

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Nigel Clements (Applicant)
AND Water Treatment Products Limited (Respondent)
REPRESENTATIVES David Bruce, Advocate for Applicant
Murray Falloon, Advocate for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 23 June 2005
DATE OF DETERMINATION 6 July 2005

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following orders:-

- A. Water Treatment Products Limited is ordered to pay to Nigel Clements the gross sum of \$9,300.00 as reimbursement.**
 - B. Water Treatment Products Limited is ordered to pay to Nigel Clements the sum of \$5,000.00 as compensation.**
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Employment Relationship Problem

[1] The problem between these parties is Mr Nigel Clements' ("Mr Clements") claim that he was unjustifiably dismissed by Water Treatment Products Limited ("the Company") on 5 October 2004.

[2] The Company says it justifiably dismissed Mr Clements after an unsuccessful three month probationary period.

[3] The parties were unable to resolve the differences between them by the use of mediation.

Probationary period

[4] A director of the Company Mr Murray Falloon ("Mr Falloon") tells the Authority that under cover of a letter dated 26 April 2004, he mailed an individual employment agreement ("the Agreement") to Mr Clements' home address for Mr Clements to eventually return to him signed.

[5] The Agreement records Mr Clements' employment with the Company as a Well Driller on a salary of \$45,000.00 per annum and reporting to the Managing Director. It also provides for a probationary period as follows:-

3. PERIOD OF PROBATION

3.1 *Subject to Section 67 of the Employment Relations Act, this Employment Agreement will have a probation period of 3 months from the time of the Agreement coming into force.*

3.2 *At the end of the third month, the Employer shall assess the Employee in respect of the on the job performance. If the Employer concludes that the Employee is not meeting the job performance standards require, the Employer will give the Employee an opportunity to respond to such concerns.*

3.3 *After considering such response as the Employee may wish to make, the Employer may:*
 (a) *Confirm the appointment of the Employee to staff; or*
 (b) *Extend the probationary period for such further period as the Employer considers necessary to enable a further assessment of the Employee to be made; or*
 (c) *Terminate the employment pursuant to this agreement.*

3.4 *If the Employer decides to extend the probationary period, the Employer may reassign the Employee to different duties for which the Employee is or appears to be better suited.*

3.5 *In assessing whether the Employee is likely to be a satisfactory appointment to staff, the Employer may take into account such matters as the Employer sees fit, irrespective of whether or not any such matter amounts to misconduct on the part of the Employee.*

[6] Mr Clements tells the Authority he was never provided with the Agreement. He says he was only ever provided with excerpts of it the day before he was dismissed but has never seen the Agreement now produced to the Authority at any stage previously. He agrees however, that his initial salary of \$45,000.00 was varied to an hourly wage of \$20.00.

[7] Mr Falloon says that he sent the Agreement under cover of his letter of 26 April 2004 but admits that he never followed up amendments including the changed remuneration and matters relating to Mr Clements' utility vehicle and related expenses. He concedes to the Authority he never produced an Agreement to Mr Clements with those agreed changes.

[8] It is clear that there never was a signed employment agreement in respect of Mr Clements' employment with the Company. The parties disagree as to why that is but the fact remains there was none.

[9] Should Mr Clements be held to a probationary period specified in an amended Agreement that was never produced to him? That is what the Company now asks the Authority to do. I am not prepared to do so and I accept Mr Clements evidence that there was never any discussion with him about a probationary period at all. He also says that he would not have left his successful business to take up a less than certain employment. On balance, I find therefore that Mr Clements' employment was not subject to a probationary period.

A Justified dismissal?

[10] Mr Clements commenced his employment with the Company as a Driller on 12 July 2004.

[11] On Saturday 2 October 2004, Mr Falloon telephoned Mr Clements and asked him to attend a company meeting on Monday 4 October 2004. Mr Clements was not told the nature of the meeting or given any particulars of what was to be discussed.

[12] Present at the meeting on 4 October 2004 were Mr Falloon, Mr Clements and a Company engineer Mr Clive Burgess. Mr Clements was told that the purpose of the meeting was to discuss his previous three months employment. He was presented with a letter dated 28 September 2004. That letter began:-

28th September 2004

Water Treatment Products Ltd

Three monthly Review meeting with Nigel Clements

Nigel started 12th July 2004

The following is a summary of the concerns that the company wishes Nigel to respond to on his performance to date with the company. Please be warned that the company will consider the answers that you give to the questions below and then take one of the three actions under 3.3 of your contract.

...

[13] The letter continued by outlining ten instances of Mr Clements' allegedly defective performance.

[14] Mr Clements was naturally shocked to receive the letter. He was composed sufficiently to assert himself and insisted that he be permitted to take advice about the situation. He says Mr Falloon was most reluctant to postpone the session and insisted on having Mr Clements' responses immediately. The meeting was eventually adjourned and Mr Clements was permitted to have representation at a further meeting to be held the following day. Mr Clements elected to have the chief executive officer of the Company Mr Bill Bracks ("Mr Bracks") and one Mr Steffan Colls ("Mr Colls") as his support.

[15] At the meeting the following day on 5 October 2004, Mr Clements presented a written response to each of the ten matters raised in the advice dated 28 September 2004. Mr Clements and Mr Colls were asked to leave the room. After a very short deliberation, the three directors of the Company Mr Falloon, Mr Bracks and Mr Grant Birchall elected to summarily terminate Mr Clements employment.

[16] Mr Falloon explains the justification for Mr Clements' summary dismissal. He says:-

Nigel was not dismissed immediately. We had the discussion and listened to his points and then decided. We were not operating under dismissal procedures but under his contractual conditions for a three monthly review. As stated elsewhere the decision really hinged on the statement that Nigel had made that he was the best driller in New Zealand. There was no way that he could justify that after what we had been through and the drillers that we have had since. Therefore there was no way that we could try and improve his performance by extra training as he did not consider that anyone knew more than him. This decision was come to after due deliberation amongst the officers of the company without Nigel in the room.

Discussion

[17] Section 67 of the *Employment Relations Act 2000* ("the Act") deals with probationary periods. The law relating to unjustifiable dismissal is not changed by such arrangements. The relevant legal principles relating to dismissals following probationary periods are succinctly set out in a decision of the Court of Appeal in *Nelson Air Ltd v NZALPA*¹ where the Court stated:-

Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings, to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end.

[18] In addition, the statutory duty of good faith makes it all the more imperative that the employer takes an active approach to ensure the trial period will ultimately be successful.

[19] I have already said that I do not consider Mr Clements was bound to the probationary period expressed in the Agreement. In any event, the law makes clear that established legal principles relating to unjustifiable dismissal remain unaffected by probationary periods. In determining whether Mr Clements was unjustifiably dismissed, the Authority investigates to see whether there was a full and fair investigation which revealed information capable of being regarded as serious misconduct.

[20] I am not persuaded that there was a full and fair investigation. The decision to summarily terminate Mr Clements' employment was unfair in a number of ways.

[21] Firstly, it was unfair to present to him the predated letter of 28 September 2004 and expect him to answer those allegations as, I find, Mr Falloon sought to do on 4 October 2004. It was only because Mr Clements objected that there was a further meeting.

¹ [1994] 2 ERNZ 665 (CA)

[22] The letter of 28 September 2004 contains a number of allegations but very little detail as would have been sufficient for Mr Clements to have understood what he was required to answer. For example, he was accused of misrepresenting his qualifications and experience but no detail was provided of “subsequent checking” of his past work history. He was accused of *slandering most* of the employees and the Company’s directors but no detail was provided to him whatsoever. It was wrong and unfair to expect him to answer such allegations at the meeting on 5 October 2004 without sufficient detail.

[23] I accept Mr Clements’ evidence that there was only a very short adjournment of some five minutes after he provided his response. I do not accept that there was any real consideration of his explanation in those circumstances.

[24] Most significantly, it was wrong and unfair to tell Mr Clements what he was doing wrong at the end of his employment. With the exception of the allegations relating to slander and misrepresentation of qualifications, I consider the matters raised in the letter of 28 September 2004 were instances of poor performance requiring performance management. They were not instances of misconduct.

[25] The requirements for performance management in instances of poor performance have been long established². The Authority has very recently set out the minimum requirements in its Determination in *Shannon-Renee Dizac & Marvel Distributors Ltd*³, helpfully appending fair procedure guidelines and the salient principles from the leading Employment Court decision in *Trotter*.

[26] Mr Falloon says that “*there was no way that we could try and improve his performance by extra training*”. That position implies a recognition of an obligation of performance management. Notwithstanding that recognition, Mr Clements was not accorded even minimal entitlements. I am satisfied that the Company never informed Mr Clements of its dissatisfaction with his performance and nor did it communicate to him an expected standard.

[27] It was too late at the time of dismissal for Mr Clements to do anything about the situation. He was never given an opportunity to improve his allegedly defective performance. I accept that the directors were concerned about his performance. However, they were under a duty to tell him of their concerns and to provide him with a reasonable opportunity to improve. He was never told of his shortcomings. He was never advised of necessary improvement. He was never warned of the likely consequences. All of that was unfair to him. A fair and reasonable employer would have accorded him those entitlements. When he was told, Mr Clements was simply dismissed without more.

Determination

[28] I find that the Company’s decision to summarily dismiss Mr Clements on 5 October 2004 was not a decision which a fair and reasonable employer could make in all the particular circumstances.

[29] I determine that Mr Clements has a personal grievance for unjustifiable dismissal and it is appropriate to resolve this employment relationship problem by making certain orders.

² *Trotter -v- Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659

³ unreported, AA228/05, 21 June 2005, Janet Scott. See also the Authority’s Determination in *Christopher Naughton & Vice-Chancellor of the University of Auckland*, unreported, AA 124/05, 11 April 2005, James Wilson.

[30] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[31] In the absence of any reasonable performance management process, I am not prepared to find it proved that Mr Clements' performance constitutes blameworthy conduct. I would have a different view if he had been warned and counselled and given time to improve but did not. I find therefore that Mr Clements did not contribute to the situation that led to his personal grievance and there is no basis for reducing either the nature or extent of the remedies to be granted to him.

Reimbursement

[32] I am satisfied that Mr Clements has lost remuneration as a result of the personal grievance. I am satisfied too that he took sufficient steps to mitigate his losses because he gave evidence of five applications he made for further employment. Eventually he was successful and he commenced further employment with Carlyle Drilling on 5 December 2004, exactly eight weeks after his dismissal. He shall be reimbursed for his proved income loss as a result of the Company's unlawful action. I quantify that loss as the average of his gross earnings \$13,950.00 during his twelve weeks service in the sum of \$1,162.50 for eight weeks. **I order Water Treatment Products Limited to pay to Nigel Clements the gross sum of \$9,300.00 as reimbursement.**

Compensation

[33] Mr Clements gave evidence of the effect of the personal grievance on him.

[34] He tells the Authority he was extremely hurt by his dismissal. He says he was completely and totally shattered by it. He says he put his heart and his soul into the job and he wasn't given a fair go.

[35] He had never been sacked before. His dismissal caused him much financial hardship because he was the sole income earner in his household. He has a young family to support and a mortgage to service.

[36] His partner, Ms Sharon Edge, tells the Authority Mr Clements was deeply affected by his dismissal. She says he became withdrawn and a totally different person. She and their family also had to deal with Mr Clement's knock-backs when he made unsuccessful applications for other employment. She says the children noticed his changed manner and the situation affected the whole family.

[37] Mr Clements was close to tears as he recounted the effects the dismissal had on him. Even now, many months after the dismissal, the situation clearly continues to cause him much distress and anxiety.

[38] Having regard to his evidence, the nature of the personal grievance and the length of his service with the Company, **I order Water Treatment Products Limited to pay to Nigel Clements the gross sum of \$5,000 as compensation.**

Costs

[39] In the event that Mr Clements seeks costs, the parties are encouraged to resolve that question between them, but failing such agreement, Mr Bruce is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. That memorandum is to provide full details of Mr Clements' actual costs and propose a reasonable contribution to those actual costs. Mr Falloon is to lodge a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority