

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 81
5527189

BETWEEN TATARI RAMEKA
 Applicant

AND GNOMEFARMER PAINTERS
 LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Bede Laracy, Advocate for Applicant
 Philip Wilson, on behalf of Respondent

Investigation Meeting: 30 April 2015 at Wellington

Submissions Received: Oral submissions on the day of the investigation

Determination: 24 August 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Tatari Rameka says he was unjustifiably dismissed from his position with Gnomefarmer Painters Limited (Gnomefarmer). He seeks lost wages, \$15,000 in compensation and costs including the filing fee. He further requests that penalties be ordered and paid directly to him for Gnomefarmer's breach of good faith and its failure to supply wage and time records.

[2] Gnomefarmer is a small Wellington based business that specialises in residential painting services. Mr Philip Wilson is the company's sole director. He says Mr Rameka did not have the requisite skills needed to perform the work required by Gnomefarmer and was dismissed during his 90 day trial period. He raised concerns that prior to his employment Gnomefarmer had been misled over Mr Rameka's work experience, and further says Mr Rameka was told his employment might only last 8 weeks.

Summary of relevant information

[3] Following a sudden resignation in late July 2014 Gnomefarmer was in urgent need of an experienced painter to assist with scheduled work commitments. Mr Syd Keremete, an employee of Gnomefarmer, advised Mr Wilson that his brother in-law, Mr Rameka, was available to work.

[4] Mr Rameka commenced work on the morning of 18 August 2014. Terms of employment were not recorded in an employment agreement.

[5] Mr Rameka's employment lasted six weeks and two days. Mr Wilson says it soon became apparent that Mr Rameka had not worked as a commercial painter and his workmanship was that of an entry level trainee. He also says that following Mr Rameka's appointment there was a discernible change to Mr Keremete's attitude. He says a "*them and us*" atmosphere developed, with Mr Keremete and Mr Rameka on one side and the foreman, Mr Burke, and himself on the other. He points to two incidents in particular as causing concern.

[6] Firstly, in mid-September Mr Keremete refused to dismantle and transfer scaffolding until both he and Mr Rameka were paid an additional sum of money for the task. Mr Keremete does not dispute the event but states construction and dismantling of scaffolding is an activity that is paid at a higher rate. He considered Gnomefarmer had "*taken advantage*" by leaving him and his brother-in-law to do this type of work without extra payment.

[7] Matters came to a head on 30 September 2014. Mr Rameka and Mr Keremete were unwilling to follow the instructions of Mr Burke and undertake scraping until dust masks were provided, although these were eventually sourced. When Mr Wilson arrived on site later in the day Mr Keremete approached him for a pay rise. He denies his request included an increased pay rate for Mr Rameka or that he was acting as Mr Rameka's proxy, but accepted in evidence that Mr Wilson may have perceived that was the case.

[8] Mr Wilson called Mr Keremete that evening. He told Mr Keremete that he was concerned about the effect Mr Keremete and Mr Rameka were having on the business and noted that Mr Keremete had exhibited a level of discontent from the time Mr Rameka commenced employment. He told Mr Keremete to "*stand down*" for three days to consider

whether he wished to remain employed by Gnomefarmer, and that he was no longer willing to employ Mr Rameka.

[9] Mr Keremete immediately conveyed that message to Mr Ramaka who called Mr Wilson an hour later wanting to know why he had been dismissed. Mr Ramaka says no detail was given other than Mr Wilson's agreement to provide a letter that he could take to WINZ and that he was "*sorry*".

[10] Mr Rameka and Mr Keremete confronted Mr Wilson at a worksite the following day. The discussion quickly became heated and neither party's issues were resolved.

The issues

[11] The law requires an employer to justify both its decision to dismiss an employee, as well as the process taken to dismiss an employee. The Authority is required to assess whether Gnomefarmer's actions - why it dismissed Mr Rameka and how it dismissed him – were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.¹ The following issues need to be examined:

- (a) is Gnomefarmer able to justify its decision to dismiss Mr Rameka on the basis that he was employed on a 90 day trial period;
- (b) was Gnomefarmer able to cancel the employment relationship with Mr Rameka on the basis of representations about Mr Ramaka's painting experience;
- (c) was Gnomefarmer able to dismiss Mr Rameka on the basis of poor performance;
- (d) is Gnomefarmer able to justify its decision to dismiss on grounds that he was a fixed term employee;
- (e) if Mr Rameka was dismissed unjustifiably, what remedies should be awarded.

¹ Section 103A(2)

Was Mr Rameka employed under a 90 day trial period?

[12] When Gnomefarmer initially responded to Mr Rameka's notice of a personal grievance it stated Mr Rameka had been dismissed pursuant to a 90 day trial period. At the Authority's investigation meeting Mr Wilson said he had believed 90 day trial periods applied automatically to all new employees.

[13] The Employment Relations Act sets out what is required before a 90 day trial period provision may lawfully exempt an employer from a future claim of an unjustified dismissal. Importantly, a 90 day trial period must comply with s67A(2) and (3) of the Act, including that it must be set out in writing in an intended employment agreement. That document must be signed by a prospective employee before he or she begins work. It follows that Mr Rameka cannot be subject to a valid 90 day trial period as no written employment agreement existed between the parties. Gnomefarmer is not able to justify its decision to dismiss based on a 90 day trial provision.

Was Gnomefarmer able to dismiss Mr Rameka based on pre-employment misrepresentations about his painting experience?

[14] There is a suggestion contained in Mr Wilson's evidence that Gnomefarmer was justified in dismissing Mr Rameka because he did not have the experience that was represented to it before his employment began.

[15] Section 7(3) Contractual Remedies Act 1979 provides (amongst other things) that a party to a contract may cancel it if has been induced to enter into it by a misrepresentation and there was an express or implied agreement that the truth of the representation was essential to it. Importantly the misrepresentation must be made by or on behalf of another party to the contract. Mr Wilson accepted there was no direct communication with Mr Rameka before he commenced work and therefore no representation of any kind was made by Mr Rameka to Gnomefarmer.

[16] Mr Wilson referred to text messages between himself and Mr Keremete where he asked "*how much experience does [Mr Rameka] have painting I need to sort out a pay rate*". Mr Keremete responded: "*Yeah bro the same as me*". Mr Keremete said he had worked as a painter for 10 years. He says his text message was solely in relation to the rate of pay Mr Rameka should be placed on and not to the issue of Mr Rameka's experience. I found his response disingenuous. However I am not at all persuaded that the content of the exchanged

messages evidences a representation and associated agreement that the truth of the representation was essential to Gnomefarmer or that it was made on Mr Rameka's instruction and behalf.

[17] In any event, had Gnomefarmer been able to establish a misrepresentation as to Mr Rameka's work experience was made² and that it had had relied on the truth of that assertion as an essential factor leading it to offer him employment, the obligation of good faith would have required it to put that concern to Mr Rameka and allow him an opportunity to respond before it could have reasonably ended the employment relationship.

[18] Gnomefarmer was not able to cancel Mr Rameka's employment agreement on grounds of pre-employment misrepresentation.

Was Gnomefarmer able to dismiss Mr Rameka for poor performance?

[19] An employer may dismiss an employee for poor performance but it cannot do so without first informing the employee of the concerns and the standard required. In addition, a reasonable opportunity must be allowed for the employee to meet the required standard. Mr Wilson accepted in evidence that he did not engage in any of the above processes. In these circumstances I am unable to conclude Gnomefarmer was able to justifiably dismiss Mr Rameka for poor performance.

Was Mr Rameka employed on a fixed term basis?

[20] Mr Wilson refers to his discussion with Mr Rameka on 18 August 2014 and says it was made clear to Mr Rameka that his employment could only be assured for two months.

[21] There is an inference that Gnome Painter would have been justified in dismissing Mr Rameka 2 to 3 weeks following the date on which he was actually dismissed. Mr Rameka conceded that Mr Wilson had told him there was no guarantee of work beyond two months but says there was no firm agreement that his employment would end at that time.

[22] If an employer wishes to employ an individual for a defined period of time only, it must have genuine reasons based on reasonable grounds for wanting the employment to end

² Within the parameters of the Contractual Remedies Act

in that way. Those reasons and the way in which the employment will end must be expressly recorded in the relevant employment agreement³.

[23] Even if there was a verbal agreement that Mr Rameka's employment would end in two months, Gnomefarmer is not able to rely on that arrangement to terminate Mr Rameka's employment at the time that it did, or 2 to 3 weeks later. As noted Mr Rameka was not given an employment agreement. Any agreement to have Mr Rameka's employment end after two months did not comply with the requirements contained at s 66⁴ with respect to fixed term employment.

[24] Gnomefarmer is not able to justify its decision to dismiss on grounds that Mr Rameka was a temporary employee.

Was Gnomefarmer's decision to dismiss Mr Rameka and the process it used, the actions of a fair and reasonable employer in all the circumstances

[25] Mr Wilson did not obtain HR or legal advice in respect to Mr Rameka's dismissal and it was apparent that Gnomefarmer has limited resources. However, even as a small and inexperienced employer Gnomefarmer's process fell below the basic minimum requirements of a fair and reasonable employer.

[26] Mr Rameka was entirely unaware that there were any concerns about his performance or his attitude at any time before he was told of his dismissal. The failure of Gnomefarmer to advise Mr Rameka of its concerns and allow him an opportunity to respond before deciding to dismiss renders the dismissal both substantively and procedurally unjustified. The procedural defects in the process used to dismiss Mr Rameka were not minor and resulted in Mr Ramaka being treated unfairly.

[27] I find Mr Rameka was unjustifiably dismissed.

Remedies

Lost wages

[28] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the

³ Section 66(4)

⁴ Employment Relations Act 2000

employee “*as a result of the grievance*”. Section 128(2) of the Act stipulates that the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months’ ordinary time remuneration.

[29] Mr Rameka requests compensation for lost income although the amount sought was not quantified. An evaluation of lost remuneration requires an assessment of efforts made to mitigate loss alongside what, if any, earnings have been made during the period of the claim. Consideration may be given to the contingencies of life.⁵

[30] Where an employee claims he or she has been unjustifiably dismissed the employee should make attempts to reduce any losses as a result of the dismissal⁶. In practical terms this means an employee should attempt to find alternative employment and not presume their losses will be entirely reimbursed. Mr Rameka provided evidence of a job application made 6-7 weeks after his dismissal but no other independent evidence was furnished to establish he sought work despite my request that this information be made available. I note he did not register with WINZ until February 2015 even though he knew it might assist him find alternative work.

[31] Mr Rameka reluctantly conceded that his experience was limited to assisting the painting of his marae. He had never been in paid employment as a painter. Even if Gnomefarmer had undertaken a fair process including providing a reasonable opportunity for Mr Rameka to improve I consider it most unlikely he would have achieved the standard of an experienced painter that Gnomefarmer required.

[32] In these circumstances I consider his employment is unlikely to have endured beyond a further 4 weeks.

[33] Taking the above factors into account I find Mr Rameka’s lost remuneration should be limited to the sum equal to four weeks’ wages, subject to any contribution.

⁵ *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315

⁶ *Allen v Transpacific Industries Group Limited (t/a Medismart Limited)* (2009) 6 NZELR 530

Compensation for humiliation, loss of dignity, and injury to the feelings

[34] Mr Rameka said he was depressed (although I have no evidence of a formal diagnosis) after his dismissal and began to sleep during the day. I accept he was shocked at the suddenness of dismissal in circumstances where there had been no forewarning of it. His evidence leads me to consider a modest award of \$2,500, subject to my assessment as to contributory behaviour, is appropriate.

Contribution

[35] I accept that Gnomefarmer had concerns about Mr Rameka's ability to perform the role. However I do not find that Mr Rameka contributed to the situation giving rise to his grievance when he was unaware of her employer's concerns and unable to make attempts to remedy those. I cannot conclude that Mr Rameka contributed to the personal grievance in a blameworthy way such that her remedies should be reduced.

Penalties

[36] Mr Rameka's statement of problem asserted Gnomefarmer was in breach of good faith, and that it failed to provide wage and time records.

[37] Gnomefarmer's failure to properly communicate its concerns with Mr Rameka before he was dismissed forms a major component of his claim that he was unjustifiably dismissed. He has now been compensated for that action and I am unwilling to order a penalty as an alternative means of compensation.⁷

[38] Mr Wilson considered the requirement to maintain wage and time records was filled by the provision of payslips. While this action does not fulfil the requirements under s 130(1). I consider the omission to be inadvertent and the mistake should not be met with punitive action. The claim for penalties is dismissed.

Costs

[39] Costs are reserved.

⁷ *Tan v Yang* [2014] NZEmpC 65 at [31]

Summary of Orders

[40] Gnomefarmer Painting Limited is to pay Mr Rameka:

- i. \$2,500.00 as compensation for humiliation, loss of dignity and injury⁸; and
- ii. reimbursement of lost wages of \$2,844⁹ (gross)¹⁰.

Michele Ryan
Member of the Employment Relations Authority

⁸ pursuant to s 123(1)(c)(i)

⁹ Four weeks wages at 39.5 hours a week (the average hours Mr Rameka worked each week) at \$18.00 per hour

¹⁰ pursuant to s 128(2)