IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 527
3148181

	BETWEEN	NICK SCOTT Applicant
	AND	E CYCLES NZ LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Dave Cain, advocate for the Applicant Chris Hoff-Nielsen for the Respondent
Investigation Meeting:	22 June 2023 in Auckland
Determination:	15 September 2023

DETERMINATION OF THE AUTHORITY

A. Nick Scott's employment with E Cycles NZ Limited (ECNZL) was not subject to a valid trial period.

B. Mr Scott was unjustifiably dismissed. In settlement of his personal grievance ECNZL must pay Mr Scott the following sums within 28 days of the date of this determination:

(i) $7,962.50 as remuneration for wages lost as a result of the grievance; and

(ii) $15,000 as compensation for humiliation, loss of dignity, and injury to his feelings.

C. Costs are reserved with a timetable set for lodging memoranda if the parties cannot agree the issue of costs between themselves.

Employment relationship problem

[1] Nick Scott worked for E Cycles NZ Limited (ECNZL) from 3 May to 4 June 2021. He said his employment ended by ECNZL director Chris Hoff-Nielsen dismissing him during a heated discussion about work issues. Mr Hoff-Nielsen said he considered Mr Scott had resigned on 4 June by "abandoning the workplace" after their discussion.

[2] In a letter he sent to Mr Hoff-Nielsen the following week Mr Scott raised a personal grievance in which he said he had been "fired on the spot" with no warning. He said a trial period in his written employment agreement did not apply because he had been working for ECNZL before he signed the agreement. He identified a number of shortcomings in the work arrangements over the previous five weeks. These included not being provided with adequate training; safety concerns about how the work was carried out; belittling comments made by Mr Hoff-Nielsen about him and other staff; criticising him for taking a day off which he had previously advised the operations manager about; and ongoing problems in providing access to the online accounting system ECNZL used for logging hours worked.

[3] In his application to the Authority Mr Scott said he complied with an instruction Mr Hoff-Nielsen gave him on 4 June to backdate his signature on a copy of his employment agreement to 28 April 2021. He said Mr Hoff-Nielsen had then raised concerns about Mr Scott's work that led to a heated discussion which Mr Scott said ended with Mr Hoff-Nielsen telling him "just finish the day and then you're done". He said he asked "are you firing me" and Mr Hoff-Nielsen had replied "yes". Mr Scott said he then left the premises.

[4] Mr Scott sought findings that he was unjustifiably dismissed and orders for ECNZL to pay him lost wages and compensation for distress caused by dismissal.

[5] ECNZL, in its statement in reply, said Mr Scott had signed his employment agreement on 28 April 2021 before starting work. It said an email Mr Scott sent to Mr Hoff-Nielsen in the early evening of 4 June saying he understood the "employment agreement to be terminated effective immediately" was Mr Scott's resignation. It denied dismissing him.

The Authority's investigation

[6] The Authority's investigation of Mr Scott's application was delayed twice. An investigation meeting scheduled for 18 August 2022 was postponed at Mr Hoff-Nielsen's request for Covid-19-related health reasons. A meeting scheduled for 27 January 2023 was delayed because Mr Hoff-Nielsen had to travel around that time to another Authority investigation meeting elsewhere.

[7] Mr Scott had complied with Authority directions to lodge witness statements and documents in advance of the investigation meeting, providing a statement from him and his aunt, Tina Auger. ECNZL did not provide any written witness statements or documents in advance. Mr Hoff-Nielsen attended the meeting and gave oral evidence. He had also advised by email the day before that a former employee, Amandeep Singh, would also attend to give evidence. Mr Singh did not attend.

[8] Under affirmation Mr Scott, Ms Auger and Mr Hoff-Nielsen answered questions from me and the parties' representatives. Mr Scott's representative and Mr Hoff-Nielsen also gave closing submissions.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[10] The issues requiring investigation and determination were:

(a) Was Mr Scott's employment subject to a valid and enforceable trial period (so that he could not pursue a personal grievance for dismissal)?

(b) If not subject to that limitation on pursuing his grievance, was Mr Scott unjustifiably dismissed by ECNZL?

(c) If ECNZL is found to have acted unjustifiably (in disadvantaging and/or dismissing Mr Scott), what remedies should be awarded to him, considering:

- Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
- Compensation under s123(1)(c)(i) of the Act?

(d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Scott that contributed to the situation giving rise to his grievance?

(e) Should either party contribute to the costs of representation of the other party?

No valid and enforceable trial period

[11] Authority determinations are made from an assessment of the evidence made on the balance of probabilities, that is the civil standard of proof of what is more likely than not to have occurred. The assessment relies on the evidence of witnesses and what may be corroborated from documents or other records made at the relevant time.

[12] In this case, this assessment of the available evidence supported a conclusion that the employment agreement between Mr Scott and ECNZL was not completed until 4 June 2021, some five weeks after he started working for the company. This was contrary to Mr Hoff-Nielsen's claim that Mr Scott had signed his employment agreement on 28 April 2021, before his first day of work in early May.

The law

[13] The Act allows an employer operating a business with fewer than 20 employees to employ someone on a trial period for up to 90 days if that person has not previously been employed by the employer.[1] An employee under such a trial period is then prohibited from bringing a personal grievance of unjustified dismissal if they are dismissed or given notice of dismissal during the trial period.[2]

[14] The requirement that the person has not previously been the employer's employee, in effect, means the employee must sign the agreement containing the trial period term before they start work.[3] Case law on this statutory provision has firmly established an employer must be able to show, if the point is in question, that it has strictly complied with the requirements for documenting an agreed trial period.[4] Being able to show the necessary documentation is supported by a requirement in the Act that, where an employee is employed under an individual employment agreement, the

[1] Employment Relations Act 2000, s 67A.
[2] Section 67B.
[3] *Blackmore v Honick Properties Limited* [2011] NZEmpC 152 at [65]-[70].
[4] *Smith v Stokes Valley Pharmacy(2009) Ltd* [2010] NZEmpC 111 at [48].

employer must retain a signed copy of that agreement and provide the employee with a copy of it if requested to do so.[5]

[15] Failure to meet the statutory requirements for agreement on a trial period means the employer loses the protection from an employee pursuing a personal grievance or other legal proceedings for dismissal during the supposed trial period.

The facts

[16] Mr Hoff-Nielsen said Mr Scott had signed the employment agreement "there on the spot" during a meeting with him on 28 April 2021. He accepted Mr Scott had raised a concern about a restraint of trade clause but said that was resolved on the day by removing the page containing that term from the agreement Mr Scott signed.

[17] Mr Scott said he had not signed the agreement, instead taking it away to read and subsequently raising a concern about the wording of a restraint of trade clause. Mr Scott was concerned a provision about engaging in other work might affect his freedom to continue with a small digital business he operated. He said this question was not resolved in the following weeks and it was not until 4 June that Mr Hoff-Nielsen gave him a version of the agreement without the restraint clause for signature.

[18] The copy of the signed agreement provided to the Authority had a handwritten date in two places. On the front page, in what Mr Scott said was his handwriting, he had written the date "28/4/2020". On the thirteenth and last page, above Mr Scott's signature was the handwritten date of "28/4/21". Mr Scott said he signed the agreement on 4 June but wrote the 28 April date because Mr Hoff-Nielsen told him to do so. He said he had written 2020 on the front page, not the actual year of 2021, because he was "stressed".

[19] Mr Hoff-Nielsen denied the agreement was not signed until 4 June or that he had asked Mr Scott to backdate it to 28 April. The available records do not corroborate Mr Hoff-Nielsen's account.

[20] On 19 May Mr Hoff-Nielsen sent Mr Scott a WhatsApp message which included the following:

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[5] Section 64(1) and (3).

> Hi Nic
> Just seeing if you could sign up into xero?
> And that u could pass me the contract – I'd like to get us squared up.
> …

[21] Mr Scott replied:

> I haven't been given a login for xero yet.
> Still waiting on the finalized contract to be given to me.

[22] If Mr Scott had signed and returned the agreement on 28 April, there would be no reason for Mr Hoff-Nielsen to be asking for him to "pass" that document to him or for Mr Scott referring to waiting for a "finalized" agreement.

[23] Mr Scott said the agreement given to him by Mr Hoff-Nielsen for signature on 4 June did not include the restraint clause he had raised a concern about. He said that after he signed it Mr Hoff-Nielsen had gone out of the store in which they were meeting and used the camera on his photo to take a photo of the agreement. Soon after they continued their conversation which ended, in Mr Scott's account, with him asking "am I being fired" and Mr Hoff-Nielsen answering "yes". Mr Hoff-Nielsen's account of that part of their conversation was that he had answered that question by saying "it is 100 per cent up to you" and Mr Scott had chosen to leave.

[24] Their conversation appears to have been over by 12:50pm because Mr Scott had, at that time, sent this message to the ECNZL's operations manager in reply to an earlier message: "Don't worry. I got fired".

[25] In a following message Mr Scott asked the operations manager for Mr Hoff-Nielsen's email address. In a further message, after being sent the address, he explained: "I just need Chris email address cause he's fired me without any warning."

[26] At 5:06pm Mr Scott sent Mr Hoff-Nielsen an email with this message:

> As per today's conversation I understand our employment agreement to be terminated effective immediately.
>
> Please advise this in writing, and how you plan to settle final remuneration.
>
> Please also provide me was copy of our contract.

[27] At 6:30pm Mr Hoff-Nielsen sent Mr Scott the following WhatsApp message, attaching a PDF format document with the title Employment Agreement and the description "Doc 04 Jun 2021, 12.05pm" and "13 pages":

> Hi Nic
> This is the copy i scanned today. Sorry i [sic] did not work out. At least we both tried. Next pay run Wednesday will be yr last Regards.

[28] The employment agreement is 13 pages. The time stamp of 12:05pm for the PDF-formatted 4 June document is consistent with the evidence of Mr Scott and Mr Hoff-Nielsen about when their conversation took place and with Mr Scott's evidence that Mr Hoff-Nielsen had 'taken a photo' of the agreement after he signed it. Mr Hoff-Nielsen confirmed, in his oral evidence, that he had an application on his mobile phone which he could use to scan documents. The copy provided also showed the tips of fingers holding down the edge of each page. Mr Hoff-Nielsen said that, although he could not remember doing so, "it looks like I scanned that document that day".

Conclusion on lack of valid and enforceable trial period

[29] As a matter of likelihood, on the civil standard of the balance of probabilities, the reason for Mr Hoff-Nielsen scanning the employment agreement at 12:05pm on 4 June was because Mr Scott had just signed it that day. There was no credible reason for Mr Hoff-Nielsen to do so if Mr Scott had already signed the agreement some five weeks earlier.

[30] The effect of this finding is that ECNZL had not established, again to the civil standard of the balance of probabilities, that Mr Scott signed his agreement with the company on 28 April, before starting work. As a consequence ECNZL had not met the necessary standard of compliance with the requirements of s 67A of the Act for entering a trial period. It was not, therefore, able to rely on that supposed trial period to dismiss Mr Scott in the way that it did or to prevent him from pursuing a personal grievance for unjustified dismissal.

[31] There were three other reasons canvassed in the evidence, and in the submissions made on Mr Scott's behalf, that may also have led to a conclusion that the trial period term written in the agreement Mr Scott had signed was not enforceable.

[32] Firstly, there was a possibility that ECNZL had 20 or more employees (full-time, part-time and casual) on the date of 28 April when it said the employment agreement was entered into. If so, and Mr Hoff-Nielsen was unable to confirm this

detail at the investigation meeting, ECNZL would not have been eligible to have trial periods for new employees anyway.[6]

[33] Secondly, there was some evidence that Mr Scott had spent some hours working in an ECNZL workshop on the two days he had attended interviews about the job in order to demonstrate his skills for repair and other work on bicycles. He was later paid for this work and, even if he had signed the agreement on 28 April, he had arguably already been "employed" earlier that day.

[34] Thirdly, if Mr Scott was held to have been dismissed on 4 June, he was not given the "2 weeks' notice in writing" required by the agreement's term on ending the employment.

[35] However, given the firm conclusion already reached, that the agreement was signed on 4 June and by that date was too late to include an enforceable trial period, there was no need to further explore whether similar conclusions could have been made on those three possible additional reasons.

Mr Scott was dismissed on 4 June 2021

[36] Mr Hoff-Nielsen said he had not dismissed Mr Scott on 4 June. He said Mr Scott had become angry during their discussion and "walked out on me". He said he expected Mr Scott to come back.

[37] Mr Scott said Mr Hoff-Nielsen had criticised him for having a bad attitude and not making enough sales in the two stores he worked in. Mr Scott thought criticism of his productivity and sales was unfair and the conversation became heated. He said the meeting ended with Mr Hoff-Nielsen saying to finish out the rest of the day and then he was done. Mr Scott said that after Mr Hoff-Nielsen had responded "yes" to his question about being fired, Mr Scott said "I'll just leave now then" and Mr Hoff-Nielsen replied "ok".

[38] There were no witnesses to the conversation. Both men said they paused the conversation when a customer came into the store and then resumed it. The "he said, he said" conflict in their evidence is resolved by considering what was said and done in the correspondence that followed.

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[6] Employment Relations Act 2000, s 67A(2).

[39] Mr Scott's clear belief that he had been fired was reflected in his messages to the operations manager later in the day. As already referred to, Mr Scott described himself (at 12:50pm) as being "fired" and (at 5:05pm) saying he was fired without warning.

[40] Mr Hoff-Nielsen's suggestion that he expected Mr Scott to come back does not accord with his response that evening to Mr Scott's email (at 5:07pm) which had said he "understood our employment agreement to be terminated effective immediately". Mr Hoff-Nielsen's WhatsApp message at 6:30pm did not query that description. If termination of the employment was not Mr Hoff-Nielsen's intended outcome, it was not likely he would have responded to that message by saying only that he was sorry that "it did not work out" and telling Mr Scott when his last pay would be made.

[41] On the balance of probabilities Mr Scott's description of being sent away on that day because of Mr Hoff-Nielsen's dissatisfaction with his work was the more likely explanation of what had happened that day.

[42] Mr Hoff-Nielsen was entitled to raise with Mr Scott any concerns he had about his performance of his duties. However, a fair and reasonable employer could not have made a decision to 'call it quits' without giving Mr Scott a better chance to address those concerns. Under the test of justification set by 103A of the Act Mr Scott was entitled to a reasonable opportunity to respond to whatever those concerns were and to have Mr Hoff-Nielsen genuinely consider whatever explanations Mr Scott gave before reaching a decision to end the employment relationship. Reaching that conclusion in the space of a brief, heated conversation was not what a fair and reasonable employer could have done in all the circumstances at the time. This defect in the process Mr Hoff-Nielsen followed was more than minor and resulted in Mr Scott being treated unfairly because he did not have a fair opportunity to explain his own concerns or discuss with Mr Hoff-Nielsen what measures might realistically have been taken to address or improve how he carried out his duties.[7]

[43] Accordingly Mr Scott had established he had a personal grievance for unjustified dismissal. He was entitled to an assessment of remedies to settle his grievance.

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[7] Employment Relations Act 2000, s 103A(3)(c) and (d) and s 103A(5).

Remedies

Lost remuneration

[44] Mr Scott sought an order for reimbursement of lost wages for 13 weeks. On his hourly rate of $22.75 for 35 hours a week, the total sought was $10,351.25.

[45] Where an employee who has a personal grievance and has lost wages as a result of the grievance, s 128 of the Act requires the Authority to order the employer to pay that employee "the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration".

[46] An assessment of the three-month loss of remuneration Mr Scott said he had suffered must consider two other factors in assessing his claim. Firstly, there is the question of whether Mr Scott took reasonable steps to mitigate, that is offset, his loss by doing what he could reasonably be expected to have done to try and find other work or income. Secondly, a counter-factual analysis is made of whether Mr Scott's employment with ECNZL might have ended anyway, not by unjustified dismissal but as a result of some other contingency of life.[8]

[47] Mr Scott gave frank evidence about some personal difficulties he faced at the time that he took the job with ECNZL and after losing it. He was returning to the paid workforce after the death of his mother, having taken a year off to care for her during her terminal illness. He also had some other mental health challenges at that time. Those circumstances hampered his confidence in seeking further paid work following his short and what proved to be an unhappy stint with ECNZL.

[48] He opted, with the assistance of a friend, to move to Wellington and take up an opportunity to be coached in property investment work. He received no pay during the time he spent with that coach but regarded it as investing time and energy in a future opportunity. Some months later he was able to generate some income in a photography role. Later in 2021, when restrictions on movement under Covid-19 emergency measures in place at that time were lifted, he moved back to Auckland to be closer to family and friends.

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[8] Telecom New Zealand Ltd v Nutter [2004] 1 ERNZ 315 (CA) at [81].

[49] A realistic assessment must also be made, applying the counter-factual analysis, of how long Mr Scott might have remained working for ECNZL even if Mr Hoff-Nielsen had fairly addressed his concerns. Mr Scott's own account showed that he had formed a strong view within his first few weeks of work that the workplace was not well-organised and he found Mr Hoff-Nielsen difficult to work for. He was unlikely to have continued for much longer with what he saw as a dysfunctional employment relationship.[9] In that context there was no basis for an assessment of lost wages for more than three months under s 128(3). Realistically, it was more likely that Mr Scott would have left to take up work opportunities elsewhere within that three-month period.

[50] Accordingly, taking account of the limited mitigation efforts and the prospect that the employment may not have lasted that much longer anyway, the award for lost wages under s 128(2) of the Act is set at a lesser sum of ten weeks' ordinary remuneration. Taking those weeks as each comprising 35 hours worked at $22.75 an hour, the amount ECNZL must pay Mr Scott for lost remuneration is $7,962.50. This sum must be paid to him within 28 days of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[51] An award of compensation in each case must have regard to the individual circumstances of the particular person seeking the award. Precision is difficult. The exercise of discretion in making an award inevitably involves a broad-brush approach.[10]

[52] ECNZL may not have been aware of the details of Mr Scott's personal circumstances and some resulting personal fragility in returning to the workforce and dealing with difficulties arising in the employment relationship. However the assessment of compensation under this heading addresses the effect on the particular worker in their individual circumstances, not the knowledge of the employer.

[53] In this case Mr Scott had placed considerable hope that his job with ECNZL would help "putting his life back together" after a difficult personal year and so the sudden end of his job was deeply felt. He described suffering "bad anxiety" and other setbacks to his mental health.

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[9] *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA 608 at [39].
[10] *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA 608 at [36].

[54] In closing submissions Mr Scott sought an award of compensation of $15,000 for the effects of his dismissal on him and as consistent with Authority awards in other cases. This is the appropriate sum to award as the compensation ECNZL must pay Mr Scott for the humiliation and injury to his feelings caused by his unjustified dismissal. It must be paid to him within 28 days of this determination.

No reduction for contributory conduct

[55] ECNZL did not establish any sufficient ground on which the remedies awarded to Mr Scott required a reduction due to any blameworthy conduct by him. Even if elements of his work during the first five weeks of his employment could have been improved, he was not responsible for ECNZL's failure to properly address those with him and, with suitable training and direction, give him the opportunity to address any work issues before taking any further action against him.

Costs

[56] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[57] If they are not able to do so and an Authority determination on costs is needed, Mr Scott may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum ECNZL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[58] The parties could expect the Authority to determine costs for this one-day investigation meeting, if asked to do so, on its usual notional daily rate of $4,500 unless particular circumstances or factors in this case required an upward or downward adjustment of that tariff.[11]

Robin Arthur
Member of the Employment Relations Authority

[11] See www.era.govt.nz/determinations/awarding-costs-remedies.