

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 327
3027191

BETWEEN DENNIS HICKS
Applicant

AND GREAT LAKE ALUMINIUM
& GLASS LIMITED
TRADING AS VISTALITE
TAUPO
Respondent

Member of Authority: Nicola Craig

Representatives: Alex Kersjes for the Applicant
Steve Punter for the Respondent

Investigation Meeting: 23 July 2018 at Taupo

Date of determination: 18 October 2018

DETERMINATION OF THE AUTHORITY

- A. Dennis Hicks was an employee of Great Lakes Aluminium & Glass Ltd trading as Vistalite Taupo (Vistalite).**
- B. Mr Hicks was unjustifiably dismissed by Vistalite.**
- C. Within 28 days of the date of this determination Vistalite is ordered to pay Mr Hicks \$4,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- D. Within 28 days of the date of this determination Vistalite is**

ordered to pay Mr Hicks the sum of \$1,039.50 gross as wages and \$83.16 gross holiday pay.

E. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.

Employment relationship problem

[1] Dennis Hicks was receiving a WINZ benefit as he was only able to obtain casual work. He attended a work placement seminar, which was aimed to help get people off the benefit and into work.

[2] At the seminar Mr Hicks met Ms M, a representative of an employment placement and support organisation (the placement organisation). Ms M had previously approached Great Lakes Aluminium & Glass Ltd trading as Vistalite Taupo (Vistalite or the company) and got their agreement about placing a person with the company. Vistalite manufactures aluminium windows and doors at its Taupo premises. Ms M gave Mr Hicks Vistalite's contact details.

[3] Mr Hicks undertook a trial placement from 31 October 2017 assembling windows. On 8 November 2017 Mr Hicks was told by Bronek Szpetnar, Vistalite's owner and director, that he was not required any further.

[4] The parties have different views as to the nature of the arrangement between them. Mr Hicks claims that he was an employee and should have been paid for the trial. He also claims that he was unjustifiably dismissed by the company. Vistalite says that Mr Hicks was unpaid placement, designed to assist WINZ clients to gain experience and work opportunities but that Mr Hicks was not its employee.

[5] An investigation meeting was held in Taupo on 23 July 2018. I heard from Mr Hicks, Mr Szpetnar and Vistalite's general manager Ross Harvie.

[6] Prior to the investigation meeting attempts had been made by Vistalite and the Authority to ensure that Ms M attended the investigation meeting to give evidence. The Authority received an indication that Ms M may have been reluctant to attend voluntarily. Attempts to arrange for her attendance were unsuccessful. She was in the process of leaving her position and the country, and a summons was not able to be served on her. She therefore did not give evidence, although an email from her to

Vistalite's representative on 13 December 2017, setting out her recollection of events, was filed.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[8] The issues for determination are:

- (a) Was Mr Hicks an employee of Vistalite?
- (b) If he was an employee, was he unjustifiably dismissed?
- (c) If he was unjustifiably dismissed, what remedies, if any, should he receive?
- (d) Does Vistalite owe Mr Hicks any wages and holiday pay?

The placement organisation's approach to Vistalite

[9] Vistalite was approached by the placement organisation unsolicited. The company had not previously undertaken this type of arrangement with WINZ beneficiaries. It had previously employed people who were inexperienced, or came without a recommendation, on short trial periods of a week or so. If the person did not work out they would be paid something modest like the minimum wage for their work time.

[10] Ms M's presentation to Vistalite was that beneficiaries would be placed inside a 'host' company on unpaid work trials. If the host company assessed the person favourably and a vacancy existed, the company could offer employment. Mr Szpetnar understood it to be a risk-free proposal as there was no cost to the company and no obligation to offer employment.

[11] I accept that Vistalite was not advertising for staff at the time the placement organisation approached it. However, Mr Szpetnar acknowledges that if the trial worked well he might have been able to find room for the person on trial.

[12] Mr Szpetnar agreed to the arrangement at his sole meeting with Ms M. He assumed that the person to be placed would be told by Ms M that the placement was

an unpaid trial. He saw the relationship as being between the placement organisation and the beneficiary, rather than between Vistalite and the beneficiary. There was no email or written correspondence between Vistalite and the placement organisation.

The seminar

[13] Mr Hick's estimated that the seminar was on 23 or 24 October 2017. As 23 October 2017 was Labour Day, it seems likely that the seminar was on Tuesday 24 October 2017.

[14] Given that Ms M did not give evidence, I must rely largely on Mr Hicks' evidence, assuming that I find it credible, which I do.

[15] Ms M explained at the seminar that her organisation was a work placement company and related it to a labour hire company, except that they took no commission as they were a not for profit organisation. Mr Hicks was familiar with labour hire companies. Ms M said that people would be placed into jobs, which would be paid and that would get them off the benefit.

[16] Ms M asked if anyone had experience in window glazing as she had a job on her books. Mr Hicks had done some what similar work before and so expressed an interest. He told her that he had never done glazing work previously but was willing to give it a go.

[17] Ms M said she would refer him to the employer. She advised Mr Hicks that there would be a brief trial to ensure that he was suitable. Mr Hicks' understanding was that the employer was actually looking for workers. While Vistalite had difficulties finding skilled tradespeople, it was not advertising a position at this time.

[18] Mr Hicks had experience in working through recruitment agencies and labour hire companies. He had also had some history of undertaking work trials, which had always been paid. Mr Hicks assumed he would be paid the minimum wage or something a little above that.

[19] Mr Hicks found Ms M's approach quite informal, particularly as he was not provided with any paperwork. Unfortunately it appears that what was the usual paperwork between WINZ and the placement organisation regarding Mr Hicks' placement was not received by Ms M before Mr Hicks' placement was completed.

[20] Ms M's email says that Mr Hicks was not "officially signed up" with the placement organisation. He had not yet been sent the paperwork.

Initial contact between Mr Hicks and Mr Szpetnar

[21] At the seminar Ms M gave Mr Szpetnar's phone number to Mr Hicks. She told him to speak to Mr Szpetnar, saying that he had spoken to Ms M and that Mr Szpetnar would start Mr Hicks working at Vistalite.

[22] Mr Hicks texted Ms M on 27 October 2017 advising that he had a meeting with Mr Szpetnar on Monday.

[23] On Monday 30 October 2017 Mr Hicks went into Vistalite. He was prepared for an interview but Mr Szpetnar said that he had read Mr Hick's resume and understood that Mr Hicks had done a lot of practical work so the job should be no barrier. There was little discussion about the job itself and none about the pay situation. Mr Hicks says that he didn't raise the pay as he did not feel it needed to be raised. He was prepared to start on the minimum wage to get his foot in the door. .

[24] Mr Szpetnar said that what he looked for in people was speed. Mr Szpetnar said that he would get Mr Hicks in to work here for a few days to see how much work output he was producing and then he could make a decision. Mr Hicks was comfortable with that as he had already been told by Ms M about the trial. The two agreed that Mr Hicks would start the next day and work until the end of the week.

[25] Mr Szpetnar showed Mr Hicks around the factory. He told Mr Hicks to sign in each morning.

[26] Mr Hicks texted Ms M the same day saying that his trial was starting tomorrow.

The first week of the trial

[27] Mr Hicks started at Vistalite on 31 October 2017, assembling sash windows. Other staff were told that Mr Hicks was going to be working with them.

[28] Mr Hicks usually worked from 8am to 5pm. He would go to an allocated bench and work with another employee. Orders would be examined, parts obtained, preparation done and the windows assembled. Mr Hicks was not just observing, he

was undertaking the work alongside the other person and getting the orders filled. He would be shown what to do and then expected to do the job himself.

[29] Mr Hicks had tea and lunch breaks with the other workers and did not feel that he was treated any differently from them.

[30] On 31 October 2017 Mr Hicks phoned WINZ and advised them that he had a job with Vistalite and wanted to suspend his benefit. The benefit suspension was confirmed in WINZ paperwork.

[31] On 2 November 2017 Mr Szpetnar informed the workers, including Mr Hicks, that they were a bit behind schedule and overtime was needed to catch up. Mr Hicks was happy to do overtime and worked until about 8.45pm that night.

[32] On the same day Mr Hicks received a text from Ms M checking how the trial was going. Mr Hicks replied that all was good and very busy. He let Ms M know that he would be in touch if Mr Szpetnar wanted him back next week. She replied that she would call Mr Szpetnar the next day and see what he thinks, and if he wants to take Mr Hicks on full time. She hoped that a decision would be made the following day.

[33] Around this time Mr Hicks was called by the labour hire company he had worked for and offered a few months' work through them. He turned it down as he preferred the type of work at Vistalite.

[34] On Friday 3 November 2018 Vistalite put on drinks and food after work and Mr Szpetnar asked Mr Hicks to attend. Nothing was said about the trial.

The second week

[35] On Sunday Mr Hicks messaged Ms M that he was going to go in tomorrow anyway, which she supported. He went to a toolbox meeting on Monday 6 November 2018. Mr Szpetnar said to him that if he was going to be here Mr Szpetnar wanted to see some more speed.

[36] Mr Hicks heard Mr Szpetnar asking another new worker, who had started at the same time as Mr Hicks, for his bank account details and tax code. Mr Hicks became concerned when Mr Szpetnar did not ask the same of him. At the

investigation meeting the evidence was that person had a different type of job to what Mr Hicks was doing.

[37] Mr Hicks phoned Ms M and told her about the other worker, but that Mr Hicks had not heard any decision about himself. He told her about the other work offer. She said that the trial was not paid. Mr Hicks says that was a complete shock to him as there had been no discussion with either Ms M or Mr Szpetnar previously about it being an unpaid trial.

[38] Mr Hicks asked Ms M what had happened, why had he not been told it was unpaid? He says she went quiet. She said that she did tell him he would be on a trial. She told him that trials were normally unpaid and said that there had clearly been a misunderstanding. Ms M apologised for not telling him it was unpaid. He told Ms M that he had suspended his benefit on the basis of his understanding that he would be paid by Vistalite. Later that day she arranged to have his benefit reinstated.

[39] Later that day Ms M texted Mr Hicks saying that she had tried calling Mr Szpetnar about the trial but had been unable to speak to him. She suggested that if Mr Hicks saw him, he should ask Mr Szpetnar how he was going. Ms M also noted that she had emailed WINZ about the benefit.

[40] Mr Hicks replied, asking Ms M to let him know about the benefit as the payment was due that night. He said that was “the main thing I’m worried about”. Ms M replied that she would get it sorted today and that Mr Szpetnar had now told her that he would have an answer by the night following and would see how Mr Hicks went up until then.

[41] Mr Szpetnar asked Mr Hicks that day how many windows he had made. Mr Hicks was uncertain. Mr Szpetnar replied that he was not sure he was happy with Mr Hicks’ speed. Mr Hicks says that he had not been given any benchmarks to work to.

[42] Ms M told Mr Hicks that Mr Szpetnar was sitting on the fence about hiring Mr Hicks but had received good feedback from other workers and wanted Mr Hicks to work another trial day the following day.

[43] Mr Hicks worked on Tuesday 7 November 2017 but was asked via Ms M to work again the following day as Mr Szpetnar was not in the factory that day to

observe Mr Hicks. Mr Hicks felt that the trial was being dragged out unnecessarily but hoped working another day would cement his role.

[44] The parties disagreed somewhat on the amount of supervision and feedback which Mr Hicks received whilst working at Vistalite. The company emphasised the supervision of Mr Hick's work whereas Mr Hicks indicated that after the first day or two there was little direct supervision. Mr Hicks believed that the only feedback was about the speed of his work. In its evidence Vistalite also questioned the quality of the work although Mr Szpetnar accepted that this issue may not have been raised with Mr Hicks.

[45] Mr Harvie occasionally checked on Mr Hick's work on Wednesday 8 November 2017.

[46] At 5pm that day Mr Szpetnar approached Mr Hicks and said that the time had come for him to decide and that Mr Hick's speed was just not there, so he could not take Mr Hicks on. Mr Hick's replied fine, it was good that a decision was made, and left Vistalite. He says that he was not surprised by the outcome.

[47] Mr Hicks phoned Ms M and asked whose idea it was that the work was unpaid. Ms M replied that it was discussed between herself and employers as to whether or not the employer was happy to pay for a trial.

The nature of the relationship

[48] The parties are divided on whether Mr Hicks was employed by Vistalite. Mr says that he was employed on a work trial, albeit with no written individual employment agreement.

[49] Vistalite says that Mr Hicks was undertaking a short period of work experience, with a view to being considered if there was a job available, which as it turned out there was not. Although Vistalite was not advertising for a staff member at that time, from Mr Szpetnar's evidence, if Mr Hicks had proved to be impressive to Vistalite then a position may well have been created for him. It was a trial but Vistalite says that Mr Hicks was not employed by it.

[50] In *Salad Bowl Ltd v Howe-Thornley*¹ Chief Judge Colgan considered whether a work trial was employment. Consideration was given to whether the person on the trial was a volunteer², and if not, whether they met the test of being an employee.

[51] Volunteers do “not expect” to be rewarded for the work to be performed as a volunteer and receive no reward for the work performed as a volunteer.³ His Honour noted in *Salad Bowl* that the volunteer definition in s 6 of the Act focuses not on what the person claiming to be an employee may have been told by the other party, but what that person expects.⁴

[52] Mr Hicks clearly expected to be remunerated. Neither Ms M or Mr Szpetnar told him that it was unpaid. Although Ms M’s email says that she told Mr Hicks that the trial was unpaid, she did not give evidence and as I found Mr Hicks’ evidence in this regard credible, I prefer his evidence. He did expect to be remunerated. In terms of receiving a reward, Mr Hicks was invited to the drinks and food event on the Friday night during his trial. I am not satisfied that Mr Hicks was a volunteer.

[53] The next question is whether he was an employee. As was noted in the *Salad Bowl* decision, just because one is not a volunteer, does not make one an employee.⁵

[54] Ms M could not just send Mr Hicks and the company had to accept him. It was Mr Szpetnar’s decision whether he agreed to Mr Hicks starting the trial with the company. Mr Hicks was anticipating an interview although Mr Szpetnar chose to cut that short, accepting from the resume that Mr Hicks had practical experience which set him up for the position. Mr Szpetnar offered that Mr Hicks come and start the work trial on 31 October 2018. Mr Hicks accepted. His role was primarily to work in the factory constructing windows and this was sufficiently clear.

[55] However, there was no discussion by Mr Hicks, either with Ms M or Mr Szpetnar regarding pay and no employment agreement provided.

[56] Mr Hicks believed that he would be paid. This expectation was partly based on his interactions with Ms M. Mr Szpetnar accepts that he did not mention whether the trial was paid or unpaid, as he thought Ms M had discussed that with Mr Hicks.

¹ *Salad Bowl Ltd v Howe-Thornley* [2013] NZ EmpC 152

² Section 6(1)(c) of the Act

³ Section 6(1)(c) of the Act

⁴ *Salad Bowl Ltd v Howe-Thornley* [2013] NZ EmpC 152 at [36]

⁵ Above n 4 at [38]

[57] Mr Hicks' belief was also based on his previous experience from other positions of trial periods which were paid. Some of these occurred in a different context. However, Mr Hicks had some time previously undertaken a two- or three-week paid placement arranged by WINZ.

[58] Supporting Mr Hicks' evidence of his understanding is the fact that he let WINZ know that they should suspend payment of his benefit, on the basis that he believed Vistalite would pay him.

[59] I accept Mr Hick's evidence that what mattered to him was not the pay rate but to get his foot in the door to get a job which was preferable to him than the work which he had been undertaking for the labour hire company. He was prepared to take the minimum wage at that point.

[60] My impression of Vistalite's evidence was that this was a similar arrangement to the trials which it had operated with others previously.

[61] Vistalite filed material from the placement organisation's website. That refers to the aim of helping prepare people for employment, matching them with an appropriate employer and giving them the opportunity to secure full-time employment. It states:

You may be expected to do a short period of work experience (no more than 5 days) to help secure the job. This is not a course. ... [The placement organisation] is designed to get you off the benefit and into full-time work.

[62] There is no reference to whether the work experience is on pay. From Mr Hicks' evidence, Ms M told him that some placements on pay and some are not. I do not see any basis on which Mr Hicks should be taken to know that it was to be an unpaid trial.

[63] Once at Vistalite Mr Hicks undertook work of economic value to Vistalite. Although Vistalite challenged the adequacy and therefore the profitability of that work, Mr Hicks still did provide labour which was of some value. He was not merely watching other people work.

[64] I recognise that some may have sympathy with Vistalite which did not make any misrepresentation to Mr Hicks and was trying to give him a hand. However, it assumed that Ms M had told Mr Hicks that the trial was unpaid, did not ensure that

there was any documentation spelling out the nature of the arrangement and did not check with Mr Hicks what his understanding of the arrangement was. It received seven days' free labour from Mr Hicks.

[65] On the basis of the *Salad Bowl* decision, I conclude that Mr Hicks was an employee of Vistalite, as he had an expectation of remuneration, and undertook economically valuable work for Vistalite.

Unjustified dismissal

[66] Having established that Mr Hicks and Vistalite were in an employment relationship I then look at whether the termination of Mr Hicks' employment was justified.

[67] The parties agree that Mr Hicks was employed on a trial period. Under s 67A of the Act an employment agreement may contain a trial period for 90 days or less. However, s 67A(2) requires the trial period to be in writing. Here there was no employment agreement documentation. Vistalite can therefore not claim the protection of s 67B of the Act which prevents dismissal grievance claims being brought where valid trial periods are in operation.

[68] Vistalite decided not to continue Mr Hicks' employment on the basis of his performance. In such cases there are requirements to identify the nature of the performance inadequacies, identify what standards must be met, warn of the likely consequences of failure to improve and give the employee an opportunity to improve.⁶

[69] While I accept that there were some comments made to Mr Hicks about the speed of his performance, this was not done in such a way as to meet the requirements of what a fair and reasonable employer would do in performance situations. For example, it was not made clear to Mr Hicks what standard of speed was expected of him and he was not given the opportunity to comment before the decision to dismiss was made.

[70] Mr Hicks was unjustifiably dismissed by Vistalite.

⁶ *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659

Remedies

Lost wages

[71] In the statement of problem Mr Hicks claimed nine weeks' lost wages totalling \$6,378.00, which equates to \$708.66 gross per week. The basis of a claim at that rate is unclear, as it appears to be at significantly higher hourly rate than the minimum wage, despite no rate being agreed between Vistalite and Mr Hicks.

[72] At the investigation meeting evidence was received regarding Mr Hicks gaining of other work. Despite turning down the work offered through the labour hire company whilst he was at Vistalite, when he was told that the Vistalite work was not continuing, he was able to pick up the labour hire work.

[73] On Mr Hick's behalf a claim was made for over 200 hours of time difference between the nominal 40 hours a week which it was suggested would have been secured at Vistalite and the number of hours he worked for the labour hire company.

[74] There are two difficulties with this claim. Firstly, there was little evidence that Mr Hicks would have had 40 hours a week employment at Vistalite. There was some evidence of a standard 8.5 hour day being worked but also that the flow of work was variable. Although the placement organisation had referred to trying to find people full time work, there had been no discussion between Mr Szpetnar and Mr Hicks regarding any hours of work. Also, lesser hours than 40 are sometimes regarded as full time. There is insufficient certainty of the hours Mr Hicks would have worked had he continued at Vistalite.

[75] The second difficulty is that Mr Hicks was paid for almost all of his labour hire work at the rate of \$17.00 gross per hour, whereas the minimum wage was \$15.75. As there was no agreement between Mr Hicks and Mr Szpetnar of any rate or payment of any rate, the minimum wage rate is the most which Mr Hicks could claim.

[76] I am not satisfied on the evidence that Mr Hicks has established that he lost wages in the period following his dismissal and so make no award in that regard.

Compensation under s 123(1)(c)(i)

[77] Mr Hicks also claims \$12,000 compensation under s 123(1)(c)(i) of the Act. Mr Hicks provided some evidence, when questioned, of the effects of the dismissal on

him. He kept thinking about what had happened. He felt upset and was disillusioned and dismayed by what had occurred. Tempering this evidence somewhat, are his comments to Ms M that his main concern was getting his benefit resumed and that the outcome of the trial was not surprising.

[78] Mr Hicks' witness statement referred to the financial impact of losing seven days' wages as being huge, having suspended his benefit and getting no money from Vistalite. However, under cross examination he accepted that he was continuously paid his benefit. The issue of wage arrears is dealt with below.

[79] Considering the evidence overall, I order that Vistalite pays Mr Hicks compensation of \$4,000.00 within 28 days of the date of this determination.

Contribution

[80] I have considered whether Mr Hicks can be said to have contributed to his dismissal so that a reduction should be made to the remedies. I accept that Vistalite had concerns regarding Mr Hicks' performance. However, believing that this was a valid trial period for someone who was not an employee, it did not properly carry out the process which would have been expected of a fair and reasonable employer in situations where there are performance concerns.

[81] I do not consider, in the context of a seven-day work trial, that any performance issues which there were, can be said to be blameworthy on Mr Hicks' part. I therefore make no reduction to the remedies.

[82] For the sake of completeness I note that Vistalite reserved its right to pursue Mr Hicks for the cost of re-work. The quantum of any such costs was not evidence in this investigation meeting.

Wage claim

[83] Having found that Mr Hicks was an employee I now consider his claim for wage arrears. Vistalite made no payment to Mr Hicks, as it understood it did not have to.

[84] For the seven days he worked, including overtime hours, Mr Hicks claims 66 hours of work at the minimum wage of \$15.75 gross per hour, totalling \$1039.50, as well as holiday pay on that of \$83.16. He was not paid any wages by Vistalite.

Vistalite did not challenge that Mr Hicks had spent 66 hours on the placement. Having found Mr Hicks to have been an employee, I order Vistalite to pay Mr Hicks the sum of \$1039.50 gross, along with \$83.16 gross holiday pay, within 28 days of the date of this determination.

Costs

[85] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Hicks shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Vistalite shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority