IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 114
5456172
5456181

	BETWEEN	MICHAEL KERSE First Applicant
	AND	MICHAEL WRIGHT Second Applicant
	AND	COOK STRAIT DISTRIBUTORS LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Graeme Ogilvie, Advocate for the Applicants Kevin Chapman on behalf of the Respondent
Investigation Meeting:	1 April 2015
Directed Mediation attended	5 October 2015
Determination:	20 November 2015

DETERMINATION OF THE AUTHORITY No: 2

Background to this determination

[1] In 2014 the applicants, Mr Kerse and Mr Wright, lodged separate applications against their former employer Cook Strait Distributors Ltd (CSDL). With consent their claims were consolidated. The applicants each claimed he had been unjustifiably disadvantaged and unjustifiably dismissed by CSDL.

[2] In the lead up to a scheduled investigation meeting into the applicants' claims, it became apparent that a preliminary issue existed. Prior to commencing employment on 4 February 2014, following CSDL's purchase of the business from

the applicants' previous employer, the applicants had each signed an individual employment agreement containing a 90 day trial period provision. There is some doubt as to when exactly Mr Wright was dismissed which I shall return to, but in any event each applicant had his employment terminated within 90 days of commencing employment with CSDL. The effect of the 90 day trial period provisions was that neither applicant was entitled to bring a personal grievance or legal proceedings in respect of the dismissal.

[3] The applicants amended their documents[1] to include assertions that their respective employment agreements (including the trial period provisions) had been bargained unfairly.

[4] The additional allegations resulted in deferment of the unjustified dismissal allegations until after the lawfulness of the bargaining between the parties was decided.

[5] The claims associated with the bargaining were resolved in a determination dated 21 April 2015.[2] CSDL was found to have failed to provide the applicants with a reasonable opportunity to obtain independent advice on the proposed employment agreements, as required by s 63A(2)(c) of the Employment Relations Act (the Act). The failure also constituted a breach of s 68(2)(d) of the Act and I concluded that CSDL's bargaining with the applicants was unfair.

The issues to be determined

[6] The issues that require determination in this application are:

- whether the Authority should cancel or vary the trial period provisions contained in each applicant's employment agreement; and if so
- whether one of both of the applicants were unjustifiably dismissed; and if so
- what remedies should be awarded

[1] 3 March 2015
[2] *Kerse and Wright v Cook Strait Distributors Ltd* [2015] NZERA Wellington 42

Should the Authority cancel or vary the trial period provisions contained in each applicants employment agreement bargained unfairly with each of the applicants?

[7] Section 69 of the Act provides a range of remedies where a party to an individual agreement is found to have bargained unfairly, including a discretionary power that allows the Authority to cancel or vary an [employment] agreement.[3] Such an order however is subject to requirements set out at s 164 being met. Those prerequisites have since been actioned, including the parties' attendance at mediation, but the problem remained unresolved.[4]

[8] The applicants wish to challenge CSDL's actions in respect to their dismissals. If left to stand the applicants' trial period provisions will prohibit each of them from progressing their respective personal grievance claims in respect to the dismissals.

[9] Section 113(1) provides that the only means by which an employee may challenge a dismissal is by way of a personal grievance. I am satisfied that there is no adequate remedy, other than orders to vary the applicants' employment agreements, that would allow the applicants to have progress their claims of unjustified dismissal.[5]

[10] Pursuant to s 69(1)(b) I find that the 90 day trial period provisions within each applicant's employment agreement is invalid and make orders to this effect.

The events leading to the dismissals

[11] The applicants' claims of an unjustified disadvantage have been already been determined,[6] however events relevant to those matters, in part, form the background leading to each individual's termination of employment as follows:

[12] Mr Kerse's employment agreement provided for a minimum of 32 hours a week whereas Mr Wright's agreement provided for a minimum of 8 hours per week. The employment agreement for both applicants contained the following provision:

> *The employer may alter these hours of work from time to time if this is require for business reasons, and following consultation with the employee.*

---

[3] At s 63(2)(c)
[4] The parties were directed to mediation within two weeks of the date on which the determination (refer n3) was issued. That time frame was not complied with, however the parties ultimately attended mediation on 5 October 2015
[5] Pursuant to s 164(b)
[6] Ibid at n1

[13] The exact date was unclear but in the first week of March 2014 CSDL devised and posted a roster plan for the week beginning 10 March 2014. Mr Kerse and Mr Wright were each assigned graveyard shifts (11pm-7.30am).

[14] Each man approached CSDL's sole director, Mr Chapman, to discuss the roster plan. Mr Kerse had not worked a graveyard shift and asked for training. Mr Wright advised he had commitments which prevented him from working graveyard shifts in the immediate future but indicated he would be able to do in a month or so. CSDL then reduced the number of shifts Mr Kerse was allocated in the roster and Mr Wright's name was removed from the roster. CSDL accepted that it did not consult with either applicant about the alteration to hours of work.

[15] In my determination of 21 April 2015 I found that, while CSDL may have been entitled to instruct either or both the applicants to perform the shifts for which each was rostered, it was not entitled to unilaterally reduce the applicants' contractually agreed hours of work without first consulting with each individual. I found CSDL's actions were not the actions of a fair and reasonable employer in all the circumstances and that it had unjustifiably disadvantaged each of them.

Were one or both of the applicants unjustifiably dismissed?

[16] I have found that the trial period provisions contained in the applicants' employment agreements are unenforceable. As a consequence the Authority is entitled to assess whether CSDL's actions at the time each of the dismissals occurred were what a fair and reasonable employer could have done in all the circumstances.[7] That assessment requires the Authority to consider the reasons for CSDL's decision to dismiss and the processes it used to dismiss the applicants.

[17] Section 103A(3) of the Act sets outs minimum standards of procedural fairness when an employer is considering taking action against an employee. Amongst other things an employer should raise with an employee the concern(s) it has, allow the employee a reasonable opportunity to respond to those matters, and genuinely consider the employee's explanation before taking any action.

[7] s 103A(2) of the Act

Mr Kerse

[18] On 13 March 2014 CSDL gave Mr Kerse written notice that his employment would terminate. The letter referred to s67A and B (the statutory trial period provisions within the Act) and advised his employment would cease on 27 March 2014. When questioned by the Authority CSDL refused to answer questions as to why Mr Kerse's employment was terminated.

[19] I accept that at the time of Mr Kerse's dismissal CSDL considered it could rely on the trial period provisions and was not required to adhere to minimum procedural standards that an employer is obliged to engage when contemplating a decision to dismiss an employee. Those standards cannot be avoided in circumstances where an agreement to trial provisions has been obtained unfairly. I am in no doubt that when CSDL dismissed Mr Kerse it did not comply with the requirements set out at 103A(3). Mr Kerse was (and remains) unaware of the reason for his dismissal and was denied any opportunity to respond or challenge CSDL's decision to dismiss. These were not the actions of a fair and reasonable employer in the circumstances and I find Mr Kerse's dismissal was substantively and procedurally unfair and without justification.

Mr Wright

[20] There is some uncertainty as to when Mr Wright's employment was terminated. It is arguable that Mr Wright was effectively dismissed by the removal of his name from the roster on or about 14 March. Having assessed the evidence I consider Mr Wright's employment was terminated at a later date.

[21] Mr Chapman says after Mr Wright advised of his unavailability to work some shifts on 14 March it was up to Mr Wright to contact CSDL and advise when he would be available for work. Mr Wright's evidence was unclear on this point. He says he called CSDL's premises on several occasions over the following weeks to see if he was placed on the roster but agrees he did not speak directly with Mr Chapman.

[22] In April Mr Chapman called Mr Wright although neither can recall the exact date. Mr Wright says he was asked if he was available for work on the grave-yard shift (11pm-7.30am). He says he told Mr Chapman he was, but wanted to obtain advice from his representative whom he had recently instructed. He reports Mr Chapman indicated he would get back to him but that he did not. In contrast Mr

Chapman says Mr Wright declined his offer and told him his representative would deal with the matter.

[23] A letter dated 19 April 2014 was produced before the Authority that informed Mr Wright that his employment would terminate on 3 May 2014 pursuant to the 90 day trial period provisions. The parties dispute when this sent and received but on 3 May 2014 Mr Wright was paid out his holiday entitlements.

[24] Even if I were to accept Mr Chapman's account of the discussion had with Mr Wright in April there is no suggestion that CSDL raised with Mr Wright, at that time or prior to 3 May, any concerns that work had been refused. I also do not regard Mr Wright's desire to either seek advice on the matter or have his employer contact his representative as a refusal to work or that this action provides cause for termination of employment. Alternatively if CSDL is asserting that by his refusal to work Mr Wright had resigned there is no evidence that CSDL made proper inquiry with Mr Wright that this was his intention as its good faith obligations obliged it to do. I also consider that if Mr Wright had, by words or actions, resigned there would have been no need for CSDL to furnish a letter advising his employment was terminated.

[25] On balance I consider it more likely that Mr Chapman was irritated by Mr Wright failure to be immediately available for the graveyard shift (as I found he had been when Mr Wright was unable to work the shift pattern in March) and CSDL resolved to terminate his employment.

[26] I am satisfied that CSDL did not engage in any procedural fairness requirements although it is likely, as occurred with Mr Kerse, that it did not regard these were necessary given the trial period provisions within the employment agreement. In the absence of any communication with Mr Wright about its decision to dismiss, CSDL's actions were unjustifiable. I find Mr Wright was unjustifiably dismissed on 3 May 2014.

Remedies

[27] The applicants each seek remedies of three months' wages, compensation and costs associated with their respective unjustified dismissals.

[28] Section 128(2) of the Act provides that the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months' ordinary time remuneration.

[29] Mr Kerse and Mr Wright are both above the age of 65. Each provided credible testimony of their separate attempts to find alternative work. Both regard their age to have been an impediment to obtaining work and neither has been able to achieve new employment. The applicants are each entitled to the sum equal to of 3 months' wages.

[30] Mr Kerse and Mr Wright both gave evidence on their separate feelings of distress. I accept each felt a moderate level of distress and humiliation as consequence of CSDL's unjustified action. Pursuant to s.123(1)(c)(i) I award each of the applicants $5,000 to compensate for their distress and humiliation. Neither of the applicants contributed to the situation that gave rise to the personal grievance and their remedies are not impacted by s.124.

Costs

[31] Costs are reserved.

Orders

[32] Pursuant to s 69(1)(b) the trial period provisions within Mr Kerse's and Mr Wright's respective written employment agreements are invalid and unenforceable.

[33] Cook Strait Distributors Limited is ordered to:

(a) reimburse Mr Kerse the sum of $6,032 (gross) for lost wages;[8]

(b) reimburse Mr Wright the sum of $1,508 (gross) for lost wages;[9]

(c) compensate Mr Kerse and Mr Wright the sum of $5,000 each.[10]

Michele Ryan
Member of the Employment Relations Authority

[8] s 123(1)(b) and s 128(2)
[9] ibid
[10] s 123(1)(c)(i)