

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2017] NZEmpC 141
EMPC 36/2017**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MARILOU RABAJANTE LEWIS Plaintiff
AND	IMMIGRATION GURU LTD Defendant

Hearing: 7 August 2017

Appearances: J Lewis, agent for plaintiff
J Bath, agent for defendant

Judgment: 10 November 2017

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff, Marilou Lewis, and the defendant, Immigration Guru Ltd (Immigration Guru), executed a written individual employment agreement dated 4 November 2015. Under the agreement, Mrs Lewis was to commence employment with the defendant on 16 November 2015 as an administrator.

[2] The agreement contained clauses incorporating a probation period and a trial period. The probation period was specified in the agreement to last for the first three months of employment. The trial period was stated in the employment agreement to apply for a period of 90 days.

[3] Clause 3 of the employment agreement, which concerned the nature and term of the agreement, reads as follows:

3.1 Individual Agreement of Ongoing and Indefinite Duration

This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The employment shall commence on **Monday the 16th November 2015** shall continue until either party terminates the agreement in accordance with the terms of this agreement. The clauses in this agreement may be varied or updated by agreement between the parties at any time.

3.2 Probation

A probation period will apply for the first **3 months** of employment to assess and confirm suitability for the position. The employer will provide guidance, feedback and any necessary support to the employee. Both parties will promptly discuss any difficulties that arise, and the employer will appropriately warn the employee if he or she is contemplating termination. Any termination must comply with the termination clause in this agreement. This probation period does not limit the legal rights and obligations of the employer or the employee, and both parties must deal with each other in good faith.

3.3. Trial periods

A trial period will apply for a period of **90 Days** employment to assess and confirm suitability for the position. Parties may only agree to a trial period if the employee has not previously been employed by the employer.

During the trial period the employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. The employee may pursue a personal grievance on grounds as specified in sections 103(1)b-g of the Employment Relations Act 2000 (such as: unjustified disadvantage; discrimination; sexual harassment; racial harassment; duress with respect to union membership; and the employer not complying with Part 6A of the Employment Relations Act 2000).

Any notice, as specified in the employment agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the employer or the employee (including access to mediation services), except as specified in sections 67A (5) of the Employment Relations Act 2000.

[4] As the issue of termination of employment has relevance in this matter, cl 13 of the employment agreement is set out. It reads as follows:

13.1 Termination of trial period

The employer may terminate the trial period by providing **2 weeks'** notice to the employee within the trial period

13.2 General Termination

The Employer may terminate this agreement for cause, by providing **4 weeks'** notice in writing to the Employee. Likewise the Employee is

required to give **4** weeks' notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

(Emphasis in original)

[5] On 2 February 2016, Mrs Lewis was given two weeks' notice of termination of her employment. Notice was purported to have been given by Immigration Guru pursuant to the trial period clause in the agreement. Termination was confirmed in writing on 3 February 2016. Mrs Lewis was not required to work out the period of notice and was paid in lieu.

[6] Mrs Lewis raised a personal grievance and then commenced proceedings in the Employment Relations Authority (the Authority). An investigation meeting took place on 3 October 2016. In a determination dated 13 October 2016, the Authority held:¹

- (a) The trial period provision in Mrs Lewis' employment agreement was valid, and she could not succeed in her claim for unjustifiable dismissal;
- (b) Mrs Lewis was not racially discriminated against in her employment and was not unjustifiably disadvantaged in respect of pay issues;
- (c) Mrs Lewis was not racially discriminated against and not unjustifiably disadvantaged in terms of marketing duties that formed part of her role.
- (d) Mrs Lewis was not racially discriminated against and/or was not unjustifiably disadvantaged in respect of having to focus on marketing duties during the latter part of her employment;
- (e) Mrs Lewis was not racially discriminated against in terms of her expenses not being refunded.

¹ *Lewis v Immigration Guru Ltd* [2016] NZERA Auckland 349.

[7] Mrs Lewis challenged the determination of the Authority. Her election to challenge the determination was against the whole of the determination, and she sought a hearing de novo.

Pleadings issues

[8] The following remedies are sought in the statement of claim:

1. That the defendant did directly discriminate against the plaintiff.
2. That the defendant did indirectly discriminate against the plaintiff.
3. That the plaintiff should be adequately compensated for such discrimination according to the remedies set out in s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for hurt and humiliation, and injury to the plaintiff's feelings.
4. To hold that the defendant disadvantaged the plaintiff, when it used an unfair procedure in realigning the plaintiff's core duties.
5. That the plaintiff should be compensated for the disadvantage caused by the defendant according to the remedies set out in s 123(1)(c)(i) of the Act for hurt and humiliation, and injury to the plaintiff's feelings.
6. To declare that the trial period specified in the employment agreement was void ab initio.
7. That the plaintiff should be compensated for lost wages according to s 123(1)(b) of the Act.
8. To declare that the plaintiff was disadvantaged by the defendant's failure to fulfil cl 7.1 of the employment agreement.
9. That the plaintiff should be compensated for the defendant's failure to fulfil cl 7.1 of the employment agreement according to the remedies set out in s 123(1)(c)(i) of the Act for hurt and humiliation, and injury to the plaintiff's feelings.

[9] Even though a declaration is sought that the clause in the employment agreement containing the 90-day trial period was void, no claim is made that Mrs Lewis' dismissal was unjustifiable. Those grievances which are pleaded relate to discrimination and disadvantage in employment. These are unconnected to the dismissal under the 90-day trial period, in the sense that, if the trial period is held as valid, that does not preclude grievances other than for dismissal being raised.

[10] The omission in the statement of claim of an allegation of unjustifiable dismissal is clearly an oversight. Mr Lewis, on behalf of Mrs Lewis, argued that if

the 90-day trial period did not apply, Mrs Lewis could pursue a grievance for unjustifiable dismissal, and clearly that was being raised along with the remedies which would accompany it if proved.

[11] Mrs Lewis is not precluded by the pleading omission from seeking to have the Court consider a claim for unjustifiable dismissal. In *Nathan v C3 Ltd*, the Court of Appeal stated as follows:²

[35] The fact that Mr Nathan's personal grievance was a claim for unjustifiable dismissal under s 103(1)(a) did not mean that the Employment Court was precluded from considering the discrimination issue in the correct statutory context. A pleading point of that nature would be contrary to s 122 which expressly permits the Court to make a finding that a personal grievance is of a type other than that alleged.

[12] The Court of Appeal in *Nathan* relied upon *New Zealand Van Lines Ltd v Gray*.³ That case was decided under the Employment Contracts Act 1991. However, s 34 of that Act had a materially identical provision to s 122 of the Employment Relations Act 2000 (the Act). Clearly, the *Gray* case is still relevant, as the Court of Appeal cited it in *Nathan*.

[13] In *Gray*, the Court of Appeal upheld the Tribunal's decision to use s 34 to change an unjustifiable dismissal claim into an unjustifiable disadvantage claim. The Court stated:⁴

This appears to us to be exactly the kind of situation for which s 34 was designed if a just result were to be reached, provided that the parties were given a fair opportunity to address the issues as the Tribunal identified them. We can see no error of law in the actions the Tribunal took. It was not a substitution of a new personal grievance for the grievance complained of. It relied on the same sequence of events and in respect of those events found a different type of grievance (disadvantage) from what had been asserted (dismissal). Further, it seems to us that the procedure was fair and just to the parties, appropriately informal (in not requiring for instance any amendments of the pleadings when the issues were clear) and speedy: ...

[14] While the argument runs the opposite way in the present case (finding an unjustifiable dismissal in addition to or instead of an unjustified disadvantage), the same circumstances would apply in this case. The sequence of events discussed in

² *Nathan v C3 Ltd* [2015] NZCA 350, [2015] ERNZ 61 at [35] (footnotes omitted).

³ *New Zealand Van Lines Ltd v Gray* [1999] 1 ERNZ 85 (CA).

⁴ At 96-97.

the hearing covered the circumstances of the dismissal, and based on those circumstances, the only real defence for it was the 90-day trial period. This was the main topic of discussion in the hearing. There would be no unfairness to the parties here in entitling Mrs Lewis to have a grievance for unjustifiable dismissal considered either in substitution for or in addition to the discrimination and disadvantage grievances. In the present case, the position is probably even stronger than that which existed in *Gray*. The sole claim that termination of employment pursuant to a 90-day trial period prevents is for unjustified dismissal. Thus, the fact that it was discussed in Court points to an implicit understanding between both parties that an unjustifiable dismissal was being raised as a claim even though not pleaded. Indeed, without a claim for unjustifiable dismissal, all of the discussion around the 90-day trial period would in fact be a non-sequitur.

[15] In the circumstances, despite the deficiency in the pleadings, Mrs Lewis is permitted to have a claim for unjustifiable dismissal considered.

Factual outline

[16] Mrs Lewis was in employment at Rainbow's End when she expressed interest in the position being offered by the defendant. Originally, the defendant was seeking to recruit a licensed immigration advisor, but due to a lack of response from suitable candidates, the role was changed to that of an administrator with the potential to become a licensed immigration advisor.

[17] Mrs Lewis was successful in her application for the administrator role and, as stated earlier, commenced employment with the defendant on 16 November 2015. Prior to that she had attended a one day trial, which appears to have been successful. Once the employment was confirmed, Mrs Lewis tendered her resignation at Rainbow's End.

[18] The job description attached to the written employment agreement is as follows:

Duties and responsibilities:

- Liaising with other staff to arrange meetings, prepare reports, briefing notes and correspondence, and proofreading work.
- Liaise with Immigration NZ and other agencies on behalf of the Managers/Advisors and Directors
- Maintaining appointment diaries and making travel arrangements for Managers, Directors and Licensed Immigration Advisers
- Answering telephone calls, responding to inquiries and redirecting callers in a timely and professional manner
- Taking and transcribing dictation of letters and other documents
- Greeting visitors and clients, ascertaining nature of business and directing visitors and clients to appropriate Manager, Director or Licensed Immigration Adviser
- Implement business management decisions
- Set up appointments for parties to meet for mediation for resolving client complaints
- Work with relevant organisations to resolve disputes if required
- Attend meetings and presentations with managers and directors
- Assist with legal aspects of operating the company
- Assist in Marketing and promoting the company's services to potential clients.

Skills required:

- Knowledge of the legal system
- Knowledge of legislation and regulations
- Understanding of legal terms and methods
- Legal research skills

Personal requirements

- Excellent communication skills
- Reliable and responsible
- Accurate and punctual
- Able to keep information private
- Able to work well under pressure
- Able to plan and organise efficiently

[19] During the interview, it appears that there was discussion about Mrs Lewis undertaking a trial period. Jasmine Bath, who is a director of Immigration Guru, stated in her evidence that she explained to Mrs Lewis that the company would trial her performance and suitability in the first 90-days of her employment, and if she was found to be suitable during the trial period, she would become a permanent employee. Mrs Bath says that she explained to Mrs Lewis that the trial period was important for Mrs Lewis, as it would give her the "opportunity to decide if she was happy to become a permanent employee". Unfortunately, as will be discussed later

in this judgment, conflicting provisions relating to the first period of employment obscure the true nature of the initial 90-day or three-month period.

[20] There was also some discussion between Mrs Lewis, Jay Bath (also a director of Immigration Guru) and Mrs Bath during the one day trial about marketing duties which Mrs Lewis could undertake. The job description, of course, includes marketing duties, but that does not appear to be one of the primary responsibilities. Mrs Lewis, in her evidence, stated that she was not made to understand that marketing would be her sole duty and responsibility, although marketing to the Filipino community appears to have been discussed as a possibility. She stated in evidence that allocation of marketing duties would be dependent upon “scarcity of lodgements” which were part of her other administration duties.

[21] From the time of Mrs Lewis’ first wages payment, difficulties arose as to the crediting of the full amount into Mrs Lewis’ bank account. This was raised with Immigration Guru, and it is not in dispute that Mrs Bath carried out enquiries as to whether the difficulties were associated with the company’s bank. It appears to have been concluded that the difficulties arose with Mrs Lewis’ own bank, and while the problem eventually appears to have been resolved, it did continue for a period. Mrs Lewis states that she reached the point where she simply accepted the position. It has been raised as a separate disadvantage grievance in the proceedings.

[22] The plaintiff called evidence from a manager of her bank, Jeffrey Mascarenhas, whose evidence clearly shows that the difficulties associated with Mrs Lewis receiving all her wages at the one time into her bank account arose from a policy adopted by her own bank, not the bank of Immigration Guru. However, there was some culpability on the part of Immigration Guru in that the reason Mrs Lewis’ bank was only allowing credit of half her wages was because Immigration Guru’s bank was crediting Mrs Lewis’ wages to her account as uncleared funds. The full amount of wages would not be credited until the two-day clearance period had expired. Immigration Guru should have responded to this issue to ensure Mrs Lewis could obtain full credit earlier.

[23] During December 2015, Mrs Lewis began marketing efforts towards the Filipino community. She first endeavoured to enquire into advertising in a newspaper in Manila, but the apparent trade terms were not satisfactory to Mrs Bath, and Mrs Lewis was directed to investigate advertising in a Filipino newspaper circulating in Auckland. Mrs Lewis' efforts in this regard were not taken up by Mrs Bath, and Mrs Lewis states in her evidence that during the second week of January 2016 she noticed a change in her employer's behaviour towards her and finding fault with her work. On 19 January 2016, Mrs Lewis was instructed not to continue with her other administrative duties and concentrate solely on marketing. A discussion took place with Mr and Mrs Bath during which a marketing strategy plan appears to have been promulgated, which Mrs Lewis was to implement. It does not appear to be in dispute that no consultation took place prior to Mrs Lewis being directed to change her duties and responsibilities in this way.

[24] Mrs Lewis undertook marketing duties from that time, including a marketing trip which appears to have been to the CBD in Auckland. On the same trip she also visited the New Zealand International Academy, where an acquaintance was employed, and she made a proposal to supply information to students who needed help or assistance with their visas. There was some discussion prior to this marketing trip surrounding reimbursement of Mrs Lewis' travelling expenses.

[25] On 2 February 2016, Mrs Lewis reported to work and outlined the accomplishments she had made during the marketing trip. Around 1 pm on that day, Mrs Bath indicated to Mrs Lewis she and her husband wished to meet with her. At around 3 pm on that day, she attended a meeting with Mr and Mrs Bath, and her employment was terminated.

[26] Mrs Bath informed Mrs Lewis that, as her trial period was finishing on 16 February 2016, they decided not to continue with her employment. One of the reasons for this was that Mrs Lewis had been unable to recruit Filipino clients. Mrs Lewis was given two weeks' notice and paid in lieu. Mrs Bath also indicated that a reference letter would be given to Mrs Lewis to assist her in applying for alternative employment. This letter was never issued because she raised her personal grievance on the day of her termination on 2 February 2016.

Legal issues arising and discussion

[27] Legal principles applying to issues relating to trial periods pursuant to ss 67A and 67B of the Act were discussed and established in *Smith v Stokes Valley Pharmacy (2009) Ltd*.⁵ The principles contained in the judgment are neatly summarised in the following passages from the headnote of the report:

(2) Sections 67A and 67B of the Act remove longstanding employee protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly intended. The new provisions were intended to address the circumstances of “new” employees who had not been previously employed, had not been employed recently, or for whom obtaining employment might have proved difficult for any other reason. Read together, ss 67A and 67B both provide for a new form of “trial period” and remove some existing employee entitlements to challenge at law a dismissal. (paras 48, 49)

(3) Section 67B(1) of the Act applies if an employer terminates an employment agreement containing a trial provision by giving the employee notice of the termination before the end of the trial period. It does not matter whether the termination takes effect before, at, or after the end of the trial period. The subsection contemplates that “notice” will be advice of when, in future, the dismissal will take effect. It is necessary that the giving of the notice of termination of the employment agreement must be before the end of the trial period. It is significant, also, that the notice is of termination of the employment agreement and not of employment. (paras 60, 61)

(4) The effect of s 67B(5)(a) of the Act is to relieve an employer in the making of a decision whether to terminate an employment agreement containing a trial provision pursuant to the terms of that provision, only from providing the employee with information relevant to the continuation of the employee’s employment about that decision and an opportunity to comment on the information before the decision is made. Other s 4 good faith obligations apply and are enforceable, but other than by personal grievance for unjustified dismissal. Even absent s 4(1A)(c) good faith obligations, those remaining under s 4 are significant and enforceable by trial period employees. (para 69)

(5) Though an employer is not obliged to notify an employee of the employer’s proposal to end the employee’s employment or to offer the employee an opportunity to comment thereon, this does not preclude an employee seeking and being entitled to receive an explanation for the dismissal at the time notice is given. Interpreting s 67A and s 67B obligations strictly and against the removal of rights of access to justice unless clearly so expressed, the Court considered that an employer, upon

⁵ *Smith v Stokes Valley Pharmacy Ltd (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253.

giving notice of termination of an employment relationship in reliance on s 67B, was not entitled in law to refuse to give an explanation for such a significant decision. Nor is the employer entitled to give an explanation that is misleading or deceptive or that may tend to mislead or deceive the employee. (paras 81, 82)

(6) The new sections are neither simple nor the very broad and blunt prohibition against bringing legal proceedings that is sometimes portrayed rhetorically. They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with. Significant obligations of good faith dealing remain upon employers. (para 83)

[28] As a result of the unusual combination and order of provisions contained in cls 3.2 and 3.3 of the employment agreement as set out earlier in this judgment, Mr Lewis, in his submissions, referred to the *Lighthouse* series of cases decided in the Authority.⁶ In those cases, the employment agreements and the circumstances surrounding the date when the employees commenced work were equivocal and not as clearly stated as in the present case. The trial period provision in the *Lighthouse* series of cases did not contain a commencement date, although there was a reference in the schedule to the agreement as to when the agreement would commence. The trial period provisions were held to be invalid.

[29] Nevertheless, in the present case, even though the commencement of employment is clearly stated, equivocation arises because of Mrs Lewis being required under the agreement to undertake a probation period of employment at the same time as she was undergoing the trial period. Difficulty arises for Immigration Guru by cl 3.2 of the agreement, which deals with the probation period and states that it will apply for the first three months of employment, whereas cl 3.3, dealing with trial periods, simply states that the trial period will apply for a period of 90-days employment without specifying any commencement date. Mr Lewis argued that, to meet the requirements of the statutory provisions, cl 3.3 should have separately specified a date of commencement.

[30] Mr Lewis further argued that the *Lighthouse* cases were relevant in circumstances where Mrs Lewis, in order to commence employment with

⁶ *Baxter v Lighthouse ECE Ltd* [2016] NZERA Auckland 283; *Clark v Lighthouse ECE Ltd* [2016] NZERA Auckland 281; *Du Plooy v Lighthouse ECE Ltd* [2016] NZERA Auckland 282; and *Honey v Lighthouse ECE Ltd* [2016] NZERA Auckland 284.

Immigration Guru on the date stated in cl 3.1 of the agreement, was required to give an adequate period of notice to her former employer. Mr Lewis submitted that to comply with that requirement, there may have needed to be some variation in the date of her starting work and therefore giving rise to circumstances similar to the employees in the *Lighthouse* cases. That submission is somewhat weak because, in any event, Mrs Lewis had adequate time to give the appropriate notice to the former employer, clearly did so and commenced employment with Immigration Guru on the date stated in the employment agreement.

[31] However, all of that does not rule out the possibility that, with the way that cl 3.3 is worded and the ambiguity arising from the fact that there was a simultaneous probationary period applying, the trial period provision is unenforceable. In view of the statement in *Smith* that ss 67A and B of the Act should be interpreted strictly and not liberally because they are an exception to the general minimum standards of employment, the employee protective scheme as provided in the Act and access to justice, the inadequacy of the provisions in the employment agreement is significant.

[32] In this case, Immigration Guru decided to rely upon the trial period clause to terminate Mrs Lewis' employment in circumstances where it believed it was not required to justify the termination and Mrs Lewis would be unable to raise a personal grievance for unjustifiable dismissal. In agreeing to be bound simultaneously by the probationary period and trial period clauses, Immigration Guru placed itself in a situation where there were unresolvable conflicts. Under the employment agreement, termination pursuant to the trial period provision could be given with two weeks' notice, whereas under the probation period clause, four weeks' written notice was required. In agreeing to be bound by the simultaneous probation period clause, Immigration Guru was required to show justifiable cause for dismissal and undertake fair procedural requirements prior to and in carrying out the dismissal.

[33] In the circumstances prevailing in this case, simply wording cl 3.3 of the employment agreement such that a "trial period will apply for a period of 90 days employment" is inadequate to specify when the trial period will commence as required by the Act. A trial period under s 67A of the Act is required to commence at

the beginning of the employment. However, when a conflicting probationary period is also commencing at that time, substantial ambiguity arises. Were the trial period provisions in this agreement not to have been accompanied by the probation period clause, it could have been inferred that it commenced at the time Mrs Lewis began employment. However, in this case, the probationary period provision in the agreement precedes the provision relating to the trial period. Accepting Mr Lewis' submission relating to the absence of a specific starting point in the trial period provision, it could be argued that the trial period was not to commence until the expiration of the probationary period, and the trial period clause would therefore be invalid.

[34] Alternatively, and this was probably the case, Immigration Guru intended the probationary period and the trial period provisions to start at the same time and run together. This was misguided, however, as in such circumstances, Immigration Guru cannot simply be entitled to abandon its obligations to Mrs Lewis under the probationary period in favour of a dismissal under the trial period provision, even if Immigration Guru considered that a convenient position to take. Such obligations would include, for example, a fair warning that dismissal was being considered. This is clear from the wording of cl 3.2 and previous case law on probationary agreements.⁷ The lack of fair warning, or indeed, any procedural steps taken by Immigration Guru before the dismissal of Mrs Lewis, is incompatible with the obligations created by cl 3.2.

[35] It is difficult to ascertain how this conflict in the employment agreement arose. It appears that the agreement had been drawn up without legal advice and relying upon a template provided by the Ministry of Business, Innovation and Employment. Clearly, the consequences of including both a probationary period provision and a trial period provision in the one agreement where one or the other should have been selected were not foreseen.

[36] As indicated earlier in this judgment when dealing with the pleadings issues, Mrs Lewis, contemplating that she may not be successful in her attempts to have the

⁷ See for example *Nelson Air Ltd v New Zealand Airline Pilots Association* [1994] 2 ERNZ 665 (CA) at 669-670.

trial provision declared unenforceable, has raised disadvantage grievances based on allegations of racial discrimination. These would not be excluded in the event that the trial period provision was held to be valid and applicable as the Authority did in its determination.

[37] While Mrs Lewis may have suffered some minor disadvantages apart from the dismissal because of the actions of Immigration Guru leading up to termination of her employment, it is difficult to ascertain how those actions could be described as racial discrimination. Mrs Lewis' Filipino ethnicity featured in discussions with Immigration Guru prior to and during her employment, but as the Authority has found in its determination, the actions of Immigration Guru in this regard could not be considered racial discrimination under the requirements of ss 103(1)(c), 104 and 105(1)(f) of the Act.⁸ I agree with the Authority's analysis.

[38] Nevertheless, there are potentially two areas where Mrs Lewis may have suffered disadvantage in her employment because of the actions of Immigration Guru. The first of these relates to the difficulties in having her wages fully available to her on the day when Immigration Guru paid them into her bank. This difficulty lasted for several weeks, but it appears from the evidence that the position was rectified by the banks. As Mrs Lewis could not get a satisfactory response on this issue, she did not take it further. However, Immigration Guru did have certain obligations in this regard, and it may well be that it should have pursued the matter further with its bank because the simple answer to the difficulty was to ensure that funds paid into Mrs Lewis' account were cleared funds so there was no delay in her own bank obtaining clearance. The difficulty with this grievance so far as Mrs Lewis is concerned is that she would have only been disadvantaged to a very minor degree.

[39] The second disadvantage in her employment relates to the fact that even though marketing was only a small proportion of the duties contained in her job description, towards the end of her period of employment she was taken off other administrative duties and asked to spend her entire time on marketing. Even then, when Mrs Lewis commenced contacts within the Filipino community, Mrs Bath did

⁸ *Lewis v Immigration Guru Ltd*, above n 1, at [73]-[102].

not exactly encourage her in her efforts. It was clear by this time that Immigration Guru had decided to take up the option, which it believed was available to it, to terminate Mrs Lewis' employment under the trial period provision. Again, it is difficult to assess the extent of the disadvantage which Mrs Lewis suffered because of this action by Immigration Guru in diverting her duties solely to marketing. She suffered no loss of wages and while clearly uncomfortable with this being her sole duty she willingly attempted to pursue marketing opportunities for Immigration Guru.

Conclusions

[40] Based on the preceding analysis, the trial period provision contained in the employment agreement cannot be relied upon by Immigration Guru. Mrs Lewis was thus unjustifiably dismissed by Immigration Guru. Inadequate grounds were provided for terminating her employment, and indeed, an allegation that the dismissal was justifiable is inconsistent with the employer's offer to provide a reference for the departing employee. Quite apart from that, Immigration Guru was required to comply with fair and reasonable procedural requirements in carrying out the termination of employment. In considering those factors contained in s 103A(3) of the Act, Immigration Guru has failed to meet any of those standards. No attempt was made to allow Mrs Lewis to be represented by an adviser in the one meeting held to terminate her employment. If there were performance issues, Mrs Lewis was not given an opportunity to respond or improve. Indeed, the way that Immigration Guru dismissed Mrs Lewis was tantamount to a summary dismissal. In all the circumstances which prevailed, the employer in this case clearly failed to act in a manner that a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The dismissal was therefore unjustifiable.

[41] While I have held that Mrs Lewis has failed to establish a disadvantage grievance based on discrimination, the actions by Immigration Guru in failing to adequately resolve Mrs Lewis' pay issues and diverting her away from most of her administrative duties solely to marketing were actions which affected her employment to her disadvantage and were unjustifiable.

[42] Unfortunately, while Mrs Lewis has established personal grievances, she failed in her evidence to assist the Court to deal with the monetary remedies which she claims. She seeks compensation for hurt, humiliation and injury to her feelings and reimbursement for wages she has lost because of having her employment terminated. Mr Lewis conceded at the hearing, when presenting his closing submissions, that the evidence in relation to remedies was inadequate. Mrs Bath, representing Immigration Guru, was clearly aware that the evidence was inadequate and during the hearing tempered her cross-examination of Mrs Lewis accordingly. Nevertheless, in her brief of evidence, Mrs Lewis refers to being demoralised by the employer's changed behaviour towards her and being teary eyed and hurt following the meeting in which her employment was terminated. That she clearly remained upset was confirmed by her demeanour when giving evidence.

[43] Insofar as reimbursement of lost wages is concerned, there was no evidence as to whether Mrs Lewis obtained alternative employment following dismissal. There was no evidence as to whether she took steps to mitigate her loss in this regard. However, in circumstances where Mrs Lewis had terminated her regular employment with a prior employer to take up employment with Immigration Guru, then have that employment terminated within a short period, it would be reasonable to expect that she would not have been able to obtain alternative employment immediately.

[44] In respect of the dismissal and the disadvantage grievances, it seems to me that there is sufficient evidence to make a modest award of compensation for hurt and humiliation and that reimbursement for lost wages should be made for a period of two weeks. This I consider to be a reasonable period for Mrs Lewis to gather herself together after what were peremptory actions by the employer and to arrange alternative employment. The evidence discloses that she was paid \$16 per hour and was employed for 35 hours each week. The gross amount she would have earned for two weeks at these rates would be \$1,120. Accordingly, Immigration Guru is ordered to pay Mrs Lewis the gross sum of \$1,120. Mrs Lewis will need to deal with the Inland Revenue Department as to how that figure should be taxed.

[45] Insofar as compensation is concerned, I make an award of \$1,000. This amount is to reflect the hurt and humiliation suffered, in total, from the unjustified dismissal and the two unjustified disadvantages. Immigration Guru is ordered to pay Mrs Lewis this sum as compensation pursuant to s 123(1)(c)(i) of the Act.

[46] As Mrs Lewis was represented by her husband in the proceedings and was therefore not legally represented, she is not entitled to any award of costs. However, Immigration Guru is to reimburse Mrs Lewis for filing fees which she paid in both the Authority and the Court proceedings.

M E Perkins
Judge

Judgment signed at 3 pm on 10 November 2017