New Zealand Employment Relations Authority Decisions

Ruru v Mr Apple New Zealand Limited (Wellington) [2017] NZERA 2039; [2017] NZERA Wellington 39 (19 May 2017)

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Last Updated: 27 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 39
5620879

BETWEEN GRAHAM RURU Applicant

AND MR APPLE NEW ZEALAND LIMITED

Respondent

Member of Authority: M B Loftus

Representatives: Shayne Malone, Counsel for Applicant

Bill Calver, Counsel for Respondent Investigation Meeting: 31 March 2017 at Napier Submissions Received: At the investigation meeting Determination: 19 May 2017

DETERMINATION OF

THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant, Graham Ruru, claims he was unjustifiably dismissed by the respondent, Mr Apple NZ Limited (“Mr Apple”),

on 24 March 2016.

[2] Mr Ruru also claims he was unjustifiably disadvantaged as he was not *made aware of the issue he had to rectify* and deprived of a chance to address them.

[3] Mr Apple says Mr Ruru is precluded from advancing his claim given his employment agreement contains a 90 day trial provision which prohibits the taking of a personal grievance for unjustified dismissal.1 It denies the disadvantage claim.

Background

[4] At the end of 2015 Mr Ruru was unemployed but seeking work. Through Work and Income New Zealand (WINZ) he became aware of a forklift driver position at Mr Apple. He applied.

[5] Mr Ruru says that having applied he attended a forklift driving assessment *around mid-January 2016*. He says he then attended a job interview with Doug Guild, Mr Apple's Operations Manager, around 28 January 2016.

[6] Mr Ruru goes on to say:

Doug handed me an employment agreement for the forklift driver position. I was excited that I had found a job and was ready to start as soon as possible. I signed the agreement in front of Doug. I took that agreement home.2

[7] Mr Ruru says later that day he received a telephone call from Mr Guild who asked if he would be interested in a better career opportunity. Mr Ruru says Mr Guild advised there may be a position in the Despatch Department which had the advantage of offering permanent as opposed to seasonal work. Mr Ruru says Mr Guild advised he thought Mr Ruru's skills would be better utilised in that role. Mr Ruru says he *accepted this* and was told a further interview would be organised with Chrissi Faber, Mr Apple's Shipping Coordinator.

[8] Mr Apple has a different view of these events. It confirms the interview with Mr Guild occurred at 9am on 28 January 2016. It says a pre-employment forklift assessment occurred the same day and after the interview with that assertion being supported by contemporaneous documentary evidence.

[9] Mr Apple denies Mr Guild gave Mr Ruru an employment agreement that day and says there are two reasons why he could not have done so. First, a pre- employment drug assessment is a precondition of any offer. Mr Ruru did his on 9

February 2016. Second, employment agreements can only be generated by the Human Resources Department and managers do not possess pro-forma documents they could use. No agreement was prepared for Mr Ruru at the time.

[10] Mr Apple says Mr Guild conferred with the assessor, Mr Wharerau, after the forklift assessment. Mr Wharerau considered Mr Ruru's forklift skills adequate but was of the view he should only perform those duties on an occasional basis and not be appointed to a position where forklift driving was the prime task. It was then Mr Guild, who had been impressed with Mr Ruru performance during the interview, referred his application to Ms Faber. He thought Mr Ruru possessed skills which meant he might be capable of filling a tele-clerk's role. Mr Guild denies offering Mr Ruru a job and states *I certainly did not have him sign an employment agreement*.

[11] Mr Ruru says he attended the interview with Ms Faber *a few days later but I am unsure of actual dates*. He says he was

asked to bring the agreement he had signed for the forklift driver position and Ms Faber took it from him, tore it up, and threw it in a bin.

[12] Mr Apple says the interview occurred on 1 February and was also attended, albeit in part only, by Amalia Canterbury. Ms Faber denies taking and destroying the employment agreement as alleged by Mr Ruru.

[13] However the parties do agree Mr Ruru was successful and two days later he was contacted by telephone. During the call an offer was made and he and Ms Faber arranged that he attend induction on 15 February 2016.

[14] The induction involved ten new employees and was conducted by Ms Faber and Ms Canterbury. It took approximately two hours and consisted of a tour of the cool store and attending to paperwork. Staff were also introduced to an induction pamphlet.

[15] One of the documents given to staff at induction is the employment agreement. About that Mr Ruru says he was given one and required to sign it forthwith.

[16] Mr Apple says staff are told they are entitled to seek independent advice and

Ms Faber adds:

Mr Ruru did not ask for additional time to do this, but he did ask if he could have a photocopy of the agreement. I can remember photocopying his agreement and handing him an extra copy.3

[17] Mr Ruru commenced the following day.

[18] Mr Ruru says his first intimation there were concerns with his performance came on 24 March 2016. He says he was called into an office to talk to Ms Faber and Joe, a recruiter./ He says *I was told that I did not meet requirements for the Dispatch position and that my employment was being terminated.*4

[19] Mr Ruru goes on to say he asked why he was being dismissed and was told he would have to take it up with Human Resources. He says he was advised he need not work his notice period but he would be paid in lieu.

[20] Mr Ruru says he approached Human Resources but was advised by the manager, Rachelle Hayes, HR was unaware of the dismissal. He says he was then told Ms Hayes would telephone him after she had investigated.

[21] Ms Hayes has a slightly different view. She says she told Mr Ruru she would ask Ms Faber why he was being dismissed and advise accordingly. She adds she referred to the fact the employment agreement contained a 90 day trial period which was used to assess suitability.

[22] The clause in question is on the front page of the agreement and reads:

90 DAY TRIAL PERIOD

(a) The employee will serve a trial period for a period NOT EXCEEDING 90 CALENDAR DAYS from the date of commencement in order to assess and confirm suitability of the employee for this position.

(b) At any time during the trial period, the Employer may terminate the employment relationship and the Employee may not issue a personal grievance on the grounds of unjustified dismissal or any other legal proceedings in respect of the dismissal. The Employee may, however, pursue a personal grievance on the grounds specified in Section

103(1)(b)-(g) of the Employment Relations Act 2000.

...

(d) This trial period does not limit the legal rights and obligations of the Employer or the Employee (including access to mediation services), except as specified in Section 67B of the Employment Relations Act 2000. However, the Employer is not required to comply with Sections 4(1A)(c) and 120 of the Employment Relations Act 2000 when making a decision whether to terminate an employment agreement under this clause.

(e) The Employee and Employer acknowledge and agree that the terms of this clause constitute a trial provision within the meaning of s.67A(2) of the Employment Relations Act 2000.

[23] Having spoken to Ms Faber Ms Hayes telephoned Mr Ruru at approximately

2.15pm. By that time Mr Ruru was with his lawyer and he handed the phone to Mr Malone. Ms Hayes says she explained the termination was pursuant to the 90 day trial period to which the latter advised he wasn't aware there was one and it would be taken further.

[24] On 29 March Mr Ruru went to Mr Apple's premises to drop off his uniform

and key tag. A further conversation ensued with Ms Hayes during which she says the

90 day trial period was again discussed.

[25] Later that day Ms Hayes received a telephone call from WINZ and was asked whether or not the forklift driver position might still be available for Mr Ruru. Ms Hayes says she replied she did not think so but would investigate.

[26] On 31 March Ms Hayes telephoned Mr Ruru to ask whether he was interested in another position with the company. He was not and the termination was confirmed by letter. Again the 90 day trial period was mentioned.

Determination

[27] Mr Ruru's prime claim is he was unjustifiably dismissed. This claim is based on a submission Mr Ruru *intended to be an employee when he accepted the forklift driver position on 28 January 2016* and that would invalidate the 90 day trial provision in the agreement of 15 February 2016 as it was signed subsequently. There is an further claim the employment agreement is

invalid as Mr Ruru was not given an appropriate opportunity to consider it before signing.

[28] There is also the claim Mr Ruru was unjustifiably disadvantaged by Mr Apple's failure to tell him of his alleged deficiencies thus depriving him of an opportunity to address them.

[29] The submission the employment agreement of 15 February was invalidated by virtue of the fact Mr Ruru was a person intending to work was not pursued with vigour. It was effectively abandoned as a result of my conclusion in an earlier 90 trial determination where I said:

...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.5

[30] Even if that were not the case I have to conclude I would, on the evidence, have failed to accept Mr Ruru signed an agreement on 28 January. In addition to Mr Guild's denial there was an agreement, there was Ms Faber's denial she destroyed it and Ms Hayes' various reason as to why it simply could not have occurred. All three remained unshaken when questioned.

[31] On the other hand Mr Ruru exhibited some uncertainty about what occurred and when. For example there is contemporaneous documentation that shows he is mistaken about when he undertook the forklift assessment and it follows his recollection of what occurred on 28 January is unclear. Similarly he was wrong to claims he undertook the drug test before signing the agreement on 28 January. There was also some uncertainty as to what Mr Ruru though he had signed. He said, when questioned, it was not a full employment agreement but a truncated document of about two pages advising position, pay and hours (though Mr Guild also denies such a document exists).

[32] Finally there is evidence Mr Ruru completed documentation for WINZ and his answers indicate he might be confusing those with the ones he says he signed for Mr Apple. This conclusion is supported by other answers which show he thought WINZ might have been acting for, and making offers on behalf of, Mr Apple. Mr Apple's response is that is definitely not the case and Mr Ruru did not pursue the possibility WINZ was an agent.

[33] As said, and had I had to decide the matter, I would not have concluded an employment agreement was completed in January. That means the only extant agreement is that of 15 February and there is no suggestion it had not already been signed when Mr Ruru started.

[34] Nor is there an argument the agreements 90 day trial clause does not comply with the requirements of ss 67A and 67B. The submission, described by Mr Malone

as the most important, is Mr Ruru was not given an appropriate opportunity to consider the agreement thus invalidating it.

[35] Mr Apple's witnesses are adamant the agreements content was explained at induction and some emphasis was placed on the existence of a 90 trial provision. Ms Canterbury remembers explaining that and says it was important for this group as one of the inductees was returning and it did not apply. Ms Canterbury is equally adamant she told prospective staff they could, if they wished, take the agreement away, consider it and bring it back when ready. She also says Mr Ruru gave the agreement more than a browse – he read it relatively carefully which is often not the case. She says there were only five new recruits in the room at the time and Mr Ruru was quite noticeable being at the front and well dressed (which, it also appears, is not the norm).

[36] These claims were not seriously challenged under cross examination.

[37] Mr Ruru denies reading the agreement but twice accepted its content was explained though one of those was qualified with *a bit*. There is then Mr Ruru's evidence he was excited by the job and just wanted to work. To that I add his claim, albeit not accepted, he willingly signed an agreement on 28 January without even thinking about reviewing its content and evidence about his personal circumstances which meant he was going to accept the job regardless.

[38] Having considered the evidence I conclude the existence of the 90 day clause was explained. I also accept Ms Canerbury's evidence the inductees were given an opportunity to take the agreement away and consider it. There is then Mr Ruru's evidence about needing and wanting the job. He was not, I conclude, going to stall his commencement. He was going to sign regardless and that nullifies this claim.

[39] Finally there is the claim Mr Ruru was disadvantaged by virtue of not being *made aware of the issue he had to rectify*.6 Again I have to dismiss the claim. While Ms Faber accepts she never reminded Mr Ruru of the 90 day trial period or told him his job was at risk he should have known about Mr Apple's concerns.

[40] Ms Faber says Mr Ruru ignored some training material despite having it brought to his attention by both her and others. She says he was frequently shown mistakes in his paperwork and asked to correct them. Finally and most importantly

she says Mr Ruru was well aware she was unwilling to sign him off as fully trained. This evidence was not challenged under cross examination.

[41] While Mr Ruru denies he was ever advised of any deficiencies he knew he had not been signed off as fully trained. He also accepts he had a feeling all was not well though could not say why. Frankly, there is only one probable reason. I conclude he was, as said by Ms Faber, having issues pointed out to him.

Conclusion and costs

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

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

67A(2) of the Act. The agreement was signed prior to the commencement of employment on 16 February 2016 and is not invalidated for any other reason.

[43] That means Mr Ruru is, as Mr Apple contends, precluded from bringing a personal grievance for unjustified dismissal.

[44] The claim he was unjustifiably disadvantaged also fails. Accordingly Mr

Ruru's claims are dismissed.

[45] Costs are reserved.

MB Loftus

Member of the Employment Relations Authority
