IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2019] NZERA 394
3039071

	BETWEEN	THOMAS RUTENE Applicant
	AND	WATER MART WAIRARAPA (2017) LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Alex Kersjes, advocate for the Applicant Richard McNaughton, on behalf of the Respondent
Investigation Meeting:	27 June 2019 at Masterton
Submissions Received:	At the investigation
Date of Determination:	2 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Thomas Rutene claims he was unjustifiably dismissed by Water Mart Wairarapa (2017) Limited (Water Mart) with effect 13 July 2018. Mr Rutene also claims to have been disadvantaged by virtue of what he says was an unjustified suspension briefly imposed on 11 June 2018.

[2] Water Mart accepts it dismissed Mr Rutene but asserts he cannot bring a challenge due to the existence of a trial period clause entered into pursuant to ss 67A and 67B of the Employment Relations Act 2000. Water Mart initially expressed confusion about the unjustified disadvantage claim but having heard more it says the claim is unsustainable.

Background

[3] Water Mart is a Wairarapa based operation engaged in many facets of the home construction and maintenance industry. Mr Rutene was an apprentice plumber who while living in the Wairarapa worked in Wellington. He had tired of the travel and responded to a job advertisement placed by Water Mart.

[4] As a result Mr Rutene met with Mr McNaughton, Water Mart's sole director, at a café some time over the 2018 Easter weekend. Mr Rutene is of the view the meeting concluded with his receiving an offer of employment. Mr Rutene also says he was told the trial period would be waived in response to his having aired a view he was taking a risk by leaving what he perceived as a good employer.

[5] Mr McNaughton denies an offer was made but concedes he was impressed by Mr Rutene and advised they would progress their discussions.

[6] Notwithstanding that and on the following Tuesday, 3 April, Mr McNaughton sent Mr Rutene an individual employment agreement. The covering email read:

> Hi Tom
>
> Here is your agreement and the personal details form. We will start you on $22.50 and reassess this after one month as discussed. Given that you are giving up a good job we will delete the trial period from the contract so you will not be subject to a 90-day trial period to give you confidence that this is the right move for you and your family.
>
> Please read through the agreement carefully and give me a call if you have any issues.

[7] The employment agreement contains a comprehensive trial period clause the efficacy of which neither party questions. It also contains a completeness clause which reads:

> Unless otherwise provided, this agreement sets out the full terms and conditions of the employment relationship between the parties and replaces any previous agreements or understandings whether expressed or implied. The agreement may be reviewed by the employer at his discretion. No variations to this agreement shall be enforceable unless recorded in writing and signed by both parties. For the avoidance of doubt, the employee's position description may be varied by the employer from time to time, after consultation with the employee.

[8] Mr Rutene considered receipt of the agreement confirmation of the offer he had already received. Mr McNaughton is of the view he was giving Mr Rutene an indication of the terms he might expect should an offer subsequently be made.

[9] Another issue that arose during the discussion was reference checking. Mr McNaughton says Mr Rutene was reticent about him approaching the current employer which he understood on the basis Mr Rutene did not want to damage that relationship. That said Mr McNaughton made other inquiries which, according to him, raised some concerns. He says that as a result he told Mr Rutene the trial period would now remain. Mr Rutene denies there was any such advice.

[10] Mr Rutene signed the agreement he had been sent on 10 April. He returned it to Water Mart and Mr McNaughton signed on 18 April. Mr Rutene commenced employment on 24 April but the wage review that had been scheduled for one month after commencement did not occur and neither party raised it.[1]

[11] Mr McNaughton also had growing concerns about Mr Rutene's relationship with other staff. Essentially these come down to a view various comments by Mr Rutene offended the conservative views of some of his colleagues. In this respect, things came to a head on Saturday 9 June.

[12] On that day Mr Rutene suffered an injury at work. He says he phoned Mr McNaughton to both advise of the injury and discuss an altercation he had had with one of his colleagues over comments that colleague is alleged to have made about Mr Rutene's personal life. It appears the injury was not raised with a tense discussion developing over the other issue. Mr Rutene says he was told not to confront the other employee and not to come to work the following Monday. It is this purported instruction Mr Rutene interprets as constituting the unjustified suspension.

