

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 308
3195359

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| BETWEEN | MORGAN CAMPBELL Applicant |
| AND | T JULIAN CONTRACTING LIMITED Respondent |

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| Member of Authority: | Alex Leulu |
| Representatives: | Dave Cain, advocate for the Applicant No appearance by the Respondent |
| Investigation Meeting: | 9 November 2023 in Auckland |
| Submissions and further information received: | 9 November 2023, 19 December 2023, 4 February 2024, and 16 April 2024 from the Applicant 8 December 2023, 21 December 2023 and 12 April 2024 from the Respondent |
| Determination: | 24 May 2024 |

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Morgan Campbell was employed by T Julian Contracting Limited (TJCL) as a digger operator in May 2022. TJCL dismissed Mr Campbell from his employment on 14 June 2022. Mr Campbell claimed his dismissal was unjustified.

[2] TJCL disputed Mr Campbell's claims. It said Mr Campbell's dismissal was justified and in accordance with the trial period provision of his individual employment agreement.

The Authority's investigation

Events leading up to the investigation meeting

[3] TJCL did not attend the Authority's investigation. An investigation meeting was initially scheduled for 20 June 2023. Todd Julian, the director of TJCL informed the Authority of his inability to attend the investigation meeting.

[4] The date for the investigation meeting was vacated and the Authority took steps to arrange a new suitable date. TJCL did not engage with the Authority's attempt to set down a suitable investigation meeting date. A further investigation meeting date was set for 9 November 2023.

[5] On 7 November 2023 Mr Julian contacted the Authority and confirmed his intention not to attend the investigation meeting. Apart from lodging its statement in reply, TJCL did not lodge any witness statements or any other evidence before the investigation meeting.

[6] The investigation meeting proceeded as scheduled. TJCL did not attend the investigation meeting. Mr Campbell attended the investigation meeting and lodged a written witness statement prior to the investigation meeting. He also answered questions under affirmation from me. His representative also provided written closing submissions on the day.

Events after the investigation meeting

[7] After the investigation meeting, TJCL was given an opportunity to provide written closing submission to the Authority. On 16 November 2023 TJCL contacted the Authority through a newly instructed representative. TJCL requested an extension of time for lodging its closing submissions. TJCL also sought leave for Mr Julian to lodge an affidavit to the Authority on behalf of TJCL. The Authority granted leave and accordingly, Mr Julian lodged his affidavit on 8 December 2023 followed by TJCL's closing submissions on 21 December 2023.

[8] 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.

Non-publication order

[9] On 20 December 2023 TJCL lodged to the Authority its financial records in the form of a draft ‘Statement of Financial Position’ for the eight months ending on 30 November 2023. On 12 April 2024 TJCL then lodged its draft ‘Annual Report’ for the year ending 31 March 2024 (together these two documents are referred to as ‘the financial records’).

[10] TJCL asked the Authority not to disclose its financial records to Mr Campbell due to it containing “highly sensitive financial and commercial information relating to the company”. The Authority informed the parties that TJCL’s views in respect of the financial records were to be treated as an application for a non-publication order.

[11] The financial records were provided by TJCL to support its submission for any order for payment to Mr Campbell to be paid in instalments. Mr Campbell’s objections to the financial statements were focussed more on the degree the Authority should rely on the financial statements. This is addressed later in this determination.

[12] TJCL’s concerns were reasonable. The nature of the information in the financial records was commercially sensitive to TJCL. For this reason, TJCL’s application for a non-publication order is granted.

The issues

[13] The issues requiring investigation and determination were:

- (a) Was Mr Campbell employed by TJCL under a valid trial period?
- (b) Was Mr Campbell unjustifiably dismissed from his employment by TJCL on 14 June 2022? If so, is he entitled to a consideration of remedies including:
 - (i) Reimbursement of lost wages;
 - (ii) Reimbursement of lost benefit; and
 - (iii) Compensation under s 123(1)(c)(i) of the Act.
- (c) Should any remedy awarded be reduced (under s 124 of the Act) for blameworthy conduct by Mr Campbell which contributed to the circumstances which gave rise to his grievance?

- (d) Should either party contribute to the costs of representation of the other party?

Context

TJCL's job vacancy

[14] TJCL is a business specialising in earthworks and cartage services. On Saturday 21 May 2022 TJCL advertised on the Trade Me website for a vacant digger operator for the company. In response to the advertisement, Mr Campbell contacted TJCL and shortly after he met with Mr Julian to discuss the role. Although he considered himself an experienced digger operator, Mr Campbell told Mr Julian he was not experienced in civil work.

[15] During the meeting TJCL offered Mr Campbell the role which he accepted. He was not given a copy of his written employment agreement at this time. He was due to start on the following Monday and was to work alongside an experienced TJCL employee. Both parties disputed various other aspects associated with the start of his employment including:

- (a) Whether the meeting occurred on Saturday 21 May 2022 or Sunday 22 May 2022;
- (b) Whether TJCL informed Mr Campbell about his employment being subject to a 90-day trial period; and
- (c) When Mr Campbell was given a copy of his individual employment agreement and when he (and Mr Julian) had physically signed the employment agreement.

Mr Campbell's dismissal

[16] Mr Campbell started his work for TJCL on Monday 23 May 2022. During his first three days of work, Mr Campbell continued to work along side another experienced TJCL employee. After this period, he began to work on his own. While working alone he kept his own work records which recorded his hours, where he worked and what machinery he used to complete his work.

[17] On Sunday 12 June 2022 Mr Campbell needed to leave work to go home because his children were unwell. He was also not feeling well and became worried about the possibility of contracting COVID-19. Due to a pre-existing medical condition, Mr Campbell had a compromised immune system.

[18] Mr Campbell said he called Mr Julian on the same day and told him he needed to go home. He told Mr Julian his return to work was subject to his children's recovery from sickness and his pre-arranged doctor's appointment (scheduled for Monday 13 June 2022).

[19] On the following day Mr Campbell sent Mr Julian a text message confirming he would not be attending work and would return the next day (Tuesday 14 June 2022). In response, Mr Julian messaged Mr Campbell saying when Mr Campbell returned to work, they "needed to talk".

[20] Mr Campbell returned to work on Tuesday 14 June 2022. Upon returning to work he said he spoke to Mr Julian who said to him "bro you may as well go home. I don't want you employed by me anymore". He said Mr Julian asked him to leave the workplace, which he did. Later in the day, Mr Campbell texted Mr Julian asking for a copy of his employment agreement.

[21] On Wednesday 15 June 2022 Mr Campbell said he was contacted by Mr Julian. Mr Julian had asked him why he had not provided evidence of his medical appointment on 13 June 2022. Mr Campbell said this was the first time TJCL asked him about medical evidence for his medical appointment. He was also confused as to why TJCL requested this information given he was dismissed the day before.

[22] On the same day, Mr Campbell returned the digger vehicle keys to Kerryanne Lapwood, TJCL's Administrator. Ms Lapwood also provided him with a copy of his employment agreement and his final payslip. On 23 June 2022 Mr Campbell raised a personal grievance against TJCL for unjustified dismissal.

Was Mr Campbell subject to a valid 90-day trial period?

The requirements of a valid trial period

[23] A trial provision within an employment agreement must be in writing. It must also provide for the trial period to start at the beginning of the employee's employment

for a duration of 90 days or less.¹ An employer may dismiss an employee during a valid trial period without being subject to a personal grievance claim or other legal proceedings by the employee in respect of the dismissal.

[24] At the time of Mr Campbell's employment, TJCL was also required to have employed less than 20 employees and could only apply the trial to employees not previously employed by TJCL.²

[25] The Employment Court has provided guidance on how trial periods under the Act should be assessed. The Court endorsed a strict approach where strict compliance with the Act was required.³ The Court also recognised the importance of having an employment agreement signed before an employee starts work for an employer. An employee who signs an employment agreement (containing a trial provision) after they had commenced work would likely be held not to be bound by the trial provision.⁴

Mr Campbell's circumstances

[26] The parties did not dispute whether the trial period provision of Mr Campbell's employment agreement was valid. They disagreed on when Mr Campbell was made aware of the trial period condition of his employment. This disagreement included when Mr Campbell had received and signed his employment agreement.

[27] Mr Campbell's employment agreement showed it was signed by both him and Mr Julian on Thursday 26 May 2022. Mr Campbell said he received a copy of his written agreement on Tuesday 24 May 2022 (his second day of work). He said this was the first time he knew he was subject to a 90-day trial period as part of his employment.

[28] Mr Campbell said he signed the agreement on 26 May 2022 and returned it to TJCL the next day on Friday 27 May 2022. He said Mr Julian received the agreement on 27 May 2022 and backdated his own signature to 26 May 2022.

[29] TJCL disputed Mr Campbell's recollection and said he was given his employment agreement on Monday 23 May 2022. In his affidavit, Mr Julian said Ms

¹ Employment Relations Act 2000, s 67A.

² Section 67A of the Act was amended in December 2023 to allow all employers to utilise a 90-day trial under the Act (removing the 20 employee limit).

³ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253 at [48].

⁴ *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper* [2021] NZEmpC 45, [2021] ERNZ 133.

Lapwood gave Mr Campbell the agreement before he started work on the day. He also said Ms Lapwood discussed the details of Mr Campbell's employment agreement with him which included a discussion about the 90-day trial period provision within the agreement. Mr Julian also said Mr Campbell signed the employment agreement on 23 May 2022.

Was Mr Campbell bound by the 90-day trial provision?

[30] Mr Campbell's recollection of when he became aware of the 90-day trial period provision was preferred over Mr Julian's untested affidavit evidence. Mr Campbell's recollection of signing the agreement on 26 May 2022 was more plausible than Mr Julian's recollection. In reference to Mr Julian's recollection, it was difficult to understand why Mr Campbell would sign and date his agreement three days later than the day he physically signed the agreement.

[31] There was no other documentary evidence to show TJCL was intending for Mr Campbell's employment to be subject to a trial period provision. This included TJCL's job advertisement and the TJCL job application form. For these reasons, Mr Campbell was likely to have been first made aware of the trial period provision upon receiving his employment agreement on 24 May 2024. This was a day after he already started working for TJCL.

[32] A valid trial period should have been notified and in place at the start of Mr Campbell's employment. He was not notified of the trial period provision at the start of his employment, and he had signed the employment agreement well after he started work. The trial period provision of Mr Campbell's employment was not properly executed, and Mr Campbell was not bound by it.

Mr Campbell's claim for unjustified dismissal

Mr Julian's evidence

[33] Mr Campbell believed he was doing good work for TJCL. He said TJCL did not raise any concerns with him about his work and he didn't receive any verbal or written warnings.

[34] TJCL disagreed with Mr Campbell and said they had concerns about his work performance and his work attendance. Mr Julian referred to several instances between 30 May 2022 to 10 June 2022 where TJCL had concerns about:

- (a) Finishing work early without advising or obtaining approval from TJCL;
- (b) Incorrectly recording his hours of work on his timesheet; and
- (c) Mr Campbell failing to properly complete his work tasks.

[35] Mr Julian said he had raised these issues with Mr Campbell on 10 June 2022. As a result, he said he sent Mr Julian home and had checked on him with a text message later in the day. Mr Campbell did not respond to the text message.

[36] As a result of Mr Campbell's absence from work on 13 June 2022, Mr Julian arranged for a meeting with Mr Campbell upon his return to work. This occurred on 14 June 2022. During this meeting, Mr Julian said he had reiterated his previous work concerns with Mr Campbell, and he was considering terminating Mr Campbell's employment in accordance with the trial clause of his employment agreement.

[37] He also expressed doubt about whether Mr Campbell's children were unwell. In raising the issues with Mr Campbell, Mr Julian said he referred him to the following declaration within Mr Campbell's job application form:

I understand that any false or misleading information or material fact suppressed may result in my employment being terminated.

[38] Both parties appear to agree on what occurred next with Mr Campbell leaving the work premises and receiving TJCL's notice of termination (the termination notice) later that day. The termination notice to Mr Campbell was relatively brief and stated TJCL had:

... decided to exercise its right to end our employment relationship under the 90 Day Trial Period ... We exercise our right to end your employment agreement – effective immediately on the 14th of June 2022 for serious misconduct. Due to the intentional omission of information and the intentional manipulation of the information provided that has been dishonest.

Was Mr Campbell's dismissal justified?

[39] In determining whether a dismissal was justifiable, the Authority must consider whether the employer acted on reasonable grounds and whether the process taken to reach its decision was fair.⁵

[40] Mr Campbell's employment agreement contained a provision for dismissal for serious misconduct. It also provided a non-exhaustive list of examples of serious misconduct. Mr Campbell's employment agreement states:

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

[41] The Authority must consider whether TJCL's actions were actions of a reasonable employer. This included whether TJCL had properly raised its allegations with Mr Campbell, adequately investigated the allegations and gave him a reasonable opportunity to respond to its concerns.

[42] Apart from Mr Julian's recollection of events, there was no documentary evidence to show Mr Campbell's alleged conduct and work performance issues were properly raised with him prior to the termination of his employment.

[43] TJCL's grounds for terminating Mr Campbell's employment within the termination notice were also vague and brief. The termination notice did not sufficiently specify which of Mr Campbell's actions constituted serious misconduct. The termination notice also did not refer to previous instances where Mr Campbell was warned about his conduct.

[44] Although it was likely Mr Julian had concerns about Mr Campbell's work performance, there was insufficient evidence to show these concerns were sufficiently raised during Mr Campbell's employment. There was also insufficient evidence to show these concerns amounted to serious misconduct. If TJCL properly carried out an inquiry into its concerns, it may have been in a better position to determine the nature of Mr Campbell's conduct. It failed to do so. For these reasons, Mr Campbell was unjustifiably dismissed by TJCL.

⁵ Employment Relations Act 2000, s 103A.

Remedies

[45] Mr Campbell had established his personal grievance for unjustified dismissal and is entitled to remedies.

Lost wages

[46] Mr Campbell claimed lost wages equal to three months of wages he would have received from TJCL. This amounted to a claim of \$15,600 gross for lost wages. This was calculated at \$30 an hour for 40 hours per week for 13 weeks.

[47] TJCL asked the Authority to assess an award to Mr Campbell for lost wages using a counter-factual analysis. In summary, this analysis relied on the premise that putting aside Mr Campbell's unjustified dismissal, his circumstances would ultimately have resulted in the termination of the employment relationship. On this basis, Mr Campbell's claim to lost wages would have been limited to when his justified termination would have likely occurred.

[48] The evidence was not sufficiently clear to establish whether Mr Julian had properly raised his concerns relating to Mr Campbell's conduct (and whether it was serious misconduct). For this reason, a counter-factual analysis was not suitable in this case as it was unclear whether TJCL would have eventually terminated Mr Campbell's employment (if it followed the correct process in addressing Mr Campbell's alleged conduct).

[49] Mr Campbell's claim for three months lost wages was accepted but his calculation is adjusted to account for 12 weeks. TJCL is ordered to pay Mr Campbell lost wages of \$14,400.

Loss of benefit

[50] Mr Campbell also sought a claim for reimbursement for loss of benefit. Specifically, he had referred to a provision within Mr Campbell's employment agreement which said he would be provided a work vehicle for work purposes.

[51] Mr Campbell said he was provided the benefit of the use of the vehicle for only two days during his employment with TJCL. He has sought reimbursement for the other days he should have been given the use of a work vehicle.

[52] TJCL opposed Mr Campbell's claims on the basis it was not initially claimed in his statement of problem.

[53] There was insufficient evidence to determine the nature of any vehicle use agreement between the parties outside of the terms and conditions of Mr Campbell's employment agreement. This was made more difficult given the short amount of time Mr Campbell had worked for TJCL. For these reasons, no findings are made in respect of Mr Campbell's claim for loss of benefit.

Compensation for hurt and humiliation

[54] As a result of his termination, Mr Campbell said he felt embarrassed and humiliated by TJCL's actions. He said the situation had a significant impact on his confidence and contributed to the increased complications associated with his own medical ailment.

[55] Mr Campbell also referred to the financial impact on his family given he was the sole income earner. As a result of losing his job he said he had to borrow money from family to make ends meet. He also had to sell his vehicle to cover his bills and living expenses.

[56] TJCL said Mr Campbell had not sufficiently proven he had suffered harm because of TJCL's actions. Alternatively, if the Authority found he had suffered harm, it said his level of harm would be limited given he had only been employed for a short period of time. TJCL submitted in this case, only a minimal compensation amount should be awarded to Mr Campbell.

[57] Mr Campbell did suffer some form of hurt and humiliation because of TJCL's actions. His income records show the limited amount of income he had received after his employment was terminated by TJCL.

[58] There was limited medical evidence to support Mr Campbell claims relating to the effect his dismissal had on him. However, he did have a prevailing medical ailment which was previously disclosed to TJCL in his job application form. TJCL's actions would have likely contributed to the effects of this medical ailment.

[59] Considering similar cases, an appropriate remedy was an order for TJCL to pay Mr Campbell an amount of \$7,000 for hurt and humiliation in respect of unjustified dismissal claim.

Contribution

[60] Together with Mr Julian's concerns of Mr Campbell's work, TJCL also referred to conduct by Mr Campbell which was discovered after the termination of his employment. This conduct included allegations relating to misstated hours of work and claiming for work hours he was not entitled to. TJCL also made allegations against Mr Campbell of running a competing business against TJCL while he was employed by them.

[61] Together with the allegations it relied on in terminating Mr Campbell's employment, TJCL said this should be considered as contributory conduct which should reduce any remedies ordered against it.

[62] As determined, there was insufficient evidence to support TJCL's allegations. If TJCL had properly investigated Mr Julian's concerns during Mr Campbell's employment, it would have been in a better position to show whether Mr Julian was engaged in the alleged conduct.

[63] There is insufficient evidence to show Mr Campbell had contributed to the situation giving rise to his grievance in a way which might result in a reduction of his remedies. Accordingly, there were no grounds to reduce the amount of remedies he should receive.

Respondent's Financial Position

[64] TJCL asked the Authority to consider TJCL's financial circumstances when determining any remedy ordered against it.⁶ TJCL specifically asked if the Authority made such an order, to consider payment to Mr Campbell by instalments (if the financial position of TJCL required it). In support of its request TJCL provided its financial records which appeared to show the company was operating in a precarious position at the end of the last financial year.

⁶ Employment Relations Act 2000, s 123(2).

[65] Mr Campbell had not seen the financial documents but was able to respond to TJCL's closing submissions about TJCL's financial position. In response, Mr Campbell challenged the validity of TJCL's financial documents because the documents were in draft form. I agree with Mr Campbell's submissions. Because the documents were in draft form, it was not clear whether the records showed the finalised account summary for TJCL. However, the financial records also showed TJCL had sufficient equity to meet the remedy ordered by the Authority. For these reasons, TJCL is ordered to pay Mr Campbell the total remedy amount of \$21,400 within 28 days of this determination.

Costs

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

[67] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Campbell may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum TJCL 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.

[68] 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.⁷

Alex Leulu
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1