IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 94
5524994

	BETWEEN	DAVID OBERDRIES Applicant
	AND	CB NORWOOD DISTRIBUTORS LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Vincent Carmine , Counsel for the Applicant Scott Doolan, Advocate for the Respondent
Investigation Meeting:	18 May 2015 in Blenheim
Submissions received:	At the investigation meeting Further evidence and submissions received: 22, 25 and 29 May and 4, 5 and 8 June 2015.
Determination:	9 July 2015

DETERMINATION OF THE AUTHORITY

A. David Oberdries was dismissed under a valid s. 67A Employment Relations Act 2000 90-day trial period provision and the Employment Relations Authority has no jurisdiction to hear and determine the proceedings brought in respect of that dismissal.

B. Mr Oberdries' claims are dismissed because the claims were brought in respect of his dismissal.

Employment relationship problem

[1] David Oberdries was employed as a sales representative with CB Norwood Distributors Limited (CB Norwood) selling farm machinery. He began work on 11

August 2014. There was a 90-day trial period provision in his individual employment agreement (IEA). Mr Oberdries was dismissed on 3 October 2014.

[2] Mr Oberdries is prevented from bringing a personal grievance claim or other legal proceedings in respect of his dismissal by virtue of s. 67A of the Employment Relations Act 2000 (the Act).

[3] Mr Oberdries claims that he was unjustifiably disadvantaged in his employment by CB Norwood breaching its statutory and contractual obligations to him. He says that he was dismissed because of his incapacity without a medical report that was required under his IEA.

[4] Mr Oberdries claimed that he was discriminated against by reason of disability, being a period of convalescence from surgery to his shoulder. However, the discrimination claim was dropped at the investigation meeting.

[5] Mr Oberdries also claims that CB Norwood breached its duty of good faith to him. In addition, he claims that CB Norwood was estopped from dismissing him on the basis that his period of convalescence was too long.

[6] By way of remedy Mr Oberdries claims reinstatement, lost salary and benefits, and compensation for humiliation, loss of dignity and injury to his feelings of $20,000. No penalty for a breach of good faith was sought.

[7] In additional submissions provided after the investigation meeting Mr Carmine raised a new claim, that Mr Oberdries was dismissed so a named new employee could be appointed. I do not propose to determine that claim because it was raised far too late to allow the respondent to be able to respond to it.

[8] CB Norwood denies Mr Oberdries' claims and says that he was dismissed because of lack of expected performance under the valid 90-day trial period provision in his IEA. It denies that his employment was terminated because of his surgery or because his period of convalescence was going to be longer than expected. CB Norwood says that Mr Oberdries claims are outside of the Authority's jurisdiction because they are related to his dismissal. In addition, CB Norwood says it did not breach its duty of good faith to Mr Oberdries.

Issues

[9] The issues to be determined are:

(i) Because of the valid 90-day trial period, which claims are within the Authority's jurisdiction? Specifically, was there any unjustified disadvantage that was not "in respect of the dismissal"?

(ii) Was there any claim of contractual breach that was not "in respect of the dismissal"?

(iii) Did CB Norwood breach its duty of good faith to Mr Oberdries?

(iv) Was CB Norwood estopped from dismissing Mr Oberdries?

(v) If any of Mr Oberdries' claims are substantiated what remedies could be awarded?

(vi) Costs.

Relevant background facts

[10] On 28 May 2014 CB Norwood advertised for a sales representative. Mr Oberdries did not apply for that role and on 1 July 2014 another person (Trent) was employed as a sales representative at an entry level.

[11] Jason Prendergast is the Regional Branch Manager of CB Norwood. After the employment of Trent, Mr Prendergast assessed how to best structure the sales team. He considered appointing either a new sales manager or an experienced sales representative with relevant industry experience.

[12] On 19 June 2014 the previous owner of the business, who was still working there, sold Mr Oberdries' father a new tractor. The previous owner of the business informed Mr Prendergast that he learned from Mr Oberdries' father that Mr Oberdries was working as a sales representative in a similar business and was unhappy with his job. Mr Oberdries' father suggested that Mr Prendergast make contact with Mr Oberdries.

[13] During the interview process Mr Oberdries told Mr Prendergast he would need an operation on his shoulder which was likely to be in the New Year and that he would be off work for around two weeks.

[14] Mr Prendergast contacted Mr Oberdries and on 11 July 2014 Mr Oberdries provided his CV. On 14 July 2014 Mr Oberdries was interviewed by Mr Prendergast

and the previous owner of the business. There was a second interview held with the then CEO of CB Norwood. Mr Prendergast believed that he had found an experienced, senior sales representative, *who could hit the ground running*, and Mr Oberdries was employed.

[15] Mr Oberdries IEA contains a trial period provision:

> *7.1 The employee and the employer agree that the employee's employment is subject to an initial trial period of 90 calendar days commencing on the day the employee first starts work for the employer.*
>
> *7.2 During the trial period:*
>
> *7.2.1 the parties will each deal with the other in good faith;*
>
> *7.2.2 any clauses in this agreement and any applicable employer policies relating to training, or to disciplinary or performance management processes, will not apply but the employer may in its sole discretion apply some other training or disciplinary or performance management process as they see fit.*
>
> *7.2.3 at any time and in its sole discretion the employer may dismiss the employee (or give notice of dismissal) and the employee is not entitled to bring a personal grievance or any other legal proceedings in respect of the dismissal;*
>
> *7.2.4 the notice period to terminate the employment shall be one week's written notice except in the case of serious misconduct where no notice is required.*

[16] Mr Oberdries signed the IEA on 29 July 2014 and began working with CB Norwood on 11 August 2014.

[17] At some stage in the first few weeks of his employment Mr Oberdries' shoulder operation was scheduled for 20 September 2014.

[18] On 16 September 2014 Mr Oberdries was contacted by ACC and told that his shoulder surgery would be on 18 September 2014.

[19] Mr Oberdries says at the pre-operation meeting his surgeon advised him that until he performed the operation, and could see the extent of the damage to the shoulder, he could not give an accurate assessment of the likely recovery time. However, it was possible that recovery might take six weeks or more. Mr Oberdries

says that until then both he and Mr Prendergast had been anticipating that he would return to work after two weeks.

[20] Mr Oberdries says that he informed Mr Prendergast before the operation that he would be away from work for at least six weeks. He says that Mr Prendergast looked *put out* by that and that Mr Prendergast said to him *I will need to think about your future with the company*.

[21] Mr Prendergast denies that and says that he said something like *we will need to think about what we are going to do*. Both agree that Mr Prendergast told Mr Oberdries that his health came first.

[22] Mr Prendergast thinks that the conversation about the period of recovery was not until after the surgery.

[23] On 25 September 2014, a week after the surgery, Mr Oberdries had a meeting with his ACC case manager, Rachel Potrykus. She advised Mr Oberdries that she had been trying to get hold of Mr Prendergast to arrange a meeting with him at the workplace to organise a workplace assessment so that a return to work plan for Mr Oberdries could be developed.

[24] On that same day Mr Prendergast and Mr Oberdries agreed to meet. They met at CB Norwood's office and discussed Mr Oberdries' surgeon's advice that he would be off work for at least six weeks of recovery time. Mr Prendergast says that topic was raised by Mr Oberdries.

[25] There is conflicting evidence about who called the meeting and what else was discussed. Mr Oberdries says nothing was discussed other than the period of time that he would be required to be off work and his desire that Mr Prendergast cooperate with Ms Potrykus to arrange a return to work plan. Mr Oberdries and Mr Prendergast agree that Mr Prendergast said something like *it would be good to see some of the quotes you've done turned into sales*. Mr Oberdries took that as a positive comment meaning that Mr Prendergast was looking forward to him getting back to work.

[26] Mr Prendergast's evidence is that he discussed a number of things with Mr Oberdries during that meeting, which he had requested Mr Oberdries to attend. His diary notes, which I accept as an accurate indication of areas he planned to cover, read:

Performance Meeting 1 pm – D O.

Points to cover

**Cover Sales/leads – 1 sale 3 k*

- *Remember Trial period*

**Experience! – expand to interview note*

**Leads*

**Feedback*

**Compare to Trent – Strength/weak etc.*

[27] Mr Prendergast's evidence is that he discussed:

- that Mr Oberdries was on a trial period;
- his lack of sales;
- during the first month he had only sold one secondhand tractor for $3,000;
- he had failed in two other deals because of his pitch and his lack of experience;
- his stated experience and knowledge prior to his employment was different to what he was demonstrating;
- the other sales representative had outperformed him;
- that Mr Prendergast was disappointed with Mr Oberdries' performance and that his disappointment had nothing to do with Mr Oberdries having had to have an operation or the period of recovery he expected to have off work.

[28] Mr Oberdries denies that any issues of performance or his trial period were discussed on 25 September 2014.[1] He says that the first indication he had that CB

[1] I have had conflicting evidence about who arranged the meeting, for what purpose and what time of day it was. I have carefully considered the evidence and the submissions from both parties. I do not consider it relevant who arranged it as on balance I have preferred Mr Prendergast's evidence of what was discussed at the meeting for its consistency and detail of recall. Also although I understand that Mr Carmine asks me to consider Mr Oberdries' evidence of the time of the meeting as more likely to be accurate, even if it is I am satisfied about what was discussed at the meeting.

Norwood was considering dismissing him was when Mr Prendergast telephoned him on 2 October 2014 to arrange a meeting.

[29] Mr Prendergast visited Mr Oberdries at home on 2 October 2014 and told him that CB Norwood was considering dismissing him for poor performance during his trial period. Mr Prendergast says that he discussed Mr Oberdries' lack of sales and that he was disappointed with his performance and lack of skill and experience demonstrated in the workplace compared to how he presented at the interview stage. I am satisfied that the discussion lasted about an hour. Mr Prendergast says after considering Mr Oberdries' responses he told him that he was dismissed.

[30] Mr Prendergast says that they did not discuss Mr Oberdries' health except at the end of the meeting when Mr Oberdries said he did not think he was being dismissed for poor performance but because he needed six weeks off work for recuperation.

[31] At the end of the meeting Mr Prendergast arranged he would collect Mr Oberdries' vehicle, laptop and mobile phone the following day.

[32] On 3 October Mr Prendergast came to collect the vehicle etc. and handed Mr Oberdries a letter confirming his dismissal stating that it was carried out in accordance with the 90-day trial period. The letter also confirmed that the restraint of trade clause would not be enforced, that Mr Oberdries could take away with him a database he had brought with him and that Mr Prendergast would provide a reference to any future employers.

The relevant law

Claims of unjustified disadvantage

[33] Under s.103(1)(b) of the Act an employee must prove:

> *That 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 by the employer.*

[34] The disadvantage must be to the employee's terms and conditions of employment, which include the physical environment, the amenities and facilities available, and payment to the employee and other matters.

[35] However, it is not sufficient that an employee is subjectively dissatisfied with their working circumstances, terms or conditions. There must have been an act or omission by the employer leading to disadvantageous consequences for the employee, when objectively considered.

[36] Section 67A of the Act provides that if an employee is dismissed under a valid 90-day trial period provision he cannot bring a personal grievance or other legal proceedings in respect of the dismissal. If the claimed disadvantages were intrinsically linked to the dismissal, or in respect of the dismissal, they cannot succeed.

Was there any unjustified disadvantage to Mr Oberdries from CB Norwood's alleged lack of co-operation with ACC?

[37] Mr Oberdries claimed that Mr Prendergast had been evasive when the ACC claims manager, Rachel Potrykus, contacted him to set up a meeting at the workplace to complete a workplace assessment. I understand Mr Oberdries asks me to conclude that amounted to an unjustified disadvantage to him.

[38] Mr Prendergast denies that he was evasive or that he put off Ms Potrykus. He says that Ms Potrykus' own case notes show that she telephoned him twice,[2] once on 24 September and once on 25 September, and that on 25 September 2014 he telephoned her back as soon as was practicable for him.

[39] Ms Potrykus' evidence at the investigation meeting established that it is not unusual for her to have to have a number of discussions with employers about arranging a workplace assessment.

[40] I am satisfied from Mr Prendergast's evidence that by the time Mr Oberdries' had his operation Mr Prendergast was already concerned about Mr Oberdries' lack of expected performance. He says that despite Mr Oberdries' training and other obligations which took him away from the worksite from time to time over the first six weeks he was not performing as an experienced sales person was expected to. He was also disappointed with Mr Oberdries' lack of sector and customer knowledge. Mr Prendergast said that he raised these issues in discussions with Mr Oberdries over

[2] Ms Potrykus rang Mr Prendergast again on 29 September and left a voicemail message.

the first four weeks of his employment, and that he spoke to him *about how he was tracking at least weekly*.

[41] When Mr Prendergast spoke to Ms Potrykus on 25 September 2014 he was already considering dismissing Mr Oberdries. Indeed that is the day he first formally mentioned to Mr Oberdries that he had serious concerns about his performance. When Mr Prendergast told Ms Potrykus he *planned to think about next steps regarding David's employment this week*[3] I am satisfied that he had Mr Oberdries' possible dismissal in mind.

[42] By the end of Mr Oberdries' employment on 2 October 2014 no actual disadvantage to Mr Oberdries' terms and conditions of employment had occurred from any CB Norwood lack of cooperation with Ms Potrykus because Mr Oberdries was far from being physically ready to return to work on reduced tasks. There was no disadvantage and so no unjustified disadvantage.

[43] If it is incorrect that there was no disadvantage, then it was overtaken by the dismissal under the valid 90-day trial period which it is clear Mr Prendergast was considering using to dismiss Mr Oberdries at least from 25 September and so is intrinsically related to the dismissal. The claim is dismissed for lack of jurisdiction.

Was there any unjustified disadvantage to Mr Oberdries or was there a breach of good faith from the process used to dismiss him, particularly from a lack of any earlier discussion of poor performance?

[44] Mr Carmine submits that despite the 90-day trial period being valid and preventing Mr Oberdries bringing any proceedings *in respect of the dismissal*, the lack of process related to CB Norwood's dissatisfaction with Mr Oberdries' performance was an unjustified disadvantage to Mr Oberdries.

[45] Mr Carmine correctly submits that in dismissing Mr Oberdries under the 90-day provision CB Norwood was not obliged to conduct a performance review as set out in the IEA because clause 7.2.2 makes it clear that employer policies for training and performance management processes do not apply. However, he submits that that Mr Oberdries was misled or deceived by CB Norwood in breach of its duty of good

[3] Ms Potrykus' contact notes from Mr Oberdries' ACC file.

faith to him as he was surprised by the suggestion of lack of performance, whether that came on 25 September or on 2 October, and shocked that it was raised so close to being told he was being dismissed for lack of performance.

[46] Mr Carmine asks me to consider an excerpt from *Martin v Healthy Living Trading Company Limited:*[4]

> *A further aspect of Hardy's unjustified action towards Ms Martin was evident from how it dealt with performance concerns that were the reason for its decision to dismiss her. What it did and how it did it, did not meet the requirements of the employment agreement or Hardy's obligations under s4 of the Act*[5].

[47] I also note the Employment Court case of *Smith v Stokes Valley Pharmacy*[6] in which the Chief Judge held that Ms Smith had been unjustifiably disadvantaged by the employer's failure to provide feedback on her performance which prevented her from performing to a standard which would have avoided her dismissal.

[48] However, in these cases there were not valid 90-day trial period provisions and so the employees were not prevented from bringing legal proceedings in respect of their dismissals. Personal grievances were found to exist and remedies were given. These cases do not assist Mr Oberdries' claims.

[49] Another case, *Castle v Luxottica Retail NZ Limited,*[7] is more similar to Mr Oberdries' case as there was a valid 90-day trial period provision. In relation to a claimed unjustified disadvantage of lack of support during Mr Castle's employment, Member Robinson wrote:

> *[44] Employers are still required to act in good faith during a trial period, and the good faith obligations require both employers and employees to be pro-active and constructive in all aspects of the employment relationship.*
> *[54] … I accept that Luxotica had raised concerns with Mr Castle … about his performance during the course of his employment and I find that Mr Castle's failure to successfully address these concerns lead to the termination of Mr Castle's employment.*

[50] Ultimately Member Robinson found that Mr Castle could not succeed because the unjustified disadvantage was intrinsically linked to the 90-day trial period termination of his employment.

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[4] [2014] NZERA Auckland 440.
[5] Ibid., paragraph 26.
[6] [2010] ERNZ 253.
[7] [2014] NZERA Auckland 17

[51] It is absolutely correct that both the common law obligations of good faith and the s. 4 of the Act good faith provision apply during the employment of all employees, including those with valid 90-day trial periods in their employment agreements. In addition, clause 7.2.1 of Mr Oberdries' IEA required both parties to deal with each other in good faith. I am satisfied that Mr Oberdries was dismissed for less than expected performance.

[52] Mr Oberdries' evidence is that 2 October 2014 was when he first heard of his performance being so lacking that CB Norwood was considering dismissing him within the 90-day period. That was the same day he was dismissed. However, the duty of good faith meant that although CB Norwood was not required to use it usual performance management processes (clause 7.2.2) it owed Mr Oberdries a duty to be active and constructive in establishing and maintaining an employment relationship in which it was responsive and communicative during his employment.

[53] In other words, CB Norwood probably should have been clearer, more detailed and probably more formal in its feedback to Mr Oberdries over his first 4-5 weeks and certainly earlier than when he had his operation. Its failure to give better and more specific feedback which it linked to the possibility of dismissal meant Mr Oberdries was deprived of an opportunity to increase his performance and avoid his dismissal. In addition, the timing of Mr Prendergast raising the performance considerations and disclosing he was considering dismissing Mr Oberdries led Mr Oberdries, not unreasonably, to connect his dismissal with his operation and the longer than signalled convalescence period he needed.

[54] However, what I have said is not a determination that CB Norwood breached its duty of good faith to Mr Oberdries because that claim is intrinsically bound up with the dismissal in respect of which Mr Oberdries cannot bring legal proceedings.

Was there any contractual breach not in respect of the dismissal?

[55] Mr Carmine submits that CB Norwood should have been required to apply the processes related to dismissal on the grounds of long-term medical incapacity in clause 32 of the IEA before deciding to dismiss Mr Oberdries. However, clause 7.2.3 accurately states the position that within the 90-day trial period *at any time and in its sole discretion the employer may dismiss the employee* …. CB Norwood did utilise

the valid 90-day trial period provision set out in clause 7 of the IEA and Mr Oberdries is prevented from bringing legal proceedings in respect of his dismissal. This claim is dismissed.

Was CB Norwood estopped from dismissing Mr Oberdries?

[56] Since Mr Oberdries could not bring proceedings in respect of his dismissal I cannot dealt with the argument that CB Norwood was estopped from dismissing him.

Remedies claimed

[57] No claims have been made out and so no remedies are due. However, Mr Oberdries did claim the following remedies and I comment on each of them for Mr Oberdries' and Mr Carmine's benefit.

[58] Reinstatement was claimed. That is a discretionary remedy only available for a personal grievance. Although ss. 123 and 125 of the Act do not specifically say so reinstatement is overwhelmingly a remedy for unjustified dismissal, a claim which Mr Oberdries was prevented from bringing.

[59] The remedy of lost wages etc. is one usually associated with an unjustified dismissal because the employee has to prove loss of remuneration as a result of the personal grievance or loss of a benefit which they might reasonably have been expected to obtain if the personal grievance had not arisen.[8] Again, Mr Oberdries would have to have been able to prove a personal grievance. He was prevented from bringing proceedings in respect of his dismissal yet the dismissal is the only way he lost wages and any benefits.

[60] Compensation for humiliation, loss of dignity and injury may be awarded only on proof of a successful personal grievance, and proof of such humiliation etc. being as a result of the personal grievance. All the evidence Mr Oberdries gave of his humiliation etc. relates to and stems from being dismissed. Because Mr Oberdries cannot bring a claim in respect of his dismissal, the Authority could not have made any award of compensation for the effect of the dismissal on him.

[8] Sections 123(1)(b) and 128 of the Act.

Costs

[61] Costs are reserved. The unsuccessful part can usually expect to pay a reasonable contribution towards the successful party's costs.

[62] The parties are invited to agree on the matter. In order to assist the parties I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is $3,500. The investigation meeting lasted less than a day.

[63] If no agreement is reached any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply. The parties should identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority