IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 50
5517029

BETWEEN	HAMISH BOHNY Applicant
A N D	THE SERIOUS SANDWICH LIMITED First Respondent
A N D	MISCHA BELTON Second Respondent

Member of Authority:	Helen Doyle
Representatives:	Gregory Bennett, Advocate for the Applicant Oliver Belton, Advocate for the First and Second Respondent
Investigation Meeting:	18 March 2015 at Christchurch
Submissions Received:	At the investigation meeting
Date of Determination:	21 April 2015

DETERMINATION OF THE AUTHORITY

A **The trial period in the employment agreement is not effective because Hamish Bohny was an employee at the time the employment agreement was signed. Mr Bohny is not prevented from bringing a personal grievance.**

B **Hamish Bohny was unjustifiably dismissed.**

C **The Authority has made the following orders jointly and/or severally for payment by The Serious Sandwich Limited and Mischa Belton to Hamish Bohny:**

(i) Lost wages in the sum of $1154.88 gross;

(ii) Compensation in the sum of $4000 without deduction;

(iii) Costs are reserved and failing agreement I have timetabled for submissions.

The second respondent

[1] A copy of the relevant employment agreement in this matter was provided to the Authority and Mr Bennett on 17 March 2015, the day before the investigation meeting. The employer named in the employment agreement was Mischa Belton who is the sole director of The Serious Sandwich Limited (The Serious Sandwich). There is no reference in the employment agreement to The Serious Sandwich.

[2] I record that there had been earlier requests made by both the Authority and Mr Bennett for the employment agreement. Mischa Belton believed that the agreement had been supplied by his then representative.

[3] There was a discussion at the investigation meeting as to the best way to proceed in light of the parties to the employment agreement. It was agreed that Mr Belton would discuss the matter with his brother and representative for The Serious Sandwich, Oliver Belton, and advise the Authority as to whether Mr Belton would agree to be joined to the proceeding as a second respondent.

[4] On 25 March 2015, Mr Oliver Belton advised the Authority in an email that both Mr Belton and The Serious Sandwich consented to the joining of Mr Belton as a respondent party.

[5] By consent, Mischa Belton is joined to this proceeding as second respondent. If there are any orders made by the Authority then they will be made jointly and/or severally against both respondents. The respondents will be in the best position to decide if there is a question of liability where it should fall.

Employment relationship problem

[6] Section 67A of the Employment Relations Act 2000 (the Act) provides that an employment agreement containing a trial period provision not exceeding 90 days may be entered into by an employee who has not been employed by the employer. Section

67B of the Act provides that an employee whose employment agreement is terminated before the end of the trial period may not bring a personal grievance in respect of the dismissal.

[7] Hamish Bohny says that he was an employee at the time the employment agreement was signed. Mr Belton is the owner and sole director/shareholder of The Serious Sandwich.

[8] In or about September 2013, Mr Belton advertised for an experienced barista to work in a second sandwich shop in Christchurch operated by The Serious Sandwich.

[9] Mr Bohny attended an interview with Mr Belton and says that between the interview and 16 September 2013 he was offered and accepted the position at the sandwich shop. He said in oral evidence that accordingly he handed in his notice at a ski rental shop where he was working. Mr Bohny said that he did not think/recall there was any discussion at the interview or later at a bar where he and his girlfriend and Mr Belton had a drink about a 90 day trial period.

[10] Mr Belton had a different view of the matter. He said that he made it clear to Mr Bohny that he would be subject to a 90 day trial period, both at the interview and then later at the bar. Mr Belton said he also made it clear that Mr Bohny would need to sign an employment agreement and that he considered that there was no firm agreement about employing Mr Bohny before such the employment agreement was signed.

[11] Mr Bohny was to have commenced work on 16 September 2013 but was unwell at that time with suspected appendicitis. His girlfriend advised Mr Belton by text message that Mr Bohny would not be at work. Mr Belton thought that he may have received the text on Sunday 15 September 2013. Mr Belton was able to get someone else to cover for that week. Mr Bohny said that he was advised it was not appendicitis and he told Mr Belton that he could come into work on 17 September 2013 but Mr Belton had already arranged the cover for him for that week.

