

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 679
3165063

BETWEEN WILLIAM EDERVEEN
 Applicant

AND IMPECCABLE LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Erin Drew and Simon Greening, counsel for the Applicant
 No appearance for the Respondent

Investigation Meeting: 6 December 2022 in Tauranga

Submissions and/or further 6 December 2022 from the Applicant
evidence 2 December 2022 from the Respondent

Determination: 20 December 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr William Ederveen, claims that he was unjustifiably dismissed by the Respondent, Impeccable Limited (Impeccable), on 2 February 2022.

[2] Impeccable denies that Mr Ederveen was unjustifiably dismissed and claimed in the Statement in Reply that he was justifiably dismissed in accordance with a 90 day trial period. Subsequently in the written submissions filed on its behalf on 2 December 2022, Impeccable denied that Mr Ederveen had been dismissed and claimed that he abandoned his employment.

[3] Impeccable claims that Mr Ederveen did not act in good faith towards it by failing to be responsive and communicative, and by damaging its reputation.

The Authority's investigation

[4] During the Investigation Meeting I received oral and written evidence from Mr Ederveen.

[5] There was no appearance for the Respondent and a telephone call was made by an Authority Officer to the lawyer who had been instructed by Impeccable and who had filed closing submissions on behalf of Impeccable. The lawyer advised that they had no instructions to attend the Investigation Meeting.

[6] The Authority Officer then telephoned Mr Doran, sole Director and Shareholder of Impeccable, but there was no response. I waited 10 minutes before starting the meeting, but when there was no appearance or contact from the Respondent, and being satisfied that Impeccable had received notification of the Investigation Meeting date and time, the meeting proceeded pursuant to clause 12 Schedule 2 of the Employment Relations Act 2000 (the Act).

[7] 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.

Issues

[8] The issues requiring investigation are whether or not:

- Mr Ederveen was dismissed by Impeccable?
- Mr Ederveen was dismissed in accordance with a valid trial period?
- Mr Ederveen abandoned his employment voluntarily?

If Mr Ederveen was not dismissed in accordance with a valid trial period or abandoned his employment voluntarily:

- He was unjustifiably dismissed?
- Mr Ederveen failed to act in good faith toward Impeccable?

Background

[9] Impeccable is a small family operated business providing both interior and exterior painting services. Mr Doran is the director, there was an office manager and administrator, and there were approximately 7 employees during the time of Mr Ederveen's employment.

[10] Mr Ederveen said he heard there was a position available at Impeccable through the foreman who was a friend. He telephoned Mr Doran and there was an interview arranged for 20 November 2021.

[11] Mr Ederveen said during the interview Mr Doran discussed the rate of pay per hour and confirmed with Mr Ederveen that he could continue working throughout the Christmas/New Year holiday period. Mr Ederveen said he did not recall a trial period being discussed.

[12] Mr Ederveen commenced working for Impeccable on 6 December 2021.

[13] However despite the reassurance that he could continue working during the Christmas break period, he was informed by text message from Mr Doran on 23 December 2021 that there would be no work for him until 10 January 2022.

[14] Mr Ederveen said that when he returned to work on 10 January 2022, Mr Doran provided him with an individual employment agreement (the Employment Agreement).

[15] He read it, and signed it on 17 January 2022 below the section entitled 'Employee Acknowledgment' which acknowledged among other things that he had read and understood the terms and conditions of it, had received a copy of it, and had been told of his right to obtain independent advice on it.

[16] The Employment Agreement contained the following clauses:

Abandoning employment

If the employee is away from work for 3 working days in a row without telling the employer or getting their permission – and the employer has made reasonable efforts to contact the employee to clarify the reason for their absence and whether they intend to return to work – the employer may regard the employment as abandoned.

Ending employment

...

The employee or the employer will give Four weeks' notice in writing, unless otherwise set out in this agreement. If the employee does not give the agreed amount of notice, the employer might be able to claim a breach of this agreement.

[17] In the submissions filed on behalf of Mr Doran it was stated that Mr Doran believed the employment agreement was provided at a staff meeting on Monday 13 December 2021, however Mr Ederveen did not sign and return it until sometime later.

[18] On 1 February 2022 Mr Ederveen said he was working at a site with some other employees, who were having difficulty operating a water blaster. He offered to assist them to

get it working but in the process, he snapped the pull cord. Mr Ederveen said one of the employees telephoned Mr Doran with a view to having this issue resolved.

[19] The following morning, 2 February 2022, Mr Doran arrived at the work site and Mr Ederveen said that when he asked him about the water blaster, he had taken responsibility for having snapped the pull cord.

[20] Mr Ederveen said Mr Doran told him he worked too slowly and said: "I can't have you work for me anymore.". Mr Doran had told him he could continue working for Impeccable until he found alternative employment, so having regarded himself as having been dismissed, he began to look for another job.

[21] It was submitted for Mr Doran that he had not told Mr Ederveen he was dismissed, but confirmed he had said Mr Everdeen's employment could continue until such time as he found another job.

[22] On 4 February 2022 there had been a text message exchange between Mr Ederveen and the office manager at Impeccable:

Mr Ederveen: Good morning. I have another meeting this morning that I need to attend.
Are you ok if I start at 8?

Impeccable: Hey Will. Yep that's fine, even if you wanted the day off you can.
Not a lot of work than can be done today.

Mr Ederveen: Oh oo I thought that would have been the case. Have a lovely
weekend. I'll let ya known if I'll be back next week.

Impeccable: Yeah not sure about the scaffolding at So it stuffs all plans up ...
okay thanks Will. You too!

[23] Mr Ederveen had worked on 7 and 8 February 2022.

[24] On 9 February 2022 Mr Ederveen said he had sent a friend a text message asking if the friend's father had a job available for him.

[25] His friend responded that same day asking him to start work on 14 February 2022, so Mr Ederveen said he finished working for Impeccable on 8 February 2022.

[26] He did not tell Mr Doran he was leaving, nor did he provide notice in writing because of his understanding that he had been dismissed on 2 February 2022. However Mr Ederveen said that he subsequently informed the Impeccable office manager that he had obtained another job.

[27] Mr Doran said Mr Ederveen failed to return to work on 9 February 2022 and the first communication he received after that date that was a communication in which Mr Ederveen said he was going “to sue for a personal grievance”

Was Mr Ederveen dismissed by Impeccable?

[28] A dismissal was defined by the Court of Appeal in *Wellington, Taranki and Marlborough Clerical IUOW v Greenwich* as: “termination of the employment relationship at the initiative of the employer”.¹

[29] I find that Mr Ederveen believed he had been dismissed in circumstances in which, although no actual date had been provided for the employment to end, it was clear from what Mr Doran had said to him that it would only subsist for the period of time it took for him (Mr Ederveen) to find another job.

[30] I am supported in that view by the fact that in the Statement in Reply it referred to Mr Ederveen being on a trial period and that he had left of his own accord: “after he was told the employment was no longer available.”

[31] I find that Mr Ederveen’s belief that he had been dismissed during the conversation with Mr Doran on 2 February 2022 was based on reasonable grounds, and I determine that he was dismissed by Impeccable on that date.

Was Mr Ederveen dismissed in accordance with a valid trial period?

[32] Trial periods are set out in s.67A of the Act which state:

s.67A. When employment agreement may contain provision for trial period for 90 days or less

- (1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3) and an employer.

¹ *Wellington, Taranki and Marlborough Clerical IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC) at [103]

- (2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that –
- (a) For a specified period (not exceeding 90 days), starting at the beginning of the employee’s employment, the employee is to serve a trial period; and
 - (b) During that period the 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.
- (3) **Employee** means an employee who has not been previously employed by the employer.

[33] The effect of a valid trial period provision is that if the employee is given notice of dismissal during the trial period, he or she cannot raise a personal grievance for unjustified dismissal.

