

-
**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 627
3223459

BETWEEN	LUCAS SARGISON Applicant
AND	BINE & CO LIMITED T/A THE SLIP INN Respondent

Member of Authority:	Davinnia Tan
Representatives:	Dave Cain, counsel for the Applicant Cieran Bine Thomas for the Respondent
Investigation Meeting:	12 October 2023 in Blenheim
Submissions received:	At the investigation meeting from the Applicant 16 October 2023 from the Respondent
Determination:	25 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Sargison claims that he was unjustifiably dismissed on 18 December 2022 without notice by Bine and Co limited (Bine and Co) trading as ‘The Slip Inn’.

[2] Sole director and shareholder of Bine and Co, Mr Cieran Thomas, says that Mr Sargison was on a 90-day trial period when he was dismissed and disputes that Mr Sargison was unjustifiably dismissed.

Background

[3] To assist with family bills, Mr Sargison was looking for employment and was advised about a vacancy at The Slip Inn in Havelock.

[4] Mr Cieran Thomas met with Mr Sargison in late November 2022 about the role. On 25 November 2022 Mr Cieran Thomas sent a text message to Mr Sargison to “welcome” him to the team.

[5] Mr Sargison was provided an unsigned employment agreement on Saturday 26 November 2022.

Terms of employment agreement

[6] The employment agreement included the following terms and conditions:

[...] The employee will start working for the employer on 28/11/2022 and continue until either the employer or the employee ends this relationship.

Trial Period

The first 90 days of employment will be a trial period starting from the first day of work.

During the trial period, the employer may dismiss the employee. Notice must be given within the trial period. Depending on how long the notice period is, the last day of employment may be before, at, or after the end of the trial period.

During the trial period the employer’s normal notice period doesn’t apply. Instead, either the employee or the employer may end this agreement by giving 1 weeks notice before the trial period ends. The employer might decide to pay the employee not to work. For serious misconduct, the employee may be dismissed without notice.

If dismissed during the trial period, the employee cannot bring a personal grievance or other legal proceedings about the dismissal. They may still bring a personal grievance if they feel the employer has treated them unfairly for other reasons, e.g. discrimination, harassment or unjustified disadvantage.

During the trial period, the employer and employee must treat each other in good faith.

Signing and commencing of employment

[7] On 30 November 2022, both Mr Sargison and Mr Cieran Thomas signed the employment agreement.

[8] Although the employment agreement provided for employment to commence on 28 November 2022, Mr Sargison’s first rostered shift commenced on Thursday 1 December 2022. Mr Sargison’s regular rostered shifts were Thursdays to Sundays.

Events of 17 December 2022

[9] On 17 December 2022, the Slip Inn had a function. As Mr Cieran Thomas was unwell that day, he organised for his father Michael Thomas to be the Acting Duty Manager in his absence.

[10] Mr Sargison worked that day and finished between 7.00 and 7.30 pm. He then asked Mr Michael Thomas who was having a staff meal at that time for a staff drink (referred to parties as a “staffie”). Mr Michael Thomas agreed to the staffie. Mr Sargison then poured himself a beer at the bar and sat down in front of Mr Michael Thomas. Upon finishing his drink, Mr Sargison then advised Mr Michael Thomas that his shift was done for the day and left for the evening.

Dismissal of 18 December 2022

[11] The following day on 18 December 2022, Mr Cieran Thomas returned to the Slip Inn.

[12] When Mr Sargison arrived for his shift that day, Mr Cieran Thomas wanted to speak to him. They then met in the kitchen where Mr Cieran Thomas raised several issues with him including that he had been “lazy” the evening prior and that he did not do what was “expected of him”.

[13] Mr Sargison says he was not given a chance to explain himself and was told to “get the fuck out” and that Mr Sargison and his family were “no longer welcome” at the Slip Inn. Mr Cieran Thomas denies using those words but does not dispute that he dismissed Mr Sargison that day without providing prior notice.

[14] Later that day, Mr Sargison sent Mr Cieran Thomas two text messages seeking reasons for his dismissal and expressing his disappointment that he was dismissed suddenly. Mr Cieran Thomas read the text messages but did not respond.

[15] Approximately six months following the dismissal, Mr Sargison found permanent employment.

[16] Mr Sargison says he has been unjustifiably dismissed which was humiliating and that the dismissal has had a detrimental impact on his mental health. Mr Sargison seeks compensation under section 123(1)(c) of the Employment Relations Act 2000 (the Act), outstanding wages, loss of remuneration and a contribution towards his costs.

The Authority's investigation

[17] For the Authority's investigation written witness statements were lodged from Mr Sargison, Mr Sargison's mother Ms Teresa Dennis, Mr Cieran Thomas, and Mr Michael Thomas. All witnesses answered questions under oath or affirmation from me and the parties' representatives. Counsel for Mr Sargison gave oral closing submissions and provided written submissions at the investigation meeting. Mr Cieran Thomas responded to oral submissions given by Counsel for Mr Sargison at the investigation meeting and in writing.

[18] 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

[19] The issues requiring investigation and determination were:

- (a) Whether Mr Sargison's employment was subject to a valid 90-day trial provision;
- (b) Whether he was unjustifiably dismissed from his employment;
- (c) If Bine and Co's actions were not justified, what remedies should be awarded considering:
 - (i) Compensation for humiliation, loss of dignity and injury to feelings and/or
 - (ii) Lost wages
 - (iii) Is Mr Sargison entitled to payment for notice or other arrears of wages?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Sargison that contributed to the situation giving rise to his personal grievance?
- (e) Should either party contribute to the costs of representation of the other party.

Was there a valid 90-day trial provision?

Mr Sargison's submissions

[20] Counsel for Mr Sargison has submitted that the 90-day trial period in the employment agreement is not valid because the employment agreement was signed on 30 November 2022 after employment had commenced on 28 November 2022. Citing the decision of *Smith v Stokes Valley Pharmacy (2009) Limited*¹ where the Court held that where an employee signed an agreement after commencing work, they were then not a new employee, and therefore the trial period was not valid.

[21] In addition, counsel for Mr Sargison submitted that even if the 90-day trial period was valid, the notice period of providing one week's notice was not complied with when Mr Sargison was dismissed without notice. As such, Bine and Co cannot rely upon the protection of the trial provision in the agreement or the trial period provisions in the Act.²

Bine and Co's submissions

[22] Mr Cieran Thomas submitted that he had written '28 November 2022' as the intended commencement date as a "simple courtesy" to let Mr Sargison know that he would be considered for rosters later in the week and to assure him that he would have employment with Bine and Co. However Mr Sargison was not rostered on until that Thursday, 1 December 2022, a day after the employment agreement was signed. As such the 1 December 2022 should be considered his starting date of employment with Bine and Co.

90- day trial valid

[23] In the evidence provided by both parties, there was no dispute that the 90-day trial was briefly discussed when the parties met to discuss the prospects of employment. Mr Sargison accepted there would be a 90-day trial as part of his employment.

[24] Although the employment agreement stipulated a commencement date of 28 November 2022, it also stated that the 90-day trial period would start "from the first day of work".

[25] Mr Sargison was not rostered to start work until Thursday, 1 December 2022.

¹ *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111.

² *Farmer Motor Group v Ltd v McKenzie* [2017] NZEmpC 98.

[26] In his evidence, Mr Sargison was a little confused as to his start date with Bine and Co, eventually deferring to the commencement date stated in his employment agreement. However he did not indicate that he expected to work on Monday 28 November 2022. It was not a disputed fact that he was rostered on regularly from Thursday to Sunday each week.

[27] There was no evidence of any pre-work training, induction, or other pre-roster obligation taking place prior to the first rostered shift. The evidence therefore shows that both parties intended for Mr Sargison to begin work on 1 December 2022. For completeness, I also note that the trial period provision does provide for dismissal without notice in the event of serious misconduct.

[28] In the absence of contrary evidence, as the agreement was signed on 30 November 2022 and Mr Sargison started work on 1 December 2022, I find that there was a valid 90-day trial provision in place.

Was Mr Sargison unjustifiably dismissed by Bine and Co?

[29] It is not a disputed fact that Mr Sargison was dismissed by Bine and Co without notice on 18 December 2022. Following his dismissal, Mr Sargison sought reasons for the dismissal but was not provided one.

[30] The law is clear that an employer cannot rely on a 90-day trial provision to restrict a claim for unjustifiable dismissal where there has been a summary dismissal (i.e. without notice).³

[31] This means that I must consider Mr Sargison's claim of unjustified dismissal.

[32] To determine the justification of a dismissal by the employer complained of under s 103(1)(a) of the Act the Authority applies the test in s 103A of the Act on an objective basis.

[33] When considering whether Mr Sargison's dismissal was justified, I must apply the test of justification set out at s 103A of the Act. I must consider whether:

- (a) Mr Cieran Thomas sufficiently investigated the allegations against Mr Sargison before dismissing him;

³ *Farmer Motor Group v Ltd v McKenzie* [2017] NZEmpC 98.

- (b) Mr Cieran Thomas raised the concerns that he had with Mr Sargison before dismissing him;
- (c) Mr Cieran Thomas gave Mr Sargison a reasonable opportunity to respond to those concerns before dismissing him; and
- (d) Mr Cieran Thomas genuinely considered Mr Sargison's explanations before dismissing him.

[34] I may also take into account any other factors I think are relevant.

Inadequacy in substance and process

[35] Mr Cieran Thomas stated that soon after hiring Mr Sargison, it became apparent to him and other kitchen staff that Mr Sargison was lacking in kitchen skills and not meeting performance expectations. Mr Cieran Thomas said that this led to daily frustration with Mr Sargison. Mr Cieran Thomas said that as someone who has worked in the kitchen for a long time, he would be able to tell within a couple of weeks if a person was up to the job simply by the way they used a kitchen knife.

[36] Despite what Mr Cieran Thomas described as daily frustration with Mr Sargison, he did not raise his concerns with Mr Sargison. Mr Cieran Thomas said that in his business, they do not have meetings, but verbal instructions such as instructing Mr Sargison to "pick up the pace", would be given. Mr Cieran Thomas said he also did not raise this with Mr Sargison because Mr Sargison's father had recently passed away and he wanted to give him "breathing room". However following the function of 17 December 2022 at The Slip Inn, Mr Cieran Thomas dismissed Mr Sargison following Mr Michael Thomas' complaints about Mr Sargison.

[37] Although Mr Cieran Thomas was not present at The Slip Inn on 17 December 2022 due to illness, he had received complaints from about Mr Sargison's conduct from Mr Michael Thomas, including an allegation that Mr Sargison finished his shift early, poured himself a beer after Mr Michael Thomas agreed to a 'staffie', and did not finish cleaning the dishes in the kitchen so the other staff had to clean up after him. Mr Cieran Thomas was also unhappy with Mr Sargison working at the bar serving guests drinks and touching the till when he was not trained as a front of house staff.

[38] Mr Sargison said that he had previously asked Mr Cieran Thomas whether he could adjust his finishing time so he could catch a ride with his stepfather because Mr

Sargison no longer had his own transportation following a car accident. His evidence was that Mr Cieran Thomas said that was fine. With regard to the 'staffie', Mr Cieran Thomas initially referred to this as 'theft' in the statement in reply, but at the investigation meeting he accepted that when he had been the duty manager, he had allowed Mr Sargison to have an alcoholic beverage as a 'staffie'. Mr Michael Thomas also accepted that Mr Sargison had been tasked to "float" between front of house and the kitchen to assist where help was needed and this included serving guests drinks at the bar due to the volume of guests.

[39] Mr Sargison stated that when he had arrived at The Slip Inn that morning, Mr Cieran Thomas was waiting for him and the dismissal happened very quickly just over five minutes. Mr Sargison stated that Mr Cieran Thomas had "berated" him, told him he was "lazy" and to "get the fuck out" and that Mr Sargison and his family were "no longer welcome" at the Slip Inn. Mr Sargison stated that he did not feel he was able to explain his side of the story in those circumstances nor was he asked to do so.

[40] Mr Cieran Thomas denied telling Mr Sargison to "get the fuck out" but accepted that he dismissed Mr Sargison without notice. In his view, Mr Sargison's behaviour amounted to serious misconduct and notice was not required.

[41] Mr Cieran Thomas' evidence was that he felt Mr Sargison's performance from the outset did not meet his expectations and was having an adverse impact on staff and his business. However, at no stage during Mr Sargison's employment did Mr Cieran Thomas raise these concerns in a constructive manner with Mr Sargison to allow a reasonable opportunity for Mr Sargison to respond to those concerns. Instead, upon receiving complaints from Mr Michael Thomas about Mr Sargison, Mr Cieran Thomas dismissed Mr Sargison immediately and did not give him a reasonable opportunity to respond to his concerns prior to dismissing him. It was clear from the evidence given at the investigation meeting that Mr Sargison's actions of 17 December 2022 were either directed or authorised by Mr Michael Thomas.

[42] Having heard the parties' evidence, I am not satisfied that any of the above allegations against Mr Sargison have been properly made out on the evidence such that a fair and reasonable employer would genuinely believe, based on reasonable grounds, that serious misconduct occurred. At best they could be characterised as a lack of clear

communication between the parties and to the extent the concerns relate to Mr Sargison's skills in the kitchen, performance issues.

[43] Dismissing an employee without notice is not a justified response to performance or misconduct concerns, both of which require a graduated warning process to be exhausted before the final sanction of dismissal could be imposed. Dismissal for poor performance and/or misconduct must also be on notice. Neither of these processes were exhausted prior to Mr Sargison's dismissal.

[44] In addition none of the tests in s 103A were met. Mr Cieran Thomas did not raise the concerns with Mr Sargison prior to dismissing him, he did not give Mr Sargison a reasonable opportunity to respond and therefore did not give genuine consideration to any explanation to those concerns prior to dismissing Mr Sargison.

[45] Accordingly, I find that the summary dismissal is not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred and as such the dismissal is substantively and procedurally unjustified.

Reasons for dismissal

[46] Following his dismissal, Mr Sargison sent a text message to Mr Cieran Thomas seeking reasons for his dismissal, but Mr Cieran Thomas did not respond. Section 120 of the Act requires an employer to provide a written statement of the reasons for the dismissal within 14 days after the day on which the request is received, where an employee has made such a request within 60 days after the dismissal or after the employee has become aware of the dismissal.

[47] In addition, I note that good faith obligations still apply where an employee is on a trial period. As the Employment Court in *Smith v Stokes Valley Pharmacy (2009) Limited*⁴ found, this means that an employer cannot refuse to give an explanation for its decision to terminate an employment agreement during a trial period.

To refuse to give to an employee being dismissed otherwise lawfully, any explanation about why that is happening, is not only inconsistent with the statutory obligation to be "responsible and communicative" but is arguably the antithesis of that requirement of good faith behaviour between the parties in the employment relationship. The obligation is unaffected by ss67A and 67B.

⁴ *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111.

Remedies

Compensation

[48] As Mr Sargison's unjustified dismissal claim is made out, I find he is entitled to compensation for humiliation and injury to feelings pursuant to s 123(1)(c)(i) of the Act. An award of compensation in each case must have regard to the individual circumstances of the particular person seeking the award.

[49] In Mr Sargison's circumstances, his counsellor provided the Authority with a letter setting out her professional opinion that the dismissal and the manner in which it occurred had a negative impact on Mr Sargison's wellbeing and mental health.

[50] In closing submissions counsel for Mr Sargison sought an award of compensation of \$15,000.00 to \$20,000.00 for the effects of his dismissal on him and as consistent with Authority awards in other cases.

[51] Having balanced his evidence against current trends in both the Court and Authority, I consider \$15,000.00 appropriate for the humiliation and injury to his feelings caused by his unjustified dismissal.

[52] Accordingly I order Bine and Co to pay Mr Sargison \$15,000.00 as compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act. It must be paid to him within 28 days of the date of this determination.

Lost remuneration

[53] Where an employee who has a personal grievance and has lost wages as a result of the grievance, s 128 of the Act requires the Authority to order the employer to pay that employee "the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration". Section 128 also provides that the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[54] In determining Mr Sargison's lost remuneration under s 128, I have considered whether Mr Sargison has taken reasonable steps to mitigate his loss by doing what he could reasonably be expected to have done to try and find other work or income. I have

also considered whether Mr Sargison's employment with Bine and Co might have ended anyway due to other reasons unrelated to his grievance claim.

[55] Mr Sargison provided evidence supporting his efforts in looking for other work from 27 February 2023. He said that following the dismissal, he wanted to focus on his wellbeing and mental health before finding employment. Mr Sargison found employment 25 weeks following the dismissal. Counsel for Mr Sargison submitted that in these circumstances the Authority should consider exercising its discretion to award lost wages for a period exceeding three months post-termination.

[56] I acknowledge the submissions made on behalf of Mr Sargison however I do not consider it appropriate to award 25 weeks of lost wages. Mr Sargison had applied for other jobs from 27 February 2023 following the dismissal on 18 December 2022, but the jobs he applied for were all based in the Waikato. Although I accept that Mr Sargison had not planned to return to study in the Waikato for the 2023 academic year, equally I am not persuaded that he was intending to stay in Pelorus Bridge permanently even if he remained employed with Bine and Co. As his evidence showed, Mr Sargison had moved to Pelorus Bridge primarily to be closer to family following news that his father was terminally ill and who sadly passed away at the end of 2022.

[57] In these circumstances, I consider that an award of three months of wages is appropriate. This shall be calculated as follows:

- Mr Sargison's total remuneration for three weeks \$1,565.74 equates to an average weekly wage of \$521.91
- Average weekly wage of \$521.91 x 13 weeks = \$6,784.83

[58] Accordingly I order Bine and Co to pay Mr Sargison \$6,784.83 gross as recompense for three months of wages lost as a result of the dismissal. It must be paid to him within 28 days of the date of this determination.

No reduction for contributory conduct

[59] I am required under s 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[60] Counsel for Mr Sargison submitted that none of Bine and Co's issues or concerns, as cited in the statement of reply, were raised prior with Mr Sargison. As such there can be no blameworthy conduct on his part.

[61] I agree that the evidence does not establish any blameworthy conduct on the part of Mr Sargison which resulted in his unjustified dismissal. Having considered the matter of contribution as I am required to do so under s 124 of the Act, there is to be no reduction in the remedies awarded.

Orders

[62] Bine and Co Limited is ordered to pay to Mr Lucas Sargison within 28 days of the date of this determination:

- (a) The sum of \$6,784.83 gross as compensation for lost wages; and
- (b) The sum of \$15,000.00 without deduction as compensation for hurt, humiliation and injury to feelings.

Costs

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

[64] If they are not able to do so and an Authority determination on costs is needed Mr Sargison 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 Bine and Co 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.

[65] 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.⁵

Davinnia Tan
Member of the Employment Relations Authority

⁵ See www.era.govt.nz/determinations/awarding-costs-remedies.