness statement, Ms Te Tai sets out:

I began going through the employment agreement with [Ms] Tepania, starting at page one, which had the agreement start date in it as 25th July. I wrote 18th in pen above the 25th and both [Ms] Tepania and I initialled it. We continued through every page of the agreement, spoke to the items listed and then initialled each page until we got to the back page for signing. At this point as [Ms] Tepania was signing the agreement, she asked should she date 18th July as per the amended start date and I advised her no, to sign it 20th of July, as this was the accurate date as we were sitting there signing it.

[52] Although Ms Tepania had indicated she wished to attend Haven Falls for the remainder of the week, she did not end up attending on Friday 22 July 2022.

[53] It is common ground that Haven Falls paid Ms Tepania wages for working 29.5 hours for the week commencing 18 July 2022. Although the payslip provided to Ms Tepania does not record the hours worked on any particular day, Ms Te Tai in response to questions from the Authority, confirmed that Ms Tepania was paid wages for the hours she worked on Monday 18 July 2022 and Tuesday 19 July 2022 (as well as Wednesday 20 July 2022, and Thursday 21 July 2022). By virtue of receiving payment, Ms Tepania is therefore not a "volunteer" as defined in s 6(1)(c) of the Act.

When was the agreement formed?

[54] As already noted, the Authority finds that it is more likely than not that Ms Tepania received this email and the attached intended employment agreement. But

despite Ms Pukepuke's claim that Ms Tepania had accepted the key terms of the employment agreement (including the 90-day trial provision) on 12 July 2022, there is no evidence before the Authority of this having occurred.

[55] There is no evidence of Ms Tepania and Haven Falls being of one mind in terms of the employment agreement until it was signed by the parties on 20 July 2022.

[56] Ms Te Tai also accepted that it was the point at which Ms Tepania signed the employment agreement that she became bound by its terms and was not bound by any of its terms during the bargaining period. Ms Te Tai accepted that this was the period from when Ms Pukepuke sent Ms Tepania the intended employment agreement on 12 July 2022, to when the parties signed and backdated the agreement on 20 July 2022.

[57] Ms Pukepuke's 12 July 2022 email to Ms Tepania concludes with her saying to Ms Tepania:

Hopefully this gives you insight into the role but if you have any other questions feel free to email me, I am on call this weekend so a bit problematic to spend good time on the phone ... If you could let me know on Tuesday if you are interested in pursuing this we will plan to meet with you over the following week.

[58] The Authority is satisfied that this is consistent with the bargaining stage of the recruitment process. At the time of Ms Pukepuke's email to Ms Tepania, a written offer of employment had been made by Haven Falls, but no acceptance of the written offer had been communicated by Ms Tepania either before or after the 12 July 2022 email, until the parties signed the employment agreement on 20 July 2022.

[59] Certainly, Ms Pukepuke's request to Ms Tepania "If you could let me know on Tuesday if you are interested in pursuing this..." would indicate that nothing had been agreed at that point, and the parties were still in negotiations.

[60] In answer to questions from the Authority, Ms Te Tai accepted that there was an important distinction between Ms Tepania confirming she had read over the employment agreement (which in her witness statement is all Ms Te Tai claims that Ms Tepania confirmed doing), and Ms Tepania confirming that she accepted all the clauses contained in the agreement.

[61] Ms Te Tai also accepted that when she sat down with Ms Tepania on the morning of 20 July 2022, and went over the agreement clause by clause with her, Ms Tepania had not communicated her acceptance of the employment agreement and did not communicate her acceptance until the explanation process had concluded, and Ms Tepania and Ms Te Tai signed the agreement.

Discussion

90-day trial periods

[62] Section 67A of the Act 2000 provides:

(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.

(2) For the purposes of this section and s 67B,-

...

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
- (b) During that period, the small-to-medium-sized employer may dismiss the employee; and
- (c) If the small-to-medium-sized employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[63] Section 67B of the Act sets out the effect of a trial provision in an employment agreement, which is that during the trial period an employer is able to give notice to the affected employee of termination of the employee's employment, and the employee is unable to bring a personal grievance for unjustified dismissal or other legal proceedings in respect of the termination.

[64] Because the effect of ss 67A and 67B is to remove longstanding employee protections, and access to dispute resolution and justice, the Employment Court in *Smith v Stokes Valley Pharmacy (2009) Limited* held that a strict approach to the interpretation of trial periods is required.¹

¹ *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111 at [48].

[65] In the *Stokes Valley Pharmacy* case, Ms Smith had worked for the employer for one day before signing her employment agreement. Because of this, the Court held that she did not meet the statutory definition of a new employee, and that the 90-day trial provision was invalid.

[66] On the issue of the agreement being signed after the work had already begun, the Court in *Stokes Valley Pharmacy* held:²

These passages confirm the statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise settled during its course. Employees affected are to be new employees. Such clauses contain a balance of employee protective elements as well as facilitating hiring and firing.

[67] In *Senate Investment Trust through Crown Lease Trustees Limited v Cooper* the Court held that the failure to have the employee sign the agreement before he started work was fatal.³

Is Ms Tepania prevented from bringing a personal grievance in respect of the termination?

[68] Counsel for Haven Falls submitted that the Authority should accept its evidence that Ms Tepania was aware of the key terms of the employment agreement, including the trial period, and had accepted all such terms prior to the start of her employment; and therefore the 90-day trial provision was valid.

[69] Haven Falls submitted that because of inconsistencies within her witness statement, the Authority should consider Ms Tepania's evidence to be unreliable and prefer Haven Falls' evidence that the key terms of the employment agreement (including the 90-day trial provision) were agreed on 12 July 2022, prior to Ms Tepania starting work. Counsel for Haven Falls referred to the Authority's determination in *Berea v Best Health Foods Ltd* to support this position.⁴

[70] The difficulty with this submission, is that in *Best Health Foods*, although a hard copy of the employment agreement was not signed prior to Ms Berea starting

² At [47].

³ *Senate Investment Trust through Crown Lease Trustees Limited v Cooper* [2021] NZEmpC 45.

⁴ *Berea v Best Health Foods Ltd* [2020] NZERA 474.

work, she had been emailed an intended employment agreement (containing a trial period provision), as well as sent an email drawing her attention the fact that the employer required a 90-day trial period. The parties had exchanged emails, and Ms Berea had confirmed in writing that she accepted the key terms of the employment agreement.

[71] The Authority noted in *Best Health Foods* that:⁵

...email exchanges between the parties evidence that ‘offer and acceptance’ of all terms had been completed prior to Ms Berea commencing employment.

[72] There is no evidence before the Authority of Ms Tepania communicating her acceptance of any of the terms of the employment agreement, until she signed the agreement, and in fact Ms Tepania says she did not agree to the trial period until she and Ms Te Tai signed the employment agreement on the morning of 20 July 2022.

[73] Such an approach is not consistent with the Employment Court’s dictum in *Stokes Valley Pharmacy*, (set out above) that trial periods are to be agreed upon and evidenced in writing and signed by both parties at the start of the employment, and not agreed retrospectively.

[74] In reliance on *Best Health Foods*, counsel for Haven Falls submitted that Ms Tepania should be estopped from claiming the 90-day trial period is invalid. The submission being that prior to her starting work, Ms Tepania created an impression that she had accepted the trial period.

[75] There is no evidence of Ms Tepania creating an expectation that she accepted the 90-day trial prior to her starting work. Nor is there any evidence of Haven Falls having relied to its detriment, on such an expectation.

[76] If Ms Tepania had made a representation that she had already accepted the entire intended employment agreement, then on the morning of 20 July 2022, there would have been no need for Ms Te Tai to go to the trouble of explaining the intended employment agreement, with specific reference to the 90-day trial provision, and double check that Ms Tepania was “...happy with the terms of employment and comfortable...” to sign the agreement, as is set out in Ms Te Tai’s witness statement.

⁵ At [28].

[77] The Authority is satisfied that Ms Tepania performed work for Haven Falls on Monday 18 July 2022, Tuesday 19 July 2022, and for part of the morning of Wednesday 20 July 2022, prior to the parties signing the employment agreement. Haven Falls accepts that Ms Tepania performed work during this period and paid her wages for the hours she worked.

[78] The Authority finds that Ms Tepania was employed by Haven Falls (albeit pursuant to an unwritten employment agreement) because she performed two days' work (and had begun her third day of work), prior to signing the written employment agreement on 20 July 2022. Ms Tepania was therefore not an employee who had not previously been employed by Haven Falls, as required by the provisions of s 67A(1) of the Act.

[79] As was accepted by Ms Te Tai in response to questions from the Authority, the point at which Ms Tepania communicated her acceptance of all the terms of the employment agreement (including the 90-day trial provision) was after Ms Te Tai had finished going over the entire agreement with her, when Ms Tepania signed the agreement on 20 July 2022. By that stage, Ms Tepania had already been employed by Haven Falls for more than two days.

[80] As such, the Authority finds that the 90-day trial provision contained in Ms Tepania's employment agreement with Haven Falls was invalid.

Was Ms Tepania dismissed by Haven Falls?

[81] It was common ground between the parties that from 19 to 30 September 2022 (and consistent with Haven Falls' policy), Ms Tepania had worked at Haven Falls Funeral Home ki Rotorua Limited, and that during Ms Tepania's secondment to this site, Haven Falls had received two complaints from whānau in respect of a funeral service in which Ms Tepania had assisted.

[82] On the morning of 3 October 2022 Ms Pukepuke met with Ms Tepania.

[83] Ms Pukepuke describes the meeting as a "check in" and also a "pre-planned one on one hui", and that Ms Tepania had been made aware in advance of the purpose of the meeting – which in the statement in reply Haven Falls says was to discuss the complaints about Ms Tepania's work arising from her time in Rotorua; Ms Tepania's

wish to be transferred on a permanent basis from Haven Falls in Auckland to the Rotorua site; as well as Ms Tepania's alleged "unauthorised work on a public holiday".

[84] Ms Pukepuke's evidence is that "Both [Ms] Tepania and myself were well aware that this korero would take place immediately upon her return to Auckland", because she had told Ms Tepania that "...we will meet as soon as she returns to Auckland site and we will determine a plan forward together...".

[85] Ms Tepania describes the meeting as a "catch-up", and says she was not made aware of the purpose of the meeting.

[86] Whether the meeting is best described as a "catch-up" or a "check in" does not matter. The Authority is satisfied that this was intended to be an informal meeting between Ms Tepania and Ms Pukepuke, to discuss the Rotorua complaints, Ms Tepania's desire to relocate to Rotorua on a permanent basis, and to address the issue of Ms Tepania working on a public holiday.

[87] The meeting was not intended to be disciplinary, and because of this Ms Tepania was not advised of her entitlement to have support and/or representation at the meeting. Ms Pukepuke gave evidence to the Authority that the meeting was "not started as disciplinary".

[88] Ms Pukepuke's evidence is that at the meeting, Ms Tepania expressed extreme dissatisfaction about her time in Rotorua, describing the Rotorua team as "immature ... children ...". Ms Pukepuke also alleges that Ms Tepania complained about the culture of the Whangārei site, and about the "culture of the entire [Haven Falls] organisation ...".

[89] Ms Pukepuke also says that at this meeting, Ms Tepania advised her that she:

... could not, and would not, be able to do the face to face, administrative or IT components of the Funeral Director's position. She stated that she can only do the 'back engine' components of the position and could not do the 'front engine'. For context, back engine is an internal term utilised and refers to cleaning, casketising, laundry, drop off and pick up from embalmers, etc etc, all duties hands on and no contact with whānau. Front engine refers to the face for the whānau, conducting all hui and planning with the whānau, ...completing all funeral service requirements such as PowerPoints, order of services, etc etc. My response to [Ms] Tepania was that the position of funeral director required her to complete both sets of responsibilities as a collective, and that if this was the case it would be a concern moving forward.

[90] Ms Pukepuke also says that Ms Tepania advised her during the meeting that although she had given some thought to attending a computer training course, she had realised she was "...too old to relearn these skills, that she used to be very good at them but has now realised she cannot do them."

[91] Ms Tepania's account of this meeting differs from that of Ms Pukepuke's. Ms Tepania says that she and Ms Pukepuke "...had a brief discussion about some concerns that I had with some of the behaviours... at the Rotorua branch".

[92] Ms Tepania then says that when Ms Pukepuke raised the issue of the complaints received about her work during her time at the Rotorua site, she apologised, and explained how sorry she was for the errors.

[93] Ms Tepania says that she explained to Ms Pukepuke that she wanted to upskill herself in terms of computer literacy and had been looking online for suitable training courses.

[94] Ms Tepania says that Ms Pukepuke then advised her that Haven Falls "...really needed someone who was strong in the admin side of things already, whereas I was still learning".

[95] What both parties agree on however, is that at this meeting the employment relationship was ended.

[96] Haven Falls' statement in reply appears to suggest that the employment relationship ended at Ms Tepania's request:

In view of the applicant's points and concerns, and following discussions of the various options available, it was suggested by [Ms Tepania] following discussions that she would leave with notice given to her pursuant to her contract. The applicant confirmed she wanted to end her employment immediately without notice as she no longer wanted to work for Haven Falls.

[97] Later in the day on 3 October 2022, Haven Falls sent Ms Tepania a letter by email. This letter sets out:

Tēnā koe Kim

This correspondence is confirmation of our korero earlier today. As stated, both you and I are aware that the initial 90 days of your employment is a trial

period. This trial period commenced on 18 July 2022 and ends on 15 October 2022.

The trial period is an opportunity for us to determine your suitability for the job and position here at Haven Falls Funeral Home. As I said, unfortunately, we have decided that we have determined a lack of suitability for this position and therefore are providing you with one [week's] notice, as per what is stated in the employment agreement.

[98] In response to questions from the Authority, Ms Pukepuke confirmed that it was Haven Falls' decision to end the employment relationship, not Ms Tepania's decision. Ms Pukepuke explained that Haven Falls had no choice but to give Ms Tepania her notice, based on what Ms Tepania had said during the 3 October 2022 meeting, and that the effect of Ms Tepania's advice was that Haven Falls had determined that Ms Tepania's suitability had been severely compromised. As a result, Haven Falls had no choice but to give Ms Tepania her notice.

[99] The Employment Court has held that a dismissal is the termination of the employment relationship at the employer's initiative.⁶ It is quite clear that the decision to end the relationship was taken by Haven Falls, and not Ms Tepania.

[100] The Authority is satisfied that Ms Tepania was dismissed by Haven Falls.

If Ms Tepania was dismissed, was that unjustified?

[101] The Authority assesses Haven Falls' justification of its actions by applying the test of justification set out in s 103A of the Act.

[102] The relevant parts of s 103A are:

- (1) ... 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).
- (2) 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.
- (3) In applying the test in subsection (2) 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

⁶ *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (T/A Greenwich and Associates Employment Agency and Complete Fitness Centre)* [1983] ERNZ Sel Cas 95 (AC).

- (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.

[103] In addition to the four procedural fairness factors set out in s 103A(3) above, the Authority may take into account other factors as appropriate, and must not determine an action to be unjustified solely because of defects in the process if such defects were minor and did not result in Ms Tepania being treated unfairly.

[104] Haven Falls, as a fair and reasonable employer, could also be expected to comply with the good faith obligations set out in s 4 of the Act including the obligations set out in s 4(1)(a) and (c):

Without limiting paragraph (b), [the duty of good faith] requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

- (i) Access to information, relevant to the continuation of the employee's employment, about the decision; and
- (ii) An opportunity to comment on the information to their employer before the decision is made.

[105] In relation to the two complaints received from whānau in relation to Ms Tepania's alleged errors, Ms Pukepuke's evidence is that:

Upon receiving the complaints, I spoke with the Rotorua team leader, Isaac Clarkson. My instruction to him was to print off the complaint and meet with the team to share the concerns of the whānau and to gather some context from the team members involved so that I could appropriately respond to the complaints.

[106] In response to questions from the Authority, Ms Pukepuke confirmed that there had been two written complaints received. Initially, one of the complaints was received verbally. Haven Falls then requested that the complainant put this verbal complaint in writing, which appears to have occurred several days later. Ms Pukepuke told the

Authority that the complaints were raised with the Rotorua team (during the time of Ms Tepania's secondment) by the team leader, together as a group.

[107] Ms Pukepuke confirmed to the Authority that at no stage prior to the 3 October 2022 meeting were either of the complaints provided in writing to Ms Tepania. However, Ms Pukepuke's evidence to the Authority was that the contents of the written complaints about Ms Tepania formed no basis for the termination of Ms Tepania's employment.

[108] Ms Pukepuke's evidence is that of particular concern to her, was the "outburst" (as she described it to the Authority), by Ms Tepania at the 3 October 2022 meeting. Ms Pukepuke described Ms Tepania as using "heated" and "vulgar" language and having "intense" body language during this discussion.

[109] In addition, Ms Pukepuke gave evidence about the significant difficulties she apprehended in relation to Ms Tepania's "doubling down" on her insistence that "she can provide as much value out the back of the mahi but she was adamant she could not complete the requirements of the front".

[110] The 3 October 2022 letter confirming Ms Tepania's dismissal merely sets out "a lack of suitability for this position" as the reason for the termination. The Authority is satisfied that it is more likely than not that Haven Falls' decision to dismiss Ms Tepania was influenced by the Rotorua complaints; what it perceived as Ms Tepania's inappropriate language; and the perceived refusal by Ms Tepania to perform certain functions required for her role.

[111] In response to questions from the Authority, Ms Pukepuke accepted that there were other options open to Haven Falls, such as placing Ms Tepania under a performance improvement plan (PIP), and/or commencing a disciplinary process against her for failing to follow lawful and reasonable instructions. Ms Pukepuke confirmed that in the absence of the (invalid) 90-day trial provision on which it relied, a PIP was what Haven Falls would have commenced. Ms Pukepuke also accepted that there were other means by which Haven Falls could have addressed concerns with Ms Tepania's language.

[112] In addition, Ms Pukepuke's evidence to the Authority was that at the commencement of the meeting held on 3 October 2022, she had not turned her mind to the possibility that the meeting could conclude with Ms Tepania being dismissed from her employment. It follows that as a result, Ms Tepania could not have been alerted to the possibility that her employment might be at risk.

[113] There are a number of significant procedural defects to Haven Falls' process.

[114] Before taking the decision to dismiss Ms Tepania, a fair and reasonable employer should at least have done the following:

- (a) provided her with written copies in advance, of the Rotorua complaints;
- (b) raised any concerns it held about Ms Tepania, including concerns around the language she used in the workplace and/or her alleged refusal to perform significant necessary functions of her role;
- (c) sufficiently investigated the allegations against Ms Tepania;
- (d) advised her that her employment could potentially be at risk and given her the opportunity to attend a meeting to discuss the concerns;
- (e) given her the opportunity to have representation at any such meeting;
- (f) given Ms Tepania a reasonable opportunity to respond to these concerns;
and
- (g) genuinely considered Ms Tepania's explanation (if any) in relation to the above allegations.

[115] In addition, a fair and reasonable employer could be expected to comply with the termination provisions of the employment agreement (set out at [22] and [23] above), including the requirement to follow a fair process in deciding to end the employment set out in the agreement.

[116] All such steps should have occurred prior to Haven Falls' decision to dismiss Ms Tepania from her employment.

[117] The defects in Haven Falls' process are more than minor and resulted in Ms Tepania being treated unfairly.

[118] As a result, Haven Falls is unable to justify its decision to dismiss Ms Tepania from her employment.

What remedies (if any) should Ms Tepania receive?

[119] Ms Tepania has established a personal grievance for unjustified dismissal. She is therefore entitled to consideration of the remedies sought.

[120] Ms Tepania seeks reimbursement of a sum equal to the whole of the wages she has lost as a result of her personal grievance; together with compensation of \$25,000 pursuant to s 123(1)(c)(i) of the Act for the humiliation, loss of dignity, and injury to feelings arising from her unjustified dismissal.

Reimbursement

[121] Ms Tepania seeks reimbursement of earnings lost as a result of her dismissal pursuant to s 123(1)(b) and s 128 of the Act.

[122] Ms Tepania is claiming the sum of \$4,830 (gross) in lost wages. The calculation for this sum is based on her loss of 35 hours per week (the minimum hours of work she was entitled to under the employment agreement), at a rate of \$23 per hour, for the period of six weeks during which she was unemployed.

[123] Ms Tepania provided evidence to show that she had applied for seven new roles in the six weeks following her dismissal, including two applications to other funeral homes.

[124] After reviewing the evidence of loss, and Ms Tepania's attempts to secure further employment, the Authority is satisfied that she is entitled to an award of six weeks' (gross) lost remuneration.

[125] In addition, holiday pay is ordered, calculated at eight per cent (gross) of the lost wages.

Compensation for humiliation, loss of dignity and injury to feelings

[126] Ms Tepania's evidence is that as a member of her marae, she had gained significant mana from her work at Haven Falls and was proud of how she was contributing to her community and practising her culture. Her evidence is that having that taken away from her by way of her dismissal was extremely significant for her, and

that it had affected her whole sense of wellbeing. She says that “my Te Whare Tapa Whā was suddenly out of balance, and I felt unwell as a result.”

[127] Ms Tepania’s evidence is that she had problems sleeping following her dismissal, was stressed that she no longer had a source of income, she suffered from anxiety and sought medical attention.

[128] Ms Tepania’s evidence establishes that she has experienced harm under each of the heads in s 123(1)(c)(i) of the Act. I have quantified the harm suffered having regard to the spectrum of harm and quantum of compensation, particularly with regard to other awards of compensation.

[129] Having regard to the particular circumstances of this case, an award of \$18,000 under to s 123(1)(c)(i) is appropriate. In *Wikaira v Chief Executive of the Department of Corrections* the Employment Court confirmed that it was desirable that awards of compensation pursuant to s 123(1)(c)(i) of the Act “...should be, although not over-generous, nevertheless fair, realistic and not miserly.”⁷

Contribution

[130] Where the Authority determines an employee has a personal grievance, it is required under s 124 of the Act to consider the extent to which the employee’s actions contributed towards the situation that gave rise to the personal grievance, and if the actions so require, reduce remedies that would otherwise have been awarded.

[131] To be taken into account as contributing behaviour, the actions of the employee must be both causative of the outcome, and blameworthy.⁸ Longstanding case law establishes that there must be more than simple cause and effect shown. The employee’s actions must be culpable or blameworthy.⁹

[132] The Employment Court in *Paykel Limited v Ahlfeld*¹⁰ held:

... that such lacks of performance as may have existed were not sufficiently blameworthy to justify a reduction in the remedies because they had not been properly brought to the respondent’s attention and he had not had the opportunity of correcting his performance.

⁷ *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237].

⁸ *Goodfellow v Building Connexion Limited T/A ITM Building Centre* [2010] NZEmpC 82.

⁹ *Harris v The Warehouse Limited* [2014] NZEmpC 188.

¹⁰ *Paykel Limited v Ahlfeld* [1993] 1 ERNZ 134 at 341.

[133] Ms Tepania's situation is analogous. Even if the Authority had found there was sufficient causal connection between Ms Tepania's actions in allegedly refusing to perform certain key functions of her role, and/or her alleged use of "vulgar" language, she was entitled to have these concerns properly brought to her attention and provided an opportunity to correct her performance. Haven falls did neither of these things.

[134] As such, the Authority is satisfied that Ms Tepania did not contribute in a blameworthy way to the circumstances which led to her employment ending.

[135] There are no deductions from the monetary remedies for reasons of contribution.

Summary of orders

[136] Within 28 days of the date of this determination, Haven Falls must pay Kim Tepania the following amounts:

- (a) compensation in the sum of \$18,000 under s 123(1)(c)(i) of the Act;
- (b) reimbursement of lost wages in the sum of \$4,830 (gross), under s 123(1)(b) of the Act; and
- (c) holiday pay in the sum of \$386.40 (gross), being eight per cent of the six weeks' lost remuneration, under s 123(1)(b) of the Act.

Costs

[137] The parties are encouraged to resolve this issue between them. If this is not possible, Ms Tepania is to lodge and serve a costs memorandum within ten working days of the date of this Determination, and Haven Falls may lodge and serve any reply memorandum within a further five working days.

Jeremy Lynch
Member of the Employment Relations Authority