[34] However an employer may only rely upon a trial period to dismiss an employee who had not previously been employed by it.² In this case Mr Ederveen was an existing employee having commenced employment with Impeccable on 6 December 2021 when provided with the Employment Agreement in January 2022, and which he signed on 17 January

[35] I find that Mr Ederveen was an existing employee at the time the Employment Agreement was provided to him and the 90 day trial period was therefore not valid because it did not comply with the statutory requirements.

[36] I determine that Mr Ederveen was not justifiably dismissed in accordance with a valid trial period provision.

Did Mr Ederveen abandon his employment voluntarily?

[37] The Employment Agreement which had been issued to Mr Ederveen and which he agreed he had read and understood, stated;

² *Stokes v Smith Valley Pharmacy* (2009) [2010] NZEmpC 111 at [47]

Abandoning employment

If the employee is away from work for 3 working days in a row without telling the employer or getting their permission – and the employer has made reasonable efforts to contact the employee to clarify the reason for their absence and whether they intend to return to work – the employer may regard the employment as abandoned.

[38] The Court of Appeal in *E N Ramsbottom Ltd v Chambers*³ accepted a submission that an employer must be cautious in drawing the inference that an employee has abandoned their employment and that it faces a high threshold if contending that the employment ended at the employee's initiative.

[39] There had been an understanding between the parties that Mr Ederveen's employment would subsist only until such time as he found alternative employment. I find that the text messages between Impeccable and Mr Ederveen on 4 February 2022 indicate that it was understood Mr Ederveen would be applying for alternative employment, attending for interviews and his return to the workplace would only take place if he did not find another job.

[40] Had this not been the case I find that Impeccable would have been asking, or indeed insisting, in the text messages that Mr Ederveen attend for work in accordance with the terms of the Employment Agreement which specified his hours of work as 40 per week on Monday to Friday.

[41] It did not do so, and I find that the text messages indicate an acceptance on the part of Impeccable that Mr Ederveen might not return to work. I find this to be consistent with Mr Doran having informed Mr Ederveen that his employment with it would subsist only as long as it took him to obtain alternative employment.

[42] Moreover in order to rely upon the abandonment clause in the Employment Agreement, Impeccable was required to make: "reasonable efforts to contact the employee to clarify the reason for their absence" after three working days absence by the employee. There is no evidence that Impeccable tried to contact Mr Ederveen to clarify the reason for his absence from work.

[43] In these circumstances I consider that Impeccable did not try to contact Mr Ederveen because of its understanding that Mr Ederveen would try to obtain alternative employment after Mr Doran told him his employment with Impeccable would not be ongoing. At the point that

³*E N Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97

alternative employment was obtained, the employment relationship between it and Mr Ederveen would terminate.

[44] I consider that the actions of Impeccable did not surmount the high threshold identified by the Court of Appeal in that they were not consistent with its submission that Mr Ederveen abandoned his employment

[45] I find that Impeccable cannot rely upon the abandonment clause in the Employment Agreement.

[46] I determine that Mr Ederveen did not voluntarily abandon his employment with Impeccable.

Was Mr Ederveen unjustifiably dismissed?

[47] Justification for dismissal is set out in s 103A of the Act and states:

S103A Test of Justification

- (1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[48] A dismissal must be justifiable on both substantive and procedural grounds.

[49] It is submitted for Impeccable that there was agreement that the employment relationship between them was not working out, and that Mr Ederveen should look for other employment.

[50] I find the evidence supports that the impetus for the ending of the employment relationship came from the employer, and that Mr Ederveen only commenced his search for alternative employment after Mr Doran spoke to him on 2 February 2021 and told him there would be no ongoing employment for him with Impeccable.

[51] There is no doubt from the text message evidence provided to the Authority and Mr Ederveen's evidence that Mr Doran had been upset at the damage to the water blaster. It was

new and expensive and the text messages indicate that there had been a previous issue regarding it raised with Mr Ederveen by Mr Doran. However there was no indication or evidence that there had been any disciplinary action taken about the issue.

[52] There was no evidence that any formal disciplinary process had been entered into with Mr Ederveen about his quality of work, and his evidence was that he understood he had been working to an acceptable standard.

[53] I find there was no substantive justification for Mr Everdeen's employment to be terminated.

[54] It is also required pursuant to s 103A of the Act that a fair process is followed by the employer in the context of disciplinary action. The minimum requirements are that:

- (a) ... the employer sufficiently investigated the allegations against the employee ...
- (b) ... the employer raised the concerns that the employer had with the employee ...
- (c) ... the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[55] I note also that employers and employees are under a duty of good faith to behave towards each other in good faith pursuant to s 4 of the Act. In accordance with s 4(1A)(c) an employer who is proposing to make a decision that will, or is likely to have, an adverse effect on the continuance of an employee's employment is required to provide the affected employee with:

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

[56] I find that there is no evidence that Impeccable followed any process, still less a fair one, in the case of Mr Ederveen. Mr Doran merely informed Mr Ederveen that there was no ongoing employment for him at Impeccable.

[57] I determine that Mr Ederveen was unjustifiably dismissed by Impeccable.

Did Mr Ederveen fail to act in good faith toward Impeccable?

[58] Pursuant to s4 of the Act, parties to an employment relationship are expected to act in good faith towards each other. Amongst other things, that includes being responsive and communicative.

[59] I observe that once informed by Mr Doran that there was no ongoing employment in Impeccable for him, Mr Ederveen kept Impeccable informed of his intentions, particularly in the text messages sent on 4 February 2021 in which he:

- (i) informed Impeccable that he had a meeting and asked if it would be acceptable for him to start at 8; and
- (ii) told Impeccable he would advise it if he would be back at work the next week.

[60] Mr Ederveen said that he subsequently informed the Impeccable office manager that he had obtained another job.

[61] I determine that Mr Ederveen did not breach the duty of good faith by failing to be communicative and responsive and to act in good faith towards Impeccable.

Remedies

Lost Wages

[62] Mr Ederveen obtained another job almost immediately, however it was at a lower rate of hourly pay. Mr Ederveen had been earning \$30 per hour at Impeccable, however the new employment he obtained only paid him \$22.00 per hour.

[63] I order Impeccable to pay Mr Ederveen the sum of \$4,160.00 gross (calculated as \$30.00 per hour x 40 hours x 13 weeks less \$22.00 per hour x 40 Hours x 13 weeks) pursuant to s 28(3) of the Act.

Compensation

[64] Mr Ederveen gave evidence that his confidence has been adversely affected by the allegation that he had been a slow worker. He had been distressed and embarrassed by the loss of his job and having to explain that he had been dismissed when seeking for new employment.

[65] Impeccable is ordered to pay Mr Ederveen the sum of \$5,500.00 as compensation pursuant to s 123(1)(c)(1) of the Act.

Contribution

[66] I am required under s 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[67] It was submitted on the part of Impeccable that Mr Ederveen spoke negatively about it to a client whilst on the job which upset it and likely caused damage to its reputation.

[68] It was also submitted that Mr Ederveen recorded an extraordinary amount of time to complete jobs and exceeded the expected timeframes of a painter with his level of ability. This caused significant financial loss to Impeccable.

[69] In regard to the claim that Mr Ederveen defamed Impeccable to a client, and that Mr Ederveen recorded an extraordinary amount of time taken to complete jobs, the estimates provided by Impeccable in the submissions were unsupported by either oral or written evidence.

[70] Accordingly I find no contributing conduct by Mr Ederveen and there will be no reduction in the remedies ordered.

Costs

[71] There was no appearance on the part of Impeccable and the Investigation meeting took less than half a day.

[72] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point.

[73] Accordingly Impeccable is ordered to pay Mr Ederveen the sum of \$2,250.00 towards his legal costs, pursuant to clause 15 of Schedule 2 of the Act.

Filing Fee

[74] I order Impeccable to pay Mr Ederveen the filing fee of \$71.56.

Eleanor Robinson
Member of the Employment Relations Authority