

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 574
3052597

BETWEEN

JAMES HILFORD
Applicant

AND

HAMILTON HARDWARE
RETAIL LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person
Russell Drake for Respondent

Investigation Meeting: 26 June 2019 in Hamilton and 8 July 2019 by telephone
for submissions

Submissions received: From both parties on 5 July 2019 in writing and on 8
July 2019

Date of determination: 9 October 2019

DETERMINATION OF THE AUTHORITY

- A. James Hilford has not established his claim that he was disadvantaged due to unjustified action by Hamilton Hardware Retail Limited (HHRL).**
- B. Mr Hilford is prevented by a trial period from bringing an unjustified dismissal claim.**
- C. 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] James Hilford was employed by Hamilton Hardware Retail Limited (HHRL or the company) as a sales assistant at Mitre 10 MEGA in Te Rapa. After a brief period of employment HHRL dismissed Mr Hilford under a trial period.

[2] Mr Hilford challenges aspects of his treatment by HHRL and his dismissal. HHRL says that Mr Hilford is prevented from bringing a dismissal claim and there is no basis for his other claims.

[3] An investigation meeting was held in Hamilton on 26 June 2019. I heard evidence from Mr Hilford and HHRL employees Melanie Stevenson (human resources administrator), Vanessa Cassidy (zone specialist), Amanda Stuart (retail operations manager) and Jessica Fernley (human resource manager). As the evidence took most of the day, the parties subsequently provided written submissions. They then had an opportunity to address me at a resumption of the investigation meeting held by telephone on 8 July 2019.

Issues

[4] The issues for investigation and determination are:

- (a) Was Mr Hilford subject to disadvantage by unjustified HHRL actions regarding provision of:
 - (i) Rest and meal breaks;
 - (ii) Training; and/or
 - (iii) A safe work environment in which to raise concerns without retribution?
- (b) Is Mr Hilford precluded from bringing an unjustified dismissal claim due to a trial period in his employment agreement?
- (c) If not, was he unjustifiably dismissed?
- (d) If Mr Hilford establishes a personal grievances claim what remedies (if any) should he receive?

[5] An earlier claim by HHRL that Mr Hilford had not raised his personal grievance claim in time was withdrawn at the investigation meeting.

Mr Hilford's appointment and induction

[6] Mr Hilford was a university student. He was offered of part time employment with HHRL, initially two days a week. Ms Stevenson phoned Mr Hilford to tell him of the offer and to say that it included a 90-day trial period. Mr Hilford questioned whether such trial periods were still applicable and Ms Stevenson confirmed they were.

[7] On 13 July 2018 HHRL emailed a letter of offer at the Te Rapa store to Mr Hilford attaching an individual employment agreement. Mr Hilford signed the agreement the same day.

[8] On 19 July 2019 Mr Hilford went into the store, picked up his uniform and was introduced to his supervisor and the plumbing and bathroom team. The following day he had a full day's induction, along with other new staff. This was primarily with human resources representatives, rather than on the shop floor.

[9] Mitre 10 MEGA stores are very large with thousands of products sold. The induction included an instruction to explain to customers asking questions, that the staff member was new and to refer to an aisle map of the whole store, indicating departments and products.

[10] At the induction Mr Hilford raised the possibility of transferring to the other Hamilton store owned by HHRL. This subject was also raised by him on his first day in the store itself.

Mr Hilford's work in the store

[11] Mr Hilford did not have a smooth start with HHRL. He only undertook about half a dozen shifts.

[12] On 27 July 2018 a staff member from the plumbing department and Ms Cassidy both commented to Ms Stuart that they had been unable to find Mr Hilford during the day. It appears that having not been able to locate another staff member to discuss breaks with, Mr Hilford took himself off on his break.

[13] On one of his first days, having started work at 9am, Mr Hilford took himself off on a morning break at 10.45am. Ms Cassidy could not find Mr Hilford and became concerned. Other plumbing department staff did not know where he was. Ms Cassidy then heard that Mr Hilford was in the café and approached him there. She told him that he needed to tell someone before he was going on a break as she had just spent some time looking for him. She said once he had finished his break he should come back to the department.