[13] Mr McNaughton disagrees the instruction was given. He says Mr Rutene was extremely angry and as he, Mr McNaughton, was not going to be in the work place on Monday he told Mr Rutene not to approach the colleague. He says Mr Rutene's anger was such the call ended with Mr Rutene hanging up and he, Mr McNaughton, then rang the

[1] Refer e-mail quoted in paragraph [6]

colleague and told him not to come to the firm's yard on Monday but to go directly to the job upon which he was working.

[14] As it transpired Mr Rutene awoke the following Monday to extreme pain and an injured elbow he describes as being like a softball. He went to his doctor and was placed on ACC. With various extensions the ACC continued till late July and Mr Rutene was unable to work in the interim.

[15] As already said there were multiple ACC certificates. The second covered the period 26 June to 8 July. On 6 July and prior to the certificate's expiry Mr Rutene contacted Water Mart about a return to work.

[16] The response was an email from Mr McNaughton reading:

> Good Morning Tom
>
> We refer to clauses 4.0 - 4.7 of your Employment Agreement with Waterrmart Wairarapa 2017 Ltd.
>
> It is with regret to advise that we wish to exercise our rights pursuant to clause 4, and give notice of terminating your employment agreement with us under the 90 day trial period.
>
> We now give you 1 weeks notice and note that you are currently on ACC. It is our understanding that your current medical certificate runs out on Sunday 8 July 2018. Please advise if you have to obtain an extension of your current medical certificate.
>
> Regards.

[17] Mr Rutene replied with:

> Hi Richard
>
> So i had a read of sections 4.0 - 4.7
> So am on on a garden period for a week? Or u want me to come to work as normal for a week?

[18] Mr McNaughton's response was:

> Hi Tom
>
> You can come back on Monday if you have been cleared to work. However, your last day of work would be 13 July 2018.
>
> Cheers

[19] Mr Rutene was not cleared for work and a subsequent ACC certificate ensued. The claim followed and an inability to resolve it has led to this investigation.

Discussion

[20] Mr Rutene's prime claim is he was unjustifiably dismissed. In deciding to dismiss Water Mart relies on the existence of a 90 day trial. A decision as to whether or not the clause was valid will determine the dismissal claim and on this the parties' positions are relatively simple.

[21] Mr Rutene is of a view that while the employment agreement contains a 90 day trial clause it cannot be relied upon as Water Mart chose to waive it when making the offer of employment. The dismissal must therefore be unjustified.

[22] Water Mart says that is not the case. Mr McNaughton says as a result of his growing unease and prior to signing he advised Mr Rutene the trial clause would remain and that is reflected in both the signed agreement and Mr Rutene's initial response of 6 July ([17] above) which did not challenge the rationale for termination. It is argued that response constitutes acknowledgment Mr Rutene knew the clause had continued to apply.

[23] Having considered whether or not the clause remained enforceable I conclude the answer is no. I do so for the following reasons.

[24] I do not accept Water Mart's claim there was no offer of employment. If one was not made at the Easter meeting there can be no doubt the agreement was subsequently proffered and both parties then acted as if it was an offer with both signing. Its content also supports a conclusion it constituted an offer with the attachment of an employee's personal details form and specification of a definitive starting rate with review. Similarly a starting date was specified in the employment agreement.

[25] That the offer was accompanied by advice the 90 day trial clause would not apply cannot be argued. The question becomes whether or not the clause was subsequently *reinserted*. Again I conclude the answer is no and do so for two reasons.

[26] First Mr McNaughton cannot tell me when or how he reinserted the 90 day trial. He said he did so prior to his signing but could not say whether he told Mr Rutene of his decision before or after the later signed. He was also unable to advise how he passed the message

saying he could not recall if it was by phone or at a face to face meeting which he says occurred at some unspecified point. Such uncertainty cannot prevail over Mr Rutene's adamant denial he received such advice or there was a subsequent meeting. He says all subsequent dealings in respect to commencement were with one of Water Mart's office staff.

[27] Second there are the terms of employment and the completeness clause Water Mart relies upon when arguing the agreement constitutes the terms of employment in their entirety. The completeness clause allows for variation provided it is recorded in writing.

[28] Returning to the conclusion proffering of the employment agreement constituted an offer. The details of the offer were advised through two documents, the agreement and the covering e-mail. The content of both must therefore be considered when determining what terms were offered and I consider the covering e-mail's statement the 90 day trial will not apply to be a written variation that was then accepted by the parties' subsequent signatures.

[29] There is no written agreement the trial be reinstated as required by the completeness clause and Water Mart is incapable of providing any other written evidence this occurred.

[30] Finally I note the argument Mr Rutene's first response of 6 July implies he knew the clause remained. I disagree and accept his evidence he was shocked and not applying rationality to his response. I also note Mr McNaughton had a similar omission in later correspondence with Mr Kersjes.

[31] I conclude the 90 trial was withdrawn and Water Mart cannot rely upon it to justify the dismissal as it tries to do. It follows the dismissal is unjustified.

[32] Now I must comment on Water Mart's argument that had it not dismissed Mr Rutene under the trial period clause it would have done so on the grounds he misled it about his previous work history and the length of time he had spent as an apprentice. This was also raised in support of a submission s 124 be applied and remedies, if awarded, be reduced.

[33] This argument fails to convince largely because nothing had been done to commence an investigation into the alleged misconduct. That means it becomes a case of how long is a piece of sting especially as Mr Rutene found replacement work in two months and the process, if it had been embarked upon, would have had to be completed by then to affect the outcome. The lack of a process also means there is little or no evidence such an approach

might have succeeded and questions about this must be raised given the evidence Mr McNaughton embarked upon a series of informal checks and arguably should have known about what he now raises as concerns.

[34] I also note Water Mart concedes Mr Rutene was a hard worker and its concerns revolved around his interaction with others. This might also have impeded or undermined a possible dismissal reliant on other grounds.

[35] I take the issue no further. Water Mart attempted to justify the dismissal on the grounds there was a valid 90 day trial and failed. Dismissing this approach also means the removal of any evidence which might support the use of s 124 to reduce the remedies that are going to be awarded. Neither Mr Rutene nor his actions played any part in Water Mart's decision to invoke an inoperable 90 day trial provision.

[36] With respect to the purported suspension and notwithstanding the disagreement about what was said when the two had the discussion on 9 June Water Mart's position is the claim is *de minimis.* Mr Rutene was incapable of returning to work as a result of the injury and offered no evidence of any harm attributable to this alleged breach.

[37] On this I agree with Water Mart. I also note Mr McNaughton's undisputed evidence he ensured the colleague did not come to Water Mart's premises on the Monday is consistent with his claim he did no more than tell Mr Rutene not to approach the colleague. Had he done as alleged the second instruction would not be necessary. Finally I note agreement Mr Rutene was very angry during the call and the evidence suggests he was not fully focused on what was being said.

[38] For these reasons I dismiss the disadvantage claims.

[1] Mr Rutene has been successful with the claim he was unjustifiably dismissed which raises the question of remedies. He seeks lost wages and compensation pursuant to s 103(1)(c)(i) of the Act. The sum specified in the statement of claim was $25,000 but during submission it was conceded this was excessive and $8,000 was sought.

[2] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. There is ample evidence Mr Rutene sought to mitigate his loss and he found replacement employment seven

weeks after the expiry of his ACC in late July. That means the lost wage claim of $6,300 is payable in full.

[39] Turning to compensation. Mr Rutene supported his claim with evidence of the hurt he felt with most emanating from financial pressure and the effect this had on his relationship with his family. There was also reference to a need for counselling.

[40] Having considered the evidence and current precedence I consider the claim, as amended, to be appropriate and note it should not be further reduced simply because it has been pitched at a realistic and reasonable level.

Conclusion

[41] For the above reasons I conclude Mr Rutene has a personal grievance in that he was unjustifiably dismissed.

[42] As a result I order Water Mart Wairarapa (2017) Limited pay Thomas Rutene:

(a) $6,300.00 (six thousand, three hundred dollars) gross being recompense of wages lost as a result of the dismissal; and

(b) $8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[43] Costs are reserved. The parties are encouraged to try and resolve the issue between themselves. In doing so they should consider as a guideline the Authority's standard tariff of $4,500 per day applied to an investigation that took a third of a day.

Michael Loftus
Member of the Employment Relations Authority