[12] Mr Bohny says that he commenced work the following week, on Monday, 23 September 2013, worked a full day and was presented with the employment agreement the afternoon of 24 September 2013. He took that home to read and

consider and then signed it on Wednesday 25 September 2013. The agreement contained a 90 day trial period.

[13] Mr Belton says that Mr Bohny did not commence work before he had been provided with and signed the written employment agreement. Mr Belton said in his oral evidence that Mr Bohny came into work on 23 September 2013 and signed the employment agreement that day but the agreement was post-dated to 25 September 2013 when it was agreed that Mr Bohny would commence work. Mr Belton said that he sent Mr Bohny home on 23 September 2013 because he was not well enough to start work and then he started work on the Wednesday 25 September after the employment agreement had been signed.

[14] Mr Belton further says that Mr Bohny had misrepresented himself in his interviews and subsequent discussions about his level of experience. He was also concerned about Mr Bohny's interaction with customers and his reluctance to take instructions from him.

[15] Mr Bohny said that he was not aware there were concerns about his coffee making and his experience in hospitality. He accepted that there were discussions from time to time about aspects of his work in the shop but that there was only one meeting outside the shop during which they discussed the cooking of the bacon and his attitude about that matter. Mr Belton said that when he raised a concern with Mr Bohny about cooking bacon Mr Bohny yelled at him.

[16] In early November Mr Belton advised Mr Bohny by text on a Sunday that he did not need to turn up to work the following Monday. In doing so he relied on the 90 day trial period. Neither party could recall the exact date of termination of employment however from my perusal of the payroll history and questions of witnesses I concluded it was likely that the relationship ended before 4 November 2013. It was within 90 days of the commencement of employment whether on 23 or 25 September 2013.

[17] Mr Bohny says that he was unjustifiably dismissed from his employment and he seeks reimbursement of two weeks wages for notice, the sum of $6000 for compensation under s 123 (1) (c) (i) of the Act, interest and reimbursement of the filing fee and costs.

The issues

[18] The issues for the Authority to determine are as follows:

(a) Is there an effective 90 day trial period in accordance with s 67B(2) of the Act that prevents Mr Bohny from bringing a personal grievance in respect of his dismissal?

(b) If the 90 day trial period is not effective, then was Mr Bohny unjustifiably dismissed? and

(c) If Mr Bohny was unjustifiably dismissed, what remedies is he entitled to and is there issues of contribution or mitigation?

Is there an effective 90 day trial period preventing Mr Bohny from bringing a personal grievance?

[19] A considerable passage of time has elapsed from the time of this brief employment relationship to the Authority investigation meeting. The statement of problem was lodged with the Authority on 2 September 2014 and the parties then attend mediation. Memories do fade over time. I have taken this into account in considering and reaching findings about what occurred.

[20] Although I am not sure as to the exact date this occurred I find it more likely than not that between the interview with Mr Belton and 16 September 2013 Mr Bohny was offered and accepted a position with Mr Belton. He knew that the hourly rate he was to be paid was $18 and he understood the nature of his duties. Mr Bohny gave notice to his employer within that time period in reliance on the offer of a position by Mr Belton and his acceptance of the same. He had also been given a date, 16 September 2013, by Mr Belton on which date he was to commence working. Mr Bohny was ill on that day and arranged for Mr Belton to be advised of that. He was replaced on a temporary basis until he was well enough to commence work for Mr Belton and The Serious Sandwich.

[21] I could not be satisfied that Mr Belton told Mr Bohny that the offer of employment was subject to, or conditional on, him signing an employment agreement. If that had been the case then I would have expected Mr Bohny to have requested and

to have been supplied with an employment agreement before his anticipated start date on 16 September 2013 and before he resigned from his other role.

[22] What that means I find is that Mr Bohny, when he accepted the offer of employment, became as described in the Employment Court judgment of *Blackmore v Honick Properties Limited*[1] an employee within the definition of employee in ss 5 and 6 of the Act. Chief Judge Colgan stated in *Blackmore* that Mr Blackmore became an employee of the company when he was offered and accepted employment with it. It was recognised in *Blackmore* that Mr Blackmore was not an employee for all or even most purposes as from that date but was entitled as an employee to access to the statutory personal grievance procedure from that date.

[23] The significance of this is that s 67A (3) of the Act defines an employee as one who has not been previously employed by the employer. That means that if Mr Bohny signed his employment agreement when he was an existing employee he was not because of s 67A (3) able to enter into an employment agreement containing a trial period.

[24] There was emphasis placed in *Blackmore* on the benefits of ss 67A and 67B of the Act to an employer in removing longstanding rights of challenge to the justification for a dismissal. In *Blackmore* it was stated[2] amongst other matters; *what this means in practice that employers wishing to avail themselves of the opportunity afforded by ss 67A and 67B must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee. This will mean in practice that trial periods in individual employment agreements must be provided to prospective employees at the same time as, and as part of, making an offer of employment to that prospective employee...*

[25] I have considered alternatively Mr Belton's evidence that Mr Bohny never became an employee until after he signed his employment agreement and that was signed before he commenced work on 25 September 2013. That requires reaching findings on the date that Mr Bohny commenced employment and when the agreement was signed.

[26] Sometimes the Authority can be assisted where there has been a considerable passage of time since the relevant events by statements or communication closer to the time. A letter dated 21 November 2013 from solicitor Hugh Matthews who then

[1] [2011] ERNZ 445 at p 456 [48]
[2] [70]

represented The Serious Sandwich in response to the raising of a personal grievance states that Mr Bohny did not commence work until 2 October 2013 after the employment agreement was signed on 25 September 2013. That commencement date was then relied on in the statement of problem and the statement in reply. I accept that the relevant payroll record that could have clarified matters was not provided to Mr Bohny before those documents were lodged. Mr Bohny and Mr Belton accept the date of 2 October 2013 is incorrect and that employment commenced earlier.

[27] That is because the payroll history shows for the first pay period ending on 2 October that Mr Bohny had worked 50.75 hours. It was simply not possible for the employment to have commenced on 2 October 2013. The evidence therefore focussed on a dispute as to whether the date of commencement of work was 23 or 25 September 2013 being the week prior to 2 October 2013. There was also the evidence from Mr Belton that the employment agreement was signed on 23 September 2013 but post-dated to the actual date of commencement of employment.

[28] I have placed in relation to the matter of postdating some reliance on the contents of Mr Matthews' letter of 21 November 2103 to Mr Bennett. That letter was written within the month of termination when one would have expected memories to have been clearer and Mr Belton's evidence of postdating the agreement is inconsistent with the contents of that letter.

[29] Mr Matthews wrote on 21 November 2013 that *our instructions are clear that at the time of initial interview and on being offered employment it was made clear to Mr Bohny that his employment would be subject to a 90 day trial period.* Further Mr Matthews' states in his letter that Mr Bohny signed the agreement on 25 September 2013 at which time the 90 day trial period was again discussed and an opportunity of taking advice given. Mr Matthews then wrote that Mr Bohny after reviewing the agreement for about 10 minutes indicated he was happy with it and signed it.

[30] I find it more probable than not that the employment agreement was signed on Wednesday 25 September 2013. That then leaves the issue as to when the employment commenced. Clause 3.1 of the employment agreement is left blank as to when the employment *shall commence*. There are no wage and time records. Mr Bohny said that he keep details of hours he worked in a notebook but that was left in the shop after his termination and was not available for the Authority to look at.

Mr Belton has no written record as to when employment actually commenced and the payroll history does not provide that detail.

[31] The pay records support that Mr Bohny worked longer hours for his first period of employment than for the other weeks. The pay week runs from Wednesday to Wednesday. The hours for the first week of employment were 50.75 and for the following weeks; 19.50, 36.50, 30.50, 31.25 and finally 24 hours. The hours worked are noticeably less therefore after the first period of employment which supports additional days worked for the first week of employment.

[32] Mr Belton says that long hours were worked for that first period and could have been worked on the weekend. I have considered that possibility but Mr Bohny was to have commenced employment the previous week on Monday 16 September 2013 and it would seem more likely that the same arrangement existed for the following week.

[33] Mr Belton's evidence was that he thought Mr Bohny came into the shop on the Monday 23 September 2013 but he sent Mr Bohny away to take more time off. I find that it is less likely that Mr Bohny would present to a new job unwell.

[34] Mr Bohny under questioning remained certain that he *definitely started* on Monday 23 September 2013 before the employment agreement was signed. He accepted that the contents of the statement of problem were wrong but I have placed weight on the fact that the employment agreement and wage and time records requested by Mr Bennett when he raised the grievance in a letter dated 20 November 2013 had not been provided at the time when the statement of problem was lodged.

[35] Mr Bohny said that it was agreed with Mr Belton that he would not get paid that first Wednesday as he had only worked a few days and that he was questioned the second week by Mr Belton about the number of hours he had worked and explained that he had held over the days for the following week.

[36] I could not be satisfied that Mr Bohny commenced his employment on the same day he signed the employment agreement or that the agreement was post-dated having been signed earlier. I find it more likely than not that Mr Bohny commenced his employment before the employment agreement was signed on 23 September 2013.

[37] I do not find in conclusion that The Serious Sandwich and Mr Belton can rely on the trial period to prevent Mr Bohny from bringing a personal grievance. At the time the employment agreement was signed on 25 September 2013 Mr Bohny was already an employee of The Serious Sandwich and Mr Belton. He had been offered and had accepted employment before 16 September 2013 and had commenced his employment on 23 September 2013 before the employment agreement was signed.

Was Mr Bohny unjustifiably dismissed?

[38] The protections afforded by ss 67A and 67B of the Act cannot be relied on and the justification of the dismissal has to be considered under the test in s 103A of the Act. That requires the Authority to determine on an objective basis whether the actions of The Serious Sandwich and Mr Belton and how they acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. There should also be compliance with the statutory obligations of good faith.

[39] The Authority must also have regard to the four procedural factors set out in s 103A (3) (a) to (d) of the Act and any other factors it thinks appropriate. It must not determine a dismissal unjustifiable because of defects in the process if they were minor and did not result in Mr Bohny being treated unfairly.

[40] The relationship ended when Mr Belton telephoned Mr Bohny on a Sunday, in all likelihood Sunday 3 November 2013, to discuss some work related issues. Mr Bohny said that he was not happy to discuss the matters with Mr Belton on his day off. He explained in his evidence that he was out walking with friends when the call came but that he thought that it was agreed they would talk about the issues with Mr Belton on the Monday at work. Mr Belton thought Mr Bohny's response to him was very rude. He denied in his evidence that he talked about setting up a meeting on Monday with Mr Bohny. He said that he got off the phone and thought that Mr Bohny's attitude was not right and that he had a 90 day trial provision that he would use. He then sent a text message to Mr Bohny to say do not come back in on Monday but to contact him if there were any concerns.

[41] Mr Bohny said that he tried to call Mr Belton back but was unsuccessful. He then produced a text message that he sent to Mr Belton on the same day after receiving Mr Belton's text dismissing him from his employment. He also produced

Mr Belton's text message response. Amongst other matters Mr Bohny stated in his text that it was unprofessional for Mr Belton to terminate a staff member by text and that he thought that they would discuss the options on Monday. He then said that if Mr Belton decided to terminate his employment than he wanted two weeks' notice or to be paid in lieu. He asked Mr Belton to call him. He produced a response text from Mr Belton that stated the two weeks' notice is only after three months and that Mr Bohny's attitude towards him is *completely unprofessional*.

[42] The employment agreement provided in the event of termination within the trial period for the provision of verbal notice and for general termination for two weeks' notice.

[43] I accept that Mr Belton had some concerns particularly with Mr Bohny's attitude. He had raised concerns about how Mr Bohny had reacted to being asked to cook bacon for a longer period. He was clearly upset at Mr Bohny's response to being called on his day off. I find that that response against a background of some dissatisfaction with Mr Bohny as an employee was the reason for the termination. I find it more likely than not that a meeting the following day had been discussed.

[44] I do not find that Mr Bohny's reaction to being called on a Sunday would justify summary dismissal. A failure to improve attitude/performance may result in dismissal after a proper process. I am not satisfied that there was a proper process in this case.

[45] There was no fair procedure before Mr Bohny was dismissed and therefore the requirements of s 103A (3) (a) to (d) of the Act were not met. These were not minor failings and they did result in unfairness to Mr Bohny.

[46] I find that Mr Bohny's dismissal was unjustified both substantively and procedurally. It was not what a fair and reasonable employer could have done in all the circumstances. He has a personal grievance that he was unjustifiably dismissed and is entitled to remedies.

Remedies

Lost wages

[47] Mr Bohny was able to obtain employment reasonably quickly and seeks two week lost wages based on a notice period of the same duration. I find that is a reasonable claim. I have averaged out Mr Bohny's hours worked over the period he worked as they varied from week to week. The average hours Mr Bohny worked over the entire period of his employment were 32.08 per week. His hourly rate was $18.00 per hour. 18 x 32.08 = $577.44 x 2 = $1154.88.

[48] Subject to any contribution assessed The Serious Sandwich Limited and Mischa Belton are jointly and/or severally liable to pay to Hamish Bohny the sum of $1154.88 gross.

Compensation

[49] Mr Bohny said that he felt the dismissal was a bit of a *kick in the guts* because he thought that there was an agreement to a meeting on the Monday and instead he was dismissed. He also felt that his character had been mudded because he had never had a problem with his employer or employment before. Mr Bohny said that if he had been paid his notice period of two weeks then he probably would not have pursued the matter. He was able to obtain another role quickly.

[50] There was some humiliation and loss of dignity for Mr Bohny when he was dismissed by text message. I accept that he was expecting to discuss issues further the next day. Mr Bohny seeks $6000 which Mr Bennett describes as modest. The amount of an award under s 123(1) (c) (i) of the Act is assessed in accordance with the evidence. I take into account that Mr Bohny was able to obtain a job quickly and would at the time in all probability have accepted a payment of notice and moved on. Taking all matters into account I am of the view that the sum of $4000 is an appropriate award for compensation.

[51] Subject to any contribution assessed The Serious Sandwich Limited and Mischa Belton are jointly and/or severally liable to pay to Hamish Bohny the sum of $4000.00.

Contribution

[52] Section 124 of the Act requires that the Authority must, when it determines that an employee has a personal grievance, consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance and

if required reduce the remedies accordingly. Mr Belton sets out several areas where he considered Mr Bohny was unsatisfactory.

[53] I could only be satisfied that one matter was addressed with any degree of formality and that concerned the cooking of bacon and Mr Bohny's attitude when an instruction was given. A further formal meeting to discuss any ongoing concerns would have been the next appropriate step. Instead Mr Bohny was dismissed by text message.

[54] I accept that Mr Belton was concerned by Mr Bohny's response to his telephone call but I do not find that the conduct by Mr Bohny was such that it contributed toward his personal grievance. Mr Bohny was on his day off and he thought another time was scheduled to talk about the issues Mr Belton had. I have found in all likelihood there had been a meeting scheduled for the next day by Mr Belton but on reflection he had a change of heart and moved to dismiss Mr Bohny by text. Even if there had not been such a meeting scheduled it would have been appropriate to have had one.

[55] Mr Oliver Belton asked me to take into account in terms of remedies the issues that had occurred in the workplace and the concerns Mr Belton had. I accept that Mr Belton did not consider the relationship was working out for a number of reasons. There was a process that Mr Belton could have used to deal with those issues and concerns. I could not be satisfied that he did because he relied instead on the trial period. I could not be satisfied that Mr Bohny was aware of all the concerns in the absence of a proper process. I do not find contribution in the circumstances.

[56] I make no reduction to the remedies for contribution.

Interest

[57] There is a claim for interest but I am not minded to make an award of interest in this matter.

Orders made jointly and/or severally

[58] The Serious Sandwich Limited and Mischa Belton are to pay to Hamish Bohny the sum of $1154.88 gross being reimbursement of lost wages.

[59] The Serious Sandwich Limited and Mischa Belton are to pay to Hamish Bohny the sum of $4000 without deduction being payment of compensation.

Costs

[60] I reserve the issue of costs. Costs may be able to be agreed. Mr Bennett has until 5 May 2015 to lodge and serve submission as to costs and Mr Oliver Belton has until 19 May 2015 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority