

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 240
5593389

BETWEEN JOSHUA LAWRENCE
 Applicant

A N D DARCY LEE BEEHRE and
 MELANIE BEEHRE t/a BEE
 HAPPY BEES
 Respondent

Member of Authority: Rachel Larmer

Representatives: Warwick Reid, Advocate for Applicant
 Megan Leaf, Counsel for Respondent

Investigation Meeting: 11 July 2016 at Tauranga

Date of Determination: 13 July 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Joshua Lawrence is 22 years old. On 06 August 2015 Mr Lawrence started work for Mr Darcy Beehre and Mrs Melanie Beehre, who are husband and wife, and who run a local beekeeping business under the trading name Bee Happy Bees on 06 October 2015.

[2] The Beehres' believe they employed Mr Lawrence as a trainee beekeeper but Mr Lawrence says he was employed as a labourer. The Beehres' dismissed Mr Lawrence on 03 October 2015 because by the time he had worked for them for nine weeks the Beehres' decided that Mr Lawrence was unsuitable to work as a beekeeper.

[3] Mr Lawrence claims his dismissal was unjustified.

[4] The Beehres' initially advised the Authority that they had dismissed Mr Lawrence under a 90 day trial period. This claim relied on the Beehres' being able to comply with the requirements for trial period provisions which are set out in s.67A of the Employment Relations Act 2000 (the Act).

[5] However they have subsequently conceded (via counsel) that Mr Lawrence was not subject to a valid trial period provision because they failed to meet the strict requirements of s.67A of the Act. The Behrees' now claim that Mr Lawrence was subject to a probationary period as provided for under s.67 of the Act.

[6] Mr Lawrence denies that and says that he was not told that he was on a trial or probationary period. He says s.67 of the Act does not apply because he did not have a written employment agreement.

[7] Mr Lawrence also says that would have alarmed him if he had been told that he was being employed on a trial period or on a probationary period because he left permanent employment to accept the Beehres' offer of employment so he would have been concerned if he knew that the job with the Beehres' was potentially not permanent.

[8] Mr Lawrence says he was not given a written employment agreement. He says that the Beehres' gave him a "*guide*" which they told him had been used for a former employee. Mr Lawrence says that the Beehres' told him not to complete that template but to review it so that he was aware of what they had used for his predecessor.

[9] Mr Lawrence claims that the written template was not given to him until later during the first week of employment. The Beehres' say he was given it on the first day and he was given paid time off work that afternoon (of his first day at work) to go home and review it. I have preferred the Beehres' evidence about that on the basis it is more likely to be correct.

[10] Mr Lawrence admits he was only at work for the morning of his first day and then got the rest of the day off on pay. He then worked for approximately two weeks on the Beehres' truck at a local engineering workshop in Te Puke under the supervision of the Te Puke workshop staff until the Beehres' were ready for him to do some more bee work.

[11] Mr Lawrence says that when he reviewed the “*guide*” (employment agreement template) it had no information about him personally in it – his name was not on it, no remuneration information had been added such as pay rate, and his hours of work had not been specified. Mr Lawrence agrees that he was asked a couple of times about the document a few weeks later but told the Beehres’ that he had given it to his parents to look at.

[12] The Beehres’ claim that the template document they provided to Mr Lawrence was in fact a written employment agreement which recorded the terms and conditions of employment. They say that because he did not raise objections about anything in that template document then they assumed he had agreed to those terms and was working consistently with them.

[13] The Beehres’ say that they established that Mr Lawrence was unsuitable for ongoing employment as a beekeeper. They identified a number of performance issues which they claim they raised with him whilst he was employed. Mr Beehre admitted that there was no documentation relating to these concerns and that they did not engage in a formal performance management process with Mr Lawrence.

[14] Mr Lawrence disputes that. He says that he was not aware that his employment was in jeopardy for poor performance. Mr Lawrence says he was following the Beehres’ instructions as best as he could.

[15] I have resolved the conflict in the evidence over whether or not Mr Lawrence was put on notice that his employment was in jeopardy in favour of Mr Lawrence’s version of events.

[16] The Beehres say they told Mr Lawrence that he would be having a work trial on Tuesday, 22 September 2015 which meant that he would be in charge of preparing the work vehicle himself for a trip to Whakatane. The Beehres’ say that Mr Lawrence made numerous mistakes and they considered he had not passed the trial.

[17] Mr Lawrence denies being told he was going to be given a work trial but he accepts his performance regarding the Whakatane trip was poor. He attributes that to a misunderstanding or miscommunication about who was responsible for what.

[18] Mr Beehre says that on Saturday, 03 October 2015 Mr Lawrence was late to work again. Mr Beehre says that he told Mr Lawrence when he turned up at work that

he was late again, his employment was not working out, so he was dismissed and would be paid one week's pay in lieu of notice.

[19] The Beehres' say Mr Lawrence's dismissal was justified because they discovered he could not work unsupervised which was the whole reason they hired him in the first place. The Beehres' say that they were very concerned that if Mr Lawrence had continued working for them he would have hurt or killed himself because beekeeping is a dangerous job.

The issues

[20] The following issues are to be determined by the Authority:

- (a) Did Mr Lawrence have a written employment agreement?
- (b) If so, did Mr Lawrence's employment agreement contain a valid probationary period clause?
- (c) Was Mr Lawrence's dismissal justified?
- (d) If not, what if any remedies should be awarded?
- (e) What if any costs should be awarded?

Did Mr Lawrence have a written employment agreement?

[21] There is a conflict in the evidence about when the template document was given to Mr Lawrence. Mr Lawrence says it was further into his first week of employment whilst Mr Beehre says it was provided after lunch on the first day of work, 3 August 2015.

[22] Mr Beehre's evidence to the Authority was that he advised Mr Lawrence that the template document was what they had used for a former worker and that it would have to be brought up to 2015 laws and tailored for Mr Lawrence. Mr Beehre claims that he told Mr Lawrence that it would have to include a 90 day trial period provision, but Mr Lawrence denies that.

[23] Mr Beehre claims that he gave Mr Lawrence the rest of the day off on pay so that he could go home and go through the template document with his parents with a view to bringing it back the following day so that the Beehres' could have any

additions made that they had talked about because they wanted it signed by the end of his first week of employment.

[24] I consider that the supposed employment agreement was only ever a blank outdated template. It did not have Mr Lawrence's name on it and it did not record his remuneration details nor did it include a sign-off section. I consider that this document was provided as a starting point for the parties to have discussions and/or negotiations regarding the terms and conditions of Mr Lawrence's employment.

[25] I consider that the Beehres' breached s.63A of the Act by failing to provide Mr Lawrence with a copy of the proposed intended agreement under discussion and by failing to advise him that he was entitled to seek independent advice about the intended proposed employment agreement prior to him accepting the offer of employment and commencing work for the Beehres'.

[26] I am not satisfied that the required necessary contract formation elements of offer and acceptance, certainty of terms, intention to create legal relations and the like exist regarding the blank template document.

[27] Mr Beehre's evidence was that he provided the template document as a starting point for the parties to have discussions but there is no dispute such discussions never actually occurred.

[28] I do not consider that the provision of a blank template which has not been updated to reflect current employment law obligations and/or which does not reflect the specific terms and conditions being offered to a prospective employee meets the requirements of s.63 or s.63A of the Act.

[29] I therefore find that there was no written employment agreement entered into between the parties.

Did Mr Lawrence's employment agreement contain a valid probationary period clause?

[30] Section 67 of the Act allows the parties to agree on probationary arrangements, including a specified written probationary period, in a written employment agreement.

[31] Section 67(3) of the Act provides that if an employer has not complied with all of the requirements of ss.67(1) and (2) of the Act regarding the required elements for a valid probationary arrangement, then it may not rely on any probationary term, if the employee elects to treat that term as ineffective.

[32] That is the case here. I find that the supposed probationary arrangements were not recorded within a valid written employment agreement. That failure entitles Mr Lawrence to elect to treat any probationary period arrangements as ineffective. I find Mr Lawrence has effectively exercised that election, so he is not subject to a valid probationary period.

[33] The effect of this finding means that Mr Lawrence was a permanent ongoing employee who was not subject to either a trial period provision or a probationary period arrangement.

[34] While it was open to the Beehres' to have put in place a probationary period or a trial period provision they did not actually do so because they failed to comply with the strict legal requirements around the use of such terms.

[35] It was the Beehres' responsibility as Mr Lawrence's employer to comply with the necessary legal requirements. I find that they failed to do so the probationary clause in the template document is not effective.

Was Mr Lawrence's dismissal justified?

[36] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether the Beehres' actions and how they acted were what a fair and reasonable employer could have done in all the circumstances at the time Mr Lawrence was dismissed.¹

[37] A fair and reasonable employer is expected to comply with its statutory obligations such as all four of the procedural fairness tests set out in s.103A(4) of the Act. These statutory obligations also include the good faith requirements in s.4(1A) of the Act.

[38] Good faith requires an employer who is proposing to make a decision which may adversely impact on an employee's ongoing employment, to provide that

¹ Section 103A(2) of the Act.

employee with all relevant information and an opportunity to be heard in respect of that information before a final decision is made.

[39] An employer's failure to comply with its statutory obligations is likely to fundamentally undermine its ability to establish justification.

[40] In addition to establishing procedural fairness an employer is also required to substantively justify a dismissal. This means that an employer must have a genuine belief based on reasonable grounds that the employee's conduct is such that dismissal is within the range of appropriate responses available to a fair and reasonable employer in all of the circumstances, at the time the decision to dismiss is made.

[41] I find that the Beehres' are unable to establish compliance with any of the good faith or procedural fairness requirements in the Act. These failures fundamentally undermine their ability to procedurally justify Mr Lawrence's dismissal.

[42] I further find that the Beehres' failure to comply with their good faith obligations and to meet statutory minimum procedural fairness requirements fundamentally undermined their ability to substantively justify Mr Lawrence's dismissal.

[43] There was absolutely no formal or proper performance management process put in place. Mr Lawrence was not fully or fairly put on notice that his ongoing employment was at risk if he did not meet specified performance standards within a defined period of time.

[44] This is not a case in which a fair and proper process would have necessarily resulted in Mr Lawrence's dismissal for poor performance. The whole aim of a performance management process is to assist an employee to lift their performance to the required standard. I find that the absence of any formal performance management process meant that did not occur in this case.

[45] The complete lack of any process appears to have resulted from the Beehres' misunderstanding that they had a valid trial period provision which enabled them to dismiss Mr Lawrence within 90 days of him starting employment. This case should serve as a warning to employers to ensure their employment documentation is in order before a prospective employee accepts an offer of employment.

Conclusion

[46] I find that The Beehres' dismissal of Mr Lawrence was substantively and procedurally unjustified.

What if any remedies should be awarded?

Mitigation of loss

[47] Mr Lawrence found a new job within seven weeks. I find he has discharged the onus of establishing on the balance of probabilities that he took appropriate steps to mitigate his loss after being dismissed.

What if any lost remuneration should be awarded?

[48] Mr Lawrence claims lost remuneration for seven weeks.

[49] Mr Lawrence says he lost \$4989.60 remuneration (being \$4,620 lost wages plus \$369.60 unpaid holiday pay) as a result of his unjustified dismissal. I am satisfied that it is appropriate for Mr Lawrence to be reimbursed for this loss.

[50] I order the Beehres' to pay Mr Lawrence \$\$4,989.60 under s.128(2) of the Act to compensate him for the lost remuneration he incurred as a result of his unjustified dismissal.

Distress compensation

[51] Mr Lawrence gave evidence to the Authority of the stress, hurt and humiliation he suffered as a result of his unjustified dismissal. He also obtained a higher paying job which appears to be a much better fit with his skills seven weeks after his dismissal.

[52] I assess Mr Lawrence's distress compensation at \$3,000. Accordingly, the Beehres' are ordered to pay Mr Lawrence \$3,000 under s.123(1)(c)(i) of the Act.

Contribution

[53] Having established that Mr Lawrence has a dismissal grievance, the Authority is required under s.124 of the Act to assess to what extent (if any) Mr Lawrence's

behaviour or actions contributed to the situation which gave rise to his unjustified dismissal.

[54] I am satisfied on the balance of probabilities that Mr Lawrence did engage in blameworthy conduct which contributed to the Beehres' concluding that he was unsuitable for the job he had been employed to do. During the investigation meeting Mr Lawrence candidly (and appropriately in my view) acknowledged that his performance had been below standard in many respects.

[55] I therefore find Mr Lawrence did contribute to the situation that gave rise to his dismissal grievance.

[56] I am satisfied that the Beehres' gave Mr Lawrence appropriate training and instructions and support regarding what was expected of him, given the size and nature of their beekeeping business.

[57] I am satisfied that Mr Lawrence's blameworthy conduct included ongoing failures to follow instructions, continued poor timekeeping, an inability to work independently or safely, failing to report damage and conducting his duties in such a deficient manner that five hives died. I consider that all of the foregoing matters were proven to the required standard of proof.

[58] This is a case in which I consider that Mr Lawrence's contribution to the situation that gave rise to his grievance is high and should be reflected by a 50% reduction in the remedies he has been awarded.

Costs

[59] The parties asked that costs be reserved because they have exchanged Calderbank offers.

[60] The parties have 14 days within which to agree on costs. If costs are not agreed the Applicant has 7 days within which to file his costs submissions and the respondent has 7 days within which to reply. Proof of actual costs incurred must be provided in support of any costs application.

[61] This timetable will be strictly enforced and any departure from it requires the prior leave of the Authority.

Outcome

[62] I make the following findings:

- (a) The parties had no written employment agreement contrary to the requirements of s.65 of the Act. Accordingly Mr Lawrence was not subject to a valid probationary period clause;
- (b) The Beehres' dismissal of Mr Lawrence was procedurally and substantively unjustified;
- (c) Mr Lawrence contributed to the situation which gave rise to his dismissal grievance so his remedies need to be reduced by 50% to reflect that contribution;
- (d) The Beehres' are ordered to pay Mr Lawrence \$2,494.80 under s.128(2) of the Act for lost remuneration (being \$4,989.60 lost remuneration plus unpaid holiday pay reduced by 50%);
- (e) The Beehres' are ordered to pay Mr Lawrence \$1,500 under s.123(1)(c)(i) of the Act (being \$3,000 distress compensation less 50%);

Rachel Larmer
Member of the Employment Relations Authority