

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 257
3138641

BETWEEN	DION HEARFIELD Applicant
AND	BELLINGHAM MARINE NEW ZEALAND LIMITED Respondent

Member of Authority:	Pam Nuttall
Representatives:	Applicant in person David Lamont for the Respondent
Investigation Meeting:	22 March 2022 at Auckland
Further information:	22 March 2022 from Applicant
Determination:	21 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Dion Hearfield, signed an employment agreement with the respondent, Bellingham Marine New Zealand Limited (BM Ltd), on 25 November 2020 and began work with the company on 30 November 2020. He was given notice of dismissal on 26 February 2021 pursuant to a 90 day trial period clause in the employment agreement and was paid one week's wages in lieu of notice. Mr Hearfield disputes the validity of the trial period and says that a proper process was not followed in dismissing him.

[2] Mr Hearfield also claims that he was disadvantaged in his employment in that concerns about health and safety issues were not adequately addressed when he raised them and that he was not permitted to take lunch breaks.

The Authority's investigation

[3] For the Authority's investigation written witness statements with supporting documents were lodged from Mr Hearfield and from Mr Lamont, Operations Manager for BM Ltd. Both witnesses answered questions under affirmation from me and from each other.

[4] I considered the statement of problem, the statement in reply, supporting documents and the witnesses' evidence.

[5] After the conclusion of the investigation meeting, Mr Hearfield also lodged copies of two emails: one from himself to Gavin McPherson, his immediate manager, raising concerns about safety and breaks and one email from Mr McPherson in response.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination were:

- (a) Did the employment agreement between Dion Hearfield and Bellingham Marine New Zealand Limited (BM Ltd) include a valid 90 day trial period and was Dion Hearfield given proper notice of termination of employment within that trial period?
- (b) If there was no valid 90 day trial period clause, was there an unjustified dismissal; that is was the decision of BM Ltd to dismiss Dion Hearfield and how that decision was reached, what a fair and reasonable employer could have done in all the circumstances at the time?

- (c) Unjustified disadvantage. (This ground for a personal grievance is not excluded by a 90 day trial period.) Was Dion Hearfield unjustifiably disadvantaged in his employment by the actions of his employer (BM Ltd) in the manner of its response to his raising of health and safety concerns, in a failure to provide paid meal breaks or otherwise?
- (d) Did the employer (BM Ltd) breach the Employment Relations Act 2000 (“the Act”) ss 69ZD & ZE by failing to provide Dion Hearfield with paid meal breaks during his working day?

Was Mr Hearfield’s dismissed in accordance with a valid trial period in his employment agreement?

[8] BM Ltd specialises in the design, manufacture, supply and installation of cast concrete marina flotation systems. Mr Hearfield worked as a Marina Construction Installer at the Half-Moon Bay site and it seems that he worked on the barge as part of the piling team through his three months of employment with the company.

[9] The parties agreed that Mr Hearfield had signed an employment agreement with BM Ltd on 25 November 2020 and begun work on 30 November 2020. He was dismissed on 26 February 2021 in a letter signed by Mr Lamont, which stated that the company was exercising its right to end the employment relationship under the 90 day trial period and was paying one week’s wages in lieu of notice.

[10] The wording of the trial period clause in the employment agreement complied with the requirements of s67A Employment Relations Act 2000 (the Act) and specified that the trial period would start from the first day of work. Accordingly the notice of dismissal was given within the required time frame, and the notice period and payment in lieu of notice complied with the wording of the employment agreement. There was no suggestion that Mr Hearfield had been previously employed by BM Ltd.

[11] Mr Hearfield was also reminded of the trial period in an email from David Lamont about a different matter on 27 January 2021 which stated:

As you are aware over the first 90 days (end 27th Feb) we evaluate your performance to determine permanent placement going forward.

[12] However, Mr Hearfield contended that the trial period was not valid because when he began work with BM Ltd it was not a small-to-medium-sized employer as

required by s67A of the Act. He claimed that the company employed at least 20 employees.

[13] Mr Lamont's evidence was that on 30 November 2020, when Mr Hearfield began work, BM Ltd employed 16 employees. The documents attached to his witness statement listed these 16 employees, categorised as fortnightly or weekly employees according to their pay cycle, and included payroll timesheets for these employees for the relevant period.

[14] Mr Hearfield did not accept that these were the only employees of the company. He asserted that there were a lot more people on the worksite than those on the list provided. Under questioning, Mr Lamont referred to two other workers who were engaged as contractors and some other workers on the site who were employed by a labour hire company.

[15] In questioning Mr Lamont, Mr Hearfield asserted that some people on the worksite, who were not identified in the list of 16 employees, had worked for BM Ltd for years. However he was only able to specify one worker in this category in his question to Mr Lamont. Mr Lamont responded that this worker did have a long-standing connection to BM Ltd and had worked on other projects with the company but always in a contractor role. Mr Hearfield then enquired specifically about another worker who was not on the list of employees. Mr Lamont agreed that this worker had attended the company Christmas party but stated that he was on ACC and that his employment had ceased by mutual agreement before 30 November 2020.

[16] The documentation provided prior to the investigation meeting did not preclude there being more than 16 employees of BM Ltd at the material time, but it did provide the opportunity for Mr Hearfield to enquire about others on the worksite. Despite vigorous generalised assertions, it did not appear that Mr Hearfield could identify anyone else that he had worked alongside during his three months of employment who might also be an employee of BM Ltd.

[17] The documents attached to Mr Lamont's witness statement also included the report of an annual revalidation assessment of BM Ltd's Management Systems Standard ISO 9001:2015: AS/NZ4801: 2001. The assessment was conducted on 15 March 2021 by Telarc, a New Zealand crown entity subsidiary and a recognised

certification/registration body for these standards. The Executive Overview of the report opens with a paragraph which states that BM Ltd is:

part of a global organisation and reports directly to the Australian part of the company. It is a relatively small organisation in New Zealand with 15 employees in total. This consists of a General Manager, Project Manager, Operations Manager, Business Administration Manager and Production Manager along with the casting team at the head office and site/installation staff at the various operational sites.

[18] Reviewing this available evidence, I found, on the balance of probabilities, that Mr Lamont's evidence as to the number of employees on BM Ltd's payroll on 30 November 2020 was more convincing than Mr Hearfield's unsupported assertions that there were at least 20 employees of the company at this date.

[19] Accordingly I find that BM Ltd was a small-to-medium-sized employer when it employed Mr Hearfield, that the trial period clause in Mr Hearfield's employment agreement was valid and effective and that Mr Hearfield's dismissal complied with the requirements of this trial period clause and the Act. Consequently I was unable to enquire further into the manner of or justification for Mr Hearfield's dismissal.

Was Mr Hearfield unjustifiably disadvantaged in his employment by the actions of his employer (BM Ltd) in failing to provide paid meal breaks?

[20] With respect to meal breaks, Mr Hearfield's statement of problem raised two concerns: that he had not been allowed lunch breaks and that there were no lunch breaks on his time sheets. In the letter dated 2 March 2021, raising his personal grievance for dismissal with his former employer, Mr Hearfield states that he was not allowed to take lunch breaks, that he constantly brought this up as an issue but was ignored, that the weekly time sheets did not record any breaks, and that he was seeking compensation "for all my lunch breaks I was not allowed and had to work through."

[21] In its response to this letter, dated 9 March 2021, in its statement in reply and in its witness statement, BM Ltd stated that the half hour break for a meal and two 10 minute rest breaks were not recorded on the weekly time sheets because all the breaks were paid. Although the employment agreement referred to an unpaid 30 minute meal break, "as a spirit of goodwill, Bellingham Marine does not deduct pay for the half hour lunchbreak."

[22] Mr Hearfield, in responding on 10 March 2021 to BM Ltd, continued to insist that he had not been permitted to take lunch breaks:

Breaks; I was not aloud [sic] to take a lunch break as stated in my PG, yes I had my paid breaks, but I did not have a lunch break, I repeatedly requested this and on numerous time discussed this with the site manager, Barge Master, and also the Crane Operator, to no conclusion, I even brought this to your attention on the meeting held on the 30th Jan, you also explained that you (meaning I) get your entitled paid breaks, but the staff do not stop for lunch.

[23] Mr Lamont's witness statement recorded his view that:

In observations, and talking to site employees the half hour meal break was consistently actioned near the middle of the shift and work ceased during this time. The timing of the 2x10 minute breaks is less formal and work will not necessarily cease but there are generally plenty of opportunities during a day to take these. Dion was observed taking regular cigarette breaks and taking timeout.

[24] When this matter was put to Mr Hearfield in the investigation meeting, however, he conceded both that the lunch break was paid and that there was a break around midday for about 30 minutes in the middle of the shift when work stopped. In answering the Authority's questions, his stated concern now seemed to be that this was the first specified break from work in the shift and that he was not allowed to have a second break in the day. He said that it was the shorter breaks either side of the midday break that weren't happening. That he had to smoke and work at the same time, not stop to have a ciggie, though sometimes he could sit and wait while piling finished.

[25] But, in response to Mr Lamont's questions, Mr Hearfield further conceded that the nature of the work did mean there was down time to take a smoko break, despite work not stopping completely at scheduled times for the shorter 10 minute periods.

[26] In light of the concessions made in responding to these questions, I find that Mr Hearfield was not unjustifiably disadvantaged in his employment by BM Ltd with respect to the provision of paid meal breaks. I also find that BM Ltd did not breach ss 69ZD & ZE of the Act by failing to provide Dion Hearfield with paid meal breaks during his working day.

Was Mr Hearfield unjustifiably disadvantaged in his employment by the actions of his employer (BM Ltd) in the manner of its response to his raising of health and safety concerns?

[27] Mr Hearfield's documents describe him as asking questions and having concerns about safety and procedures after a few days of settling into the job. The documents express concerns about no site induction, no toolbox meetings, other team members doing unsafe acts with plant and equipment. He describes moving out of the way to avoid getting hurt, being pretty much scared every day for his well-being, being terrified most of the time, constantly fearful of accidents going to happen.

There were times when working on the barge during lifting and piling operations I would move well away to the safest corner of the barge to avoid possible injury or even death...Working for Bellingham was the most dangerous working environment I have ever been in, I was constantly fearful of accidents going to happen.

[28] Mr Hearfield claims to have raised his concerns repeatedly with the site manager, the barge master and also with David Lamont by email and to have been ignored. He claims that the company "failed to act or investigate or provide myself a safe workplace".

[29] In the investigation meeting, Mr Hearfield continued to vehemently and strenuously insist that his safety had been endangered, that he had continued to raise his concerns verbally and that these concerns had been ignored.

How were Mr Hearfield's concerns raised?

[30] Initially Mr Hearfield's concerns were raised verbally with the small team out on the barge. These people appear to have been the site manager, Barge Master, and the Crane Operator with whom he also repeatedly raised the issues of lunch and breaks as set out in [22]. Mr Hearfield's witness statement records the outcome of these repeated verbal expression of concern as being that "[n]othing happened and it was like I was becoming an outsider in the workplace."

[31] For BM Ltd, Mr Lamont accepted that Mr Hearfield had raised health and safety issues verbally during his employment. He says that the company actively encourages staff to raise these issues and that Mr Hearfield's concerns were discussed and addressed as appropriate. However, Mr Lamont's evidence was that a verbal expression of health and safety concerns is the lowest form of reporting and that if an issue is not addressed then it can be escalated by one of the following processes:

Written recording in the daily toolbox minutes in the site hazards or notes section
Accident/incident form filled out
Email or communication to senior managers
Corrective and Preventative Action Form filled out

[32] Mr Hearfield was aware of the first three of these measures but denied any knowledge of Corrective and Preventative Action Forms. Despite his expressing concerns about no toolbox meetings, minutes of several toolbox meetings were put in evidence with the company's witness statement, some of which he had signed. He had also filled out an Incident Report on 11 February 2021 when he had been at fault in not judging the tide conditions with consequent damage to the barge. He had also emailed senior managers on at least two occasions about safety concerns and spoken with Mr Lamont and Mr Gavin McPherson, to whom he reported as site manager, about these issues at an informal meeting in early February.

[33] From the available evidence it would seem that there were three discrete occasions on which Mr Hearfield had used one of these mechanisms to report safety concerns beyond his immediate work team.

[34] The first occasion is an incident described by Mr Hearfield during the investigation meeting. Mr Hearfield characterised this as a serious incident where the barge had hit an object at sea and damaged the marina. Mr Hearfield's evidence was that he had emailed Mr Lamont about this incident. The Authority requested, subsequent to the investigation meeting, that Mr Hearfield provide copies of any other further emails or texts between the applicant and any of his supervisors which related to concerns about health and safety. No copy of any email about this incident was supplied. Mr Hearfield's testimony in response to questions about the matter was that it was his belief that the email to Mr Lamont had resulted in an incident report being filled out.

[35] However Mr Hearfield had not considered filling out an incident report himself though he was on the barge but not involved in what happened at the time. He said it was not his incident to report and he had not filled out a form because he was getting past caring. He did express a sense of grievance that that he was not consulted about the matter and that an incident form was filled out by Mr McPherson who was not present at the incident.

[36] The incident report was included in the BM Ltd's documents for the investigation meeting. In response to my questions Mr Hearfield seemed to feel that all

that had happened was that someone had filled out a form. But the form recorded a proposed main cause of the incident (lack of communication with tug skipper and barge deckhands) and two outcomes: establishing that the mooring pile was in fact undamaged by checking it with survey GPS and the purchase of VHF radios to be used to communicate between Tug, Crane and Blue Workboat/push boat in the future. This appeared to indicate that this method of reporting a near miss incident had been effective in ensuring an identification of a problem and some action to resolve it.

[37] The second occasion was a meeting on 3 February 2021 between Mr Hearfield, Mr Lamont and Mr Gavin McPherson. Mr Lamont's evidence is that this was an informal meeting called to discuss some concerns around Mr Hearfield's performance. The purpose of this was to give him an opportunity to address any issues before his performance was appraised at the end of the trial period. Mr Hearfield's evidence is that "they both started telling me all my problems and describing me as not fitting in." Mr Hearfield took this opportunity to raise his health and safety concerns with them both. It seems that issues with getting on with the barge master may also have been discussed and some coaching provided as to how to deal with him.

[38] Two days later, on 5 February 2021, a Toolbox Meeting Minutes document, provided in evidence by BM Ltd, records the introduction of a "Take 5" procedure. Mr Lamont's witness statement offers this as an example that Mr Hearfield's concerns were discussed and addressed as appropriate. "The purpose of this was if at any time Dion was uncomfortable, he could request a "Take 5" where work was stopped and any concerns addressed before recommencing."

[39] The third occasion followed what appears to have been an altercation on the barge involving Mr Hearfield and Keith, the barge master. Mr Hearfield sent a text message to Mr McPherson at 12.08pm 23 February 2021:

Can you please relieve me of the barge for today. There is too much tension with Keith and myself.

The response was:

Hi Dion, Sorry but you'll need to work it out with Keith. Have you spoken to him about it as we discussed?

[40] Mr Hearfield followed up his text with an email to Mr McPherson at 7.34 pm 23 February 2021:

Gavin, i was not impressed with Keith yelling at me today,.I have mentioned this before, about taking a break, lunch etc.

This direction that Keith works at, unsafe loading of lifting equipment.

Does he have a current certificate for operation of a crane?

Let's also include damage to piles, fenders etc.

Yet there seems to be no record of incidents.

I spoke with Glenn today about damage the barge is doing to his installation, fenders cut and need replaced, impact to pile guides causing concrete to break away and will need replacing.

Yet there seems to be a, she be right, not my problem. When just a little care and thinking would avoid Glenn and his team doing unnecessary repairs.

I feel he is an unsafe operator and endangers lives and property.

I also brought this to your attention more than once, yet nothing has changed.

I get abused if i want to take a break for lunch or just a break after hours of work, or no, let's get the right gear first.

I also don't understand why there is no tool box/pre start meeting every morning, when your sims require it.

I also text you today (as you are the supervisor)

You're responding was disappointing.

The shore crew/installers have 2 breaks a day as per any normal work environment.

I now request as per your policy, a tool box meeting every morning, safe working practices, and regular breaks as normal.

Please David attend also tomorrow.

[41] Mr McPherson responded:

From: Gavin McPherson gmcpherson@bellingham-marine.co.nz

Date: 24/02/21 6:16 am (GMT+12:00)

To: Dion Hearfield dionhearfield@xtra.co.nz

Cc: David Lamont dlamont@bellingham-marine.co.nz

Subject: Re: meeting request

Hi Dion,

I will investigate your claims this morning and then make a time to meet.

In the meantime, you need to organise your breaks to fit in with the rest of your crew.

Toolbox for you Tim and Keith is between you and Tim and Keith daily. If you are not clear on the plan for the day then you ask Tim and Keith.

Safe work practices are obviously required at all times and you can use a take 5 at any time. If you want to record take 5's then you are welcome to record in the daily records on the back of the toolbox records and I will check on them.

Regards

Gavin

[42] The response here is rational and proportionate. When questioned by Mr Lamont in the investigation meeting, Mr Hearfield agreed that although he was raising Keith's attitude and work methods, he was not raising issues which BM Ltd could specifically address.

[43] In the investigation meeting Mr Hearfield also worked his way through ten photos which he claimed illustrated unsafe working conditions on the barge. These photos had apparently been taken on 25 February 2021, the day before Mr Hearfield

was dismissed. Mr Hearfield considered that the photos supported his contention that conditions on the barge were highly dangerous. Mr Lamont conceded that the photos did show the worn condition of some of the equipment or incorrect attachment. However he stated that, though this was not best practice, nothing in the photos indicated that Mr Hearfield had grounds for feeling unsafe.

[44] Under questioning Mr Hearfield conceded that Mr Lamont was correct in saying that these photos had not been shown to anyone in the company during his employment. They had not been part of any reporting of concerns to BM Ltd.

Discussion

[45] In assessing whether Mr Hearfield's employment has been affected to his disadvantage by some unjustified action (or inaction) of BM Ltd, the statutory requirement is to consider whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. Were the actions of BM Ltd in response to Mr Hearfield's repeated expression of safety concerns what a fair and reasonable employer could have done in all the circumstances?

[46] Mr Hearfield says that he repeatedly raised safety concerns and that he was fearful for his life and safety. However, although these views were vehemently reiterated in the investigation meeting, some of the presentation of these concerns was inconsistent and also not compatible with the documentary material provided by BM Ltd.

[47] As referred to in [32] above, documentation provided with Mr Lamont's witness statement conflicts with some of the concerns expressed by Mr Hearfield as to no toolbox meetings and no site induction. Copies of several different toolbox meeting minutes were provided. There was also a completed staff induction record checklist document, dated 30 November 2020 and signed by Mr Hearfield, which includes such items as Health and Safety Manual Confirmation, Emergency Procedures Explained, Safety Induction and Safety Assessment.

[48] Mr Hearfield has also signed several documents confirming that the company's Safe Work Method Statements (SWMS) on a range of procedures including Piling Operations and Barge and Plant Operations had been explained and understood. He refers to breach of "Bellingham Marines [sic] "Safe Working Methods" in a letter to

David Lamont on 10 March 2021, responding to BM Ltd's rejection of his personal grievance claim. And in the email to Mr McPherson on 23 February 2021 set out at [40] above, Mr Hearfield says, "I also don't understand why there is no tool box/pre start meeting every morning, when your sims require it." However, when questioned in the investigation meeting about the reference to these SWMS documents in one of the Toolbox Meeting minutes, Mr Hearfield stated that he had not read them and did not know what was in them.

[49] The email to Mr McPherson reproduced at [40] above sets out concerns about unsafe crane operations alongside reiterated claims about denial of lunch and regular breaks which were subsequently abandoned in the investigation meeting. Although Mr Hearfield's views were vigorously expounded, the coupling of both these matters inevitably affects the credibility of the generalised safety concerns raised.

[50] Did BM Ltd response to these issues meet the standard of what a fair and reasonable employer could have done in all the circumstances? It appears that much of Mr Hearfield's expression of concern about safety matters was generalised, internally inconsistent and incompatible with the documentary evidence. As set out above, on the three occasions where matters were drawn to the attention of BM Ltd's management, there was a specific and reasonable response.

[51] I find that Mr Hearfield was not unjustifiably disadvantaged in his employment by the actions of his employer (BM Ltd) in the manner of its response to his raising of health and safety concerns.

Summary

[52] The trial period clause in Mr Hearfield's employment agreement was valid and effective and Mr Hearfield's dismissal complied with the requirements of this trial period clause and the Act. The Authority had no jurisdiction to investigate whether the dismissal was substantively and procedurally justified.

[53] Mr Hearfield was not unjustifiably disadvantaged in his employment by BM Ltd with respect to the provision of paid meal breaks.

[54] BM Ltd did not breach ss 69ZD & ZE of the Act by failing to provide Mr Hearfield with paid meal breaks during his working day.

[55] Mr Hearfield was not unjustifiably disadvantaged in his employment by the actions of BM Ltd in the manner of its response to his raising of health and safety concerns.

Costs

[56] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[57] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[58] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[59] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹

Pam Nuttall
Member of the Employment Relations Authority

¹ <<https://www.era.govt.nz/determinations/awarding-costs-remedies>>