IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 150/09
5160111

	BETWEEN	DAVID WAYNE MOORE Applicant
	AND	SEAVIEW CUSTOM ENGINEERING LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Rachelle Boulton, Counsel for Applicant Tim McGinn, Counsel for Respondent
Investigation Meeting:	3 August 2009 at Christchurch
Determination:	4 September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In an interim determination dated 29 June 2009, I dealt with the applicant (Mr Moore's) application for interim reinstatement and determined that interim reinstatement ought not to be granted. This substantive determination considers whether Mr Moore was unjustifiably dismissed and, if so, what orders the Authority ought to make to remedy that situation.

[2] Mr Moore commenced employment with the respondent (Seaview) on 26 January 2009 and his employment was terminated effective 8 May 2009. His employment was governed by the terms of an employment agreement which, although it remained unsigned, was clearly the basis of the legal relationship between the parties. That employment agreement contained a probationary period of employment for the first 90 days of the employment and it was in reliance upon that provision that Seaview brought the employment relationship to an end.

[3] The reason that the employment agreement was not signed by Mr Moore was that he considered it did not represent the bargain between the parties. Mr Moore was

interviewed by Seaview's Mr Gallagher on 9 December 2008, attended at the workplace again the following day and was there given a copy of the standard form employment agreement to review. Mr Moore then did some casual work for Seaview and by letter dated 13 January 2009, Mr Moore was formally offered employment, forwarded a copy of the employer's employment agreement duly completed with Mr Moore's details therein and signed by Seaview to represent its formal offer of employment. The wage rate offered in this communication was $22.50 per hour.

[4] Seaview maintained that was the agreed hourly rate and also maintained that Mr Moore had agreed to commence his employment on 19 January 2009, though in the result he did not actually start until a week later. One of the reasons for the delay was Mr Moore's contention that he had never agreed to an hourly rate of $22.50 and that the hourly rate agreed to for the casual work that he did in late December and for the permanent position starting in January was to be at the rate of $24 per hour. When Mr Moore received the formal offer from Seaview dated 13 January 2009, Mr Moore contacted Mr Gallagher to protest the wage rate and eventually there was an agreement that the wage rate would be $23.50 per hour.

Mr Gallagher's evidence (which on this point was not challenged) was that he had taken no steps to speak to Mr Moore's referees. Mr Gallagher said that Mr Moore's curriculum vitae presented Mr Moore as a skilled and capable tradesman who ought to have been well able to attend to the work required of him by Seaview. It was for that reason, Mr Gallagher said, that he was prepared to consent to an hourly rate of $23.50 for Mr Moore.

[5] Although nothing turns on this, Mr Moore had other issues with the employment agreement and the copy of the agreement that was supplied to the Authority by Mr Moore has a number of handwritten alterations evidencing his objections to various provisions. It is clear that none of these alterations which Mr Moore sought were ever agreed to by Seaview and there is even dispute about whether Seaview sought a return of the signed agreement. Mr Moore says that Seaview never asked for it to be returned whereas Mr Gallagher said that he regularly sought the return of the agreement duly signed, a piece of evidence which Mr Moore told me was *a bald faced lie*.

[6] Mr Moore commenced his employment on the full-time staff on 26 January 2009. By virtue of the probationary period of employment which applied to the

engagement, Mr Moore was subject to monthly reviews of his performance. Seaview's evidence is that there were concerns about Mr Moore's performance *virtually from day one*. He was considered to be both slow and unskilled despite his extensive experience and qualifications. There were also issues about his punctuality. Mr Gallagher, Seaview's Workshop Manager, produced to the Authority copies of the pages of his diary which referred to Mr Moore. He told me that … *there are a lot more entries for Dave (*Mr Moore*) than any other employee*. Mr Gallagher's evidence was that in the first month of the employment, he regularly had to speak to Mr Moore about why the latter was *struggling with the work*, and whether he (Mr Moore) knew how to do it.

[7] The first review meeting held on 26 February 2009 was dominated by concerns about Mr Moore's slowness and accompanying lack of productivity on the one hand and his punctuality issues on the other. A follow-up letter from Mr Gallagher to Mr Moore referred to *satisfactory work performance … being met* with the exception of issues around timeframes for jobs and questions of punctuality also being problematical.

[8] The second review took place on 25 March with similar outcomes being achieved. Again, the follow-up letter also dated 25 March 2009, referred to work performance *being met* except that timeframes were not always met. The letter concluded with an observation that a *satisfactory improvement* would be required by the time of the next review.

[9] On 9 April 2009, there was an additional review meeting inserted into the process by Seaview at which meeting Mr Moore was told that his progress in the role was not what Seaview had expected, that there would need to be a *substantial improvement* and that *his future was in doubt*.

[10] A final review meeting took place as scheduled on 24 April 2009 at which Seaview explained that Mr Moore was not meeting their expectations of performance *for an experienced welder*, that timeframes were still an issue and that *a lack of experience … seemed evident*. That being Seaview's conclusion, Mr Moore was dismissed from his employment on two weeks notice, Seaview exercising its right to do that in reliance on the probationary clause in the employment agreement.

Issues

[11] The issue requiring investigation by the Authority in the present case is the question of whether Seaview unjustifiably dismissed Mr Moore in relying on the probationary period of employment in the applicable employment agreement.

[12] A particular aspect of this issue for investigation is the contention Mr Moore makes that the only matters ever raised with him as problematical were the matters referred to specifically in the letters generated after each review meeting and that each of those matters were adequately addressed by him during the course of the employment.

[13] Mr Moore vigorously denied that any other matters were raised with him by Mr Gallagher during the course of the verbal interactions that the two men had during the course of the employment. Indeed, Mr Moore went so far as to accuse Mr Gallagher of falsifying entries in the latter's work diary which purportedly documented Mr Gallagher's regular oral discussions with Mr Moore about issues regarding the latter's competence.

Was Mr Moore unjustifiably dismissed?

[14] I am satisfied on the evidence before me that Mr Moore was not unjustifiably dismissed from his employment. I commence my analysis by looking at the relevant provisions in the employment agreement. I have already noted that although the agreement was never signed by Mr Moore, the terms of the agreement were the terms of the employment and in particular, there was no suggestion by Mr Moore that the probationary period provided in the employment agreement was in any way disputed.

[15] The employment agreement contains the following relevant provisions concerning the probationary period of employment:

> *5.2.1 This agreement is for a probationary period of 3 months to enable the employer, during that time, to properly assess and monitor the employee's standard of work, skills, consistency of performance in the position and compatibility with the team and if completed to the satisfaction of the employer, the employer shall notify the employee accordingly in writing and the agreement shall be deemed to be a permanent appointment subject to the other provisions of this agreement.*
>
> *5.2.2 Should the employee fail to demonstrate during the probationary period the skills and attributes required by the*

> *employer then the employer may terminate the agreement either during or at the end of the probationary period on one week's notice. As an alternative determination the employer may elect to offer the employee an extension of the probationary period for further assessment of the employee's performance under probation.*

[16] I find that the terms of those two subclauses are clearly and well expressed and that the plain meaning of those provisions are readily able to be discerned. It is the essence of Mr Moore's case that, in reliance on those provisions, Seaview did not treat him fairly, did not act towards him as a good employer would and that, contrary to law, Seaview effectively set out to ensure that the result of the probationary period would be a failure rather than a success.

In reliance on the leading case of *Trotter v. Telecom Corporation of New Zealand Ltd* WEC29/93, Mr Moore contends that Seaview had an obligation to fully inform him of its dissatisfaction with his performance in such a way as to enable him to comprehend the deficits identified and then the employer had an obligation to objectively consider whether Mr Moore had achieved the expected standard or not.

Mr Moore says that the only complaint Seaview raised with him about his performance was in respect to timeframes and that the other matters Seaview claims to have raised were not in fact raised with him at all. Of course, Seaview contend they raised other matters with Mr Moore and they produce Mr Gallagher's diary and his sworn evidence to confirm that. They also rely on the fundamental importance of the timeframes issue as evidence that Mr Moore was simply not capable of performing to the required level. In that connection, Seaview say that the timeframes issue is fundamental to the performance deficit because an inability for Seaview to make money out of Mr Moore's labours is, fatal to the employment relationship.

[17] However, before assessing the relevant merits of those competing claims, it is necessary to briefly review the relevant law. In *Nelson Air Ltd v. NZALPA* [1994] 2 ERNZ 665, the Court of Appeal disposed of a matter where the appellant (which traded as Air Nelson) had dismissed a man without giving reasons in reliance on the trial period in the relevant employment agreement. In commenting on the effect of probationary periods of employment, the Court held that there were less stringent procedural requirements in dealing with an employee on a trial or probationary period than for an employee not on such a trial period but that an employer still had an

obligation to act fairly. In commenting on the process by which a probationary period of employment is assessed, the Court said at p.669:

> *Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end.*

[18] In the presence case, Mr Moore contends that the only matters that were brought to his attention were about timeliness and an issue about punctuality which he said he addressed to the employer's satisfaction. Seaview, on the other hand, say that a number of other matters were referred to in more or less constant discussions with Mr Moore over the short period of the employment and, on Seaview's evidence, Mr Moore can have been left in little doubt that his ability to be confirmed on the permanent staff was contingent on him satisfactorily meeting Seaview's needs.

[19] The elements of the passage I quoted from the *Nelson Air Ltd* case are of assistance to the Authority in analysing the factual matrix in the present matter. First, I find that Mr Moore can have been in no doubt whatever that his work was to be assessed by the employer during the period of probation and *that permanent employment will be assured only if the employer's standards are met.* Mr Moore sold himself to the employer as an experienced senior welder entitled to a high rate of pay, but the employer's experience was that Mr Moore had oversold himself. Seaview's evidence is that they were talking to Mr Moore about his inadequacies from a very early date and the diary entries made by Mr Gallagher support that. Mr Moore says that those diary entries are forgeries. That contention, frankly, is so fanciful as to be incredible. There is not a shred of evidence to support the contention that the diary entries are not precisely what Mr Gallagher said on oath they were, that is, contemporaneous written records of actual contact between him and Mr Moore.

[20] I am satisfied then that Mr Moore either knew or ought to have known that permanent employment would only be confirmed if he met the employer's needs.

[21] Next, the question is whether Seaview have adequately pointed out Mr Moore's shortcomings because, as *Nelson Air Ltd* makes clear, it is not enough for the employer to … *be simply a critical observer*. I am satisfied that Seaview did point out Mr Moore's shortcomings both in the formal confines of monthly review meetings, the results of which were confirmed by subsequent letter, and in regular oral discussion during the course of the ordinary working day. Mr Moore contends that the only matters that he has to answer to are the matters referred to in the correspondence which follow the formal review meetings. I do not accept that claim.

[22] I do accept that the letters are less than fulsome and I would commend to Seaview the notion that they are more explicit in the complaints that they identify in subsequent communications of this sort. It is clear from Seaview's evidence that the range and extent of the difficulties Seaview had with Mr Moore's performance were not adequately summarised in Mr Gallagher's letters and in the absence of the diary notes which Mr Gallagher made available to the Authority, I should have had much more difficulty in reaching the conclusion that Mr Moore had been told about his other inadequacies. However, I am satisfied that a combination of formal and informal advice from Seaview was sufficient to convey to Mr Moore what his shortcomings were and what might happen if he was not able to address them.

[23] In that latter regard, it is clear from perusal of the evidence that as the probationary period wears on, the consequences of Seaview's anxieties about Mr Moore's performance become increasingly evident. At the end of the second review period on 25 March 2009, the letter confirming the results of the review make it clear that *a satisfactory improvement of the above will have to be met at the time of next review in one month's time*. Shortly thereafter, at the additional meeting on 9 April Mr Moore's own evidence confirms that Mr Gallagher said to him *we are not convinced we want to keep you on yet, but will give you two weeks to prove yourself* …. It follows, in my judgment, that even if it could be said that Mr Moore did not know that he can only expect permanent engagement if he meets the employer's standards (and given Mr Moore's acknowledgment that he knew he was on probation and my acceptance of a preference for the evidence of Seaview that they engaged with Mr Moore extensively on an informal basis, as well as formally) there can be little doubt Mr Moore knew his obligations, but even if all that is resisted, Mr Moore's own evidence is that on 9 April he himself records he was told by Mr Gallagher that his employment was in jeopardy as a consequence of his poor performance.

[24] It seems to me evident that, at the every least, that meeting convened by Seaview on 9 April constituted the *fair warning* that the employment might be coming to an end.

[25] Finally, the employer is obligated to judge the performance of the employee *fairly and reasonably* before reaching the decision to terminate the engagement. In the process of the Authority reviewing the decision that Seaview made to bring the engagement to an end, it is obligated to consider the matter in the light of the test set out in s.103A of the Employment Relations Act 2000 and, in consequence, to consider whether a fair and reasonable employer would dismiss in the circumstances that existed at the relevant time.

[26] My conclusion is that a fair and reasonable employer in Seaview's position would indeed dismiss in those circumstances. It seems to me evident that Mr Moore oversold himself and claimed expertise which he simply did not have. Certainly Seaview did not contribute positively to that situation by failing to check any of Mr Moore's referees or previous employers, but the fact remains that Seaview are entitled to rely on the representations made to them by Mr Moore during the engagement process and in the circumstances of the present case, insofar as it is true that Mr Moore over promised, he effectively simply set himself up to fail because the expectations Seaview had were so much greater than Mr Moore's ability to deliver. I think that dynamic was exacerbated by Mr Moore's insistence on being paid at a higher rate than, initially anyway, Seaview was comfortable with.

[27] Even if the accepted factual matrix is concerned exclusively with the matters referred to in the confirming correspondence from Seaview and Mr Moore's own sworn evidence (that is the evidence of Mr Gallagher having spoken extensively to Mr Moore during the employment is completely excluded), it is still my considered view that Seaview would be able to satisfy the s.103A test. The issue of timeliness which is clearly referred to in the correspondence, goes to the root of the efficacy of the employment of a tradesman in a profit driven business. The inability of that business to make profit from Mr Moore's labours, is in my judgment a fundamental consideration which Seaview could properly take into account in reaching its conclusion that *the trial was not a success*. If over a three month period, a senior and highly paid tradesman is unable to satisfactorily demonstrate his ability to be

profitable then, in my considered opinion, it is available to his employer to reach a conclusion that his trial has not been successful.

[28] In the particular circumstances of this case, I have chosen to base my decision on the wider evidence available to the Authority as I prefer Mr Gallagher's recollection of events to Mr Moore's, but as I say, even if my decision were based on the much narrower evidence of Mr Moore alone, together with the documentary evidence from Seaview exclusive of the diary notes, I would still reach the conclusion that the decision to terminate the employment relationship was the decision that a fair and reasonable employer would make in those circumstances.

Determination

[29] For reasons I have just enunciated, Mr Moore's claim fails in its entirety.

Costs

[30] Costs are reserved.

James Crichton
Member of the Employment Relations Authority