IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 6
5406292

	BETWEEN	KEVIN RUTAKEWHENUA ROGERS Applicant
	A N D	BRIAN WILLIS Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Gregory Bennett, advocate for Applicant Elliot Hudson, counsel for Respondent
Submissions Received:	3 January 2013
Date of Determination:	4 January 2013

DETERMINATION OF THE AUTHORITY

A. The application by Kevin Rogers pursuant to s 127 of the Employment Relations Act 2000 for an order requiring Brian Willis to reinstate him until further order of the Authority is declined.

B. On 10 January 2013 the Authority will investigate and later determine as a substantive issue whether the employment agreement between Mr Rogers and Mr Willis included a 90 day trial provision capable of being effectively invoked under the Employment Relations Act.

C. Costs are reserved.

Employment relationship problem

[1] Mr Kevin Rogers has applied to the Authority on 19 December 2012 for an order reinstating him to employment with the respondent Mr Brian Willis, pending the hearing of personal grievance claims of unjustified dismissal and unjustified disadvantage. Those grievances were raised by Mr Rogers on 17 December 2012 following notification of dismissal he received from Mr Willis on 12 December.

[2] There is no dispute that Mr Rogers commenced working for Mr Willis as a farm manager on 19 November 2012, a little over three weeks before he was dismissed by Mr Willis in purported reliance on a 90 day trial period clause. Mr Willis contends that the clause was a term of the employment agreement whereas Mr Rogers claims it was ineffective for that purpose, because he had been employed previously by Mr Willis and was therefore excluded by a provision of the Employment Relations Act from entering into a trial period as a term of his employment.

[3] The parties undertook mediation on 19 December but were unable to resolve the employment relationship problem. Although the 14 day period of notice of his dismissal given to Mr Rogers expired on 26 December 2012 he and his family have been allowed to remain in the cottage accommodation provided as a term of his employment at the farm he managed. Mr Willis requires the cottage to be vacated by Sunday 6 January 2013 however.

[4] In accordance with directions given by the Authority on 21 December this interim application is to be considered and determined urgently, by Friday 4 January 2013, on the basis of the affidavit evidence filed and served and also written submissions received on the afternoon of Thursday 3 January.

[5] The Authority's decision depends on whether the tests for granting interim injunctions have been met in all the circumstances so far made known and taking into account the object of the Act. The relevant circumstances include facts as disclosed in the affidavit evidence (which facts are to be assumed as capable of being proved at the investigation meeting next week) and the law relating to trial periods. That law is both statute and judge made, the former to be found at s 67A of the Employment Relations Act and the latter in two decisions of the Employment Court; *Smith v Stokes*

Valley Pharmacy (2009) Ltd [2010] NZEmpC 111 and *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152.

[6] Conflicts of evidence are not to be resolved at this interim stage, as the witnesses have not been examined and cross examined on their affidavits. The opportunity for that will arise at the investigation meeting. The scope and detail of the evidence of any witness is a matter that can be taken into account. Where it appears to be inadequate, the Authority cannot fill in what may be missing.

[7] Also relevant in the circumstances of this case is law relating to the formation of an employment contract or agreement. In this regard the Court's decision in *Baker v Armourguard Security Ltd* [1998] 1 ERNZ 424 is instructive.

[8] The interim injunction tests which are to be satisfied are;

- Is there an arguable case?
- Where does the balance of convenience lie?
- Are other adequate remedies available?
- Where does the overall justice of the case lie?

Is there an arguable case?

[9] Section 67A of the Act provides that a trial provision may be entered into by an employer and an employer if the former has not been previously employed by the latter. Mr Rogers could not legally have agreed to a trial period if he had earlier been an employee of Mr Willis, and in that case Mr Willis could not invoke or rely upon a trial provision even if it was written into an employment agreement executed by Mr Rogers.

[10] The evidence for the employer Mr Willis is that the trial period was agreed to on 1 November 2012 when he and Mr Rogers signed an individual employment agreement. Mr Rogers' evidence is that by then he was already an employee, following his acceptance orally in late September or early October of an offer of employment made by Mr Willis or his agent Mr John Hall.

[11] The arguable case test needs only to be satisfied at a low threshold. While a conflict of evidence may often indicate that an issue is open to argument, what is noticeable in this case is the considerable imbalance between the parties' evidence in

the detail and precision with which fundamental and crucial events occurring only recently have been recounted. Lack of representation is not an explanation for this situation, as both parties have retained either counsel or advocate.

[12] The timing of entry into the contractual relationship that was formed between Mr Rogers and Mr Willis is a key matter. There is no dispute between the parties that on 1 November 2012 they signed a written individual employment agreement. Included among its terms was a 90 day trial period expressed to be "pursuant to the Employment Relations Act." Mr Rogers and Mr Willis initialled the foot of the page on which it was written.

[13] There is also no dispute that in content, as drafted, the provision met the requirements of s 67A of the Act. It was capable of being a 90 day trial provision, so long as Mr Rogers had agreed to it before or at the time he became employed and not afterwards.

[14] Mr Rogers' evidence is that he was verbally offered employment, which he verbally accepted, before the date on which he signed the written agreement. His first affidavit evidence about this is no more than;

> *1. I was employed after going through 2 or 3 interviews with Brian Willis and John Hall a Farm Advisor.*
>
> *2. I was offered the position of farm manager verbally and I accepted the position. It was sometime after accepting the position ….. that I was required to sign the employment agreement that was provided.*

[15] Only five days later Mr Rogers swore a second affidavit which he explained was the result of his having had an opportunity to recollect events prior to commencing his employment with Mr Willis. I agree with the submission of counsel Mr Hudson that even this subsequent evidence amounts only to a bare assertion of offer of acceptance without detail, such that could reasonably be expected, as to;

> Date of the offer.
>
> Who made the offer – Mr Willis or his agent Mr Hall?
>
> How the offer was communicated.
>
> Where the offer was made.
>
> Persons present at the time of the offer.
>
> Details of the offer, including terms and conditions.

Date of acceptance.

To whom acceptance was communicated - Mr Willis or Mr Hall or both?

Method of acceptance.

[16] Mr Rogers' evidence is that on an unspecified date (no verification has been provided from phone records or other witness) Mr Willis contacted him while he was driving, possibly to Waihi, and that during this call Mr Willis had said "he would like me to start on 1 November 2012." That request may be capable of being an offer or may be simply be an enquiry to ascertain Mr Rogers' availability to be employed but which, depending on his advice, might lead to an offer.

[17] Mr Rogers evidence is that he had telephoned Mr Willis back the same day to advise that he could not relocate his household to the farm until 4 November. Mr Willis he said had replied "something along the lines of 'that's ok'." At best there is only an inference from this evidence that offer and acceptance had occurred on the particular unspecified date of these phone calls. "That's OK" are unlikely words of offer, acceptance or counter-offer.

[18] By contrast the evidence of Mr Willis and Mr Hall is detailed, precise and corroborated where possible. Considerable weight must be attached to Mr Hall's evidence in particular as he is a professional farm advisor who has had considerable experience, including in relation to farm employment or recruitment. He would seem to know what he was about, as he has remained Mr Willis' farm advisor for some 17 years.

[19] The evidence of Mr Willis and Mr Hall, untested though it remains, strongly supports their claim that Mr Rogers was offered employment on 17 October 2012 which he accepted on 1 November after being given an opportunity to consider the terms offered, take independent advice and discuss them further with Mr Willis if he wished.

[20] It would be enough to show that Mr Rogers had become a person intending to work and was therefore an employee by definition under s 6 of the Act. As the Court observed in *Baker v Armourguard Security Ltd* (above, at page 432), there is an important distinction between the formation of the employment or the employment contract itself, and the formation or articulation of its terms. The Court noted that the

contract can be and often is formed in an informal way by conduct or by words of agreement given orally and by conduct.

[21] The written agreement signed on 1 November was at least the product of negotiation by the parties of some *terms* of employment, but did their earlier conduct evidence negotiations as to whether they would enter into an employment relationship at all? Arguably they did agree to becoming party to one, performance of which was to start at a future date. Mr Willis' evidence is that the offer of employment was not made by him until 17 October and it was not accepted until 1 November when the employment agreement was signed. Mr Rogers' evidence is that he had made arrangements to shift houses before the latter date but that in itself is not determinative of when engagement took place or the contract was formed. Even at an arguable case level, vital facts need to be supported in evidence by more than mere inference or suggestion.

[22] I conclude that the case for Mr Rogers is not one that is only barely or faintly arguable but is one that is not arguable at all.

[23] The Authority may also consider whether there is an arguable case that Mr Rogers will be permanently reinstated once there has been a hearing of his grievances and in the event he is found to have been unjustifiably dismissed or disadvantaged, as he claims to have been. Reinstatement may be provided by the Authority as a remedy in a successful grievance claim if it is practicable and reasonable to do so; s 125 of the Act**.**

[24] Considerable doubt has been raised about both the reasonableness and practicability of reinstatement. Mr Willis would have it that although justification was not required for him to dismiss Mr Rogers there was justification provided by Mr Rogers' performance before notice was given. But an assessment of that was made in a period of only three weeks. Mr Willis has also sought to bring into question Mr Rogers' performance for earlier employers, although he has provided no evidence of that at all, at least no evidence that this Authority could properly take into account.

[25] On the evidence given I find that although the assessment of Mr Rogers' performance was made over a very short period it was thorough and it revealed substantial deficiencies, particularly when measured against representations made in his CV and orally by Mr Rogers as to his skill, knowledge and experience as a farm

manager. There is also clear evidence that when required to continue working under notice of dismissal Mr Rogers did not fully perform his job.

[26] On the basis of the evidence of his performance and conduct, although measured only over a short period, I consider it is unlikely Mr Rogers would be permanently reinstated if he is found to have been unjustifiably dismissed.

Where does the balance of convenience lie?

[27] I find that the balance favours Mr Rogers being allowed to continue to reside with his family in the farm cottage in the interim until his grievance claims can be finally determined.

Other remedies available

[28] I conclude that damages or compensation may not adequately address the cost and inconvenience of having to shift from the cottage somewhere else and without another job until the claims can be finally determined.

Overall justice

[29] Given the lack of an arguable case, the overall justice lies in declining the application.

Determination

[30] For the above reasons the Authority declines to order interim reinstatement.

Investigation meeting on 10 January 2013

[31] I direct that this fixture is to be for hearing as a substantive issue the question of whether there was an effective 90 day trial period in the parties' employment agreement. The witnesses will be examined and cross examined and submissions may be made, so as to leave the Authority able to determine the issue. A further investigation meeting will be required in the event the Authority determines that clause 4 of the parties agreement was invalid and not able to be invoked, in which case justification for the dismissal of Mr Rogers will become the issue, as well as remedies and contribution if there is found to have been no justification.

Costs

[32] Costs are reserved until the question is addressed at the conclusion of the investigation.

A Dumbleton
Member of the Employment Relations Authority