

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
OTAUTAHI ROHE**

[2023] NZERA 519  
3214079

BETWEEN

CONNOR KNOWLES

Applicant

AND

CF AUTOMOTIVE &  
ENGINEERING LIMITED  
Respondent

Member of Authority: David G Beck

Representatives: Paul Mathews, advocate for the Applicant  
No appearance by the Respondent

Investigation Meeting: 8 September 2023 at Christchurch

Submissions Received: 8 September 2023 from the Applicant  
None from the Respondent

Date of Determination: 11 September 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Connor Knowles worked in a mechanical engineering role for CF Automotive & Engineering Limited (CF Automotive) in Christchurch from 5 August 2022 until the employment ended in disputed circumstances on 25 August 2022. Mr Knowles says he was unjustifiably dismissed.

**The Authority investigation**

[2] Pursuant to s 174E of the Employment Relations Act 2000 (“the Act”), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I was hampered in assessing CF Automotive’s view of the situation and any disputed facts, by their failure to file evidential statements despite being directed to do so and their not attending the investigation meeting. I have

carefully considered the available correspondence and assessed Mr Knowles' evidence given during the investigation meeting.

### **Issues**

[3] The issues I must determine are:

- (i) A 'threshold' issue of whether Mr Knowles was dismissed in accord with a valid 90 days' trial period provision of his employment agreement and is prevented from advancing an unjustified dismissal claim.
- (ii) If the trial period is deemed invalid, was Mr Knowles unjustifiably dismissed?
- (iii) If Mr Knowles was unjustifiably dismissed, what remedies are appropriate given Mr Knowles is claiming:
  - (a) Arrears of wages;
  - (b) lost wages; and
  - (c) Compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 ("the Act").
- (iv) If any remedies are appropriate, should they be reduced for any contribution considering s 124 of the Act.
- (v) Costs of these proceedings.

### **What caused Mr Knowles' employment relationship problem?**

[4] On or around late July 2022, Mr Knowles was contacted by Corrie Fitzsimon the sole director of CF Automotive, which operated a small automotive repair workshop business. Mr Knowles recalled being interviewed shortly thereafter by Mr Fitzsimon including successfully undertaking some practical skills-based tests. Mr Knowles was offered the job at the interview and recalled being provided with an employment agreement for his consideration and, Mr Fitzsimon explaining he was to be engaged on a 90 days' trial period. Mr Knowles says he did not seek legal advice on the agreement but accepted he had time to do so and he recalled asking a friend look over the agreement before he later signed it. He recalled not being concerned about any terms in

the agreement and thought it was “pretty standard”. At the time, Mr Knowles was employed in another job doing similar mechanical work that he says was better paid but he was interested in working in an automotive workshop and expanding his skill base.

[5] Mr Knowles commenced employment with CF Automotive on Friday 5 August 2022 and worked eleven and a quarter hours on his first day. Mr Knowles recalled signing the employment agreement the following week and being given an unsigned copy that he provided to the Authority. The agreement provided for a \$29 hourly rate of pay for hours of work 8:30 am to 4pm Monday to Friday. However, after two days of employment Mr Knowles says he was called into Mr Fitzsimon’s office and told he was not happy with the standard of his work and given an ultimatum of resign and go back to his previous job or sign another employment agreement that reduced his hourly pay rate to \$26. Mr Knowles says he reluctantly accepted the pay reduction as he was still interested in the role. He recalled Mr Fitzsimon giving him a new employment agreement to sign a few days later which he signed on presentation but was not provided a copy to retain.

[6] Mr Knowles was supervised and trained in the workshop by a co-worker with superior qualifications but the relationship soon soured and Mr Knowles says the co-worker was volatile and constantly critical in a less than constructive manner. Mr Knowles described the co-worker as yelling and constantly berating him when it was perceived Mr Knowles was not completing tasks in a specified way.

[7] Mr Knowles says matters came to a head in the afternoon of 25 August when he was called to an impromptu meeting with Mr Fitzsimon and the co-worker supervising him. The meeting that he recalled lasting around 20 minutes, commenced with criticism of his work and when he asked how he could improve, Mr Fitzsimon told him to “just give up” and “seek a different career path”. At the end of the conversation, Mr Knowles recalls he sought clarity on his ongoing employment and was told, tomorrow (a Friday) would be his last day. After the meeting Mr Knowles recalled Mr Fitzsimon saying his and other workers’ fortnightly pay would be delayed that week because of a payroll problem.

[8] After the 25 August meeting, Mr Knowles recalled being despondent and unable to share what had happened with his family. Mr Knowles says he did not work the next day due to vehicle issues and thereafter he had no more contact with Mr Fitzsimon apart from a 29-31 August text exchange promising his wages outstanding

would be paid but Mr Knowles says this did not eventuate. The dismissal was not confirmed in writing.

[9] In an unacknowledged email of 5 September 2022, Mr Knowles' advocate raised a personal grievance of unjustified dismissal and sought payment of wages owed. Mediation was sought and later directed but CF Automotive's Mr Fitzsimon did not attend.

[10] After the matter was filed in the Authority on 17 February 2023, Mr Fitzsimon acknowledged receipt of Mr Knowles' application and indicated he would file a response after a direction conference but he failed to do so. Mr Fitzsimon also indicated he was winding the company up but to date, the company remains on the companies register although Mr Knowles understands it is no longer trading from the premises he formerly worked at.

**Issue one – is Mr Knowles unjustified dismissal grievance prevented by the operation of a 90 days' trial period?**

[11] Section 67A and 67B of the Act are the relevant governing provisions they state:

***67A When employment agreement may contain provision for trial period for 90 days or less***

- (1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.
- (2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that—
  - (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
  - (b) during that period the employer may dismiss the employee; and
  - (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- (3) **Employee** means an employee who has not been previously employed by the employer.
- (4) *[Repealed]*
- (5) To avoid doubt, a trial provision may be included in an employment agreement under section 61(1)(a), but subject to section 61(1)(b)."

**67B Effect of trial provision under section 67A**

- (1) This section applies if an employer terminates an employment agreement containing a trial provision under section 67A by giving the employee notice of the termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.
- (2) An employee whose employment agreement is terminated in accordance

- with subsection (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.
- (3) Neither this section nor a trial provision prevents an employee from bringing a personal grievance or legal proceedings on any of the grounds specified in section 103(1)(b) to (j).
  - (4) An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.
  - (5) Subsection (4) applies subject to the following provisions:
    - (a) in observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and
    - (b) the employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

## Assessment

[12] The Employment Court has indicated the requirements for setting up trial periods are strict and must be carefully adhered to as a worker's right to take an unjustified dismissal case is at issue.<sup>1</sup>

[13] The evidence suggested that Mr Knowles although aware of the 90 days' trial provision, did not sign the employment agreement until after he had commenced employment. If that was the case, Mr Knowles was exempted from coverage of the trial provision and able to pursue an unjustified dismissal claim as he was already an existing employee when he signed the agreement.<sup>2</sup>

[14] Confusion over whether the agreement provided a trial period or a probation period was also evident as both are referenced in the employment agreement. However, if I was to accept that there was a validly agreed trial period that had been entered into prior to Mr Knowles commencing employment (the employment agreement copy provided by Mr Knowles was undated and unsigned) a further hurdle is that the evidence suggested the parties then entered a second employment agreement on or around 9 August 2022 that reduced Mr Knowles pay rate. Thus, a new period of employment commenced from this point and a trial period was not possible as Mr Knowles had worked previously for CF Automotive.

[15] Regardless of the above, the employment agreement provided was unclear as it referred to the trial period commencing on 1 August 2022 and in an attached "Statement

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<sup>1</sup> *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253.

<sup>2</sup> *Ibid* and *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152, [2011] ERNZ 445.

of Personal Terms” the notice period for termination was two weeks and evidence here suggest only one day’s notice of termination was provided and that was not then paid in lieu or otherwise.

### **Finding**

[16] I find in all the circumstances identified that the 90 days’ trial period was not a valid one and CF Automotive is unable to rely upon it to prevent Mr Knowles advancing an unjustified dismissal claim.

### **Issue two – was Mr Knowles unjustifiably dismissed?**

[17] Given my finding that CF Automotive cannot rely on a valid trial period I now have to consider whether Mr Knowles dismissal was unjustified.

[18] Mr Knowles submission was that CF Automotive dismissed him in a procedurally and substantively unjustified manner that cannot satisfy s 103A of the Act or good faith obligations and he was unjustifiably dismissed.

[19] The test in s 103A(2) 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. Section 103A (3), requires that I consider a number of factors, including whether concerns were raised by the employer with the employee before dismissing the employee, whether a reasonable opportunity to respond to those concerns was given, and whether the employer genuinely considered the employee's explanations (if any) before dismissal.

[20] In the absence of any evidence from CF Automotive, I can only conclude from Mr Knowles evidence that his former employer became quickly dissatisfied with his skill level and decided the employment could not continue and dismissed Mr Knowles on 25 August without providing adequate notice.

### **Assessment**

[21] Given that the employment duration was three weeks, I find CF Automotive gave Mr Knowles insufficient time to demonstrate his skill level. The manner of the dismissal was abrupt with no practical opportunity for Mr Knowles to obtain representation or have any input into the decision. Section 103A of the Act and good

faith considerations were absent in the decision to dismiss. The procedural defects were not minor and did result in Mr Knowles being treated unfairly. I have considered that CF Automotive is a small company with no human resource support but I find nevertheless that no fair and reasonable employer could have concluded that dismissal was warranted in these circumstances.

### **Finding**

[22] I find Mr Knowles was unjustifiably dismissed and is entitled to consideration of remedies.

### **Remedies**

#### *Lost wages*

[23] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Knowles should I find that he has established a personal grievance and, s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration. Here I find Mr Knowles lost remuneration was attributed to the personal grievance.

[24] Mr Knowles provided evidence that he secured alternative employment commencing on 7 September 2022 and claimed two weeks lost wages in an amount of \$2,366. In addition, an arrears amount for the final pay period 15 August to 25 August of 70.5 hours was claimed in the amount of \$1,833. Holiday pay is claimed on both amounts.

### **Finding**

[25] CF Automotive is ordered to pay Mr Knowles lost wages and arrears in the total sum of \$4,502.52 gross (a sum including holiday pay).

#### *Compensation for hurt and humiliation*

[26] Mr Knowles and a friend gave evidence of the impact of the summary dismissal and the affect upon Mr Knowles' self-confidence, outlook and sleep patterns. Mr Knowles explained that he was shocked by the hurried and sudden nature of the dismissal, felt belittled and was impacted for around two weeks including financial pressure of not being paid his final pay or holiday pay. With some justification, Mr

Knowles felt CF Automotive dismissed him in a callous and peremptory fashion and that Mr Fitzsimon was unwilling to discuss the situation or listen to Mr Knowles' perspective of the situation.

[27] I find Mr Knowles was afforded no dignity and he suffered significant humiliation as a direct result of how he was summarily dismissed.

[28] I am convinced that at the time, Mr Knowles suffered humiliation, loss of dignity and injury to feelings but that he quickly found alternative employment and was able to put this unfortunate experience behind him.

[29] Considering the circumstances and awards made by the Authority and Court in similar situations and how CF Automotive effected this dismissal, I consider Mr Knowles evidence warrants compensation of \$9,000 under s 123(1)(c)(i) of the Act.

### **Contribution**

[30] Section 124 of the Act states that I must consider the extent to what, if any, Mr Knowles actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedies granted should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>3</sup>.

[31] Given the short period of employment involved and the lack of any evidence to the contrary, I do not see any issues of contribution from Mr Knowles.

### **Costs**

[32] Costs are at the discretion of the Authority and here Mr Knowles was successful in his claim of unjustified dismissal and has obtained compensatory remedies in an investigation meeting that took half a day at which he was represented. In the circumstances, I award Mr Knowles a contribution to costs in the amount of \$2,250.

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<sup>3</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

## **Orders**

[33] I have found that Connor Knowles was unjustifiably dismissed and is owed wage arrears by CF Automotive & Engineering Limited, who must pay the sums below to Connor Knowles within 28 days of this determination being issued:

- i. \$4,502.52 gross lost wages pursuant to s 123(1)(b) of the Act;
- ii. \$9,000 compensation pursuant to s 123(1)(c)(i) of the Act;
- iii. A \$2,250 contribution to legal costs.

David G Beck  
Member of the Employment Relations Authority