[14] Mr Hilford took this as a reprimand although Ms Cassidy was reasonably setting out what the expectations were.

[15] On 31 July 2018 Mr Hilford emailed Ms Stevenson from HR asking who his main supervisor was to be on Friday and Saturday. She replied, telling him who it was but saying the supervisor was not rostered on the days Mr Hilford was usually working

[16] Mr Hilford later emailed Ms Stevenson about breaks and training. He commented that he had not yet had training on the computer or filing systems, as well as other staff appearing to be off on their own tasks whenever he was with a customer with challenging questions. Ms Stevenson responded, commenting on Ms Cassidy's new role as zone specialist and wanting to ensure he was given support.

[17] On 3 August 2018 Mr Hilford was involved in a heated discussion with a staff member (Staff Member A) about a sale. Staff Member A had put together a bathroom package for a couple. The couple then approached Mr Hilford asking for changes. The other staff member came back into the department and he and Mr Hilford got into a heated discussion with raised voices in front of customers. Ms Cassidy contacted Ms Stuart, the store manager.

[18] Ms Stuart asked both Mr Hilford and Staff Member A what had happened. She said arguing in front of customers was not acceptable. She then decided to take Mr Hilford out of the plumbing department and put him in the seasonal department intending to buddy him up with a staff member who could train him on the computer system. However, as the staff member was about to leave, Ms Stuart stayed with Mr Hilford. She provided him with just under an hour's computer training on how to look up products and locate them. Ms Stuart discovered that Mr Hilford had not had his lunch break and so suggested he might go home 30 minutes early rather than take a break only to go home half an hour later. He agreed.

[19] On 4 August 2018 a staff member phoned Ms Stuart to report that Mr Hilford and Staff Member A were having an argument with raised voices about break times. Ms Cassidy who was with a customer, heard the argument and stepped in. When Ms Stuart arrived, she witnessed Mr Hilford now involved in a heated discussion with Ms Cassidy behind the counter. Ms Cassidy attempted to defuse the situation and explain something but Mr Hilford argued back. Ms Cassidy then said to Ms Stuart “I can’t talk to [Mr Hilford], he won’t listen”.

[20] Mr Hilford saw Staff Member A as causing the argument between the two of them. He felt rebuked by the other staff and did not accept that he argued, saying he stood his ground. He accepts that he could have raised his voice. Ms Stuart and Ms Cassidy both thought that Mr Hilford was the one not listening and continuing to raise his voice.

[21] Ms Stuart asked Mr Hilford for an explanation, saying that it was not acceptable to argue on the shop floor in front of customers. Mr Hilford said that because Staff Member A had said he was going to take a break, Mr Hilford (who was next after Staff Member A for a break) could not take his. She said she would deal with the issue later.

[22] Ms Stuart removed Mr Hilford from the plumbing department and moved him again to the seasonal department. She introduced him to a staff member there and asked her to buddy Mr Hilford to help with training. Ms Stuart explained that he was to remain in the seasonal department for the rest of his shift.

[23] That evening Mr Hilford sent a one and a half page email to Ms Stevenson, identifying that he would informally like to raise a grievance of “discrimination amongst staff to those people who request their legally entitled breaks and meal breaks and ask job related questions while training”. He mentioned a negative atmosphere in the department where, for example, nobody said good morning to him and appeared to deliberately ignore him. I note that Ms Cassidy says that Mr Hilford did the same thing on his first morning in the store.

[24] On 6 August 2018 Ms Stevenson replied at length indicating the company’s wish to work to address Mr Hilford’s concerns. Due to the nature of the issues she had emailed the store manager, who was on leave. He had indicated that he would like to meet with Mr Hilford on his return. Ms Fernley the human resources manager, who was also on leave was contacted at some point too. She describes it as unprecedented for her (and the store

manager) to be contacted while away on annual leave regarding behaviour from an employee within his first few work shifts.

[25] In her email Ms Stevenson suggested that Mr Hilford come in on a different day, if suitable to him, to work with his supervisor. Support was expressed for all staff members having their breaks. Ms Stevenson also referred to the supervisor being in the process of introducing a roster for break times. An interim process for Mr Hilford to follow was identified.

[26] The following day Ms Stevenson emailed again saying that they would put Mr Hilford in the seasonal department on Friday and Saturday.

Dismissal process

[27] Under cross examination Ms Fernley confirmed that a decision to commence a 90-day consultation process was made prior to the receipt of Mr Hilford's "informal grievance". It was made due to the number of concerns being raised regarding his fit within the work environment, specifically as a result of Mr Hilford being removed from the department on two consecutive days due to getting into arguments with other staff (Staff Member A twice and Ms Cassidy) while customers were in the store.

[28] On 10 August 2018 not long after Mr Hilford started work, Ms Stevenson asked to talk to him in a private setting. In the absence of the store manager, the chief financial officer had become involved. Mr Hilford was given a letter identifying specific concerns including going on a break without telling anyone and getting into heated discussions with other staff. The prospect of termination under the 90 day period was mentioned with Mr Hilford being given a chance to respond in writing regarding the concerns.

[29] At the meeting the CFO repeated from the letter, that Mr Hilford had until 13 August to respond. Mr Hilford started responding but the CFO advised him to put his concerns in writing. He was offered the rest of the shift and the next day's shift off on pay, which he agreed to.

[30] Mr Hilford objected to being given the 10 August 2018 letter without proper notification and without being offered a support person. He did not see it as a supportive

letter. He says he felt ambushed and thought it was more appropriate to have been sent it when he was not at work.

[31] I appreciate that it was unpleasant to get the letter. However, it could also have been problematic to notify (prior to providing the letter) that a letter was coming and a support person could be a good idea for receipt, without saying what was in the letter. This could lead to a period of uncertainty for the employee about what was going on, with the employer not wanting to answer questions until the meeting.

[32] It is important that Mr Hilford was not expected to provide a response on receiving the letter. Also, he was appropriately asked whether he would like to go home on pay or keep working. A process has to start somewhere.

[33] Mr Hilford provided a detailed written response. HHRL's representative emailed saying that although there was not a requirement to meet with 90 day processes, in light of Mr Hilford's response, the company had decided that it was fair and reasonable to offer an opportunity to meet.

[34] On 17 August 2018 Mr Hilford and his support people met with HHRL representatives. Mr Hilford accepts that he had an opportunity to state his case although did not think that HHRL really considered what he had to say.

[35] By letter of the same date Mr Hilford was informed that he was dismissed under the 90 day trial period for concerns regarding his suitability for employment with HHRL. The letter refers to the company's concern regarding his behaviour and attitudes within the work environment "including becoming argumentative and engaging in heated discussions with other employees, at times while customers were in close proximity". HHRL concluded that Mr Hilford was not suitable for customer service work. The letter records that during the meeting Mr Hilford was told that he was continuing to demonstrate "exactly the same types of behaviour" that HHRL had raised concerns about, namely that he "would not listen..., spoke over us and became argumentative".

Rest and meal breaks

[36] I now go on to consider Mr Hilford's disadvantage claims. The first concerns not getting breaks. Although reference was made to meal breaks, the main issue appears to have been with rest or tea breaks.

[37] Mr Hilford accepts that he could have been spoken to at induction about the organisation's breaks policy although did not think it was detailed. Ms Stevenson says that she spoke about breaks being arranged within a department, so that not everyone was off at the same time. Both agreed that ideally people take their breaks starting in the order in which they arrived at work. HHRL had recently increased tea breaks from 10 to 15 minutes.

[38] At the investigation meeting Mr Hilford initially identified that he could not take the majority of the 12 breaks he was entitled to during six shifts. He says he probably took three, of which two were self-managed. He says he was told at times that he would have to wait until others had had their break. However, he acknowledged that he got breaks on the induction day. Once the induction and 10 August are deducted, it appears Mr Hilford only worked four full shifts.

[39] Mr Hilford reported his concerns to HR. Ms Stevenson says she was shocked to hear in his 3 August email that Mr Hilford was not getting his breaks. She spoke to Ms Stuart and asked her to check on the department regularly to see that breaks were happening. She thinks she also spoke to Mr Hilford's supervisor. However, Mr Hilford only completed one full shift after that date.

[40] It appears from emails and witness evidence that Mr Hilford had at least one tea break on each of his first two store shifts. When Ms Stuart became aware on 3 August, after the first arguments with other staff, that he had not had his lunch break, she offered him the opportunity to leave early, which he accepted. This would have meant that he did not have an afternoon tea break.

[41] Mr Hilford had the sense of being told off for taking breaks however, when closely questioned he could not recall who told him off.

[42] In practice Mr Hilford found the process of identifying where other staff were and talking to them about breaks onerous. He did not use the options of talking to nearby

departments in the same zone or phoning customer services. He preferred a situation where staff were told by a manager to go off on breaks and did not seem to appreciate a more flexible arrangement. He veered from leaving without telling anyone (when it was not easy to find someone in his area) to rigidly sticking to a requirement that he could only go once the person who started earlier had gone on break, even if that person said they did not want to. He said that he was held hostage until the previous person went on their break.

[43] I am not satisfied that having a team managing breaks can be said to be necessarily unreasonable, particularly in a workplace where the flow of work varies. During the Authority's process Mr Hilford identified a health need for breaks but accepted he had not told HHRL or his previous employer about this.

[44] Human resources and store management were supportive of Mr Hilford getting breaks and took steps to try to ensure that he got them. I am not satisfied that there were unjustified actions by HHRL in the very short time Mr Hilford worked for HHRL.

Training

[45] Mr Hilford complains that he did not get any, or sufficiently prompt, on-the-floor training, such as about putting a sale through or finding stock. He was largely not familiar with the products and so had to refer customers to other sales staff. His impression was that other staff rolled their eyes at him, thinking he should know the answers.

[46] Mr Hilford had a full paid induction day but not in the department he was to work in. He was given a team member induction pack, which was discussed at the induction. The pack contained an induction timetable that ran over the first 90 days of employment. Day 1 (on the floor) was to include an introduction to staff, completion of three e-learning modules, a tour of the store and completing the health & safety standard operating procedure (SOP). Within the first seven days the employee was to complete an induction training checklist and some on-line modules and have a seven day review.

[47] New staff were provided with a lot of written information. There was a detailed, multi-page position description for sales assistants. This was not specific to any particular

department within the store. A store aisle map was in the induction pack, although Mr Hilford says that he had not seen it.

[48] An induction workbook for the planning and bathroom department was given to Mr Hilford. The learning is broken into phases. Phase 2 is described as the on-boarding of knowledge and skills, typically occurring over the first month in the role.

[49] Mr Hilford expressed dissatisfaction that he was not able to make a sale by operating a till or find things on the computer within the first or second day of work. In smaller stores that might be more understandable but the plumbing department did not have a till. In any event when Mr Hilford was moved temporarily to the seasonal department Ms Stuart provided him with training on operating the computer.

[50] Mr Hilford also considered that he should have been trained to put together a bathroom package for customers.

[51] Ms Stevenson was in the process of arranging times when Mr Hilford could be rostered on different days so he could work with the supervisor.

[52] My impression from HHRL witnesses and from induction documents is that the company did not expect new employees to have an extensive or detailed knowledge of products in their area. It was clear that it would take time for them to learn what they needed to know, with a three month timeframe set.

[53] There was no reference to individual sales targets or a bonus system so Mr Hilford suffered no financial loss. Mr Hilford was conscious of not knowing the answer to customer queries and felt there was a generalised negative feeling towards him by other staff. He found it annoying and humiliating to have to run around looking for people to help him.

[54] My impression is that Mr Hilford wanted to feel confident having high levels of knowledge early on. He would have preferred training via a helpful buddy. However, I am not satisfied that HHRL's actions were unjustified. In at least some instances, such as regarding bathroom packages, Mr Hilford expected a very high level of training in a very short time, I do not consider it unjustified for HHRL not to have arranged for him to have that level of knowledge within his first few days working in the store.

Safe work environment to raise concerns

[55] Mr Hilford argued that he was not provided with a safe workplace to raise issues regarding breaks and training. This was based on his view that the company's decision to utilise the trial period was based on him raising concerns. HHRL denied this.

[56] Mr Hilford felt that his concerns were being fobbed off. However, particularly having read Ms Stevenson's emails and examined Ms Stuart's actions, I cannot agree. A number of steps were taken to deal with the issues he raised. The issue about breaks was taken seriously and training on the computer system was provided.

[57] It could be argued that Mr Hilford is trying to find a way to get around the trial period and bring an unjustified disadvantage claim essentially based on his dismissal under the trial period. Section 67B(3) of the Act prevents the bringing of any "personal grievance claim or legal proceedings in respect of the dismissal", although s 67B(3) clarifies that that does not prevent personal grievances based on s 103(1)(b) to (j) which includes disadvantage grievances. However, I do not need to decide this issue as I am satisfied that it was not his raising of concerns which motivated HHRL to rely on the trial period. HHRL had other concerns about Mr Hilford, focused around his confrontational interactions with staff and getting into heated discussions, including in front of customers.

Dismissal grievance

[58] HHRL relies on sections ss 67B(3) of the Act to preclude Mr Hilford from being able to bring an unjustified dismissal claim.

[59] Mr Hilford does not deny that he was the subject of a trial period. However, a trial period takes away what would otherwise be the right to challenge a dismissal. I must be satisfied that HHRL has complied with the requirements in s 67A and implemented the dismissal in accordance with s 67B.

[60] I note that Mr Hilford's employment was terminated in August 2018 which was prior to the changes to ss 67A and B on 6 May 2019 which restricted their application to small-to-medium-sized employers.

[61] To be effective trial periods must be entered into in writing prior to the employee beginning work.¹ The trial period in the employment agreement between HHRL and Mr Hilford was in an agreement signed by him on 13 July 2018. The agreement was said to commence on 20 July 2018; Mr Hilford's first day of work.²

[62] A trial period clause must be for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment.³ The clause here was specified to be of 90 days beginning on the day Mr Hilford commences employment.

[63] The clause must also state that during the trial period the employer may dismiss the employee and if it does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal. The clause in Mr Hilford's agreement states that.⁴

[64] HHRL relied on the trial period when dismissing Mr Hilford. The employment agreement states that either party may terminate the agreement during the trial period by giving one week's notice of termination to the other. The employer is permitted to pay the employee wages in lieu of requiring them to work the one week's notice during the trial period.⁵

[65] HHRL dismissed Mr Hilford by giving him one week's notice and paying him in lieu of that week.

[66] In addition HHRL provided a fair process. The company informed Mr Hilford in writing of its concerns, gave him an opportunity to respond, informed him of his right to seek have support, then met with him and his supporters and considered his feedback. It also noted to Mr Hilford within the meeting that he was demonstrating the same behaviours that had been raised with him as a concern, namely being argumentative, not listening and speaking over others.

[67] In conclusion the trial period was valid and its requirements were satisfied. Mr Hilford cannot bring an unjustified dismissal personal grievance claim.

¹ Section 67A of the Act and *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152

² Clause 2 of the employment agreement

³ Section 67A(2) of the Act.

⁴ Clause 3 of the employment agreement.

⁵ Above n 5.

Costs

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

[69] The parties could expect the Authority to use its notional daily tariff as a starting point and consider adjustments upwards or downwards from there.

Nicola Craig

Member of the Employment Relations Authority