IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 503
3102033

	BETWEEN	MICHAEL TANE Applicant
	AND	FARRAND ORCHARDS LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Therese Tudor, representative for the Applicant Martin Nicholls, counsel for the Respondent
Investigation Meeting:	14 September 2021 (by audio visual link)
Information and submissions received:	20 and 28 September 2021, from the Applicant 27 September 2021, from the Respondent
Determination:	15 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michael Tane was employed by Farrand Orchards Limited (FOL) as a trainee orchard manager from 1 April 2019 until he was dismissed on 21 June with his last day at work being 28 June. Mr Tane says his dismissal was unjustified and that he was unjustifiably disadvantaged in his employment and subject to age discrimination.[1] He seeks remedies of lost wages and compensatory damages and an award of penalties

[1] The age discrimination claim is not properly before the Authority and cannot be considered. It was not set out in the statement of problems 28 April 2020 or the amended statement of problem 28 April 2021. It is advanced in the closing submissions. FOL has not been fairly put on notice of the claim and its factual basis is not clear.

under s 134 of the Act for breach of the Employment Relations Act and s 134A for obstructing or delaying the Authority investigation a portion to be awarded to him.

[2] FOL says Mr Tane was not unjustifiably dismissed because the parties' employment agreement contained a 90-day trial period which was a binding term and that Mr Tane was lawfully dismissed within the trial period. FOL denies any breach of statutory obligation. FOL accepts if the trial period is not enforceable that Mr Tane's dismissal is unjustified.

The Authority's investigation

[3] By consent the investigation meeting was held by audio visual link. The Authority received evidence from Mr Tane and Kerry Farrand, FOL's owner and manager.

[4] 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. In determining this matter the Authority has carefully considered all the material before it, including all information provided by the parties and their submissions.

Issues

[5] The issues requiring investigation and determination are:

(i) Is the 90-day trial clause in the employment agreement enforceable?

(ii) Was Mr Tane unjustifiably dismissed;

(iii) If so, is he entitled to a consideration of remedies sought including:

i. Lost wages pursuant to section 123(1)(b) of the Act?

ii. Compensation pursuant to section 123(1)(c)(i) of the Act?

b) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Tane which contributed to the circumstances which gave rise to his grievance?

c) Did FOL's actions breach statutory obligations owed under the Employment Relations Act 2000 including obstruction or delay of the Authority investigation such that a penalty is warranted?

d) Are either party entitled to an award of costs?

The parties' employment agreement

[6] Clause 3.3 of the IEA contains a trial period:

> Trial periods
>
> A trial period will apply for a period of 90 days employment to assess and confirm suitability for the position. Parties may only agree to a trial period if the employee has not previously been employed by the employer.
>
> During the trial period the employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. The employee may pursue a personal grievance on grounds as specified in sections 103(1)b-g of the Employment Relations Act 200o (such as:
> …
> Any notice, as specified in the employment agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. 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 67A(5) of the Employment Relations Act 2000.

[7] Clause 12.2 of the IEA under the heading 'General Termination' provides the employer may give seven days' notice in writing of termination of employment for cause.

[8] Clause 3.2 of the Employment Agreement states that during a probation period of 90 days, the employer will provide guidance, feedback and any necessary support to the employee. Both parties will promptly discuss any difficulties that arise and the employer will appropriately warn the employee if it is considering termination.

Relevant law

[9] Section 67A of the Employment Relations Act 2000 (the Act) provides an employment agreement entered by a 'small-to-medium-sized' employer and an employee who has not previously been employed by that employer may contain a 90 day trial provision. Section 67B of the Act sets out the effect of a s 67A trial provision in an employment agreement namely, within the trial period an employer is able to give notice to the effected employee of termination of employment and the employee is unable to bring a personal grievance for unjustified dismissal or other legal proceedings in respect of the termination.

[10] Strict compliance with the requirements of s 67A is required. In *Smith v Stokes Valley Pharmacy (2009) Ltd* the court emphasised a strict approach was appropriate in light of the fact that the trial provisions remove longstanding employee protection and access to dispute resolution and justice.[2] In a recent judgment the court found that the failure to have the employee sign the agreement before he started work was fatal.[3]

The test for justification

[11] When the Authority considers justification for the actions of FOL it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions, as in this matter, the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of FOL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged unjustified actions.

[12] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. The Authority may take into account other factors as appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Tane being treated unfairly.

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[2] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253 at [48].
[3] *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper* [2021] NZEmpC 45 at [43].

[13] FOL could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

Background

[14] On 8 March 2019 Mr Farrand made Mr Tane a verbal offer of employment following an on-site interview which lasted about four hours. The men shook hands on the offer. Mr Farrand says during the course of the interview he made clear to Mr Tane any offer of employment would be conditional on his successfully completing a 90-day trial period. Mr Farrand says over his many years employing staff he has learnt this is a necessary requirement and he made this clear to Mr Tane. Mr Tane accepts Mr Farrand outlined bad experiences with staff in the past and emphasised the importance of trust and integrity. He says there was no mention of a 90-day trial and that Mr Farrand did not offer the employment conditional on a 90-day trial period.

[15] On 12 March 2019, Mr Farrand and Mr Tane had a telephone discussion regarding accommodation on the orchard. Mr Farrand proposed to provide the house as part of remuneration. Mr Tane agreed to this but said he first needed to see a written employment agreement. Neither Mr Farrand nor Mr Tane recalled discussing any other terms of employment during this conversation including the 90-day trial period.

[16] Mr Farrand emailed Mr Tane a written employment agreement on 17 March 2019. The employment agreement was incomplete in that it was unsigned, undated, did not have Mr Tane's name or job description or contain any pay details. It did contain a 90 day trial period. I note the covering email did not draw attention to the trial period and suggests all the terms of the proposed agreement were negotiable:

> Attached is the standard Permanent Employment Contract we have used in the past. Have a look thru it and let me know if you want to add or delete any of it. I'm not big on contracts, but by law I must have one for all Employees. I rely more on getting along with people by discussing any issues that might arise, in a grown up and mature fashion.
>
> Picking is just around the corner now, so look forward to your help.
> …

[17] Mr Tane replied by email 18 March:

> Thanks very much for the contract, and I couldn't agree more with your sentiments around contracts. I'll have a look through it tomorrow as have been flat out over the weekend and today.

> Logistics wise there's been a bit to get sorted. I'm awaiting confirmation from the removal firm but I expect to have my gear moved up Saturday or Sunday the 30th or 31st of March.
>
> The best part of it all is I have the total support of [Mrs Tane] and the [children] which is great.
>
> Thanks again for this opportunity Kerry, we're going to make a great team.
> …

[18] Mr Farrand said he did not understand Mr Tane's email as an acknowledgement that he was accepting employment with FOL. In evidence he recalled his wife asking him sometime between 17 and 30 March if Mr Tane was coming to work for FOL and he said he did not know. He said in his industry it in not unusual for people not to turn up to work and he was somewhat conditioned to this. He said when Mr Tane subsequently moved into the orchard accommodation that he knew then he had accepted employment with FOL. I take from this that Mr Farrand did not understand he and Mr Tane had reached accord.

[19] In evidence to the Authority Mr Tane said he acknowledges the employment agreement provided on 17 March contained a 90 day trial period but that he did not pick that up at the time.

[20] On 30 March 2019, Mr Tane travelled with his belongings and furniture to move into the orchard accommodation. Arrangements had been made for his family to finish the work and school year in Auckland before joining him in Kerikeri in 2020. There was some communication between Mr Tane and Mr Farrand advising of his arrival, as would be expected. Mr Farrand did not contact Mr Tane further over that weekend to discuss the employment agreement or any other matter. He said he did not wish to disturb Mr Tane when he was just settling into new accommodation.

[21] On 1 April 2019, Mr Tane started his job with FOL. There is no dispute he started working before he signed the employment agreement.

[22] The next event concerning the employment agreement was when Mr Farrand handed Mr Tane an employment agreement with his name, job title and hourly rate completed which was signed by Mr Farrand on behalf of FOL and dated 1 April 2019. Mr Farrand says this occurred on the morning of 1 April and points to the date he signed

and dated the document in support. Mr Tane says Mr Farrand handed him this document on Thursday 4 April, that he put it down and said he would look at it over the weekend. He says his recollection is consistent with the date he executed the document, Monday 8 April. While I find it more likely than not that the completed employment agreement was handed to Mr Tane as he recalls on 4 April because that is a plausible explanation for his not completing it until 8 April not a lot turns on this finding because there is no dispute Mr Tane did not sign the completed employment agreement until after his employment started.

[23] During his employment Mr Farrand oversaw Mr Tane's work regularly including directing his duties. Mr Farrand says he clearly identified to Mr Tane deficiencies and moved him onto duties better suited to his skill set. Mr Farrand said his initial concerns about Mr Tane's height proving a hindrance to his work under kiwifruit canopies was confirmed during his employment.

[24] While Mr Farrand may have held concerns about Mr Tane's performance and height the Authority is not satisfied these concerns were communicated to Mr Tane in a way which made it clear to him FOL held such concerns or that his employment was in jeopardy. For example, Mr Farrand sought to rely on a comment made by an unrelated third party to Mr Tane in Mr Farrand's presence to support FOL's contention the alleged issue concerning Mr Tane's height should have been clear to him.

[25] The opportunity was there for FOL to meet the express obligation at clause 3.2 of the employment agreement because it is accepted Mr Tane actively sought feedback from Mr Farrand during his employment and that Mr Farrand told him he was satisfied with his work. For completeness the parties agree Mr Farrand made what can fairly be characterised as minor corrections for example making it clear to Mr Tane the working day started in the field and not the shed. I am satisfied FOL fell well short of meeting the express obligation in the parties' employment agreement and the duty of good faith to be open and communicative about concerns which could put Mr Tane's employment in jeopardy.

[26] On 21 June 2019, while they were driving, Mr Farrand advised Mr Tane he was giving him seven days' notice of dismissal because he was "too tall". Mr Farrand said

he did not elaborate on the reasons because he did not wish to cause Mr Tane further embarrassment. Mr Tane said his dismissal came as a complete shock.

[27] FOL did not provide Mr Tane with written notice. Mr Tane's last day of employment was 28 June. He vacated the accommodation on the same day though FOL had given him some leeway on the vacation date.

Discussion

[28] Mr Farrand said he did not insist on Mr Tane signing an employment agreement before he started because he did not wish to disturb him while he was settling into his new accommodation and in retrospect it was a mistake not to get him to sign it before he started employment. On the information before the Authority the parties written employment agreement could not have been executed before Mr Tane started employment with FOL because one had not been provided in a form able to be executed. Mr Tane said he did not sign the 17 March employment agreement before starting because a completed employment agreement had not been provided. This is fair because the 17 March employment agreement did not meet the requirements of s 65 of the Act - Mr Tane's name was not on the document and the position and wage/salary sections were blank.

[29] FOL says notwithstanding the employment agreement not being signed by Mr Tane until after his employment commenced, the essential elements of employment had been agreed between the parties prior to Mr Tane's employment commencing including the trial period. It says it would be unconscionable for a party to promise something, in this case to sign the proposed employment agreement containing the trial period, and then seek to rely on the delay in signing the document which contained terms to which the parties had agreed. FOL relies on *Berea v Best Health Foods Limited* to support its submission a valid trial period commenced when all of the essential elements of the bargain between the parties had been struck and both parties had definitively accepted by words or deed, the terms offered.[4]

[30] The circumstances before the Authority in *Berea* are distinguishable from those currently under consideration because there is insufficient evidence that the parties

[4] *Berea v Best Health Foods Limited* [2020] NZERA 474, at [27] – [33].

agreed a trial period would form part of their terms of employment or even that FOL made clear to Mr Tane the offer was conditional on a 90-day trial period:

- Mr Tane denies Mr Farrand offered him conditional employment on 8 March and there is no direct evidence to corroborate Mr Farrand's evidence that he did;
- the next communication between the parties was 12 March and neither witness suggests a trial period was discussed then;
- Mr Farrand's 17 March email suggests all terms of the attached blank employment agreement were negotiable and it does not highlight the 90-day trial period condition as was the case in *Berea*;
- Mr Tane says he did not notice the 90-day trial period in the 17 March employment agreement and there is no evidence to contradict that for example evidence of this specific provision being drawn to his attention; and
- the parties did not discuss the terms of employment over the weekend of 30-31 March.

[31] There is no dispute the employment agreement was not executed prior to Mr Tane's employment and there is insufficient evidence to establish there was accord between the parties that Mr Tane's employment was subject to a 90-day trial period. In the circumstances of this matter FOL's failure to ensure the written employment agreement containing the 90-day trial period was executed prior to Mr Tane's employment commencing is fatal to its claim to reliance on that term.

[32] Does the dismissal meet the s 103A test for justification? No. This is properly conceded by FOL. The dismissal does not meet any of the requirements of the statutory test for a justified dismissal.

[33] Mr Tane has established a personal grievance for unjustified dismissal.[5] He is entitled to consideration of the remedies sought.

[5] The factual basis of the unjustified action and unjustified dismissal claim are the same and it is appropriate to deal with them as one claim.

Remedies

Reimbursement

[34] Mr Tane seeks reimbursement of earnings lost as a result of his dismissal pursuant to section 123(1)(b) and 128 of the Act. The period of claim runs for 12 weeks from his final date of employment being 28 June 2019. A calculation of holiday pay on lost earnings is also sought. FOL says it was unreasonable for Mr Tane to apply only for positions in Northland because he had returned to Auckland after his employment ended and he could have returned to the work he had been doing before joining FOL. Mr Tane's intention to shift North permanently was known between the parties and was a key motivator to his accepting the role with FOL. Vacation from employment related accommodation in the circumstances outlined above and returning to his family in Auckland is not, I am satisfied evidence of a shift in that intention.

[35] After reviewing the evidence of loss and Mr Tane's attempts to secure employment the Authority is satisfied he is entitled to an award of three months lost remuneration to be calculated at his rate of pay at date of dismissal.[6] Holiday pay is ordered calculated at 8% on total lost wages award.[7]

Compensation for humiliation, loss of dignity and injury to feelings

[36] Mr Tane said his dismissal was embarrassing and had taken an emotional toll on his relationship. Mr Tane's dismissal raising letter dated 17 September 2019 describes the impact of the dismissal and includes the dismissal left him shocked and hurt because there was no warning of concerns, performance management process or health or back issues that could justify a dismissal. The letter also says Mr Tane felt FOL had turned on him without warning and the dismissal had been carried out with no consideration for what it would mean to Mr Tane or his whanau.

[37] The Authority is satisfied he has experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of

[6] Mr Tane worked full time at an hourly rate of $38.50, 12 weeks lost wages = $18,480.00
[7] 8% of $18,480.00 = $1,478.40.

compensation.[8] Having regard to the particular circumstances of this case, I consider that an award of $15,000 under section 123(1)(c)(i) is appropriate.[9]

Contribution

[38] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[39] Mr Tane did not contribute in a blameworthy way to the circumstances which led to his employment ending. FOL suggested in evidence to the Authority Mr Tane's height and lack of experience in orchard work, in particular machinery operation and repair and kiwifruit pruning and tying skills made him unsuitable for the work and rendered his dismissal inevitable. These are all matters within or reasonably within FOL's knowledge when it offered Mr Tane employment or which could have been raised with him during his employment with a view to addressing any concerns but which I am satisfied were not raised with sufficient clarity as to make it clear to Mr Tane FOL held any concerns or to allow reasonable remedial steps to be taken.

[40] There are no deductions from the monetary remedies for reasons of contribution.

Penalty

Section 134A obstructs or delays without sufficient cause

[41] A penalty has been sought for conduct of FOL post dismissal which is said to have unreasonably obstructed or delayed the Authority's investigation. The conduct includes letters written on behalf of FOL to Mr Tane's father-in-law requesting Mr Tane withdraw his personal grievance, attempting to communicate directly with Mr Tane when his representative's authorisation had been communicated to FOL and inordinate and unreasonable delays in scheduling mediation.

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[8] *Richora Group Limited v Cheng* [2018] NZEmpC 113.
[9] *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

[42] Conduct prior to the application lodgment date of 28 April 2020 cannot be considered to have obstructed or delayed the Authority's investigation because the matter was not before the Authority. The communications referred to all appear to have occurred in March 2020, prior to the lodgment date and therefore cannot be a factual basis for a s 134A penalty.

[43] With respect to the claim concerning mediation the relevant time line is:

- the application was lodged on 28 April 2020;
- the Authority referred the parties to mediation on 14 May;
- on 22 July the applicant advised the Authority the parties had not yet attended mediation because FOL preferred face to face mediation rather than telephone or zoom mediation and asked for an investigation meeting to be scheduled;
- on 30 July 2020 a case management conference was held and the parties were again referred to mediation;
- on 26 January 2021 Mr Tane, by his representative wrote to the Authority that the parties had not yet been to mediation because FOL would not make itself available, raised concerns that FOL's continued failure to attend mediation was delaying and obstructing the Authority process and sought a direction to mediation to be held by telephone and leave to file an amendment statement of problem in include a s 134A penalty;
- on 11 March the Authority convened a case management conference with the parties during which a direction to mediate by 1 April 2021 was issued;
- a mediation was scheduled for 1 April but FOL did not attend. FOL had attempted unsuccessfully to cancel the mediation on 31 March;
- on 21 April an investigation meeting was scheduled for 22 July and timetable set for filing evidence;
- on 28 April an amendment statement of problem was filed including s 134A penalty;
- FOL by amended statement in reply dated 12 May denied any obstructing or delaying conduct;

- on 21 May the parties' views were sought on a further direction to mediation;
- on 14 June the parties were directed to mediation and a new investigation meeting date was scheduled; and
- the parties attended mediation on 14 July.

[44] The timeline shows there has been considerable delay in the parties attending mediation which has required intervention from the Authority to progress. There are a number of factors which have contributed to the delay in the parties attending mediation including that the parties and their representatives are in different locations (Auckland and Kerikeri), differing preferences for either telephone, zoom or in person mediation, unavailability due to work commitments and the impact of the various COVID lockdowns over the relevant period. There is also the impact of the unsuccessful attempt to cancel the scheduled directed mediation.

[45] I am not satisfied the delays in attending mediation can be said to amount to an obstruction or delay to the Authority investigation of this matter within the meaning of s 134A. The issues of delay and cancellation may be more appropriately considered in a costs setting.[10]

Section 134 – breach of the Employment Relations Act 2000

[46] A penalty has been sought for breach of the Employment Relations Act which is understood to be a claim for breach of the duty of good faith.[11] The duty of good faith includes parties to an employment relationship being active and constructive in establishing and maintaining productive employment relationships in which parties are responsive and communicative. Mr Tane has established FOL failed to actively communicate concerns with him which were relevant to his continued employment. This is a breach of the obligation of good faith as well as the express provisions of the parties' employment agreement. However, I decline to exercise my discretion and

[10] While costs associated with mediation are not usually recoverable there may be circumstance where it is appropriate.
[11] Employment Relations Act 2000, s 4(A). Refer statement of problem 28 April 2020 and amended statement of problem 28 April 2021. The statements of problem refer to breaches of ss 67(1)(a) and 236 of the Act however those provisions contain no corresponding penalty provision.

award a penalty given the circumstances of this matter including that Mr Tane has been successful in his claim for remedies arising from the same factual basis.

Summary of orders

[47] Farrand Orchards Limited must pay Michael Tane the following amounts within 28 days of the date of determination:

(i) $15,000 under s 123(1)(c)(i);
(ii) $18,480 under s 123(1)(b); and
(iii) $1,478 in holiday pay holiday pay for the period of the three months lost remuneration pursuant to s 123(1)(b) of the Employment Relations Act 2000.

Costs

[48] Costs are reserved. The parties are encouraged to resolve this issue between them. If this is not possible, Mr Tane is to file and serve any costs memorandum within 10 working days of the date of determination and FOL may file and serve any reply memorandum within a further 5 working days.

Marija Urlich
Member of the Employment Relations Authority