IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 78
5430572

	BETWEEN	DAVIDE FAGOTTI Applicant
	AND	ACME & CO LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Barbara Bucket, Counsel for the Applicant Samantha Turner, Counsel for the Respondent
Investigation Meeting:	6 June 2014
Submissions Received:	13 June & 26 June 2014 for the Applicant 20 June 2014 for the Respondent
Determination:	22 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Davide Fagotti claims he has a personal grievance arising from unjustified actions by his employer that caused him disadvantage. He says this stems from unfair bargaining for his employment agreement. Mr Fagotti also claims a personal grievance for unjustifiable dismissal. He seeks lost wages, compensation for hurt and humiliation, and costs.

[2] ACME & Co Limited (ACME) owns and operates a café, Prefab, where Mr Fagotti was employed for a brief period in February/March 2013. It denies Mr Fagotti's claims and opposes the remedies sought by him. ACME says Mr Fagotti's written employment agreement contained a trial period pursuant to s.67A of the Employment Relations Act 2000 (the Act) and his employment was lawfully terminated in accordance with s.67B.

Background

[3] In December 2012 Mr Fagotti applied for a front-of-house position at a new café, Prefab, that was shortly to open in Wellington city. At the time, Mr Fagotti was employed in a bakery in suburban Wellington.

[4] After some correspondence and telephone discussions, Mr Fagotti was asked to work at Prefab on Saturday, 9 February 2013. He agreed and completed one shift of just over eight hours. The parties agree the purpose was to assess Mr Fagotti's suitability for employment at the café.

[5] At the completion of the shift, Bridget Dunn, a director of ACME, verbally offered Mr Fagotti employment at Prefab, telling him he could resign from his current bakery position. An hourly rate of $18 had been agreed and there was a discussion between Ms Dunn and Mr Fagotti over the hours Mr Fagotti would work. They disagree over the understanding that was reached. Mr Fagotti claims he was guaranteed a minimum of 50 hours per week while Ms Dunn says she simply indicated that was the number of hours a week that would probably be available.

[6] Mr Fagotti resigned from the bakery in preparation for starting full time employment with Prefab on 23 February 2013. On 19 February 2013 Ms Dunn emailed Mr Fagotti that she could not guarantee him 50 hours per week and that it would be more like 40 hours. Mr Fagotti did not reply to that email. On 23 February he was handed an employment agreement, a tax form and a new employee form.

[7] He and Ms Dunn disagree about the timing of those documents being given to him. Mr Fagotti says it was some time after he had started work. Ms Dunn says it was first thing in the morning when Mr Fagotti arrived at the café. They also disagree over the timing of Mr Fagotti signing his employment agreement. He claims he told Ms Dunn he needed to take it home to read it before signing, while Ms Dunn claims he signed it in front of her before he started his shift.

[8] A further discrepancy is between Mr Fagotti's and Ms Dunn's accounts of a purported discussion over provisions of the employment agreement and, in particular, the trial period. Ms Dunn acknowledges she did not raise that issue with Mr Fagotti on 9 February when she offered him employment. However, she says she would have

discussed it with him when she handed him the employment agreement before he started his shift on 23 February. Mr Fagotti denies there was any discussion over the terms of the employment agreement when Ms Dunn handed it to him.

[9] Ms Dunn also noted she had asked Mr Fagotti to drop in to Prefab to pick up his employment agreement in the period between 9 February and 23 February 2013. She had intended to discuss the provisions of the agreement with him so he could sign the document before starting full time employment at Prefab. Mr Fagotti did not come in to the café within that time and Ms Dunn, who was in email contact with him, did not send the employment agreement to him.

[10] Mr Fagotti was employed at Prefab until 12 March 2013. That day he was asked to come into Ms Dunn's office towards the end of his shift. Ms Dunn handed him a letter telling him it was *"not good news"* and that his employment had been terminated. She gave no reasons.

[11] Mr Fagotti was paid for five days in lieu of notice, as provided for in the general termination provisions of his employment agreement. He obtained alternative employment on 28 March 2013 working in a restaurant owned by members of his family. Mr Fagotti was still working at that restaurant at the time of the investigation meeting.

Issues

[12] The issues for determination are:

a. whether ACME was entitled to rely on the trial period provision of Mr Fagotti's employment agreement to terminate his employment; and, if not

b. whether he was unjustifiably dismissed;

c. whether ACME bargained unfairly with Mr Fagotti over his employment agreement; and, if so

d. whether that constituted a personal grievance for disadvantage.

Could ACME rely on the trial period?

[13] The trial period provisions of the Act are as follows:

> **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.
>
> (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.
>
> (4) [*Repealed*]
>
> (5) To avoid doubt, a trial provision may be included in an employment agreement under-
>
> (a) section 61(1)(a), but subject to section 61(1)(b):
>
> (b) section 63(2)(b).
>
> **67B Effect of trial provision under section 67A**
>
> (1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.
>
> (2) An employee whose employment agreement is terminated in accordance with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.
>
> (3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (g).
>
> (4) An employee whose employment agreement contains a trial provision is, in all other respects, to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.
>
> (5) Subsection (4) applies subject to the following provisions:
>
> (a) in observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and
>
> (b) the employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

[14] ACME says when it ended Mr Fagotti's employment it believed it could rely on the trial period provisions to do so. Ms Dunn had constructed Mr Fagotti's employment agreement using the *Employment Agreement Builder* tool on the Ministry of Business, Innovation & Employment's website. The trial period provision was taken directly from that website.

[15] Counsel for Mr Fagotti submits ACME dismissed Mr Fagotti under the general termination provision of his employment agreement and did not rely on the trial provision when it terminated his employment. Ms Buckett says ACME did not refer to the trial provision clause until after Mr Fagotti had filed his statement of problem in the Authority. At that time the employer was trying to justify its dismissal of Mr Fagotti. I do not accept that. While Ms Dunn may not have specifically referenced the trial period provision in her letter of termination, I do not doubt she believed she was entitled to rely on that clause of Mr Fagotti's employment agreement to dismiss him within 90 days of the commencement of his employment.

[16] Her belief was misplaced, however. The eight hour shift Mr Fagotti had completed at Prefab on 9 February 2013 took him out of the category of employee with whom an employer may agree a trial period under s. 67A(3) of the Act. At the time he was given an employment agreement on 23 February 2013, he had previously been employed by ACME by virtue of his shift at Prefab two weeks earlier.

[17] In the *Salad Bowl*[1] judgment, issued several months after Mr Fagotti's employment had ended, Chief Judge Colgan considered whether a person who had undertaken a trial period had done so as an employee or in some other capacity, such as a volunteer. He found the person in that case had been offered and accepted work as an employee, albeit for a short period to be followed by an assessment of her suitability for further employment. The employer had engaged the person "*in employment of fixed duration, the ending of which was to be the communication to her of its decision whether she would be engaged as a permanent employee. Because of that employment agreement's non-compliance with s 66, its fixed term, which would have precluded the defendant from access to the personal grievance procedure, is not effective. In these circumstances (she) was, in law, an employee of indefinite duration (a permanent employee) who was dismissed by the plaintiff.*"

[1] *The Salad Bowl Limited v Amberleigh Howe-Thornley* [2013] NZEmpC 152, Colgan CJ

[18] During the trial period she had performed work that contributed to the commercial enterprise of the employer. Although she did not receive a financial reward for her services, she was provided with lunch as a reward for her work. The Chief Judge concluded the parties were in an employment relationship of indefinite duration at the time of her dismissal.

[19] Mr Fagotti similarly accepted a trial period of work during which his suitability for permanent employment was to be assessed. He performed duties at Prefab that provided an economic benefit to ACME for which he expected, and received, remuneration. I find the parties were in an employment relationship at that time.

[20] It follows that the trial period provisions of Mr Fagotti's employment agreement were unenforceable. ACME could not rely on them to terminate Mr Fagotti's employment. Section 67B(2), which precludes an employee whose employment is terminated pursuant to a trial period from bringing a personal grievance in respect of the dismissal, does not apply.

Was Mr Fagotti unjustifiably dismissed?

[21] Mr Fagotti's unjustifiable dismissal claim rests on whether the trial period provision of his employment agreement could be relied upon. If it could be, he would not be able to bring a personal grievance in respect of his dismissal. Counsel for ACME, acknowledged in the investigation meeting that, if the trial period provision could not be relied on, the employer could not satisfy the test of justification under s.103A of the Act.

[22] That was a proper and helpful concession for Ms Turner to make in the circumstances of Mr Fagotti's dismissal. It was not disputed that no performance issues had been brought to his attention in the course of his employment, and that he had received positive comments about his performance from the directors of ACME when he sought feedback.

[23] I find Mr Fagotti's dismissal was unjustifiable. ACME's action in terminating his employment was not one a fair and reasonable employer could have taken in all the circumstances at the time. If there were underlying reasons, as was suggested in the course of the investigation meeting, those reasons had not been put to Mr Fagotti

during his employment. He had no opportunity to respond to such matters or to have any response taken into consideration before his employment was terminated.

[24] Prefab may have been open for only a matter of weeks at the time of Mr Fagotti's dismissal, but the directors of ACME have had more than two decades of experience of owning and successfully operating a café. Although they did not employ Human Resources personnel in March 2013, they had a staff complement of approximately 45 and could have accessed human resources or legal advice if they had wished to do so.

Did ACME bargain unfairly with Mr Fagotti?

[25] S.63A of the Act concerns bargaining for an individual employment agreement or individual terms and conditions in an employment agreement. It applies in a number of specified situations which includes at s.63A(1) :

> (e) in relation to terms and conditions of an individual employment agreement for an employee if no collective agreement governs the work done, or to be done, by the employee:
>
> (f) where a fixed term of employment, or probationary or trial period of employment, is proposed:

[26] S.63A(2) of the Act requires the employer to do "*at least the following things*":

> (a) provide to the employee a copy of the intended agreement under discussion; and
>
> (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
>
> (c) give the employee a reasonable opportunity to seek that advice; and
>
> (d) consider any issues that the employee raises and respond to them.

[27] S.68 of the Act concerns unfair bargaining for individual employment agreements, including unfair bargaining for a term or condition of an individual employment agreement. It provides, amongst other matters, bargaining to be unfair in a situation where s.63A applies and the person does not have the information or the opportunity to seek advice as required by that section.

[28] It was agreed by the parties Mr Fagotti was not given an employment agreement until 23 February 2013 when he started working full time at Prefab. Some provisions would have come as no surprise as there had been discussion over hours of work, rate of pay and starting date when Mr Fagotti was offered, and accepted, a position at the end of his trial work period on 9 February 2013. Some provisions, such as the trial period, had not previously been discussed. Mr Fagotti said he understood the shift he had worked that day to have been his trial period.

[29] I prefer Ms Dunn's evidence over the timing of handing Mr Fagotti's employment agreement to him on 23 February. I accept she gave it to him immediately upon his arrival at work, not later during his shift as Mr Fagotti asserts. Ms Dunn's version of events is more credible given it was Mr Fagotti's first day of full-time employment and it was a Saturday morning, which was a very busy day for Prefab. That also fits with Ms Dunn's evidence of wanting to ensure he signed the agreement before he started work.

[30] In her written evidence Ms Dunn said Mr Fagotti did not have to start work on the day she gave him the employment agreement. She said she told him about the trial period provision and that he was entitled to get independent advice on the terms of the employment agreement. It was his choice to sign the agreement and start work that day.

[31] In her oral evidence Ms Dunn was less certain. She could not recall discussing the trial period with him but remembered telling him he must read the agreement and thought she would have brought the trial period provision to his attention. Ms Dunn also said she had asked Mr Fagotti to pick up his employment agreement in the week before he started full time work but he failed to do so.

[32] I do not find it reasonable for Ms Dunn to put the responsibility for uplifting his employment agreement on Mr Fagotti and she provided no evidence to satisfy me she had asked him to do so. Ms Dunn was in email contact with Mr Fagotti and could have sent the employment agreement to him electronically to give him the time and opportunity to take advice on it before the starting date they had agreed.

[33] If she had wished to discuss the terms of the agreement, or highlight particular provisions she wished him to consider, she could have arranged that by telephone or email. Furthermore, I am not satisfied Ms Dunn brought the trial period provision to

his attention on 23 February, or told Mr Fagotti he could defer starting work until he had taken advice on the employment agreement.

[34] In *Blackmore v Honick Properties*[2] the Chief Judge referred to the statutory necessity for an intending employee to have an opportunity to consider and take independent advice about an employment agreement before entering into it. He said:

> *What that opportunity amounts to temporally will depend upon the circumstances of the case. However, realistically, an employer will not be entitled in law to insist upon immediate execution of a form of employment agreement after its presentation to a potential employee. Nor, probably, its signed return within less than a few days or even more, depending upon the circumstances (including the time of year, the whereabouts of the parties and the like), fulfil the employer's statutory obligation.*

[35] It was Mr Fagotti's evidence that he had not signed the employment agreement at work on 23 February. He had taken it home to talk through with his partner before signing it in front of her on 24 February, but predating it to 23 February. On this matter I prefer Ms Dunn's evidence that Mr Fagotti signed the agreement in front of her on the morning of 23 February.

[36] At the investigation meeting it became clear there were two employment agreements, both signed by Mr Fagotti and Ms Dunn. They were identical documents in all respects other than the signatures of the parties. Mr Fagotti had erroneously signed one in the space for the employer's signature, as well as in the correct employee's space, and Ms Dunn had signed over his signature.

[37] While I accept Mr Fagotti took one of the agreements home to discuss with, and sign in front of, his partner, I am satisfied he had already signed the other copy of the agreement in front of Ms Dunn shortly after arriving at Prefab on 23 February.

[38] In leaving it to 23 February 2013 to give Mr Fagotti an employment agreement, ACME denied him the opportunity to take advice on it, or any of its provisions, before he commenced his full-time employment at Prefab. Even if Mr Fagotti was blasé about the agreement, as Ms Dunn attested, that did not remove the employer's statutory obligations under s.63A(2) as listed above.

[39] I find ACME breached the requirements of s. 63A(2) of the Act. It did not provide him with a copy of the employment agreement in advance, or inform him of

[2] [2011] NZEmpC 152 at [64]

his right to take advice on the agreement. Nor did it provide him with a reasonable opportunity to seek that advice.

[40] As a consequence its bargaining with Mr Fagotti for his employment agreement was unfair in accordance with s.68(2)(d) of the Act.

Does Mr Fagotti have a personal grievance for disadvantage?

[41] Personal grievances are defined in s. 103 of the Act and include at s. 103(1)(b) a situation where:

> *….the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action of the employer;…*

[42] Any disadvantage Mr Fagotti suffered as a result of ACME's unfair bargaining was his employer's reliance on the unenforceable trial period in his employment agreement resulting in his dismissal. I have already identified unjustifiable dismissal and unfair bargaining as problems in the employment relationship. Under the circumstances I find he does not have a separate personal grievance for unjustifiable action.

Summary of findings

[43] ACME was not able to rely on the trial period provisions of Mr Fagotti's employment agreement at the time it gave him notice of the termination of his employment.

[44] He has a personal grievance for unjustifiable dismissal.

[45] ACME did not bargain fairly for his employment agreement as it did not provide him with his employment agreement until 23 February 2013 when he commenced full-time work at Prefab. He was required to sign the employment agreement before he commenced his shift on that day, with no opportunity to take independent advice on the agreement or any of its provisions.

[46] Mr Fagotti does not have a personal grievance for unjustifiable action by his employer.

Remedies and contribution

[47] Ms Turner submits this is a case where an employer acted in good faith. Mr Fagotti's employment ended some months before the *Salad Bowl* case was decided and the employer could not have anticipated Mr Fagotti would be considered to have been previously employed by ACME by virtue of his work trial day. Any remedies awarded should be minimal, if any, in counsel's submission.

[48] Ms Buckett disagrees with counsel for ACME's analysis and says ignorance of the law is no excuse for breaching it. She submits a number of factors justify a premium of 25% for "*aggravation*" on any compensation award for Mr Fagotti.

[49] I have carefully considered counsels' comprehensive submissions and find remedies are appropriate, but do not find any reason to award a premium for compensation. I accept the directors of ACME mistakenly, but genuinely, believed they were entitled to rely on the trial period provision of Mr Fagotti's employment agreement to dismiss him. There was no contribution on the part of Mr Fagotti to the events that led to his personal grievance for unjustifiable dismissal.

[50] As I have found Mr Fagotti to have a personal grievance, he is entitled to remedies. Mr Fagotti obtained employment at another café approximately two weeks after his dismissal, albeit at a lower rate of pay and on what he described as a casual basis. I am satisfied from the evidence he lost remuneration as a result of his dismissal from Prefab. He is entitled under s. 128 of the Act to be awarded the lesser of a sum equal to the remuneration he lost or to three months' ordinary time remuneration. The Authority may at its discretion order an employer to pay more than that, but I do not consider a higher amount to be warranted in this instance.

[51] Mr Fagotti was dismissed on 12 March 2013 and paid wages in lieu of notice to 19 March 2013. It is reasonable he be reimbursed for the difference between the wages he would have received had he not been dismissed unjustifiably and those he actually received for three months following his dismissal. This period includes part of a pre-planned overseas trip taken by Mr Fagotti. He would not have received remuneration while on holiday and cannot be considered to have lost wages for that non-working time. Accordingly I have deducted two weeks and two days from my calculation of wages reimbursement.

[52] It was evident Mr Fagotti was distressed by his dismissal. He also referred to experiencing problems of a sensitive and physiological nature which, in his view, exacerbated his feelings of hurt and humiliation. Mr Fagotti provided no medical evidence which would lead me to conclude those matters were linked to his dismissal, and I have declined to take them into account in assessing an appropriate award of compensation.

[53] An employer who fails to comply with the provisions of s. 63A in bargaining for an individual employment agreement or for individual terms and conditions in an employment agreement is liable to a penalty imposed by the Authority. Mr Fagotti did not, in his statement of problem, seek a penalty specifically for a breach of s. 63A and I do not consider it appropriate to award one.

[54] Remedies for unfair bargaining are available under s. 69 of the Act and the Authority may, if it finds a party to an employment agreement has bargained unfairly, do one or more of the following:

> *a. make an order that the party pay to the other party such sum, by way of compensation, as the Authority thinks fit;*
>
> *b. make an order cancelling or varying the agreement[3];*
>
> *c. make such other order as it thinks fit in the circumstances.*

[55] I consider it appropriate that Mr Fagotti be compensated for ACME's unfair bargaining for his employment agreement and I have made an award accordingly.

[56] ACME is to pay Davide Fagotti the following sums:

(a) $ 2,098, less PAYE, as reimbursement of lost remuneration under s. 128(2) of the Act;

(b) $5,000 without deduction as compensation for hurt and humiliation arising from his unjustified dismissal under s. 123(1)(c)(i) of the Act; and

(c) $1,500 without deduction as compensation for unfair bargaining under s. 69(1)(a) of the Act.

[57] Leave is given to either party to revert to the Authority if it disagrees with my calculation of the amount of lost remuneration.

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[3] In certain specified circumstances.

Costs

[58] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority