IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 16
3045557

BETWEEN	MARTYN HORTON Applicant
AND	ST & CJ BELL LIMITED Respondent

Member of Authority:	Andrew Dallas
Representatives:	Allan Tobeck, counsel for Applicant Sara Jamieson, counsel for Respondent
Investigation Meeting:	24 July 2019 in Christchurch
Submissions:	24 July 2019, 30 July 2019 and 12 August 2019 for the Applicant 6 August 2019 for the Respondent
Determination:	16 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Martyn Horton worked as a stock manager for ST & CJ Bell Limited (Bell) which owns and operates "Benlea", an 1100 hectare sheep, cattle and arable farm on the banks of the Rakaia River in Mid Canterbury. Mr Horton says he was unjustifiably dismissed on 21 August 2017.

[2] Samuel Bell and Catherine Bell, directors and shareholders of Bell say that Mr Horton was dismissed pursuant to a valid 90 day trial period clause contained his individual agreement and as such he has no claim against Bell.

Issues

[3] The issues for investigation were and determination are:

(i) Was Mr Horton dismissed pursuant to a valid 90 day trial period clause contained in his individual employment agreement?;

(ii) If not, was Mr Horton unjustifiably dismissal by Bell?

(iii) If so, what remedies should be awarded to awarded to him, considering:

(a) Lost wages; and

(b) Compensation under s 123(1)(c) of the Act;

(iv) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Horton that contributed to the situation giving rise to his grievances?

(vii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[4] During the Authority's investigation meeting, I heard evidence from Mr Horton, Bell directors, Samuel Bell and Catherine Bell and their daughter, Katie Bell. A witness statement was also provided on behalf of Bell by Kevin Shepherd but he was not required to attend the investigation meeting and give evidence.

[5] Having regard to s 174E of the Act, I have not referred to all the evidence or other information provided to the Authority in this determination, However, I record I have carefully considered all material placed before the Authority. Further while I have also not referred to all submissions advanced by the representatives during my investigation, I record I have fully considered these.

[6] This determination is issued outside of the statutory three month timeframe provided by the Act. However, to the extent that exceptional circumstances are required to exist for this to be issued, these do exist.

What caused Mr Horton's employment relationship problem?

[7] During February 2017, Bell advertised for a stock manager on the "TradeMe" website. Mr Horton applied for the position and was interviewed via telephone by Sam Bell and then in person during late February. Also in attendance for the interview was Catherine Bell and Mr Horton's partner.

[8] Mr Bell subsequently offered Mr Horton the job during a telephone discussion. Mr Bell also offered to contribute to Mr Horton's relocation costs. Mr Horton initially thought about the job offer and then accepted it. Mr Bell said Mr Horton contacted him and asked him if he could start earlier than proposed due to developing issues with his current employment. Mr Bell said this was not possible because there was still a tenant in the accommodation proposed for Mr Horton and his family. In contrast, Mr Horton said Mr Bell wanted him to start earlier but the reason for this not occurring was still the same: the unavailability of accommodation.

[9] Bell had their accountant draft an employment agreement, which was their usual practice. On or about 20 April 2017, this agreement was provided to Mr Horton by Catherine Bell for review. The email sought to draw Mr Horton's attention to the fact that agreement contained a "90 day trial period" clause and advised him it was "probably best to get a legal opinion on it just so you know you are happy with it". Mr Horton was requested consider, sign and return the agreement before commencing work.

[10] Mr Horton agreed that Bell requested he do this. However, due to "technical" issues with his computer, Mr Horton said he was unable to print the agreement and return it.

[11] Bell expected Mr Horton to move his family and their belongings onto the property around the beginning of May 2017, however Mr Horton's belongings, including a boat, arrived at Benlea towards the end of April 2017. Bell would pay ultimately $1500 towards Mr Horton's removal costs.

[12] Bell said Mr Horton and his family moved into the provided accommodation at Benlea on 4 May 2017. Bell also said Catherine Bell took Mr Horton and his family down to the local school on 5 May 2017 to meet the teachers. Bell said on 7 May 2017, Mr Horton came to their farmhouse and signed the employment agreement. In attendance were Mr Bell,

Catherine Bell and their daughter, Katie. Mr Bell said he signed the agreement at 3.25pm on that day on behalf of Bell and Mr Horton signed it at 3.30pm. His evidence was supported by Catherine Bell and Katie Bell. Mr Horton would deny this.

[13] For reasons never properly explained in his evidence and during the investigation meeting, Mr Horton claimed the agreement was not signed until 16 May 2017. However, Bell produced the agreement and a review of the same disclosed the confirmed signatures of Mr Bell and Mr Horton and the date and times that they signed it.

[14] Despite his belief that the agreement was signed on 16 May 2017 (that is, after he commenced working for Bell), Mr Horton did not otherwise contest the validity of the trial period clause.

[15] On 16 May 2017, Mr Horton completed an IR330 tax form at the request of Catherine Bell so his pay could be processed.

The employment relationship and dismissal

[16] Mr Horton said despite some communication issues during his employment, he considered his performance was up to standard. In contrast, Bell said it noted a number of concerns with Mr Horton's performance of his role. Mr Bell said he sought to have a meeting with Mr Horton to discuss these concerns but when contacted via telephone he took a "confrontational and aggressive" tone. Catherine Bell said Mr Horton accused him of being a poor communicator and acting in bad faith.

[17] At a subsequent "very tense and not constructive" meeting on 25 July 2017 which was attended by Mr Bell, Mr Horton and his partner, Mr Bell gave Mr Horton notice under the trail period clause of his agreement. This was followed up in writing. Mr Horton and his family left their accommodation at Benlea on or about 18 August 2017 but his employment was not due to end until 21 August 2017.

Personal grievance raised

[18] Mr Horton subsequently raised a personal grievance for unjustified dismissal with Bell on 20 September 2017 or, at the latest, 22 September 2017. Mr Horton alleged via his

representative that Mr Bell had backdated the employment agreement to 7 May 2017 and that he was an existing employee when he signed the agreement on 16 May 2017. This allegation was strongly denied by Mr Bell via return letter from Bell's solicitors and subsequently.

[19] While not raised in the personal grievance letters of 20 September and 22 September 2017 or the statement of problem lodged on 9 November 2018, Mr Horton sought to develop two alternative arguments before the Authority.

[20] First, the employment relationship was on foot prior to Mr Horton commencing work on 8 May 2017 and therefore the 90 day trial period clause, and presumably the entire employment agreement (although, presumably, the balance of the agreement could have amounted to a variation to the employment relationship extant) was of no effect.

[21] Second, presumably in the alternative but perhaps in addition, Mr Horton was subject to unfair bargaining by Bell and was given insufficient time to seek legal advice or enter into negotiations over the agreement.

The Authority's view of Mr Horton's employment relationship problem

Primary argument

[22] Having considered the evidence before the Authority including the relevant documentation, I find that is more likely than not that the employment agreement was signed by the parties at or about 3.30pm on 7 May 2018 and not some time on 16 May 2017.

[23] The evidence of Mr Bell, Catherine Bell and Katie Bell as to the signing process for the agreement was considered, credible and consistent. This contrasted markedly with that of Mr Horton. His evidence to the Authority was inconsistent and contradictory to the point where it became increasingly clear that Mr Horton had confused the signing of the IR330 form on 16 May 2017 with that of his employment agreement. In addition, there was no collaborating evidence to support Mr Horton's allegation that he was instructed by Mr Bell to backdate the agreement from 16 May 2017 to 7 May 2018. Indeed, Mr Horton appeared to even resile from this allegation himself in his evidence to the Authority.

[24] As there was no dispute between the parties about the validity of the 90 day trial period clause contained in the agreement or that Mr Horton commenced working on 8 May

2017 (one day after I have found the agreement was signed), it was open to Bell to rely on the clause in accordance with its terms and the Act. However, that is not the end of the matter due to the late-piece alternative arguments outlined above and discussed below.

First alternative argument

[25] Mr Horton's argument here hinges on the existence of a legally effective employment relationship prior to the employment agreement being signed on 7 May (or 16 May 2017), which would have the resultant effect of rendering its 90 day trial period clause invalid. In this regard, Mr Horton argued that as a "person intending to work" for Bell, he was an "employee" within the definition of s 6 of the Act and that s 67A of the Act (trial period enabling provision) could not apply to him because he was an *existing* employee at the time he signed the employment agreement. Reliance was placed on several decisions of the Employment Court including *Smith v Stokes Valley Pharmac*y[1], *Blackmore v Honick Properties Limited*[2] and *Kumara Hotel Limited v McSherry*.[3]

[26] Bell said these cases were distinguishable on their own facts and that *Blackmore* and *Kumara*, in particular, both related to circumstances where written offers of employment did not refer to a 90 trial period. Bell said that the only document that reduced the proposed employment to writing in respect of Mr Horton was the employment agreement. Bell also said there was no evidence before the Authority that the job offer made to Mr Horton amounted to an "earlier" agreement nor was there anything reduced to writing other than the employment agreement.

[27] I accept these submissions. At most Bell made a pre-contractual offer to pay limited relocation expenses and acquiesced to a request by Mr Horton to commence moving his belongings onto the property. Both I find were acts in anticipation of an employment relationship and not more. Bell's clear intentions for the employment relationship were set out in the employment agreement drafted by its accountants and provided to Mr Horton for review. That there was a delay in returning the agreement to Bell was occasioned by "technical" issues with Mr Horton's printer. It is unclear why Mr Horton could not have made alternative arrangements to print the agreement. His tardiness in this regard ought not to be

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[1] [2010] NZEmpC 111
[2] [2011] NZEmpC 152
[3] [2018] NZEmpC 19

used against Bell to bolster an after-the-fact technical, and largely artificial, argument about intention and offer and acceptance.

Second alternative argument

[28] Having considered the evidence, there is no merit in the argument that Mr Horton was subject to unfair bargaining by Bell. If anything, the evidence points to fair bargaining and general adherence to the Act's overarching good faith principles.

Summary

[29] Mr Horton's employment was governed by an employment agreement contained a valid 90 day trail period clause. His dismissal was effected in a manner consistent with that clause and as a result, he was not unjustifiably dismissed by Bell.

[30] Having found that Mr Horton was not unjustifiably dismissed, it is not necessary to consider remedies.

Costs

[31] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Bell has 28 days from the date of this determination in which to file and serve a memorandum on costs. Mr Horton has a further 14 days in which to file and serve a memorandum in reply.

[32] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.[4]

Andrew Dallas
Chief of the Employment Relations Authority

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[4] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.