

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 52
3018631

BETWEEN

TERENCE O'HAGAN
Applicant

AND

ENVIROFOAM NZ LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Chris Jury, Counsel for the Applicant
Anna Oberndorfer, Advocate for the Respondent

Investigation meeting: 28 February 2018

Submissions received: At the investigation meeting

Determination: 19 April 2018

DETERMINATION OF THE AUTHORITY

A. Envirofoam NZ Limited unjustifiably dismissed Terence O'Hagan.

B. Envirofoam NZ Limited must pay Terence O'Hagan:

(i) \$8,840.00 gross in lost wages, and

(ii) \$11,000.00 in compensation, and

(iii) Costs of \$2,250.00

Employment relationship problem

[1] Mr O'Hagan worked in Envirofoam NZ Limited's (Envirofoam) factory from 1 November 2016 until Envirofoam dismissed him on 19 December 2016. He claims that he was unjustifiably dismissed. He seeks lost wages for the three months

following his dismissal, \$15,000 in compensation for humiliation, loss of dignity and injury to his feelings, and legal costs.

[2] At the investigation meeting, I heard sworn evidence from Mr O'Hagan, Garry Sapsford, the manager of Envirofoam, and Vanessa Orr, Envirofoam's administration manager. Each had provided me with a written witness statement in advance.

Factual background

[3] On 1 November 2016, Mr O'Hagan began working at Envirofoam's factory. He had gone in the day before on the off chance there might be work available. He spoke to Mr Sapsford who told him that Envirofoam would take him on and give him a trial.

[4] Envirofoam says it gave Mr O'Hagan a written individual employment agreement on his first day of work. There is such an agreement signed by Mr Sapsford, but not dated, which Envirofoam provided for these proceedings. Mr O'Hagan says he did not get an employment agreement. Ms Orr is very sure she gave him one. However, he did not sign one.

[5] The agreement Envirofoam says it gave to Mr O'Hagan contains what Envirofoam says were Mr O'Hagan's terms and conditions of employment. There is not a 90-day trial period clause in the agreement. However, clause 2 is a "probationary period" clause:

2.1 The first three months of the Employee's employment with the Employer are probationary [the Probationary Period]. The Probationary Period allows the Employee to evaluate the position and enables the Employee's Manager to assess the Employee's suitability for and competency for the position. The Employee will be advised if the Employee has successfully completed the Probationary Period. The Employee's ongoing employment depends upon the successful completion of the Probationary Period.

2.2 Either party may terminate the employment at any time during the Probationary Period by giving one week's written notice or payment in lieu of notice.

[6] Mr Sapsford showed Mr O'Hagan what he was required to do and worked directly alongside him for a period of time. The factory was particularly busy at the time Mr O'Hagan worked there. He was left to get on with the job to a certain extent.

[7] Mr Sapsford spoke to Mr O'Hagan at times telling him he had made mistakes and sometimes required him to correct them.

[8] On 19 December 2016, towards the end of the working day, Mr Sapsford invited Mr O'Hagan into his office and told him he was dismissed. Mr Sapsford told Mr O'Hagan the dismissal was because of his unsuitability for the job and the job being unsuitable for him. He told Mr O'Hagan that he did not think Mr O'Hagan's work would improve. He told Mr O'Hagan he was dismissing him because of the trial they had agreed on.

[9] Mr Sapsford says that did not come as a great shock to Mr O'Hagan because Mr Sapsford had spoken to him a number of times on the factory floor about incorrect measurements and errors in client orders.

[10] In contrast, Mr O'Hagan says he was very shocked and upset and had no idea that Envirofoam thought he could not do the job adequately. Instead, he says that Mr Sapsford had instead told him while he was training him that it was "OK to make mistakes". He says that once or twice Mr Sapsford had pointed out mistakes to him and he had redone the jobs.

[11] Mr O'Hagan says that he understood he was working on trial but as he did not have a written employment agreement, he did not know he was working on a probationary period.

Issues

[12] I need to resolve the following issues:

- (i) Did Envirofoam undertake a fair process, and was it justified in dismissing Mr O'Hagan?
- (ii) What difference does it make if Mr O'Hagan was employed on a probationary arrangement?
- (iii) If Envirofoam unjustifiably dismissed Mr O'Hagan, what remedies is he entitled to?
- (iv) Costs

Did Envirofoam unjustifiably dismiss Mr O'Hagan?

[13] The justification for an employee's dismissal is determined under the statutory test in s 103A of the Employment Relations Act 2000 (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. Effectively, an employer must have a substantive reason for dismissal and have carried out a fair process.

[14] The Authority may not substitute its opinion for that of the employer. In applying the objective test, the Authority must consider s 103A(3) of the Act to assess whether the employer acted fairly. In particular, I need to consider whether before deciding to dismiss Mr O'Hagan, Envirofoam:

- sufficiently investigated the allegations against him,
- raised its concerns with him,
- gave him a reasonable opportunity to respond to its concerns, and
- genuinely considered any explanation regarding the allegations.

[15] The Authority can take into account any other relevant factors. However, the Authority should not determine a dismissal unjustified solely because of any defects in the process if the defects were minor and did not result in the employer treating the employee unfairly.

What difference does a probationary period make?

[16] Section 67 of the Act is entitled 'probationary arrangements':

(1) Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation ... after the commencement of the employment,—

(a) the fact of the probation ... period must be specified in writing in the employment agreement; and

(b) neither the fact that the probation ... period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation ... period.

(2) Failure to comply with subsection (1)(a) does not affect the validity of the employment agreement between the parties.

(3) However, if the employer does not comply with subsection (1)(a), the employer may not rely on any term agreed under subsection (1)

that the employee serve a period of probation ... if the employee elects, at any time, to treat that term as ineffective.

[17] Probationary arrangements have been possible in NZ law for many decades. They pre-date the inclusion of s 103A(3) of the Act. In this case, I do not consider that there was an effective probationary period under s 67 of the Act because Mr O'Hagan never signed the employment agreement meaning there was no concluded written employment agreement as s 67(1)(a) required. That means that the probationary period was not "specified in writing in the employment agreement" and under s 67(3) Mr O'Hagan is entitled to treat the term as ineffective. That is, in effect, what he has argued during these proceedings in claiming that he did not know he was employed under a probationary period.

[18] Mr Sapsford told Mr O'Hagan that he would be on a trial period, and Mr O'Hagan knew that. However, under the Act a probationary period and a trial period are not the same. For the avoidance of doubt, I confirm that no trial period, which is commonly referred to as a 90-day trial period, was included in the employment agreement Envirofoam intended Mr O'Hagan to sign.

[19] Even if the probationary period had been in force, Envirofoam still had to act fairly to Mr O'Hagan before deciding to dismiss him on the grounds of his lack of competence or poor performance. That is because the:

... employer ... may not simply be 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.¹

[20] Even without an effective probationary period, employers may dismiss employees for poor performance, but the law requires them to do so only after a fair process.

[21] Mr Sapsford says that he became increasingly concerned about Mr O'Hagan's performance and discussed his concerns a number of times with him. However, Mr Sapsford agreed that he never held a formal discussion, for example, in the office. He did not put any of its concerns about Mr O'Hagan's performance in writing. Mr

¹ *Nelson Air Limited v NZ Airline Pilots Association* [1994] 2 ERNZ 665, at 669, Court of Appeal.

Sapsford did not point out to Mr O'Hagan that if his work did not improve there was a chance Envirofoam would dismiss him. Envirofoam had not given Mr O'Hagan any kind of formal warning and did not put him on a performance improvement programme.

Did Envirofoam comply with the tests set out in s 103A(3) of the Act?

Did Envirofoam sufficiently investigate the allegations against Mr O'Hagan?

[22] The allegations against Mr O'Hagan related solely to his job performance. Mr Sapsford says his concerns were straightforward and Envirofoam did not need to investigate any further to tell which jobs Mr O'Hagan had undertaken that clients had complained about or asked to have redone. In general, that may have been the case.

[23] After Mr O'Hagan's dismissal and after he had lodged these proceedings, Mr Sapsford made a retrospective detailed list of five problems with Mr O'Hagan's work that he remembered, from 21 November 2016 until 16 December 2016. He also listed his responses to Mr O'Hagan in each case. In two cases he noted that Mr O'Hagan had "blamed on another staff member" or "denied cutting the Arm Facings although it was his responsibility to complete the job: no other staff member was involved."

[24] Mr Sapsford did not investigate in either case whether Mr O'Hagan was correct about other staff members' contribution to the two problems. Instead, he took Mr O'Hagan's responses as a further negative thing: that Mr O'Hagan did not accept responsibility and tried to blame someone else. Mr Sapsford told me that was a factor that contributed to his decision to dismiss Mr O'Hagan.

[25] Despite Envirofoam's small size and lack of any dedicated human resources staff, I consider the further investigation would not have been onerous or too time consuming for Mr Sapsford to undertake. He merely needed to talk to the other staff Mr O'Hagan had referred to.

Did Envirofoam raise its concerns with Mr O'Hagan and give him a reasonable opportunity to respond to them?

[26] Mr Sapsford says that, as recorded in his list, on the five occasions that Mr O'Hagan had an error in his work, he spoke to Mr O'Hagan including telling him that "these problems were costing the company money, time and goodwill and had to be

eliminated.” In one case, Mr Sapsford told Mr O’Hagan there was a “very real prospect of losing a customer we have only gained earlier in the year.” He says, therefore, that Mr O’Hagan must have known that his mistakes could lead to the loss of his job.

[27] I do not accept Ms Oberndorfer’s submission that Mr Sapsford having told Mr O’Hagan each of the five times that he made a mistake meets the clear requirement in s 103A(3)(b) that the employer’s concerns must be raised with the employee. Mr Sapsford raised them as concerns with Mr O’Hagan, but not as disciplinary concerns, which is what they had become by 19 December 2016.

[28] The kind of detailed list retrospectively prepared by Mr Sapsford is something a fair and reasonable employer could have made before beginning any process that may have led to an employee’s dismissal in order to inform the employee of its concerns.

[29] I do not consider that Mr Sapsford was clear enough in his communication with Mr O’Hagan to meet the required raising of Envirofoam’s concerns with Mr O’Hagan. Mr O’Hagan did not know what Mr Sapsford wanted to talk to him about when he was called into Mr Sapsford’s office. He had not been given a copy of the list of five errors Mr Sapsford was concerned about, because Mr Sapsford had not made the list by then.

[30] Mr O’Hagan had no time to prepare his responses to Mr Sapsford’s concerns and therefore, he did not have a reasonable opportunity to respond to the concerns.

[31] Mr O’Hagan had no opportunity to seek professional advice or get support or representation at the meeting.

Did Envirofoam genuinely consider Mr O’Hagan’s explanation before dismissing him?

[32] Mr Sapsford called Mr O’Hagan into his office on 19 December with the already formed intention of dismissing him. Envirofoam did not take Mr O’Hagan’s responses into account before reaching its decision to dismiss him.

Conclusion on unjustified dismissal

[33] I do not agree with Ms Oberndorfer's submission that the process could have been amended, and if the s 103A(3) steps had been complied with the process would have taken only another week, and would still have resulted in Mr O'Hagan's dismissal for not being able to reach the required standard of performance. It is not clear whether Mr O'Hagan would have been dismissed for poor performance if Envirofoam had put in place fair steps to bring its serious concerns to Mr O'Hagan's attention, given him reasonable assistance and time to reach an acceptable standard of work as well as reasonable support and training to achieve those goals. Mr O'Hagan was also entitled to be formally told that if he could not bring his performance up to an acceptable level he may be dismissed. That required more than commenting, in what appeared to Mr O'Hagan to be an informal way, that the business could not afford similar mistakes in the future.

[34] In deciding to terminate Mr O'Hagan's employment, Envirofoam did not comply with any of the basic procedural requirements under s 103A of the Act. Mr O'Hagan was not told of Mr Sapsford's concerns about his performance in any way that would lead him to believe he might be dismissed. He had no reasonable opportunity to respond to those concerns or to improve his performance.

[35] The defects in the process were not minor and resulted in Mr O'Hagan being treated unfairly. A fair and reasonable employer could not have acted in the way Envirofoam did. Therefore, the dismissal was unjustified and I need to consider what remedies Mr O'Hagan is entitled to.

Remedies

Lost wages

[36] Mr O'Hagan claims lost wages. He has found ongoing work only recently. By 1 May 2017, he had joined a personnel company that eventually placed him in his current ongoing job. His evidence was that he searched for work in many printing companies, as he is a qualified printer, and in other areas. I accept that the timing of his dismissal made finding work over the Christmas/New Year period difficult.

[37] Section 123(1)(b) of the Act allows me to order Envirofoam to reimburse the whole or any part of wages Mr O'Hagan lost as a result of his grievance.

[38] Envirofoam paid Mr O'Hagan one week's pay in lieu of notice. Mr O'Hagan's evidence is that he did not get any new work until late March or early April 2017, and then it was casual work as a binder assistant. He now has ongoing work as a bindery assistant. There is no certainty that Mr O'Hagan would have failed to get his work up to the required standard as Ms Oberndorfer submitted if Envirofoam had followed the correct process.

[39] Section 128(2) requires me to order Envirofoam to pay Mr O'Hagan either a sum equal to his lost remuneration, provided it was lost as a result of his grievance, or 3 months' ordinary time remuneration. I consider that Envirofoam should pay Mr O'Hagan lost wages for a period of three months, or 13 weeks after his dismissal.

[40] Mr O'Hagan usually worked a 40-hour week and was paid \$17 per hour. Envirofoam must pay him $40 \times \$17 = \680.00 gross $\times 13$ weeks = \$8,840 gross in lost wages.

Compensation

[41] Mr O'Hagan claims \$15,000 in compensation for humiliation, loss of dignity and injury to his feelings.

[42] Apart from feelings that inevitably accompany a loss of employment, such as financial worry and uncertainty, Mr O'Hagan says he was shocked when he was dismissed on the spot particularly since he did not receive any advance warning. He said with Christmas and his planned wedding coming up his dismissal "affected me and my wife pretty badly". I am satisfied that Envirofoam knew about his forthcoming wedding.

[43] Mr O'Hagan says he was hurt and dumbfounded and felt humiliated. He says he was absolutely gutted, especially as he knew he was a good worker and had put effort into the job.

[44] He spoke of his confusion for the reasons given for his dismissal since he was used to using accurate measurements being a qualified printer.

[45] In considering the extent of injury to Mr O'Hagan, I have compared his case to a number of other cases in the Authority and the Employment Court. I assess the injury suffered by Mr O'Hagan, as a result of Envirofoam's actions, as falling towards but not at the top end of first level loss or damage. I consider an award of \$11,000 is appropriate.

Contribution

[46] I understand that Envirofoam considers that Mr O'Hagan's dismissal came about due to his ongoing inability to get jobs correct. It says that he would not have been kept on past the three-month probationary period as it had formed such an adverse view of him and had discussed his failings with him on the factory floor.

[47] However, I do not consider that Mr O'Hagan contributed to his personal grievance in any blameworthy way, so as to lead to a reduction in remedies. Even if his probationary period had been an effective one, Envirofoam did not carry out the fair steps that would have been required to allow Mr O'Hagan to get up to speed with his employer's requirements.

Costs

[48] Given Mr O'Hagan's success, Envirofoam would normally be required to make a reasonable contribution towards his legal costs.

[49] Mr Jury made submissions on costs at the investigation meeting. He argued for an increase in the daily tariff because of Envirofoam's early allegation that Mr O'Hagan had not raised his grievance within 90 days of the dismissal. That was a position Ms Oberndorfer maintained until after the case management teleconference call I held with the parties. However, she then accepted that was not a sustainable position. Mr Jury says that contributed to unnecessary costs being incurred.

[50] Ms Oberndorfer says that Envirofoam's objection based on the 90-day issue was withdrawn within a reasonable time. Because the Authority did not request a memorandum or any submissions on that matter, she does not accept that costs have been increased on that basis.

[51] I agree with Ms Oberndorfer that the 90-day issue would not have increased Mr O'Hagan's costs.

[52] I note that the investigation meeting took almost a half day. I consider that Envirofoam should pay a contribution to Mr O'Hagan's costs of \$2,250.

Christine Hickey
Member of the Employment Relations Authority