

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 473
5546020

BETWEEN TAUSANI SIMEI-BARTON
Applicant

A N D LDJS LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: M Piper/C Mulrennan, Counsel for the Applicant
D Gelb, Advocate for the Respondent

Investigation Meeting: 14-15 September 2015 at Auckland

Submissions Received: 15 September 2015 from the Applicant
15 September 2015 from the Respondent

Date of Determination: 23 December 2015

DETERMINATION OF THE AUTHORITY

- A. Tausani Simei-Barton was unjustifiably dismissed by LDJS Limited.**
- B. There is an order that LDJS Limited pay to Tausani Simei-Barton lost remuneration equivalent to two weeks ordinary pay less PAYE pursuant to ss.123(b) and 128 of the Employment Relations Act 2000.**
- C. There is an order that LDJS Limited pay compensation of \$2,000 pursuant to ss.123(1)(c)(i) and 124 of the Employment Relations Act 2000.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served by 25 January 2016 3 pm. The other party shall have until 9 February 2016 3 pm to file and serve a reply.**

Employment relationship problem

[1] Tausani Sime-Barton was a chef at Meadow Restaurant in Remuera, Auckland until his dismissal pursuant to a 90 day trial provision in his employment agreement. He alleges he was unjustifiably dismissed because the trial provision clause was invalid. Alternatively he alleges there was unfair bargaining leading to the signing of his employment agreement.

Facts leading to dispute

[2] The relevant events occurred within an eight week timeframe between September and October 2014.

[3] LDJS Limited opened a new restaurant “Meadow” in Remuera providing breakfast, lunch and dinner service. It contracted Michelle Ward of Hospoworld, a recruitment company, to source its restaurant staff.

[4] Mr Sime-Barton applied for the position as sous chef. He attended an interview on 3 September 2014 with the then head chef, Scott Hansen, and Ms Ward.

[5] Later that same day, Ms Ward rang then emailed Mr Sime-Barton to confirm he was to be offered the position of sous chef. Her email included a letter of offer and draft employment agreement for him to sign and return to Mr Hansen.

[6] The letter of offer was signed by Dana Johnston, a respondent director and co-owner of Meadow Restaurant. The letter advised Mr Sime-Barton *to seek independent legal advice in relation to this agreement.*

[7] The draft employment agreement was compiled from a template. Mr Hansen inserted the parties’ names, the start date and any other working conditions. The agreement contained an acknowledgment and declaration above the place for the employee’s signature confirming they had been advised of their right to obtain legal advice prior to signing and a trial period clause (clause 3.2). This clause did not specify a start or end date of the trial period. Instead it stated *a trial period will apply for a period of **NOT EXCEEDING 90 CALENDAR DAYS** employment to assess and confirm suitability for the position.*

[8] Mr Simeai-Barton emailed Ms Ward on 4 September 2014 advising he would print off and fill in the forms that night and drop them off on Monday morning (8 September).

[9] Mr Simeai-Barton also telephoned Mr Hansen on 5 September 2014. There is a dispute whether he made Mr Hansen aware he could not print out the letter and employment agreement.

[10] He met with Mr Hansen on 8 September 2014. Mr Simeai-Barton signed two copies of his employment agreement that had been printed from Mr Hansen's computer. Although the employment agreement recorded a start date of 10 September 2014, it is accepted by both parties he started on a different date.

[11] In late October 2014, Mr Hansen took a ten day holiday in Fiji. Upon his return, he received complaints from staff about Mr Simeai-Barton's conduct. Mr Hansen discussed the staff concerns with Mr Johnston. It was agreed that Mr Simeai-Barton's employment would be terminated pursuant to the trial period clause in his employment agreement.

[12] On 3 November 2014, Mr Hansen contacted Mr Simeai-Barton advising that his employment was terminated pursuant to the trial period clause.

[13] Mr Simeai-Barton obtained new employment with the Tin Soldier Restaurant the following day (4 November 2014). His employment ended when the Tin Soldier Restaurant went into receivership.

[14] By 25 November 2014, Mr Simeai-Barton obtained temp agency work at a reduced rate. He has since obtained full time work in Australia.

[15] He raised a personal grievance on 5 December 2014. The matter was unable to be resolved in mediation and is now before me for determination.

Issues

[16] At a teleconference held on 3 August 2015, the parties agreed the issues for hearing were:

- (a) Whether the trial period clause was valid;

- (b) Whether there was unfair bargaining leading to the signing of the employment agreement?

[17] The respondent conceded at the teleconference that if the 90 day trial period was invalid, the dismissal was unjustified.

Agreed facts

[18] At the above teleconference the parties confirmed they were in agreement about the following facts:

- (a) The two copies of the parties' employment agreement (to be produced to the Authority) were printed contemporaneously or from the same printer at the same time; and
- (b) The two copies of the parties' employment agreement (to be produced to the Authority) were also signed at the same time.

[19] On the basis of the parties' agreement, the evidence of a Police document analyst was admitted by consent and the expert witness was not required to attend the hearing.

Was the trial period clause valid?

Does the trial period comply with s67A(2) of the Act?

[20] Any trial provision in a contract or trial period clause must comply with s67A(2) of the Act to be enforceable. This section requires the clause is *a written provision in an employment agreement that states, or is to the effect, that ... for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period.*

[21] A trial provision "*should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment.*" This is on the basis legislation that removes previously available access to courts and tribunals

should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.¹

[22] It is common ground the trial provision clause in the parties agreement does not explicitly state a start or end date. Rather the trial provision states its duration as being *for a period ... not exceeding 90 calendar days*. Both parties agree the commencement date for employment recorded in clause 3.1 of the agreement of 10 September 2015 is incorrect. There is also a factual dispute about when Mr Simei-Barton commenced work. He alleges his employment commenced on 9 September 2015. LDJS Limited produced a timesheet with its submissions purporting to show employment commenced on 15 September 2014.²

[23] In my view this written trial provision clause fails to adequately specify the trial period starts at the beginning of this employee's employment. This is a requirement of s67A(2) of the Act. This is to prevent the uncertainty and factual disputes about commencement dates for employment and hence the trial period that have occurred here. There is nothing within the written provision or the agreement that provides any certainty about the start of the trial period. The trial provision is therefore invalid and unenforceable.

[24] As a consequence of my determination and the respondent's concessions, Mr Simei-Barton was unjustifiably dismissed.

Was there a validly concluded oral employment agreement on 3 September 2014?

[25] Mr Simei-Barton submits he became an employee pursuant to a validly concluded oral agreement on 3 September 2014 so was not a new employee at the time the written employment agreement was signed on 8 September.

[26] I do not accept this was the case. An email detailing the telephone conversation between the applicant and Ms Ward on 3 September 2014 was accepted by Mr Simei-Barton as correct.³ This records his advice to Ms Ward that he accepted *the position in principle but wanted to review the offer*.⁴ This is more akin to an

¹ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 at [48].

² The late production of the timesheet was objected to by the applicant. I have allowed it to be admitted but cannot give it great weight given the lateness and the applicant's inability to lead evidence or cross-examine the respondent about it. There was no reason for this evidence not being provided in pre-hearing disclosure.

³ Witness statement TT Simei-Barton dated 17 August 2014 sworn 14 October 2015 at para.9.

⁴ Document AA1, Statement in Reply.

expression of interest in the position subject to reviewing the formal terms and conditions of employment. It does not import an acceptance of any offer of employment. Mr Simei-Barton gave oral evidence he had been employed before and understood there would be an agreement which he would review and possibly seek legal advice about especially in relation to any trial period.

[27] The phone calls and emails between Ms Ward and Mr Hansen similarly support their understanding of an agreement in principle to the position subject to review of the formal offer.⁵ I determine Mr Simei-Barton was not offered and he did not accept employment prior to 8 September 2014.

Did the respondent render the trial period clause unenforceable?

[28] Mr Simei-Barton submits LDJS Limited rendered the trial period unenforceable. Firstly because it failed to engage with the applicant in good faith regarding its obligation in the trial period clause *to assess and confirm suitability for the position* and secondly because there was no contractual right to payment in lieu of notice of termination. He further submits this requires the employer's concerns to be put to him for comment.

[29] Section 67B sets out the effect of a valid trial provision. An employer is not required to comply with s4(1A)(c) of the Act. This section deals with the good faith duty requirements that an employer provide an affected employee with information about the decision to terminate and an opportunity to comment. I do not accept the addition of wording *to assess and confirm suitability for the position* overrides the effect of a valid trial provision as set out in s67B of the Act. The validity of the trial period clause rests upon its compliance with the matters set out in s67A of the Act.

[30] Payment in lieu of notice where there is no contractual right to do so does not invalidate the trial period clause. It may give rise to a separate action of breach of agreement under s134 of the Act. No such action is before me. Even if it was, the tests for award of a penalty are not met on the evidence here.

⁵ Document AA1 and AA3, Statement in Reply

Was there unfair bargaining leading to the signing of the employment agreement?

[31] Unfair bargaining for individual employment agreements may occur where employees *did not have the information or the opportunity to seek advice as required by [s63A]* (s68 of the Act). During bargaining for individual employment agreements, s63A of the Act requires an employer to:

- (a) *provide to the employee a copy of the intended agreement ... under discussion; and*
- (b) *advise the employee that he or she is entitled to seek independent advice about the intended agreement ...; and*
- (c) *give the employee a reasonable opportunity to seek that advice; and*
- (d) *consider any issues that the employee raises and respond to them.*

[32] An employer who fails to comply with this section is liable to a penalty (s63A(3)). However, failure to comply with this section does not affect the validity of the employment agreement (s63A(4)). The applicant must establish on the balance of probabilities that there has been unfair bargaining.⁶

[33] It is common ground that Mr Sime-Barton was emailed a copy of the letter of offer and intended employment agreement on or about 3 September 2014. The letter of offer advised Mr Sime-Barton to seek legal advice.

[34] The parties disagree about whether Mr Sime-Barton told Mr Hansen he could not print out copies of the letter or agreement. Mr Sime-Barton alleges he was unable to print it out because the agreement was in a format that his computer could not open. He says he told Mr Hansen on 5 September during their telephone call. Mr Hansen says he did not because he would have remembered this as it was “*a biggie*” meaning important. He says he would have asked him to come in and collect a paper copy.

[35] By 8 September Mr Sime-Barton had a copy of the employment agreement. The agreement he signed had been printed from Mr Hansen’s computer. He did not raise that he needed more time prior to signing the agreement because he told me at hearing that he *did not want to appear reluctant or difficult to a prospective employer*. He did not have concerns about appearing reluctant or difficult when he told Ms Ward

⁶ *Warmington v AFFCO New Zealand Ltd* [2012] NZEmpC 19; [2012] ERNZ 1; (2012) 9 NZELR 287 at [21].

that he accepted the position in principle subject to reviewing the offer on 3 September.⁷ He also had time to review the offer given he had existing employment where he would have had to give notice.

[36] Mr Hansen no longer works for the respondent. He had no motivation to be untruthful and made appropriate concessions such as the possibility he printed both copies out despite his belief he signed a copy of the agreement Mr Sime-Barton had brought in.

[37] There was no reasonable explanation why Mr Sime-Barton did not ask Ms Ward for copies of the agreement and letter of offer if he had printing difficulties. She had emailed him the documents not Mr Hansen. I am not convinced on the balance of probabilities there was unfair bargaining.

Remedies

[38] As Mr Sime-Barton has a personal grievance of unjustified dismissal the Authority must order the employer to pay to the employee the lesser of either a sum equal to any lost remuneration or 3 months' ordinary time remuneration (s128 of the Act).

[39] When considering an order for lost remuneration, the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether he seeks reinstatement.⁸ There is evidence Mr Sime-Barton obtained alternative employment with the Tin Soldier within one day of dismissal. This company subsequently went into receivership. He then found employment with Craftbros. He estimates the difference in wages over a three month period to be \$3,295.

[40] There was no contributory behaviour requiring a deduction in remedies under s124 of the Act. This is because Mr Sime-Barton was dismissed pursuant to an invalid trial period clause as opposed to his behaviour.

[41] The Authority still needs to have regard to all contingencies that might, but for the unjustified dismissal, have resulted in the termination of the employee's employment.⁹ There was evidence Mr Sime-Barton's conduct towards other staff

⁷ See para [24] above.

⁸ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

⁹ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [37]–[38].

was serious misconduct. One staff member gave evidence Mr Sime-Barton had threatened to deduct money from his wages because he left tuna out of the fridge overnight. It was accepted there was an unauthorised deduction of hours from the staff member's timesheet because he had wasted food. Mr Sime-Barton explained his actions were naïve and this was industry practice for the purposes of teaching staff about managing food wastage. In my view this was serious misconduct to alter another employee's timesheet without the authority or consent to do so. This could have resulting in an illegal deduction of wages in breach of the Wages Protection Act 1983 and exposed the employer to penalties. It was not until the staff member concerned complained to Mr Hansen that the wages issue was rectified.

[42] Several staff gave compelling evidence about being subjected to racial slurs and verbal abuse. Mr Sime-Barton accepted swearing at staff and using racial slurs but told me it was part of kitchen banter between staff. I do not accept this explanation given the obvious upset this caused to the staff members concerned and the fact they did not appear to participate in this kitchen banter. His employment agreement also identified serious misconduct as including *harassment of a work colleague*.¹⁰

[43] In my view this relationship would not have lasted longer than the time needed to conduct a disciplinary hearing which I would estimate to be two weeks. Accordingly I am only prepared to award lost remuneration in the sum of two weeks wages less PAYE.

[44] In terms of hurt and humiliation, any emotional damage appears to have been temporary. There is no evidence Mr Sime-Barton required medical intervention. There is no evidence his reputation within the hospitality industry was affected to the degree alleged (if at all). He obtained alternative employment one day after leaving the respondent's restaurant. There were allegations a director may have spoken to Mr Johnson and been told to fire him. This was hearsay, denied by Mr Johnson and at best speculative. An appropriate award is \$2,000 to mark the seriousness.

[45] The following orders are made:

- a) Tausani Sime-Barton was unjustifiably dismissed by LDJS Limited.

¹⁰ Clause 12.3 i,ii and vi of Employment Agreement dated 8 September 2014.

- b) There is an order that LDJS Limited pay to Tausani Sime-Barton lost remuneration equivalent to two weeks ordinary pay less PAYE pursuant to ss.123(b) and 128 of the Employment Relations Act 2000.
- c) There is an order that LDJS Limited pay compensation of \$2,000 pursuant to ss.123(1)(c)(i) and 124 of the Employment Relations Act 2000.
- d) Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served by 25 January 2016 3 pm. The other party shall have until 9 February 2016 3 pm to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority