

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 24
5449420

BETWEEN BRENDON CHARLES WRIGHT
Applicant

A N D BERNAL REILLY
Respondent

Member of Authority: Helen Doyle

Representatives: Mark Henderson, Counsel for the Applicant
Graeme Downing, Counsel for the Respondent

Investigation Meeting: 18 February 2015 at Nelson

Submissions Received: On the day

Date of Determination: 27 February 2015

DETERMINATION OF THE AUTHORITY

- A The trial period provision in the Federated Farmers Agreement is not effective. It does not prevent Brendon Wright from bringing a personal grievance.**
- B Brendon Wright was unjustifiably dismissed.**
- C The Authority has made the following orders for payment to Brendon Wright by Bernal Reilly:**
- (i) Lost wages in the sum of \$9,759.10 gross.**
 - (ii) Holiday pay on lost wages in the sum of \$780.73 gross.**
 - (iii) Compensation in the sum of \$9,000 without deduction.**

- (iv) **Reimbursement for removal and storage costs in the sum of \$1600.**
- (v) **Loss of the benefit of accommodation valued at \$100 per week in the sum of \$300.**
- (vi) **Reimbursement of one day's annual leave deducted in the sum of \$223.08.**
- (v) **Reimbursement of \$105 deducted for gumboots.**
- (vi) **Reimbursement of \$150 deduction for an administration fee.**
- (vii) **Interest is payable from 18 June 2014 until the date of payment at 5% on the above amounts with the exception of the \$105 for gumboots.**

D I reserve the issue of costs and failing agreement have timetabled for submissions.

Employment relationship problem

[1] Brendon Wright was employed by Bernal Reilly on his Golden Bay farm as a Farm Manager. He commenced working for Mr Reilly on 6 June 2013. Mr Wright was given five days' notice of the termination of his employment on 29 August 2013 in reliance on a 90 day trial period provision in the Federated Farmers individual employment agreement (FFA) signed by Mr Reilly and Mr Wright on 14 June 2013.

[2] Mr Wright does not accept that the trial period is effective and says that it cannot be relied on by Mr Reilly to prevent him bringing a personal grievance for unjustified dismissal. He says that the decision to dismiss him was unjustified on both substantive and procedural grounds.

[3] Mr Wright further says Mr Reilly failed to pay him for one day when he played golf at Mr Reilly's suggestion and made unlawful deductions from his final pay for an administration fee and for wet weather gear.

[4] Mr Wright claims lost wages from 5 September 2013 to 18 November 2013 taking some earnings into account in the sum of \$10,780.40 which includes holiday

pay. He seeks reimbursement for money either not paid or deducted in the combined sum of \$597.07, the sum of \$1,600 for removing and storing personal belongings, loss of the benefit of rental between 12 September 2013 and 18 November 2013 and compensation of \$10,000 for humiliation and loss of dignity.

[5] Mr Reilly says that the employment ended during the trial period and that the trial period provision prevents Mr Wright from bringing a personal grievance for unjustified dismissal. Mr Reilly does not accept that the monetary amounts claimed by Mr Wright for deductions made are necessarily due and owing.

The issues

[6] The issues for the Authority to determine are as follows:

- (a) Does the trial period provision prevent Mr Wright from bringing a personal grievance in respect of his dismissal?
- (b) If it does not was Mr Wright unjustifiably dismissed?
- (c) If Mr Wright was unjustifiably dismissed, then is he entitled to remedies and are there issues of mitigation or contribution?
- (d) Is Mr Wright entitled to be reimbursed for one day's wages for 7 June 2013?
- (e) Were deductions made from his wages for the administration fee and wet weather gear entitled to be made under his employment agreement?
- (f) Is Mr Wright entitled to compensation for loss of the benefits of \$200 rent per fortnight until he obtained further alternative employment and is he entitled to be reimbursed for removal and storage costs?
- (g) Should interest be payable?

Does the provision for a trial period provision prevent Mr Wright from bringing a personal grievance in respect of his dismissal?

[7] Section 67A of the Act provides that an employment agreement containing a trial period provision not exceeding 90 days may be entered into by an employee who has not previously been employed by the employer. Section 67B of the Act provides that an employee whose employment agreement is terminated before the end of the trial period may not bring a personal grievance in respect of the dismissal.

[8] The FFA with the trial period provision was not signed before Mr Wright commenced employment on 6 June 2013. It was signed on 14 June 2013.

[9] On 21 April 2013 Mr Wright was interviewed for and offered the role of Farm Manager on Mr Reilly's farm. Mr Wright had been employed on other farms in the Golden Bay area for 8½ years and Mr Reilly was satisfied that he had the experience for the role on his farm. Mr Wright accepted the offer of employment and an employment agreement which did not contain a trial period was signed by both parties that same day.

[10] Mr Reilly said that the employment agreement that was signed by him and Mr Wright was a supplementary agreement only as he made it clear to Mr Wright that the offer of employment was on the standard FFA terms. Mr Reilly said that he did not have a copy of the FFA with him on 21 April 2013 so only got the supplementary agreement signed. Mr Wright does not accept that there was any discussion about a FFA and that if there had been then he would not have signed the other employment agreement because that would have been too confusing.

[11] In his written evidence, Mr Reilly said that on 21 April 2013 when he offered Mr Wright the position as farm manager on his farm it was on a 90 day trial period. When Mr Reilly gave his oral evidence to the Authority, he accepted that he did not talk to Mr Wright on 21 April about a trial period.

[12] Mr Downing submits that it was unremarkable that the employment would have been offered and accepted on the basis of the standard FFA.

[13] Mr Downing referred the Authority to the Supreme Court judgment in *Wholesale Distributors Limited v Gibbons Holdings Limited*¹ as authority for considering the subsequent conduct of the parties as part of the factual matrix to determine what the parties intended when they entered the agreement.

[14] Mr Downing relies on the following subsequent conduct. Firstly the signing of the FFA on 14 June 2013 with a 90 day trial period. He submits that this confirmed the offer was subject to the parties entering into the FFA. Secondly the fact that when Mr Reilly hand delivered the notice of termination letter on 29 August 2013 to Mr Wright, Mr Wright never questioned the ability to end the relationship in reliance on the trial provision.

[15] I accept it would have been unremarkable for an offer of employment on a farm to be on the basis of the FFA but the issue is whether employment was actually offered to Mr Wright on that basis. There was nothing in the employment agreement signed by Mr Wright on 21 April 2013 to support that the offer of employment was made on the FFA terms and conditions. The employment agreement did not provide that employment was conditional on an FFA agreement being signed or that the agreement was supplementary to the FFA. Further the FFA signed on 14 June 2013 contained an entire agreement provision in clause 38. The effect of signing the FFA was that the earlier employment agreement far from being supplemental could no longer be relied on under clause 38. The fact clause 38 was not deleted from the FFA further supports the unlikelihood of any discussion that the earlier employment agreement signed was to be supplementary to an FFA.

[16] The employment agreement signed on 21 April 2013 referred to a number of matters such as performance, time off, wages (salary), safety, confidentiality and date of commencement of employment. It was only 2 and a ¼ pages in length compared to the FFA which is 39 pages. Nevertheless I accept as submitted by Mr Henderson it could be a stand-alone employment agreement. Mr Wright's evidence is that he thought that was his employment agreement to cover the work at the farm.

[17] In all the circumstances I prefer Mr Wright's evidence as inherently more likely that that there was no mention of the offer of employment being on the terms

¹ [2007] NZSC 37

and conditions of the standard FFA agreement and in those circumstances the conduct of signing a FFA on 14 June 2013 does not assist in determining what was intended.

[18] In relation to the other matter of subsequent conduct relied on, the evidence supports on 29 August 2013 Mr Reilly handed a letter giving five days' notice of termination of employment to Mr Wright. He did so over the fence of the accommodation in which Mr Wright was residing on the farm and then drove off before Mr Wright could read it. I am not satisfied that the fact Mr Wright did not approach Mr Reilly within the notice period or within the period before he was required to vacate his property takes the matter any further. Mr Wright raised a personal grievance within the statutory timeframe to do so.

[19] On 21 April 2013 therefore before commencing work, Mr Wright accepted an offer of employment from Mr Reilly. The employment agreement he signed on that same day did not contain a trial period and there was no discussion of a 90 day trial period. I have not found that the offer of employment was, on the balance of probabilities, made on the terms of the FFA.

[20] Mr Henderson submits that Mr Wright became an employee from 21 April 2013 within s 6 of the Act in that he was *a person intending to work*. Chief Judge Colgan found in *Blackmore v Honick Properties*² that from the completion of the offer and acceptance of employment, Mr Blackmore became an employee of Honick Properties to the extent that he was entitled to bring a grievance against it from when he accepted its offer of employment. Chief Judge Colgan also stated that in practice, an employer cannot require lawfully an existing employee to enter into a trial period in the course of current employment.

[21] I find the submission that Mr Wright was an employee of Mr Reilly's from 21 April 2013 is persuasive. I will set out the events leading to the signing of the FFA before returning to address this further.

[22] The signed employment agreement provided that the date of commencement of employment was 1 June 2013 which is the start of the next dairy season. There is no dispute that while Mr Wright shifted into his accommodation on Mr Reilly's farm about 2 June 2013 he did not actually commence employment until 6 June 2013.

² [2011] ERNZ 445 at [58] and [59]

[23] Mr Reilly's evidence is that as best he could recall he handed to Mr Wright on 6 June, either before he started work in the morning or at lunchtime, a FFA which contained both a trial period and a probationary period. He said that he then asked Mr Wright several times to sign it and finally called him to the house on 14 June 2013 so that the agreement could be signed.

[24] Mr Wright's evidence was that the first time he saw the FFA was on 14 June 2013 when he was asked by Mr Reilly to go to his home. Mr Wright said that another employee, Hamish, was also asked to go to the house that day but at a different time. Mr Wright said that he was then presented with the FFA which he had a quick look through and then signed and Mr Reilly also signed the agreement. There is no dispute that the date the employment agreement was signed was 14 June 2013.

[25] A finding on the disputed issue as to whether the FFA was provided on the date Mr Wright commenced work or not may not be required in this case. I will only return to this matter if I find that I am required to do so.

[26] After signing the FFA on 14 June 2013 Mr Wright said he continued with his work and Mr Reilly accepted he had never raised issues of concern with Mr Wright during his employment.

[27] On 26 August 2013, Mr Wright injured his back trying to get a dead cow off the platform so that milking could continue. Mr Wright was given a medical certificate for seven days off work. Mr Wright confirmed that there was no ACC claim lodged in respect of the injury.

[28] On 29 August 2013, Mr Reilly drove past Mr Wright's farmhouse where he was living on the farm and tooted his horn. Mr Wright came out from the accommodation and was given a letter in an envelope which advised that Mr Reilly was giving Mr Wright five days' notice that his employment had been terminated from 29 August 2013. Mr Wright was advised that he could stay in the house for two weeks and was required to leave on 12 September 2013. He was advised that the accountant would work out how much money he would be paid and holiday pay and the house would be inspected after Mr Wright vacated it.

[29] Mr Downing relies on the Authority determination in *Simmons v. Collins Stainless Steel Fabricators Ltd*³ to support Mr Reilly's view that notwithstanding the employment agreement was not signed until after employment commenced the trial period provision is valid and can be relied on.

[30] In *Simmons* the employment agreement was not signed until two weeks after employment commenced. The Member was however satisfied as stated amongst other matters at para.[14]:

.....I am satisfied that when entering into the employment at the very beginning there was agreement that the employment would be subject to a 90 day trial period subject to the Act.

[31] It was found that Mr Simmons and Mr Collins intended at all times leading up to and on the commencement of Mr Simmons' employment to be bound by the terms set out in the written employment agreement including the trial provision. The employment agreement had been provided to Mr Simmons prior to him commencing his employment and the provision reflecting a trial period was in bold and was highlighted. Mr Simmons had received a letter setting out the offer of employment which included a statement that the employment would be subject to a trial period from the date of commencement. There was a suggestion that Mr Simmons had then been evasive in signing his employment agreement. The Member concluded that there is nothing in ss 67A and 67B that requires the employment agreements to be signed.

[32] I find that this case is distinguishable from *Simmons*. Mr Wright was not offered a position on the basis that he would be subject to a 90 day trial period or on the FFA terms. The employment agreement that Mr Wright signed at the time he accepted the position on 21 April 2013 did not contain a trial period.

[33] Mr Downing placed some emphasis on the fact that Mr Wright was familiar with the FFA and its contents including a trial period. I have not found it likely that Mr Wright was verbally offered and accepted employment with Mr Reilly on the terms of the FFA. In any event it is not enough that Mr Wright had been employed previously under an FFA and may presume that some of the terms and conditions would be the same and that there may be a trial period. An employment agreement is for consideration, advice and negotiation, not presumption.

³ [2011] NZERA Auckland 330

[34] Even if I was to accept Mr Reilly's evidence that the FFA was provided to Mr Wright on the morning he commenced employment I do not find that it was intended that the FFA bind the parties until it was executed. The FFA was then not signed until a week after employment commenced. *Blackmore* at [66] is authority for the proposition that if an employer wants the protections afforded by ss 67A and 67B then they must ensure trial periods are mutually agreed in writing before a prospective employee becomes an employee.

[35] I do not find that Mr Reilly can rely on the trial period provision to prevent Mr Wright from bringing a personal grievance in respect of the dismissal. At the time the FFA was executed on 14 June 2013 Mr Wright was already an employee of Mr Reilly having accepted employment and signed an employment agreement with Mr Reilly on 21 April 2013 and commenced employment on 6 June 2013.

Was Mr Wright unjustifiably dismissed?

[36] Having found that Mr Reilly is not able to rely on the protections afforded by ss 67A and 67B of the Act the justification of the dismissal then has to be considered under the test in s 103A of the Act. That requires the Authority to determine on an objective basis whether Mr Reilly's actions, and how he acted, were what a fair and reasonable employer could have done in all the circumstances at the time of dismissal.

[37] The Authority must also have regard to the four procedural factors set out in s 103A (3) (a) to (d) and any other factors it thinks appropriate. It must not determine a dismissal unjustifiable because of defects in the process if they were minor and did not result in Mr Wright being treated unfairly.

[38] Mr Reilly in his written evidence stated he had some issues with Mr Wright during the time he worked for him. In his written evidence he stated that in particular there was an issue about the amount of leave taken. The evidence supported that Mr Reilly encouraged Mr Wright to take most of the leave and Mr Reilly accepted that in the circumstances it would not be reasonable to complain about that. He then raised some other issues that were I find of a minor nature and he agreed he had not raised these in a formal way with Mr Wright. None of those issues I find would justify dismissal. There was no procedure and therefore the requirements of s 103A (3) (a) to (d) of the Act were not met. This was not a minor failing and it did result in unfairness to Mr Wright.

[39] I find that the dismissal was unjustified both substantively and procedurally. Mr Wright has a personal grievance that he was unjustifiably dismissed and is entitled to remedies.

Remedies

Lost wages

[40] Mr Wright seeks reimbursement for lost wages from 5 September 2013 being the end of his five day notice period to 18 November 2013 when he obtained employment at Foodstuffs in Christchurch. Mr Wright said that he did attempt to see if there were farming jobs in Golden Bay but as it was three quarters of the way through calving season all the jobs were filled. He also checked the newspapers and tried with WINZ to no avail. In September 2013 he moved for financial reasons and because he had nowhere else to live to Christchurch and lived with his brother. He tried to get painting and labouring work but was not experienced in those areas. He also signed up with a labour placement company Tradestaff as a temporary employee and got some days work for which he received \$1,617.84. On 18 November 2013 he obtained employment with Foodstuffs.

[41] I am satisfied that Mr Wright attempted to mitigate his lost wages. The period between 5 September and 18 November 2013 is ten weeks and one day. Mr Wright was on a salary of \$58,000 with Mr Reilly and was paid fortnightly a sum of \$2,230.77 gross.

[42] Lost wages had been calculated on a daily basis but I am of the view that the correct calculation should be fortnightly so I arrive at a slightly different figure than Mr Wright's. I have multiplied the fortnightly sum paid to Mr Wright when he was employed by Mr Reilly by five weeks to arrive at a figure of \$11,153.85 and added a further day at \$223.08 in accordance with the figure arrived at by Mr Reilly's accountant for the daily rate. The total then is \$11,376.93 gross from which has to be deducted earnings received during that period of \$1,617.84. I arrive at a final figure of \$9,759.10.

[43] Subject to any issue about contribution I order payment by Mr Reilly to Mr Wright of lost wages under s 123 (1) (b) in the sum of \$9,759.10 gross.

Holiday pay on lost wages

[44] Holiday pay has been claimed on the lost remuneration. Judge Couch considered this claim in *Nathan Gunning v Bankrupt Vehicle Sales and Finance Limited*⁴. He found that the statutory benefits under the Holidays Act 2003 may be the subject of compensation if it is established that they were lost as the result of the personal grievance. I find that it is likely that had the dismissal not arisen Mr Wright would not have taken any of his holidays for the period from 5 September 2013 as it was a busy time. I therefore award holiday pay under s 123 (1)(c)(ii) of the Act of 8% of \$9,759.10 which is \$780.73 gross.

Compensation

[45] Mr Wright claims the sum of \$10,000 compensation for humiliation, loss of dignity and injury to feelings. The evidence supported that the dismissal had a reasonably significant impact on him. I heard from Mr Wright and by telephone from his brother Jamie who had provided a written statement of evidence. Mr Wright had lived with his brother for a while after his dismissal.

[46] Mr Wright said that there was no discussion with him at the time he was handed the envelope containing the letter terminating his employment. The dismissal was quite unexpected and Mr Wright was on sick leave under a medical certificate at the time. Mr Wright recalls that Mr Reilly after delivering the letter drove off with a smile on his face. Mr Reilly did not disagree that this may have been the situation. Mr Wright was given two weeks' notice to move out of the farm house and he said that he was stunned that Mr Reilly did not come over to see him when he left. They did not talk again before Mr Wright left the farm.

[47] Mr Wright said that he was then forced to leave Golden Bay where his son lives and where he had worked for eight and a half years to get a job. Mr Wright said that he felt stressed about that as he had been sorting his life out and then had to make significant changes. He did not like having to rely on his brother for assistance and I accept lost confidence. Mr Wright said that stress manifested itself in skin problems although agreed they were not serious enough to consult a doctor over and sleeping issues. Mr Wright said that he is still financially behind as a result of the dismissal because he thought he would have a job for at least the season with Mr Reilly. Jamie

⁴ [2013] NZEmpC 212

Wright described his brother as generally down and snappy and a *bit of a mess* with *his skin going to the pack*.

[48] I find that subject to any issues of contribution there should be an award of \$9,000 under s 123 (1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings.

Contribution

[49] Under s 124 of the Act Mr Wright did not contribute towards the situation giving rise to the personal grievance.

Removal Storage costs

[50] Mr Wright has claimed reimbursement for removal and storage costs for his personal belongings from his farm accommodation in Golden Bay to his brother's flat in Christchurch. He provided an invoice in support in support of his claim in the sum of \$1,600. Mr Wright was entitled in his employment agreement to accommodation and I accept that he was then required following what I have found to be an unjustified dismissal to vacate that accommodation. As he was unable to obtain employment in Golden Bay and had nowhere to live there he was forced to shift, store and then move his belonging to another city in order to find work.

[51] I do not find that this claim too remote in the circumstances and order reimbursement of the sum of \$1600 being money lost as a result of the grievance under s 123 (1) (b) of the Act.

Loss of benefit of allowance for rental

[52] I find that this claim is probably more accurately described as the loss of the benefit of accommodation which was valued at \$100 per week. The allowance worked in this way for Mr Wright's accommodation. \$200 per fortnight was paid to Mr Wright for a rent allowance and then deducted as rent in the same pay cycle. Mr Wright said that he lost the value of that benefit. He seeks reimbursement from 12 September until he found alternative employment on 18 November of rental in the sum of \$957.53.

[53] I could not be satisfied from the evidence that Mr Wright was required to pay rental to his brother whilst he was without employment except to the extent of a three week period referred to by Jamie Wright prior to 18 November 2013.

[54] I find that the loss of benefit of accommodation valued at \$100 per week is limited to three weeks or \$300 only and there should be reimbursement of the sum of \$300 for the loss of the benefit Mr Wright may have been expected to obtain if the personal grievance had not arisen under s 123 (c) (ii) of the Act.

[55] I order Mr Reilly to pay to Mr Wright the sum of \$300 being the loss of the benefit of accommodation valued at \$100 per week.

Deduction from annual leave entitlement for golf day on 7 June 2013

[56] Mr Wright was asked to pay golf in a tournament on 7 June 2013 by Mr Reilly. The tournament is organised by PGG Wrightsons each year. Mr Wright explained that he is not a golfer but felt Mr Reilly wanted him to participate. He said he would not have agreed to annual leave being deducted in the circumstances and if he thought it would be he would not have played.

[57] Annual leave is something that an employee requests or agrees in consultation with his or her employer to take. I accept Mr Reilly's evidence that this was a day off work for Mr Wright but I am not satisfied that Mr Wright agreed that the day would be an annual leave day or indeed thought it would be. Mr Reilly should have made it clear that this was how the day was to be regarded so Mr Wright could make an informed choice. Mr Wright should be reimbursed for this day.

[58] I order Mr Reilly to reimburse one day's annual leave deducted to Mr Wright in the sum of \$223.08 gross.

Wet Weather gear

[59] Wet weather gear was deducted from Mr Wright's final pay in the sum of \$224. Such deduction is permitted under the FFA if the gear is not returned. Mr Wright did not seek to claim reimbursement of this amount until the investigation meeting when he said that deduction was unfair because he did not get gumboots supplied at all and his jacket was stolen. A late claim can be unfair and the Authority has to proceed cautiously. Mr Reilly accepted he could not establish the gumboots

were actually supplied to Mr Wright and did not disagree that he was told the jacket had been stolen. The concern I have is that the supply form refers to trousers as well.

[60] I intend to address it in this way recognising the lateness of the claim and potential unfairness. I will order reimbursement for the gumboots only in the sum of \$105 as Mr Wright cannot return something he never had.

[61] I order Mr Reilly to reimburse the sum of \$105 for gumboots.

Deduction of administration fee

[62] Mr Reilly did not disagree that there was no basis in the FFA for this deduction from Mr Wright's final pay and it should be reimbursed.

[63] I order Mr Reilly to reimburse the sum of \$150 for deduction for the administration fee.

Interest

[64] Interest is claimed and I find it is appropriate to award interest from the date that the statement of problem was lodged on 18 June 2014 on the amounts ordered for reimbursement of lost remuneration, payment of benefits and reimbursement of deductions and the holiday pay. I do not order interest payable on the reimbursement for the gumboots.

[65] Interest is to be paid at the rate of 5 percent per annum until payment is made under clause 11 of the second schedule of the Employment Relations Act 2000.

Costs

[66] I reserve the issue of costs. Agreement may with knowledge of the usual daily tariff be able to be reached. If not Mr Henderson has until 20 March 2015 to lodge and serve submission as to costs and Mr Downing has until 3 April 2015 to lodge and serve submissions in reply.

