



[2] Mr Willis says Mr Rogers was dismissed under the trial period provision. Mr Rogers was required to work out his notice and was given notice to vacate his farm accommodation by 06 January 2013. Mr Rogers claims his dismissal was unjustified. Mr Rogers sought interim reinstatement pending the outcome of his substantive dismissal grievance. The Authority (Member Dumbleton) declined Mr Rogers' application for interim reinstatement in a determination dated 04 January 2013.<sup>1</sup>

[3] Under s.67A of the Employment Relations Act 2000 (the Act) parties may include in an employment agreement for a new employee a trial period provision which allows the employer to dismiss the employee within 90 days of the beginning of their employment without the employee having recourse to "a personal grievance or other legal proceedings" in respect of the dismissal.

[4] If the trial period provision in Mr Rogers' employment agreement meets the requirements of s.67A the Authority does not have jurisdiction to hear his dismissal grievance. Mr Rogers could not legally agree to the trial period provision if he had already been employed by Mr Willis before the parties signed the employment agreement because a trial period provision may only apply to a new employee.

[5] Mr Rogers claims the trial period provision is invalid because he had verbally accepted a verbal offer of employment before he signed the employment agreement, so was not a new employee as required by s.67A of the Act. Mr Roger's evidence was that offer and acceptance of employment occurred during a telephone call with Mr Willis on 05 October.

[6] Mr Willis denies calling Mr Rogers to offer him employment. Mr Willis says Mr Rogers was offered employment at a meeting on 17 October which was also attended by Mr Willis' longstanding farm advisor and consultant Mr John Hall. Mr Willis and Mr Hall say that Mr Rogers did not accept the offer of employment at the 17 October meeting because Mr Rogers was given a copy of the proposed employment agreement to take home so he could get advice on it and

---

<sup>1</sup> [2013] NZERA Auckland 6.

discuss two particular clauses<sup>2</sup> with his wife. Mr Willis also wanted to meet and approve the youth farm worker Mr Rogers intended to bring with him.

[7] Another meeting involving Mr Willis, Mr Hall and Mr Rogers was held on 01 November. Mr Willis and Mr Hall say that during this meeting they went through the terms of the employment agreement again and once all of these had been agreed Mr Willis and Mr Rogers then both signed the agreement.

## **Issues**

[8] Mr Rogers advised the Authority he did not intend to pursue the unjustified disadvantage personal grievance he raised in his initial grievance letter to Mr Willis.

[9] The Authority's investigation relates solely to whether it has jurisdiction to hear and determine Mr Rogers' dismissal grievance. This involves determining whether the trial period provision meets the requirements of s.67A of the Act.

[10] The particular issue in this case is whether Mr Rogers was already employed by Mr Willis when the parties signed the agreement on 01 November. There is a conflict between the parties as to when the offer of employment was made and accepted so that must also be determined.

### **Does the trial period comply with the requirements of s.67A of the Act?**

[11] On the face of it the trial period appears to comply with the requirements of s.67A of the Act. The 90 day trial period provision is contained in a written employment agreement which was signed by both parties on 01 November 2012.

[12] Clause 4 of Mr Rogers' employment agreement which contains the trial period complies with s67A because it imposes a 90 day trial period, it records he could be dismissed within 90 days on 5 days' notice, and that if dismissal occurs within 90 days then he is prevented from bringing a personal grievance or other legal proceedings in respect of his dismissal.

---

<sup>2</sup> These related to no smoking inside the farm accommodation and no dogs inside.

[13] Clause 3.2 of the employment agreement records Mr Roger's first day of work as 19 November 2012.

*Was Mr Rogers already employed when he signed his employment agreement?*

[14] Under s.67(3) of the Act a trial period can only apply to a new employee. Section 6(1)(b)(ii) of the Act defines "employee" to include a "person intending to work" i.e. someone who has accepted an offer of employment but who has not actually started work for the employer.

[15] Mr Rogers relies on the Employment Court's decision in *Blackmore v Honick Properties Limited*<sup>3</sup> that in order to meet the requirements of s.67A of the Act the trial period has to be presented in a written employment agreement to a prospective employee at the time the offer of employment is made and not after the prospective employee has already accepted the offer of employment.

Did Mr Rogers accept an offer of employment on 05 October?

[16] Mr Rogers says he was driving a truck for his former employer when he received a call on his mobile phone from Mr Willis. Mr Rogers was not sure of the date but thought it must have been 05 October 2012. Mr Rogers claims Mr Willis said "I would like to offer you the job to start on 01 November." Mr Rogers says his response to Mr Willis "great I'll get back to you about a start date." Mr Rogers says nothing else was discussed because he was driving so was aware he should not have been talking on the phone. Mr Willis says this call never happened.

[17] I have resolved this conflict on the balance of probabilities in favour of Mr Willis' evidence. Mr Rogers guessed the date of the call and only provided a date when questioned by the Authority. The evidence I heard from Mr Rogers' wife and Mr Willis satisfied me on the balance of probabilities that Mr and Mrs Rogers met Mr Willis at the farm late afternoon or early evening on 05 October 2012. The purpose of the meeting was for Mr Willis to meet Mr Roger's proposed young farm worker, but the youth worker did not show up.

---

<sup>3</sup> [2011] NZEmpC 152.

[18] I consider it unlikely Mr Willis would have offered Mr Rogers the job by telephone earlier that day when he was going to see him later that day. I also consider the parties would have discussed the offer when they met on 05 October, had such an offer been made.

[19] Neither the Rogers nor Mr Willis gave any evidence about terms and conditions or anything else about the alleged offer being discussed when they met on the afternoon of 05 October. It would be unusual for there to not be any discussions about the offer, had such an offer been made. The evidence from the Rogers and Mr Willis was that the meeting merely involved the Rogers viewing the farm and farm accommodation.

[20] Mr Rogers was not Mr Willis' first choice of employee. The evidence satisfied me Mr Willis offered the job to another couple on 08 October 2012. It does not make sense for Mr Willis to have done that if Mr Rogers' evidence was correct. I find on the balance of probabilities that Mr Willis did not offer Mr Rogers the job during a telephone call on 05 October so it follows Mr Rogers could not have accepted employment on that date.

Did Mr Rogers accept an offer of employment on 09 October?

[21] Although Mr Rogers did not give evidence that Mr Hall offered him employment with Mr Willis on 09 October or that he accepted Mr Hall's offer that same day, Mr Bennett in his submissions said that is what had occurred. Mr Bennett submitted Mr Hall had implied delegated authority from Mr Willis to offer the job to Mr Rogers on 09 October.

[22] I do not accept that submission for the following reasons:

- a. It was unsupported by Mr Rogers' evidence
- b. I accept Mr Hall's evidence he had no authority from Mr Willis to offer the job to anyone. Mr Hall's role was to assist with interviewing potential candidates
- c. Mr Willis had offered the job to another couple the day before

- d. The first choice candidates did not decline the offer until 13 October
- e. The purpose of Mr Hall's meeting with Mr Rogers on 09 October was for a second interview to discuss the farm and what was expected of the successful candidate and to go through the standard Federated Farmers terms and conditions to identify clauses that would require further consideration by the parties should Mr Rogers be successful
- f. Mr Hall did not hold himself out as authorised to offer Mr Willis employment
- g. I accept Mr Hall's evidence that he did not offer Mr Rogers employment by Mr Willis
- h. I find the 09 October meeting involved mere discussion of standard Federated Farmers terms, it did not go beyond that so I find there was no mutual intention of the parties to enter into legally binding contractual relations as at this date.

When did Mr Rogers accept the offer of employment on 17 October?

[23] Mr Bennett also submitted that Mr Rogers was offered and accepted employment when he met with Mr Willis and Mr Hall on 17 October.

[24] Mr Willis and Mr Hall agree Mr Rogers was offered employment at this meeting but they say he was given a copy of the proposed terms of the offer (as recorded in the employment agreement) to take away so he could get advice on it and discuss it with his wife should he wish to do so. Mr Hall and Mr Rogers say the offer of employment was not accepted by Mr Rogers until they met with him again on 01 November and had a final run through of the agreed terms and conditions of employment.

[25] I consider on the balance of probabilities that Mr Rogers did not accept the offer of employment until 01 November 2012.

[26] First, Mr Rogers did not give evidence he accepted employment on 17 October. Second, if Mr Rogers had accepted the offer on 17 October then he could have signed the agreement that day. The fact he did not do so suggests he had not at that point accepted the offer but was still considering it. Third, I

consider the delay between Mr Rogers receiving the offer of employment contained in the employment agreement and signing the agreement on 01 November was reasonably explained by Mr Hall and Mr Willis who said Mr Rogers was given the agreement so he could take advice on it before accepting their offer.

[27] As an aside, I consider the quality of Mr Rogers evidence on offer and acceptance was undermined by his failure to address these issues in his initial grievance letter, in his Statement of Problem or in the two sworn affidavits he filed in support of his interim reinstatement application. He also failed to fully or properly address these issues in the statement he filed in support of the jurisdictional issue.

[28] I therefore find that the evidence establishes on the balance of probabilities that Mr Rogers was not already employed by Mr Willis when the parties signed the employment agreement on 01 November. Mr Rogers fails to discharge the onus of establishing he was already an employee<sup>4</sup> when he signed the agreement on 01 November.

## **Outcome**

[29] I find Mr Willis complied with the requirement to ensure Mr Rogers' trial period provision was mutually agreed in writing before Mr Rogers accepted the offer of employment, and therefore became an employee. I am also satisfied the 16 days Mr Rogers had to consider the proposed employment agreement before he accepted the offer of employment provided him with a "reasonable opportunity" to take advice on the proposed terms of the offer of employment, including regarding the effect of the trial period provision.

[30] I therefore find Mr Rogers' employment agreement contains a valid 90 day trial period provision which complies with the requirements of s.67A of the Act and that Mr Rogers was dismissed within the 90 day trial period. This means Mr Rogers is prevented from bringing a personal grievance or other legal proceedings in respect of his dismissal.

---

<sup>4</sup> In terms of the s.6 definition in the Act.

[31] Accordingly, the Authority does not have jurisdiction to hear Mr Rogers' unjustified dismissal claim.

### **Costs**

[32] Mr Willis as the successful party is entitled to a contribution towards his actual legal costs. The parties are encouraged to resolve costs by agreement. If that is not possible costs will be dealt with by an exchange of memoranda. Mr Willis has 14 days from the date of this determination to file costs submissions, Mr Rogers has 14 days to file his submissions with Mr Willis having a further 7 days within which to file any reply submissions.

[33] Strict adherence to this timetable is required, any departure from it requires the prior leave of the Authority.

**Rachel Larmer**  
**Member of the Employment Relations Authority**