

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 322
3238959

BETWEEN MILLIE TECSON
 Applicant

AND PRIDE PROPERTY
 MANAGEMENT LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Linh Baillie, advocate for the Applicant
 Mary-Jane Thomas, counsel for the Respondent

Investigation Meeting: 5 March 2024 in Invercargill

Submissions Received: 5 March 2024 from the Applicant
 1 March 2024 and 5 March 2024 from the Respondent

Date of Determination: 31 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Millie Tecson was employed by Pride Property Management Limited (PPM) from 5 September 2022 as a Junior Property Manager.



[2] Ms Tecson resigned from her role on 4 November 2022 giving PPM four weeks' notice, as was required in her employment agreement.

[3] On 5 November 2022 PPM gave Ms Tecson 3 days' notice of termination pursuant to the 90-day trial period in Ms Tecson's employment agreement.

[4] Ms Tecson was unhappy that PPM cut short her four-week notice period by using the 90-day trial period provision. Ms Tecson raised a personal grievance for unjustifiable dismissal and unjustified disadvantage arising out of her dismissal. Ms Tecson also complained that she was not paid her final wage payment on time and that PPM breached confidentiality obligations it owed to her in relation to her dismissal.

The Authority's investigation

[5] The parties were unable to resolve Ms Tecson's grievance and Ms Tecson lodged a statement of problem in the Authority claiming unjustifiable dismissal, unjustified action causing disadvantage, wage arrears for her notice period and breach of confidentiality obligations.

[6] I investigated Ms Tecson's claims by receiving written evidence and documents, holding an investigation meeting on 5 March 2024 and assessing the submissions of the parties' representatives.

[7] I received witness statements from Ms Tecson and Nash Varghese, the CEO of PPM. In my investigation meeting, under affirmation, both witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives.

[8] 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

[9] In the course of my investigation meeting, it became clear that there were six aspects of Ms Tecson's dismissal and the events surrounding it that she was unhappy with. In this regard Ms Tecson's complaints are that:

- (a) PPM did not give her enough time between receiving the draft of her employment agreement and commencing work such that she was unable to take legal advice before signing the employment agreement. Ms Tecson's argument appears to be that because of this the employment agreement was not valid and in particular the trial period provision was not valid.
- (b) PPM did not discuss with her any concerns about her performance, those concerns ultimately leading to PPM's decision to dismiss her. And Ms Tecson says, in the circumstances PPM should have discussed any concerns with her.
- (c) PPM did not act in good faith when it gave her notice of termination, relying on the 90-day trial period provision, during her notice period.
- (d) PPM acted unreasonably when it withheld her final pay over the return of PPM property.
- (e) PPM exerted unreasonable pressure on her regarding the return of PPM property, in particular, the mobile phone PIN.
- (f) PPM breached obligations it owed to her when it disclosed to others that her employment had been terminated.

[10] I will consider how these complaints relate to the claims Ms Tecson may have.

[11] Turning first to the unjustifiable dismissal claim, Ms Tecson says she was unjustifiably dismissed because PPM could not use the 90-day trial period in circumstances where she had resigned giving four weeks' notice. This means Ms Tecson will need to



establish that PPM could not rely on the trial period provision to terminate her employment. If the trial period provision was valid and termination was carried out correctly in terms of the trial period provision, then Ms Tecson's claim for unjustifiable dismissal cannot proceed as she is unable to bring a personal grievance or legal proceedings in respect of the dismissal.¹ If the trial provision was not valid or implemented incorrectly then Ms Tecson's claim can proceed and I must decide if her dismissal was justified or not.²

[12] In relation to this Ms Tecson's first three complaints are relevant. Firstly, Ms Tecson says the trial period provision was invalid as she did not have enough time to consider it and obtain legal advice, which if correct will mean it could not be used to dismiss her. Secondly, if the trial period provision could not be used then Ms Tecson says her dismissal was unjustifiable as PPM did not discuss any issues it had with her and give her a chance to respond before PPM dismissed her. Thirdly, in any event, Ms Tecson says it was a breach of the duty of good faith to terminate her employment in her notice period.

[13] The first three complaints are also the basis for Ms Tecson's unjustified action causing disadvantage claim, in the alternative to her unjustifiable dismissal claim. The issue here being, if Ms Tecson cannot bring her unjustifiable dismissal claim because of the trial period, can she advance unjustified disadvantage claims instead? And, if so, is there a basis for the claims?

[14] Ms Tecson's other three complaints do not form the basis of any of her claims set out in her statement of problem. The question is, notwithstanding the claims identified in the statement of problem do any of these three complaints form the basis of an employment relationship problem and, if so, are the grounds established for a claim?

¹ Section 67B(2) of the Act.

² Applying the test for justification at s 103A of the Act.



Can Ms Tecson bring a claim for unjustifiable dismissal?

Was there a valid trial period provision in Ms Tecson's employment agreement?

[15] The first question for the unjustifiable dismissal claim is, was there a valid trial period provision in Ms Tecson's employment agreement?

[16] In this regard, as trial period provisions restrict an employee's right to bring an unjustifiable dismissal claim, the requirements must be strictly met in order for a trial period to be valid.³

[17] In this case there are two relevant considerations for assessing the validity of the trial period provision:

- (a) Does the provision meet the requirements of s 67A of the Act?
- (b) Did PPM meet the requirements of s 63A(2) of the Act relating to its obligation to advise Ms Tecson that she was entitled to seek independent advice about the draft employment agreement and its obligation to give a reasonable opportunity for that to happen?⁴

[18] Section 67A of the Act sets out the requirements for a provision for a trial period of 90 days or less:

- (1) An employment agreement containing a trial provision may be entered into by an employer and an employee who has not previously been employed by that employer.
- (2) For the purposes of this section and section 67B, trial provision means a written provision in an employment agreement that states, or is to the effect, that—

³ *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111.

⁴ *Senate Investment Trust Through Crown Lease Trustees Limited v Cooper* [2021] NZEmpC 45 at [37].



- (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 employer may dismiss the employee; and
- (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.

[19] I have reviewed the trial period provision in Ms Tecson's employment agreement with PPM and find that it meets the requirements of s 67A(2) of the Act. In addition, Ms Tecson was a new employee to PPM and she signed her employment agreement before she commenced work. For these reasons the trial period provision in Ms Tecson's employment agreement was valid in terms of the requirements set out in s 67A of the Act.

[20] In terms of the negotiation over Ms Tecson's employment agreement I find that Mr Varghese provided Ms Tecson with a copy of the intended employment agreement before she commenced work and advised her of her right to seek legal advice on the agreement. Ms Tecson was given sufficient time to get this advice – in particular I accept Mr Varghese's evidence of when the proposed employment agreement was provided to Ms Tecson and that, if she had needed and requested more time to consider it, then PPM would have enabled this by delaying Ms Tecson's start date.

[21] I also note that in these circumstances PPM was entitled to rely on Ms Tecson signing the employment agreement which contained an acknowledgement that she had been advised of her right to take advice and had been allowed a reasonable time to do so.

[22] I am satisfied that the trial period provision in Ms Tecson's employment agreement was valid and could be used by PPM to terminate Ms Tecson's employment.



Could PPM use the trial period to terminate Ms Tecson's employment and if so, what did it need to do?

[23] As the trial period provision was valid the next questions are, could PPM use it to terminate Ms Tecson's employment and if so, what did it need to do? There are two points raised by Ms Tecson on this:

(a) Could the trial period provision be used when Ms Tecson had served notice of resignation?

(b) Did PPM comply with the requirements of the trial period provision when it terminated Ms Tecson's employment?

[24] There is no impediment on PPM using a trial period provision during a period of notice given by Ms Tecson. From a legal perspective, having given four weeks' notice of resignation on 7 November 2022, Ms Tecson was still employed on 5 November 2022 when PPM gave her three days' notice of termination. So PPM could terminate her employment.

[25] Three days' notice was the notice required under the terms of the trial period provision in Ms Tecson's employment agreement; so PPM has complied with the trial period provision when it used it to terminate Ms Tecson's employment.

Was PPM's use of the trial period provision a breach of the duty of good faith?

[26] The third question is, was the use of the trial period provision a breach of the duty of good faith? This is what Ms Tecson claims.

[27] The use of a trial period provision, one that is valid, and when it is exercised in accordance with its terms, is not a breach of the duty of good faith. In particular s 67A(5)(a) of the Act restricts the application of the duty of good faith as set out in s 4 of the Act.



Conclusion

[28] As the trial period provision in Ms Tecson's employment agreement was valid and PPM served notice of termination in accordance with it, Ms Tecson cannot bring a claim for unjustifiable dismissal.

Alternatively, does Ms Tecson have claims for unjustified action causing disadvantage?

[29] Termination of employment by a valid trial period provision does not prevent an employee from bringing an unjustified disadvantage claim if the disadvantage is unconnected to the dismissal.⁵

[30] The claim advanced by Ms Tecson in relation to not being advised of her performance is connected to her dismissal.

[31] Ms Tecson cannot bring an unjustified action causing disadvantage claim.

Does Ms Tecson have a claim arising out of PPM's actions regarding the return of property and her final pay?

[32] Ms Tecson's employment had been terminated by PPM and she had an obligation to return PPM property to it. PPM had requested that these items be dropped off by Ms Tecson on her last day of employment.

[33] Ms Tecson failed to hand over all of the PPM property that she had on her last day of employment. This included a battery pack and air pods. In addition, she had failed to provide PPM with the PIN number for the mobile phone she had been given (which she had returned).

⁵ *Evans v JNJ Management Ltd* [2020] NZEmpC 181 at [27].



[34] PPM followed up with Ms Tecson on these matters. Despite the follow up the items had not been returned and the PIN issue had not been resolved by 15 November 2022 when PPM paid Ms Tecson her final pay.

Do the events provide a basis for an employment claim?

[35] In these circumstances there is no basis for Ms Tecson to bring a claim against PPM:

(a) PPM was entitled to insist on the return of its property and entitled to follow up on this.

(b) Despite PPM not having property returned it paid Ms Tecson her final pay without deduction in accordance with its pay cycles.

Did PPM breach an obligation of confidentiality it owed to Ms Tecson?

[36] Ms Tecson complains that PPM spoke to people in Invercargill about the termination of her employment and that this was a breach of confidentiality.

[37] This claim cannot succeed as there is no evidence to show that PPM discussed the termination of Ms Tecson's employment. And, in any event, there is not a basis established by which this could give rise to a claim, if it occurred.

Conclusion

[38] Ms Tecson's employment with PPM was validly terminated pursuant to a trial period provision and she cannot bring a claim for unjustified dismissal nor unjustified disadvantage.

[39] There is no basis for Ms Tecson to bring a claim against PPM in relation to its conduct in connection with the termination of her employment, including the return of PPM property, the payment of her final pay and any alleged breach of confidentiality.

[40] All of Ms Tecson's claim are dismissed.



Costs

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

[42] If the parties are unable to resolve costs, and an Authority determination on costs is needed, PPM may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Ms Tecson will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[43] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁶



Peter van Keulen
Member of the Employment Relations Authority

⁶ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

