

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 146
5457744

BETWEEN ANDREW HALL
 Applicant

AND SMITH CRANE &
 CONSTRUCTION LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Paul Brown, counsel for Applicant
 Tim Smith, representative of Respondent

Investigation Meeting: 17 July 2014
 Submissions from the applicant at the meeting
 Written submissions from the respondent on 8 August
 2014

Determination: 16 September 2014

DETERMINATION OF THE AUTHORITY

- A. The 90-day trial period was not valid. Therefore, Andrew Hall was unjustifiably dismissed.**
- C. Smith Crane & Construction Limited must pay Andrew Hall:**
- (i) \$31,326.91 gross in lost remuneration; and**
 - (ii) \$7,000 compensation for humiliation, loss of dignity and injury to his feelings; and**
 - (iii) \$766.75 reimbursement for variation of work visa costs.**

Employment relationship problem

[1] Andrew Hall was recruited from England as a Senior Piling Project Manager by Smith Crane & Construction Limited (SCC) to work in Christchurch. A letter of offer emailed to him referred to an attached individual employment contract (which I refer to

as an individual employment agreement or IEA) which contained a 90-day trial period clause.

[2] He accepted the offer of work by counter-signing the written letter of offer and returning it by email to SCC on about 17 September 2013. Mr Hall did not sign and return the IEA before he started work.

[3] Mr Hall commenced work in Christchurch on 13 January 2014. On 11 February 2014 Mr Hall and Tim Smith, the managing director of SCC, signed the IEA after it was discovered that Mr Hall had not already signed it. Mr Hall was dismissed by Mr Smith as at 8 April 2014 in reliance on the 90-day trial period provision in the IEA.

[4] Mr Hall says that the 90-day trial period was not valid and he has the right to bring a personal grievance claim for unjustified dismissal. In the alternative, he says that the way in which he was dismissed was an unjustified disadvantage and demonstrated bad faith on SCC's part. By way of remedy he claims:

- \$20,000 compensation for distress, humiliation and injury to hurt feelings,
- Lost wages for the first 3 months after dismissal of 11 weeks = \$30,673.06,
- Lost wages for a further 12 weeks being a shortfall in salary in the amount of \$3,923.07,
- Costs incurred in seeking new employment of \$3,577.87 which includes the cost of obtaining a variation in his work visa, and
- Legal costs.

[5] SCC says that the 90-day trial period was valid and that it dismissed Mr Hall because it was dissatisfied with his performance and therefore, it should not be facing an unjustified dismissal claim.

Issues

[6] The first and fundamental issue to be determined is whether or not the 90-day trial period provision in the IEA was valid. If it was then the Authority does not have jurisdiction to consider Mr Hall's claim of unjustified dismissal.

[7] However, if the 90-day trial period was not valid then Mr Hall's claims must be determined and the following issues examined:

- (i) Was Mr Hall unjustifiably dismissed?
- (ii) If Mr Hall was unjustifiably dismissed what remedies are due taking into account contribution?
- (iii) Alternatively, was the manner of the dismissal carried out in good faith or did the respondent breach its duty of good faith to Mr Hall?

Determination

[8] For the purposes of the Authority investigation Mr Hall, Lisa Ward, SCC's payroll and administration manager, and Mr Smith lodged written witness statements. Under oath or affirmation, they each confirmed their own statement. Clive Baddeley, SCC's Civil Contracts Manager, also gave evidence under affirmation and all witnesses answered questions from me and the parties' representatives. The representatives also had the opportunity to provide closing submissions on the facts and legal issues.

[9] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but findings of fact and law are stated and conclusions on the issues for determination are expressed.

Does the 90-day trial provision apply to Mr Hall?

[10] Mr Smith says that by signing the letter of offer Mr Hall accepted the terms and conditions contained in it and in the attached IEA and therefore the 90-day trial period was in writing and was valid. SCC says that the IEA protects it from Mr Hall's personal grievance for unjustified dismissal. SCC considers that should effectively dispose of Mr Hall's claim.

[11] Mr Baddeley drafted the letter of offer, which he and Mr Smith signed, and attached the IEA to the email. The letter of offer included the following:

Should you find the terms and conditions of the above letter and attached employment contract acceptable please sign one copy and return to our Johns Rd office and keep one copy for your own records.

[12] Mr Baddeley says he intended that paragraph to mean that Mr Hall should sign a copy of the letter of offer and of the attached contract and return a copy of both to SCC. However, when a copy of the letter of offer was returned counter-signed by Mr Hall SCC treated that as an acceptance of the job offer. Mr Hall was not asked again to sign the IEA. Mr Smith did not see a copy of the counter-signed letter of offer or of the IEA before Mr Hall began work.

[13] Mr Hall says he did not sign the IEA for two reasons. He considered it to be incomplete and he considered it to be of the kind that did not apply to his level of work; he thought it was more for a labourer.

[14] SCC submits that Mr Hall must have considered that he had an IEA otherwise he would not have started work and that if he did not agree with the IEA terms he should not have used the IEA as evidence that he had a job when he applied to Immigration New Zealand for a work permit.

[15] Mr Smith also says that without the 90-day trial period SCC would not have employed Mr Hall.

[16] Mr Smith is correct that there was an employment agreement in place when Mr Hall began work for SCC, and his work proceeded on the basis of that agreement. However, there are specific criteria that apply for a 90-day trial period provision to be valid.

[17] For a 90-day trial provision to be valid it is a fundamental requirement that it be a *written provision in an employment agreement*.¹ A further fundamental provision is that it can only apply to an *employee who has not been previously employed by the employer*.² These two requirements are intertwined and establish that if an IEA containing a 90-day trial provision has not been signed by both parties before an employee begins their employment there is no effective 90-day trial provision.

[18] In the Employment Court case of *Smith v Stokes Valley Pharmacy*³ Chief Judge Colgan said that sections 67A and 67B:

¹ Section 67A(2) of the Act.

² Section 67A(3) of the Act.

³ [2010] ERNZ 253

... are neither simple nor the very broad and blunt prohibition against bringing legal proceedings that is sometimes portrayed rhetorically. They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with. Significant obligations of good faith dealing remain upon employers.⁴

[19] Chief Judge Colgan also wrote that passages from Hansard of the Bill's reading in the House:

...confirm the statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise settled during its course. Employees affected are to be new employees....⁵

...the employer's form of draft agreement contemplated its execution by signature. Once parties sign an employment agreement, they regard themselves and are regarded by others as being bound to the obligations and benefits contained in the agreement. Conversely, until that symbolic but important act of signing, the form of agreement remains as a draft and, potentially, subject to further negotiation and alteration.

As with most contracts, and employment contracts or agreements in particular, I conclude that the parties did not intend that they each would be bound by the draft written agreement unless and until that was executed by the writing of their signatures.⁶ The application of signatures... signifies both mutual agreement to the written provisions and a solemn intention to be bound by them.

[20] In *Blackmore v Honick Properties Ltd*⁷ Chief Judge Colgan considered whether it was unreasonable to require employers to ensure that a written employment agreement containing a s 67A provision is signed before the new employee begins working. He concluded:

Employers have or ought to have been aware that trial periods must be agreed in writing before the affected employees begin work if they are to be regarded as not having been employed previously by the employer, which is an essential pre-condition of a trial period.

It is not too onerous an expectation that employers will get the correct paper work and do things in a correct sequence. ...For those reasons, I do not think it could be said that the requirements on an employer seeking to have those advantages are either impractical or onerous. ...

Parliament's intention is clear that neither a former nor an existing employee of an employer can be put onto a trial period. ...

⁴ *Smith*, page 271

⁵ *Ibid*, page 265

⁶ *Ibid*, pages 273 and 274

⁷ [2011] ERNZ 445

What this means in practice is that employers wishing to avail themselves of the opportunities 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. The legislation then requires that the prospective employee be given a reasonable opportunity to seek advice about the terms of the offer of employment (including the trial period provision) pursuant to s 63A(2)(c). It will only be when ... the agreement has been accepted by the prospective employee (usually by signing), that there will be a lawful trial period effective from the specified date of commencement of the agreement, usually in practice the date of commencement of work.⁸

[21] A key issue decided in the *Smith* case was the effect of s 67A(3); that is, who is an *employee who has not been previously employed by an employer*? In Ms Smith's case she worked for the employer before signing an employment agreement containing ss 67A and 67B provisions. Therefore Chief Judge Colgan decided that she did not meet the statutory definition of 'employee' set out in s 67A(3).

[22] In this case Mr Hall accepted the offer of employment by counter-signing the letter of offer. He worked as an employee for SCC from 13 January until 11 February 2013 without signing the IEA which contained the 90-day trial period provision. His situation is analogous to Ms Smith's situation in the *Stokes Valley Pharmacy* case. Mr Hall was an employee of SCC before he and SCC signed the IEA containing the written provision for a 90-day trial. At the time the 90-day trial period was mutually agreed in writing Mr Hall was an employee who had been previously employed by SCC, so did not meet the statutory definition of *employee* set out in s 67A(3). Therefore, the 90-day trial period provision is not effective to remove Mr Hall's right to bring a personal grievance claim of unjustified dismissal. I now consider that claim.

Was Mr Hall unjustifiably dismissed?

[23] The justification for an employee's dismissal is determined under the statutory test in s. 103A of the Act. The test requires the Authority to decide the question of justification objectively by asking whether what the employer did, and how it did it, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

⁸ Ibid, at paragraph [70]

[24] The Authority may not substitute its opinion for that of the employer but in applying the test it must consider whether the employer acted fairly in particular whether before deciding to dismiss Mr Hall SCC:

- sufficiently investigated the allegations against him,
- raised its concerns with him,
- gave him a reasonable opportunity to respond to the concerns, and
- genuinely considered any explanation regarding the allegations; and
- whether there were any other relevant factors.⁹

[25] The Authority should not determine a dismissal unjustified solely because of any defects in the employer's process if the defects were minor and did not result in the employee being treated unfairly.¹⁰

[26] Mr Smith says that he became increasingly concerned about Mr Hall's performance and discussed his concerns a number of times with Mr Baddley who Mr Hall reported to. Mr Smith decided to use the 90-day trial period provision to terminate Mr Hall's employment. On 1 April 2014 Mr Smith wrote a letter of dismissal in reliance on the 90-day trial period provision. He gave Mr Hall one week's notice.

[27] Mr Smith intended to hand the letter to Mr Hall personally. However, when Mr Smith went to find Mr Hall he was out of the office at a medical appointment. Mr Smith put the letter on Mr Hall's desk where he found it when he came into the office on 2 April 2014.

[28] Mr Hall requested a meeting to ask why he had been dismissed. He met with Mr Smith and Mr Baddeley. Mr Smith told him that in his opinion he was not capable of doing the job.

[29] Mr Hall worked his notice period and finished work on 8 April 2014.

[30] Mr Baddley says that he and Mr Smith had discussed their surprise that Mr Hall was not as commercially savvy as they had expected. Mr Baddeley also says he had one or two other concerns. He had not discussed his and Mr Smith's concerns with Mr Hall by way of specifically telling him the concerns could lead to the loss of his job within the 90-day period. He had ongoing discussions with Mr Hall about the job he

⁹ Section 103A(3) & (4) of the Act.

¹⁰ Section 103A(5) of the Act.

was doing and had pointed out certain things he considered Mr Hall should have already known, given his level of experience in the United Kingdom. However, Mr Baddeley was not involved with the decision to dismiss Mr Hall.

[31] In deciding to terminate Mr Hall's employment Mr Smith did not comply with any of the basic procedural requirements under s 103A of the Act. Mr Hall was not told of Mr Smith's concerns about his performance and had no opportunity to respond to those concerns or to improve his performance. Mr Smith cannot have taken Mr Hall's explanations about his concerns into account when making the decision to dismiss Mr Hall as he had not given Mr Hall any chance to explain.

[32] The defects in the process were not minor and resulted in Mr Hall being treated unfairly. In the absence of a valid 90-day trial period provision a fair and reasonable employer could not have acted in the way SCC did and could not have made the decision to dismiss Mr Hall on performance grounds. Therefore, the dismissal was unjustified. I need to consider what remedies Mr Hall is entitled to.

Remedies

Lost remuneration

[33] Mr Hall started his new job as a project manager for Brian Perry Civil on 23 June 2014 in Auckland. I am satisfied that he made efforts to find new employment as soon as he finished working for SCC and he has adequately mitigated his loss.

[34] Section 123(1)(b) of the Act allows me to provide for the reimbursement by SCC of the whole or any part of wages Mr Hall lost as a result of his grievance. Section 128(2) of the Act provides that I must order SCC to pay Mr Hall the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration. Since Mr Hall obtained work within the three months after his dismissal I must award him his actual lost remuneration for the three months (thirteen weeks) after his dismissal.

[35] Mr Hall's salary with SCC was \$145,000 gross per annum. That is \$2,788.46 per week. Mr Hall was without work and therefore without income from 9 April 2014 until 22 June 2014 inclusive, a period of 11 weeks.

[36] Mr Hall's claim set out in his brief of evidence was for an additional 12 weeks of shortfall of wages amounting to \$3,923.07. When that is divided by 12 an amount of \$326.92 is the weekly shortfall. Two weeks of shortfall is \$653.85.

[37] The total SCC must pay Mr Hall by way of lost wages for the three months after his dismissal is \$30,673.06 (first 11 weeks) plus \$653.85 (for two weeks making up three months actual lost remuneration) = \$31,326.91.

[38] In addition, s 128(3) of the Act gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s.128(2). Mr Hall asks me to do just that and claims for a further 10 weeks of shortfall. However, I do not consider this a suitable case to exercise my discretion to award further lost remuneration and I do not do so.

Compensation

[39] Mr Hall claims \$20,000 in compensation for the humiliation, loss of dignity and injury to his feelings resulting from the unjustified dismissal. Mr Hall provided a letter from his general practitioner Dr Jay Erickson that says on 21 May 2014 Mr Hall was depressed and was prescribed a course of antidepressants. Mr Hall told Dr Erickson that he was dissatisfied with his job and *was struggling with the long distance separation from his wife in the UK*. By that date Mr Hall had lost his job and decided to relocate to Auckland. He says he was too embarrassed to tell his GP that he had been fired but that was the main reason for his poor state of health. He says at the time of the investigation meeting he was still on antidepressants and needing sleeping pills.

[40] Mr Hall also says that he has struggled with the fact that since he was dismissed his wife has decided not to join him in New Zealand, ending his marriage of 22 years. I appreciate that has been a devastating blow for Mr Hall and that he has struggled to settle in New Zealand.

[41] Mr Hall says that the dismissal coming as it did from out of the blue was humiliating and caused him great distress. In all the circumstances, including the fact that some of Mr Hall's distress has been caused by the break-up of his marriage of 22 years and I cannot take that into account, I consider Mr Hall should be paid \$7,000 compensation.

Other claims

[42] Under s 123(1)(b) and (c)(ii) of the Act Mr Hall claims costs of \$2,811.00 for travel and accommodation costs incurred as part of his search for new employment. He travelled to Wellington, Auckland and Tauranga to look for work and to attend interviews.

[43] He also claims costs totalling \$766.75 to vary his work visa which he had originally acquired to allow him to work in New Zealand specifically for SCC. He had to pay \$278 to Immigration New Zealand to file an application to have his visa varied and was billed \$478.75 by his lawyer to assist him to get the variation approved.

[44] I do not consider that any of the costs of travel and accommodation associated with finding new employment fall within the category of loss of a benefit which Mr Hall might reasonably have been expected to obtain had he not been unjustifiably dismissed. They are not analogous to the kinds of compensable loss set out by the Employment Court in *McKendry v Janine Jansen & Anor.*¹¹ Therefore, Mr Hall cannot be compensated for them under s 123(1)(b) or 123(1)(c)(ii) of the Act.

[45] However, the money lost by Mr Hall in needing to vary his immigration visa was *any other money* lost by him as a result of his grievance and is covered under s 123(1)(b). Mr Hall already had paid to obtain a visa allowing him to work in New Zealand which was specific to SCC. Having already moved to New Zealand it was foreseeable that once he was dismissed from employment with SCC in order to remain in New Zealand he would need to obtain a variation in his visa once he had secured other employment.

[46] I consider that SCC should reimburse Mr Hall for the \$766.75 spent to vary his visa as it was money lost by him as a result of the grievance.

Contribution

[47] Having determined Mr Hall has a personal grievance s.124 of the Act requires me to consider whether he contributed to the situation which gave rise to his dismissal and if so reduce remedies accordingly.

¹¹ [2010] NZEmpC 128.

[48] SCC's reasons for Mr Hall's dismissal were because of Mr Smith's dissatisfaction with his performance. I accept that SCC was dissatisfied with Mr Hall's performance. However, an employee will not usually be found to have contributed to a dismissal for poor performance/incompetence without an earlier fair process. That is because the employer always has the ability to performance manage an employee with a proper process. Further there is always a possibility that improvement will occur if an employee is properly managed and is aware of the consequences for nonperformance. In the absence of a fair process I cannot conclude that Mr Hall would not have improved. I do not find contribution by Mr Hall as a result of SCC's concerns about his performance.

Costs

[49] Costs are reserved. Generally the successful party can expect a contribution towards their reasonable legal costs. SCC represented itself at the investigation meeting and is unlikely to have incurred any legal costs.

[50] The Authority usually awards costs on a daily tariff approach of \$3,500 for a full day of hearing. This hearing took half a day and so would usually attract a contribution of \$1,750 in legal costs plus reimbursement of the filing fee of \$71.56. I invite the parties to reach agreement on costs. Otherwise any party seeking costs should file a memorandum with the Authority within 28 days of this determination and if it objects to the claim the other party should file a memorandum in response within a further 14 days.

Christine Hickey
Member of the Employment Relations Authority