

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 614
3038191

BETWEEN	MATTHEW COOPER Applicant
AND	SENATE INVESTMENT TRUST THROUGH CROWN LEASE TRUSTEES LIMITED Respondent

Member of Authority: Trish MacKinnon

Representatives: Robert Morgan, advocate for Applicant
Toby Manktelow, counsel for Respondent

Investigation Meeting: 31 July 2019 at Palmerston North

Submissions Received: 31 July 2019 from both parties

Determination: 29 October 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Matthew Cooper was employed as a labourer by Senate Investment Trust, through its corporate trustee, Crown Lease Trustees Limited (Senate) commencing 18 June 2018. His employment was terminated by text message on 3 July 2018. Mr Cooper says his dismissal was unjustifiable and he claims lost wages and compensation and seeks costs.

[2] Senate, in its statement in reply, asserts it had reason to dismiss Mr Cooper. It claims Mr Cooper used drugs at work and would not accept the help it offered him. Senate also states that Mr Cooper was in a trial period in accordance with his individual employment agreement.

The Authority's investigation

[3] Evidence was given at the investigation meeting by Mr Cooper and Andrew Sowry, the Director of Crown Lease Trustees Limited. In accordance with s 174E of the Employment Relations Act 2000 (the Act) I have not referred in this determination to all the evidence received from them or to all of the submissions advanced by the parties. I have, however, considered all material provided to the Authority in reaching decisions on this matter.

Issues

[4] The issues for determination are:

- (a) Whether Mr Cooper's employment was subject to a trial period; and, if not,
- (b) Whether his dismissal was unjustifiable.

[5] If the employment was not subject to a trial period and Mr Cooper's dismissal is found to be unjustifiable, issues of remedies and contribution will arise.

Was there a trial period?

[6] If Mr Cooper's employment was subject to a trial period provision under s 67A of the Act, he would be barred under s 67B from bringing a personal grievance or legal proceedings in respect of his dismissal. To determine whether he was so barred, I will first traverse some of the background to the employment relationship.

[7] In May 2018 Senate advertised on Trade Me for a labourer in the building trade. Mr Cooper, who was living in the South Island at the time, registered his interest in the position which was located in Palmerston North. Mr Sowry interviewed Mr Cooper by phone on 30 May 2018. A verbal offer of employment was made and accepted. Text messages and emails ensued in one of which Mr Cooper asked Mr Sowry for a contract, which he needed to show Work & Income

New Zealand (WINZ) in order to receive assistance with his relocation expenses to Palmerston North.

[8] Mr Sowry said he emailed Mr Cooper an individual employment agreement (IEA) on 31 May 2018 telling him he had a printed copy of it for him when he arrived. Mr Cooper could not recall receiving an IEA and was unsure whether Mr Sowry was going to send it to him personally or to WINZ.

[9] Evidence provided to the Authority included email exchanges dated 31 May 2018 between Mr Cooper and Mr Sowry. I am satisfied from an examination of the content of these emails that Mr Sowry provided Mr Cooper, in response to Mr Cooper's request, a copy of the IEA as an attachment to an email on 31 May 2018. Mr Sowry had signed and dated the IEA the same day that he emailed it to Mr Cooper.

[10] The commencement date for Mr Cooper's employment was stated in the IEA to be 18 June 2018. There was a trial period clause of 90 days, with reference made in the clause to s 67A of the Employment Relations Act 2000 (the Act). No date was specified for the trial period to begin although it may be assumed it was intended to apply from Mr Cooper's first day at work on 18 June as it was stated to be for the purpose of assessing and confirming suitability for the position.¹

[11] Mr Sowry's evidence was that he discussed the trial period with Mr Cooper, although it was not clear whether this was during the telephone interview or at a later date. Mr Cooper denies the trial period was ever raised or discussed with him. He says the only term of employment they discussed was pay. The IEA was raised only in relation to his need to provide documentation to WINZ for the purpose of obtaining a relocation grant.

[12] I prefer Mr Cooper's evidence for two reasons, the first being that Mr Sowry's written evidence contained no reference to a discussion over a trial period with Mr Cooper: it was only in oral evidence that he claimed such a discussion had occurred. The second reason is that much of the communication between the parties, both before and during Mr Cooper's employment, took place via text messaging, none of which contained any reference to a trial period.

¹ *Watt & Hughes Construction Limited v Philip de Buyzer* [2019] NZEmpC 116 refers.

[13] Mr Sowry said he gave Mr Cooper two copies of the IEA in a brown A4 envelope labelled "Private" on Mr Cooper's first day at work. This was at the start of the working day and, as Mr Cooper's foreman arrived at that point, Mr Sowry said Mr Cooper put it in his car and immediately started work saying he would sign and return the document the next day.

[14] Mr Cooper did not ever return the IEA according to Mr Sowry who said he raised this again with Mr Cooper a few days later. Mr Cooper denied being given an IEA when he reported for work in Palmerston North or being asked to sign one during his employment. While I have accepted that Mr Sowry emailed the IEA to Mr Cooper on 31 May 2018, I am not persuaded he followed this up with further copies on 18 June or at any other time.

[15] Despite the lack of a signed employment agreement between the parties, Senate submits Mr Cooper was on notice of the terms of the IEA with Senate. There was an 18 day period between Mr Cooper receiving that document and commencing work, during which he had given no hint of wishing to negotiate any of its terms.

[16] In Senate's submission it met all its good faith obligations to Mr Cooper from the outset while he, in contrast, said nothing to alert his employer to his non-acceptance of any of the terms of the employment agreement offered to him. The nub of Senate's argument is that the Authority should treat the trial period as having been accepted by Mr Cooper and enforceable.

[17] I do not accept that submission. I have found that Mr Cooper received a copy of the IEA, but do not accept this constituted, or could be construed as, acceptance of all of its terms. Mr Sowry, when sending the IEA as an attachment to an email, gave no indication that the terms of the IEA were open for negotiation. In any event I am satisfied the offer of employment had been made and accepted before the IEA was provided. I am not persuaded there was any discussion between Mr Sowry and Mr Cooper over the trial period before Mr Cooper commenced his employment.

[18] If Mr Sowry had given Mr Cooper a printed version of the IEA on his first morning at work, asking him to sign and return it to him, that would not assist him. Once Mr Cooper had commenced work, which by Mr Sowry's evidence he did immediately, he was an existing employee and the terms of the trial period would be unenforceable. In *Smith v Stokes Valley Pharmacy (2009) Limited* former Chief

Judge Colgan referred to the balancing of employee protective rights and the facilitation of hiring and firing.² Noting that ss 67A and 67B remove longstanding employee protections and access to justice, the Chief Judge said:

As such, they should be interpreted strictly and not liberally because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment. Legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.³

[19] I find Senate cannot rely on the trial period provision in Mr Cooper's unsigned IEA and Mr Cooper is not barred by s 67B from bringing a personal grievance in relation to his dismissal.

[20] I note further that, if Mr Sowry had understood the trial period provision to be in place, Senate would have paid Mr Cooper five days' notice in accordance with the Termination of Trial Period provision of the IEA. No notice period was paid to Mr Cooper.

Was Mr Cooper unjustifiably dismissed?

[21] Mr Sowry dismissed Mr Cooper by text message on 3 July 2018. In the course of the Authority's investigation he acknowledged orally his acute awareness of this not being the way to dismiss someone. He said he said he was greatly frustrated at the time.

[22] In his evidence Mr Sowry said Mr Cooper had been taking drugs while at work and exhibiting behaviour that concerned him from an early stage in the employment relationship. This included shouting, swearing, ranting and appearing to be "stoned". I accept Mr Sowry's account of the behaviour he directly witnessed on the worksite. I also accept Mr Sowry's evidence of telling Mr Cooper he had a drug problem and that he had to "kick" the drugs if he wanted to continue working for Senate.

[23] I regard other evidence Mr Sowry gave, relating to claims made to him about Mr Cooper's behaviour by the foreman and another person, as less reliable. Neither of those people attended the investigation meeting or provided sworn statements and,

² [2010] NZEmpC 111.

³ At [48].

while I accept that Mr Sowry had conversations with them about Mr Cooper, I am reluctant to accord much weight to the untested reports he received from them.

[24] I accept that Mr Sowry raised the prospect of Mr Cooper undergoing a drug on Friday 29 June 2018 while at the work site. His evidence of that having occurred is supported by one of the text messages he exchanged with Mr Cooper on 3 July 2018. Mr Sowry's text was sent at 4.33pm, approximately one hour and forty minutes after the text in which he dismissed Mr Cooper. In it he refers to having asked Mr Cooper, on what turned out to be Mr Cooper's last day at the worksite, if he was willing to undergo a drug test. Mr Cooper in his response did not deny or query the accuracy of Mr Sowry's statement.

[25] Mr Cooper denied taking drugs or behaving strangely at work. He said Mr Sowry was annoyed when he told him, during the employment relationship, that he had to check in with his probation officer during his lunch break. His evidence was that Mr Sowry's attitude to him changed from that time.

[26] Mr Cooper acknowledged he had not told Mr Sowry about his criminal conviction when applying, or being interviewed, for the position. He said Mr Sowry had not asked him during the interview if he had any convictions and he did not believe he had to volunteer the information. Under questioning he said that, in hindsight, he probably should have disclosed the information.

[27] While Mr Sowry said he did not dismiss Mr Cooper over his criminal convictions, the evidence of text conversations reveals he had concerns over the employee's failure to disclose them. On the evening of Sunday 1 July 2018 Mr Sowry texted Mr Cooper telling him he had been thinking a lot about his "hiding" his criminal convictions. He said he did not want Mr Cooper to return to work until they had discussed the matter, suggesting they do so the following afternoon.

[28] Mr Cooper responded that he had never hidden his conviction and that Mr Sowry had never asked. He said it was a minor assault; he had since had counselling, and was a different person. He texted Mr Sowry again in the early afternoon of 2 July saying that the builder Mr Sowry had assigned him to work with had called him twice asking him to come to work. Mr Cooper said he was not going to do that as Mr Sowry had to want him there. He said he was very keen to prove himself and would

wait for Mr Sowry to call him. He also noted he had "a few appointments" that day with his probation officer and WINZ."

[29] Mr Cooper texted Mr Sowry again that day (2 July) at 5.37 pm saying he had been waiting for Mr Sowry to call him and asking whether he was to turn up to work the next day "...so we can move forward and work". Mr Sowry asked if Mr Cooper was happy for him to speak with his probation officer, saying "At the moment I'm not comfortable with you working he may change my mind." Mr Cooper replied that he was happy for his employer to speak with the probation officer.

[30] It was not until the following morning (3 July) that Mr Cooper gave Mr Sowry his probation officer's contact details. On the afternoon of 3 July Mr Sowry texted Mr Cooper to say the builder had told him he (Mr Cooper) was coming pick up something from his van. Mr Sowry offered to collect the item and meet Mr Cooper at a specified venue that afternoon. Mr Cooper immediately replied "No we need to have a meeting first."

[31] Mr Sowry responded that was what he was proposing and continued as follows:

I will not be continuing to employ you after talking to your probation officer and Dave. I would like to meet and have a conversation about it but it feels like you have become hostile. I would like to get back to you anything that belongs to you of course and will process your final pay tomorrow. (*grammar inserted for clarity*)

[32] Mr Cooper informed Mr Sowry he could not do that and asked him to put it in writing. He said Mr Sowry had "played" him as far as he and WINZ were concerned and that WINZ had a phone call "consolidating all of this". Mr Sowry then asked him he could have the number of Mr Cooper's WINZ worker in order that he could call them and said:

I also want a drug test tomorrow morning I will arrange it and let you know

[33] Mr Cooper pointed out that he had already been "let go" by Mr Sowry and asked why he would want a drug test done. Mr Sowry asked if he was refusing to have a drug test, saying he was very concerned about Mr Cooper and his responses and that he would like to try and help him.

[34] A number of further texts were exchanged in which Mr Cooper made it clear he had taken legal advice on 2 July and intended to speak further with his lawyer. Mr Sowry told him threats were unnecessary and his texts became increasingly focussed on wanting to help Mr Cooper with his "drug addiction". He urged Mr Cooper to take the drug test and "prove me wrong and we are all back on track".

[35] Mr Cooper continued to refuse to take a drug test. He talked of notifying "health and safety and labor department" over Mr Sowry "not playing ball" with that area of his employment. He also notified Mr Sowry he would get back to him "with the terms I'm going to ask u to meet...".

[36] Two weeks and several texts later, after Mr Cooper had raised personal grievances for unjustifiable dismissal and unjustifiable disadvantage and "loss of income", he made an offer to resolve the matter which Mr Sowry did not accept. The parties did not resolve the matter either between themselves or at the mediation to which they were directed by the Authority

[37] Mr Cooper submits his dismissal was both substantively and procedurally flawed. He says he was dismissed purportedly on the basis of drug use but says no issue was raised with him about this until after he had been dismissed. In Mr Cooper's view Mr Sowry dismissed him in an over-reaction to being informed him that he was on parole.

[38] Senate submits Mr Cooper brought his dismissal on himself by breaching his good faith obligations in not informing his employer from the outset that he was on probation. It refers in submissions to the evidence on which Mr Sowry based his belief that Mr Cooper was using drugs.

[39] Senate also submits Mr Cooper's text messages after 1 July 2018 were not helpful to his position. In its submission Mr Cooper, instead of grappling with the issue at hand engaged in "jousting" with Mr Sowry, giving the impression he wished to avoid meeting with him. It submits that Mr Cooper had a golden opportunity to be reinstated to his position: all he had to do was pass a drug test after he had been dismissed. In Senate's submission, Mr Cooper's refusal to take up this opportunity constituted a failure to take reasonable steps to mitigate his loss.

[40] I reject those submissions and find Mr Cooper's dismissal to have been unjustifiable. Section 103A of the Act provides the test against which a dismissal is to be objectively assessed in determining whether the dismissal was justifiable. The test is whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[41] The Act specifies a number of factors the Authority is required to consider in applying the test. In relation to Mr Cooper's dismissal I am required to consider:

- Whether the employer sufficiently investigated the allegations against him, having regard to the resources available to it; and
- Whether it raised its concerns with Mr Cooper before dismissing him; and
- Whether it gave him a reasonable opportunity to respond to its concerns before dismissing him; and
- Whether it genuinely considered his explanations in relation to the allegations against him before dismissing him.⁴

[42] As stated above, Mr Sowry said he dismissed Mr Cooper over his concerns about drug use at work. In oral evidence Mr Sowry said he discussed drugs with Mr Cooper during his employment and told him he was relaxed about cannabis use but objected to stronger drugs. He said that, even if Mr Cooper had failed a drug test, he probably would not have dismissed him, but would have tried to help him overcome his problem.

[43] While that may be the case, it is clear that Mr Sowry, although referring to a drug test on 29 June, did not require Mr Cooper to have one. Nor did Mr Sowry raise the issue of a drug test, or any issue as to drug taking, on 3 July when he dismissed Mr Cooper by text message.

[44] Mr Sowry gave Mr Cooper no reason for his dismissal at the time other than to imply it was linked to his conversation with Mr Cooper's probation officer and with the foreman. He did not specify the content of those discussions to Mr Cooper. In written evidence to the Authority, however, Mr Sowry said the probation officer had

⁴ Section 103A (3) (a) to (d)

not told him the nature of Mr Cooper's convictions. He contradicted this in oral evidence when he said the probation officer had told him they were "very violent convictions".

[45] Taking all of the above into account, I conclude Senate did not properly put Mr Cooper on notice of its concerns, or give him an opportunity to address those concerns, or investigate the matters for which it said it dismissed him. The Act precludes the Authority from finding a dismissal to be unjustifiable solely because of defects in the employer's process if the defects were minor, and if they did not result in the employee being treated unfairly.⁵

[46] In this instance the defects were not minor. There was a complete failure of process which has led me to find Mr Cooper has a personal grievance for unjustifiable dismissal.

Remedies and contribution

[47] Mr Cooper seeks compensation for the hurt, humiliation and injury to feelings he suffered in the sum of \$4,800. He also seeks lost wages. He was able to obtain only sporadic and short-term work following his dismissal. Mr Cooper said he began looking for alternative work immediately through Trade Me and Seek websites and by distributing business cards to potential employers. His dismissal caused him to lose confidence which made it more difficult to obtain work.

[48] Section 128 of the Act provides that, where the Authority determines an employee has a personal grievance and has lost remuneration as a result of the personal grievance, the Authority must order an employer to pay the employee the lesser of a sum equal to the lost remuneration or three months' ordinary time remuneration. It may, in its discretion, award a greater sum than that.

[49] In deciding the nature and extent of remedies, the Authority must consider the extent to which the employee contributed towards the situation that gave rise to the personal grievance and reduce accordingly the remedies that would otherwise have been awarded if the employee's actions so require.⁶

⁵ Section 103A(5).

⁶ Section 124.

[50] I accept Mr Cooper's evidence of losing confidence following his dismissal and find the sum he is seeking to be reasonable. Subject to any issue as to contribution, Senate is ordered to pay Mr Cooper \$4,800 in compensation under s 123(1)(c)(i) of the Act.

[51] With regard to lost remuneration, I find three months is an adequate period to award lost wages in this instance. Mr Cooper was employed to work a 40 hour week and was paid \$17.00 per hour. Three months' remuneration is \$8,840 gross. Evidence provided by Mr Cooper by way of bank statements show that he earned \$3,644.33 in the period following his dismissal until 2 October 2018. By my calculation Mr Cooper lost remuneration in the sum of \$5,195.67 gross. Senate is ordered to pay him that amount under s 128 of the Act, subject to any contribution that may be determined.

[52] Senate has submitted Mr Cooper had a "golden opportunity" on 4 July 2018 to get himself reinstated. It referred to Mr Sowry's text request that Mr Cooper submit to a drug test and his (Mr Sowry's) comment that "it will all be good then". In its submissions Senate described Mr Cooper's failure to avail himself of that opportunity as a failure to take reasonable steps to mitigate his loss.

[53] I reject that submission. Mr Sowry raised the issue of drug use verbally with Mr Cooper on 29 June but did not refer to drugs at all in subsequent text conversations with him until after he had dismissed Mr Cooper. The employment relationship had been abruptly ended on 3 July and there was no obligation on Mr Cooper to submit to a drug test after that time. His employer's lack of a fair procedure in summarily dismissing him would not have engendered confidence that he would be treated fairly regardless of the result of such testing.

[54] With regard to contribution, I reject the employer's objection to Mr Cooper's failure to disclose criminal convictions. I accept Mr Cooper's evidence that he was not asked whether he had a criminal conviction and it did not occur to him to volunteer the information. His acknowledgment from the perspective of hindsight that he probably should have done so, makes me conclude it is likely he would have replied honestly if asked during his interview whether he had a criminal record.

[55] I do consider, however, that Mr Cooper contributed to the situation that led to his personal grievance by the behaviour he exhibited at the worksite. That behaviour

concerned his employer to the extent that Mr Sowry raised the possibility of Mr Cooper undertaking a drug test. I cannot ignore the part that played in Mr Cooper's dismissal and, taking all factors into account, find a contribution of 25 per cent appropriate. The remedies are to be adjusted accordingly.

Orders

[56] Senate Investment Trust, through Crown Lease Trustees Limited, is ordered to pay Matthew Cooper:

- (a) \$3,600 without deduction under s 123(1)(c)(i) of the Act; and
- (b) \$3,896.75 gross under s 128 of the Act.

[57] For the sake of clarity, the sums in [55](a) and (b) above have had the contribution, calculated at 25%, deducted.

Costs

[58] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority