New Zealand Employment Relations Authority Decisions

Pogai v Mount Erin Limited (Wellington) [2017] NZERA 2008; [2017] NZERA Wellington 8 (27 February 2017)

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Last Updated: 6 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 8
5620337

BETWEEN HAMISH POGAI Applicant

AND MOUNT ERIN LIMITED Respondent

Member of Authority: M B Loftus

Representatives: Shayne Malone, Counsel for Applicant

Dave Robb, Advocate for Respondent Investigation Meeting: 15 November 2016 at Napier Submissions Received: At the investigation meeting Determination: 27 February 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Hamish Pogai, claims he was unjustifiably dismissed by the respondent, Mount Erin Limited (Mount Erin), on 19 February 2016.

[2] Mount Erin claims Mr Pogai is precluded from advancing his claim given a

90 day trial provision in his employment agreement and the resulting prohibition on the taking of a personal grievance for unjustified dismissal.1

Background

[3] Mount Erin operates a fruit packing facility near Hastings. It employed Mr Pogai as a quality controller after a thorough selection process during November and December 2015. The process culminated in a telephone call from Mount Erin's

site manager, Mark Parkinson, during which he advised Mr Pogai there would be an offer of employment. Mr Pogai claims he accepted immediately.

[4] The telephone call was followed by an email. It read:

As discussed today by phone, we are very pleased to be able to offer you a role as one of our Quality Controllers for the 2016 apple packing season. I have attached an employment agreement and position description for you.

Please contact me during the week commencing 11 January and we can complete your pre-employment paperwork so you can be ready to commence work from Monday 18 January 2016.

Have a safe and happy Christmas with family & friends.

[5] Mr Pogai responded the same day. His email reads:

Thank you Mark.

I have received your email and looking forward to making contact again week commencing 11 January.

Kindest regards Hamish

[6] The arrangement Mr Parkinson and Mr Pogai would talk prior to Mr Pogai commencing work is in accordance with Mount Erin's standard procedures and its goal of ensuring the requisite paperwork is completed prior to commencement. Unfortunately it did not occur in Mr Pogai's case.

[7] On 13 January Mr Pogai emailed Mr Parkinson advising he was making contact in order to complete the paperwork. Mr Parkinson replied advising:

I will be away tomorrow and Friday, but we can do this on Monday morning. Please arrive at 8am on Monday, we'll get you clocked in and then can sort the paperwork and do induction etc.

I'll look forward to seeing you then.

[8] Mr Pogai goes on to say:

I turned up after 8am on 18 January 2016 for my first day at work. I was shown around the pack house and different working areas of the pack house. I was also introduced to staff. I was then taken back to the office and given an employment agreement to sign. I was told that it was the same agreement they emailed me. I signed the agreement about an hour after I had turned up for work, which was

after I was shown around my work area including meetings with others. I must have been clocked in at 8.00am by Mark on the first day as I did not see my clock-in card until the second day of work.2

[9] The reference to the employment agreement being the same as that Mr Pogai had earlier received relates to the fact one was attached to the email of 23 December. About that Mr Pogai says he had a quick look, concluded it seemed to be a standard agreement and did not take any further interest. He did not print it and did not bring a copy when he arrived on 18 January.

[10] Mr Parkinson says Mr Pogai arrived at approximately 7.45am on 18 January. He goes on to say:

Prior to him commencing work at 8am, he had signed his employment agreement and this was left by the Office Manager's keyboard.

[11] Mr Parkinson says it was his practice to have a copy of the employment agreement with other documents requiring completion upon commencement such as IRD and KiwiSaver forms in case a new employee did not bring the one they had originally received. He also accepts he clocked Mr Pogai in but says he did not do so until after the agreement had been signed. Mr Pogai was clocked in at 7.57.

[12] The office/administration manager, Christine Blackberry, says that on the morning of 18 January she arrived at work close to 8am as she normally does, unpacked the laptop she takes home and let it start up. She goes on to say that when she arrived she saw Mr Pogai's employment pack, which contained his signed agreement, on the reception counter and she also saw Messrs Pogai and Parkinson in the cafeteria area.

[13] Mr Pogai accepts he had signed the employment agreement prior to Ms

Blackberry's arrival but says that did not occur until at least 8.30 and possibly later. [14] The first substantive clause of Mr Pogai's employment agreement reads:

Trial period:

The employee has not previously been employed by the company. A

trial period will apply for a period of 90 calendar days commencing from the employee's start date. At any time during the trial period the employee may be dismissed by the company giving 7 days verbal

notice at the company's sole discretion. If the company dismisses the employee during the trial period then the employee

may not pursue a personal grievance on the grounds of unjustified dismissal.

[15] As events transpired the employment did not work as the parties hoped. Mr Parkinson says supervisory staff brought concerns about Mr Pogai's performance to his attention and these were also raised with Mr Pogai by the supervisors themselves. Mr Pogai denies he was presented with any formal concerns but accepts there were some discussions.

[16] On 18 February 2016 a number of staff, including Mr Pogai, completed a grading assessment. This is a test of fruit grading skills which was an integral part of his job. Mr Pogai accepts his result was *not the best* but believes extenuating circumstances led to the outcome.

[17] Irrespective, this would appear to have been the final straw as the following afternoon Mr Parkinson approached Mr Pogai and advised he needed to speak about something. They went to the smoko room where another manager was waiting.

[18] About the ensuing discussion Mr Pogai says:

I was told that the position wasn't working out and that I wasn't needed any more. They seemed very upset and I think this was directed at me. I was asked to resign and that I would be paid a week's wages. I told them I wouldn't resign. I was then asked to leave the site immediately and not clock out. I was told that I would be paid a week but was not required to work and that my employment was being terminated.3

[19] Mr Parkinson says he explained that after five weeks the management team felt Mr Pogai was not performing to the standard required or expected of an experienced QC. He says he told Mr Pogai he:

... felt the job was not working out for him or us, and that we were giving him notice under the 90 day trial period clause in our agreement.4

[20] Mr Parkinson goes on to say he then suggested that instead of working his notice period Mr Pogai finish that day and use the following week to look for other

employment. Mr Parkinson says Mr Pogai agreed.

3 Brief of evidence at [15]

4 Brief of evidence at [1.15.3]

[21] Mr Parkinson denies Mount Erin ever raised or suggested the possibility of resignation. Similarly Mr Pogai is adamant the 90 day trial was not mentioned during the discussion.

Determination

[22] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided that exceptional circumstances existed to allow a written determination of findings at a later date.

[23] As already said, Mr Pogai claims he was unjustifiably dismissed. Mount Erin's response is he is precluded from pursuing the claim by virtue of the 90 day trial provision included in his employment agreement.5

[24] Section 67A(2) of the Employment Relations Act 2000 (the Act) requires such a provision should make it clear, that:

a. the employee is subject to a trial period of a specified period not exceeding 90 days starting at the commencement of the employee's employment; and

b. during that period the employer may dismiss the employee; and

c. if the employer does dismiss, the employee may not bring a personal grievance or other legal proceedings in respect of the dismissal.

[25] The clause in question complies with the above requirements and this is conceded on Mr Pogai's behalf but that is not the basis of his challenge. He claims the clause is, for a number of reasons, invalid. He says:

(a) He had already commenced employment when he signed the agreement on the morning of 18 January 2016;

(b) If that is not the case, it can be argued he was an employed on 23

December 2015 given he verbally accepted the offer that day;

(c) The agreement was not bargained for fairly as Mr Pogai was not given an opportunity to seek advice on its content; and

(d) He signed the employment agreement without knowledge of the 90 day trial as it had not been brought to his attention.

[26] The parties agree the prime question is whether or not Mr Pogai commenced before signing his employment agreement. This is because:

... the statutory intention [was] *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.6*

[27] Mount Erin disagrees with Mr Pogai's claim he had already started when he signed the employment agreement on 18 January which would, if correct, invalidate the trial period clause.

[28] On when he signed the agreement Mr Pogai has given various conflicting answers and exhibited uncertainty as to when it occurred. In his brief he said it was an hour after commencement ([8] above) yet when questioned during the investigation he initially said it was *around 8 o'clock and Mark [Parkinson] signed strait after*. When this was pursued he resiled and said he signed around 8.30.

[29] The same inconsistency was not present in Mount Erin's answers. Mr Parkinson consistently said the agreement was signed prior to Mr Pogai's scheduled commencement time of 8am and he did not clock Mr Pogai in until after that occurred. Mr Pogai was clocked in at 7.57am.

[30] Similarly Ms Blackberry's evidence is the signed agreement was on the reception desk when she arrived and Mr Pogai accepts this to be the case. Unfortunately for Mr Pogai his view Ms Blackberry did not arrive until around 8.30 is not supported by the evidence. She is recorded as having clocked in at 8.02am and her evidence this was not the first thing she did upon arrival was not challenged. In other words the evince leads me to conclude the employment agreement was signed before Mr Pogai's scheduled commencement time of 8.00am.

[31] In the alternate, and as a fall-back, Mr Pogai contends he was actually an employee as of 23 December 2015 as, according to him, he accepted the offer verbally that day.

[32] I have some difficulty with this approach. First it seems contradictory to assert provisions in the employment agreement are invalidated by the fact they were not drawn to Mr Pogai's attention and then argue he could accept the offer when it and its detail had not yet been presented to him. There is then the fact Mr Pogai's answers were again uncertain when questioned about this but in any event the evidence supports a conclusion Mr Pogai was told an offer was going to be made – not that it had been made. It is, I conclude, difficult to accept an offer that is yet to be made.

[33] Finally, and more importantly, while the act of offer and acceptance may mean someone is considered *a person intending to work* and as a result they obtain various benefits under the Act, that does not mean they are yet an employee. An employee is a *... person of any age employed by an employer to do any work for hire or reward under a contract of service.* A person is not an employee doing work or receiving reward until they commence. In this case that did not occur until 18 January 2016.

[34] Mr Pogai also argues the agreement should not be enforced as it was not bargained for fairly as he was not given an opportunity to seek advice on its content. In making this claim he relies on the Court's view it is mandatory such an opportunity be given.7

[35] In my view the evidence does not support the assertion Mount Erin failed to allow Mr Pogai to seek advice. Mr Pogai received a copy of the agreement on 23

December 2015. Even though this was just prior to Christmas he had over three weeks to peruse it and seek advice. As he admits he chose not to take any interest in the document. He did nothing more than give it a superficial glance and made no attempt to seek advice about its content. His decision to do that cannot be visited on Mount Erin.

[36] This argument has a second limb and that is when faced with a second copy of the agreement on the morning of 18 January he was not given a further chance to review the document and seek advice. Again I reject the argument. First there is no

evidence Mr Pogai made such a request and second it fails to recognise he already had ample opportunity to review the agreement and seek advice.

[37] Finally there is the argument the 90 day trial period was not brought to Mr Pogai's attention. That is clearly not the case given the clause was contained in the agreement forwarded to Mr Pogai on 23 December. It was there for him to read had he chosen to do so. It was his decision not to avail himself of that opportunity.

Conclusion and costs

[38] The above leads me to the following conclusions. The 90 day trial period

clause in Mr Pogai's employment agreement complies with the requirements of s

67A(2) of the Act. The agreement was signed prior to Mr Pogai's commencement of employment on 18 Janaury 2016 and is not invalidated for any of the other reasons argued.

[39] That means Mr Pogai is, as Mount Erin contends, precluded from bring a personal grievance for unjustified dismissal and accordingly his claim is dismissed.

[40] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority
