New Zealand Employment Relations Authority Decisions

Bartholomeusz v Tradefog Global Co Limited (Christchurch) [2017] NZERA 1062; [2017] NZERA Christchurch 62 (28 April 2017)

Last Updated: 20 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 62
5595807

BETWEEN CHRISTOPHER DAVID BARTHOLOMEUSZ

Applicant

A N D TRADEFOG GLOBAL CO LIMITED

First Respondent

A N D TRADEFOG INTERNATIONAL LIMITED

Second Respondent

Member of Authority: Helen Doyle

Representatives: Michael McDonald, Advocate for Applicant

David Beard, Counsel for Respondents

Investigation Meeting: 30 June 2016 at Christchurch

Submissions Received: 30 June, 12 July and 5 August 2016, from the Applicant

7 July, 20 July, and 29 August 2016 from the Respondents

Date of Determination: 28 April 2017

DETERMINATION OF AUTHORITY

A. **Christopher David Bartholomeusz was employed by the second respondent Tradefog International Limited.**
B. **Christopher David Bartholomeusz was unjustifiably dismissed from Tradefog International Limited.**

C Tradefog International Limited is ordered to pay to Christopher

David Bartholomeusz the following:

(i) Reimbursement of lost wages in the sum of $8307.63 gross.

(ii) Payment of the loss of the benefit of holiday pay on that amount in the sum of $664.61 gross.

(iii) Payment of compensation in the sum of $12,000 without deduction.

D Costs are reserved and a timetable has been set.

Application for joinder of second respondent

[1] The Authority in a preliminary determination dated 21 July 2016 ordered that Tradefog International Limited be joined as a second respondent to these proceedings1. The determination was challenged by the first and second respondent. It was agreed with the representatives that the Authority would await the outcome of that challenge before determining the substantive matter. There is now a judgment from the Employment Court.2 The Authority can proceed to determine the substantive matter including whether Christopher Bartholomeusz was employed by the first or second respondent.

Employment relationship problem

[2] Mr Bartholomeusz says that he was unjustifiably dismissed as a salesperson of agricultural products from his employment with either the first or second respondent.

[3] He was party to a written individual employment agreement signed on 19 June

2015 with the second respondent, Tradefog International Limited (Tradefog International) and his employment commenced on 30 June 2015. The sole director of both the first and second respondents is Xueyan Soloman Ye.

[4] On 17 September 2015 Mr Ye telephoned Mr Bartholomeusz to establish his whereabouts. Mr Bartholomeusz explained that he was in Hinds, South Canterbury. Mr Ye advised that he would meet Mr Bartholomeusz in a few minutes.

Mr Bartholomeusz then met with Mr Ye who advised that there was to be a discussion

1 [2016] NZERA Christchurch 120

2 *Tradefog Global Co Ltd and Tradefog International Ltd v Christopher Bartholomeusz* [2017] NZEmpC 24

about the trial period. Mr Ye advised Mr Bartholomeusz that he was a good employee but “due to economics I must let you go”. Mr Bartholomeusz said that this was a shock for him. Mr Ye advised he would get his solicitor to write to Mr Bartholomeusz and Mr Bartholomeusz said that he responded that he would have his lawyer contact Mr Ye.

[5] On 22 September 2015 Mr Bartholomeusz received a letter dated

17 September 2015 that gave him formal notice pursuant to s 67B of the Employment

Relations Act 2000 (the Act), and advised that employment would be terminated as at

17 September 2015. The letter advised amongst other matters as follows:

I have shared with you my concerns about the current economic situation and the negative impact to the business as a whole. Having run your own business I would have thought you would have been more understanding.

I am willing to do what I can to help you find new employment and appreciate how difficult this is for you while it has not been an easy thing for me as well.

I wish you all the best in the future. I can pay extra one week salary for you after the termination date for the goodness. In the meantime I expect the return of all company property without hesitation. I will be back in the Christchurch Monday and so can uplift this property from you.

Sincerely

[6] The letter was on letterhead reflecting Tradefog International, without reference to its limited liability, at its top left hand side but the top right-hand corner showed Tradefog Global Co Ltd trading as Tradefog International Limited. A personal grievance was raised with Tradefog Global.

[7] Mr Bartholomeusz says that the trial period in clause 3 of his employment agreement is not valid. First, he says that he was already an employee before he signed the employment agreement and alternatively, or additionally, he says that the trial period did not meet the requirements of s 67A (2) of the Employment Relations Act 2000 (“the Act”). That is because it did not advise that if the employer dismissed the employee during the trial period the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal. Further, Mr Bartholomeusz says that the dismissal was procedurally and substantially unjustified and he seeks reimbursement of lost wages, other money and compensation.

[8] Mr Ye in the statement in reply lodged on behalf of the first respondent says that Mr Bartholomeusz is prohibited from bringing an unjustified dismissal claim because of the trial period.

The issues

[9] The issues for the Authority are as follows:

(a) Was Mr Bartholomeusz employed by the first or the second respondent;

(b) Was Mr Bartholomeusz already an employee of either the first or second respondent when the employment agreement was entered into and therefore not a new employee;

(c) Did clause 3 of the employment agreement contain a valid trial period in accordance with ss 67A and 67B of the Act;

(d) If the trial period was not valid and could not be relied on to terminate

Mr Bartholomeusz' employment, was the dismissal justified;

(e) If the dismissal was not justified then what remedies is Mr Bartholomeusz entitled to and is there an issue of contribution and mitigation?

Was Mr Bartholomeusz employed by the first or the second respondent?

[10] The first respondent Tradefog Global was incorporated on 2 August 2004 and its name from the date of incorporation until 8 March 2013 was Tradefog International. The second respondent Tradefog International was incorporated on

8 March 2013. Mr Ye is the sole director and shareholder of both companies. The shareholding in both companies is held solely by Mr Ye.

[11] The offer of employment to Mr Bartholomeusz was signed by Mr Ye acknowledging he was director of Tradefog International. The employment agreement reflected the employer as Tradefog International and Mr Ye signed on behalf of that company.

[12] The letter terminating Mr Bartholomeusz' employment is somewhat confusing as earlier set out. Mr Ye did not through the process of the proceeding take issue with the first respondent being named as the employer.

[13] Mr McDonald, in a memorandum dated 5 August 2016 refers to the element of confusion arising from the letter of termination. Mr McDonald submits that the usual reference to "trading" would mean that Tradefog International is an agent for the principal Tradefog Global. Mr Beard in a memorandum dated 29 August 2016 submits that the letterhead used is not determinative of the identity of the employer and that Mr Bartholomeusz has no cause of action against the first respondent.

[14] In *Colosimo v Parker*3 the Employment Court set out the principles that apply when considering the identity of the correct employer. These principles have been applied and referred to in a later judgment of the Employment Court in *Wilson v Bruce Wilson Painting & Decorating Limited.*4

[15] The principles can be briefly summarised as follows. The onus of proving the identity of the employer rests on the employee where the employee puts that fact in issue. The standard of proof is on the balance of probabilities and the question of who the employer was must be determined at the outset of the employment. The Authority should objectively assess the employment relationship at its outset and ask who an independent but knowledgeable observer would have said was the employer. Failure to notify or make an employee aware of the identity of the employer is not conclusive.

[16] An objective assessment of the evidence establishes the following. The letter of offer of employment to Mr Bartholomeusz is for a position of sales person at Tradefog International. It is signed by Mr Ye as a director of Tradefog International. The written employment agreement signed by Mr Bartholomeusz specifies the employer as Tradefog International and was signed for and on behalf of that company by Mr Ye as Director. There was no evidence to support that Mr Bartholomeusz was not paid by the second respondent. There was confusion I accept because of the reference to Tradefog Global t/a Tradefog International on the letter of termination of

employment however there was no evidence of any mutual agreement to change the

3 *Colosimo v Parker* (2007) 8 NZELC 98,622

4 *Wilson v Bruce Wilson Painting & Decorating Ltd* [2014] NZEmpC 83 at [13], (2014) 11 NZELR

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employer to Tradefog Global. A tax invoice attached to the statement in reply for a farm Mr Bartholomeusz sold sulphate ammonia to is headed Tradefog International. I do not derive particular assistance from the webpages attached to Mr McDonald's memorandum.

[17] I find objectively assessed at the outset of employment the letter of offer and the employment agreement show that Mr

Bartholomeusz was employed by the second respondent. Tradefog International is a separate legal identity to Tradefog Global. I am not satisfied that the employment relationship with Tradefog International was changed before the relationship was terminated. Mr McDonald does not maintain that Mr Bartholomeusz was jointly employed. The letter of termination clearly caused some confusion but I do not find objectively assessed an independent but knowledgeable observer would have said the employer was Tradefog Global.

[18] I find that Mr Bartholomeusz was employed by the second respondent, Tradefog International Limited.

The trial period

[19] There were two reasons set out by Mr Barthlomeusz in the statement of problem why the trial period could not be relied on and was invalid. The first was that Mr Bartholomeusz was already an employee when the employment agreement was signed and the second was that the trial period does not state or is to the effect that if dismissed the employee is not entitled to bring a personal grievance or other legal proceeding in respect of the dismissal.

[20] In final submissions Mr McDonald primarily relied on the content of the trial period in clause 3 of the employment agreement. For completeness I record the evidence I heard about the events surrounding the offer and acceptance of employment did not support a finding that it took place independently of the signing of the employment agreement. There was no dispute that the employment agreement was signed before Mr Bartholomeusz commenced work.

[21] Clause 3 of the employment agreement does not state that the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal. It provides:

Trial period

You are initially employed on a trial period of 90 days, in accordance with ss 67A and 67B of the Employment Relations Act 2000. The employer may, at any time during the trial period, choose to terminate your employment. If the employer terminates your employment during the trial period, the employer will give you notice of termination before the end of the trial period whether the termination is to take effect before or at the end of the trial period.

[22] Section 67A (2) of the Act provides as follows about what a trial provision means:

(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.

[23] Mr Beard submits that the reference in clause 3 of the employment agreement to "in accordance with ss 67A and 67B" is to the effect that the words of s 67A (2) are by definition incorporated as a written term of the employment agreement by reference. He submits this includes reference to s 67A(2)(c) of the Act. He distinguishes the facts in this case from those referred to by Mr McDonald in his submissions.

[24] The starting point is the Employment Court judgment in *Smith v Stokes Valley Pharmacy (2009) Limited* [5] and in particular what was stated in that case about the interpretation and application of ss 67A and 67B of the Act. Chief Judge Colgan stated in *Smith* that ss 67A and 67B remove longstanding employee protections and access to dispute resolution and to justice and they should be interpreted strictly and not liberally. He stated that legislation that removes previously available access to

courts and tribunals should be strictly interpreted and as having that consequence only

to the extent that is clearly articulated.[6]

5 [2010] NZEmpC 111; [2010] ERNZ 253

6 At [48]

[25] The phrase trial period in s 67A (2) was considered in depth in *Smith* as was s 67B which provides for the effect of the trial provision under s 67A. It was stated in *Smith* that a trial period must be a written provision and "must state, or is to the effect, that [it states]... a number of things".[7] There is specific reference to s 67A(2)(c) and that the written trial provision must state or be to the effect that if the employer does dismiss the employee during the trial period, "the employee is not entitled to bring a

personal grievance or other legal proceeding in respect of the dismissal."

[26] Chief Judge Colgan at the end of the part of the judgment on interpretation and application of ss 67A and 67B concluded with a statement about reliance on trial provisions.8 It is to the effect that the new sections are not simple nor a blunt or broad prohibition against bringing legal proceedings and they provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. It is stated that there is a risk to the employer of disqualification from those immunities if these steps are not complied with.

[27] Subsequent Authority determinations have held where there was nothing stated or to the effect that the employee was not entitled to bring a dismissal grievance, in a clause purporting to be a trial period under s 67A, that in accordance with the strict approach in *Smith* the employer could not rely on the provision.9

[28] Is incorporation of s 67A(2)(c) of the Act then available by reference in clause

3 to such trial period being in accordance with ss 67A and 67B of the Act? *Smith* recognised that ss 67A and 67B remove longstanding employee protections and access to dispute resolution and should be strictly interpreted and having that consequence only to the extent that is clearly articulated. I do not find in accordance with the strict approach in *Smith,* clause 3 contains a trial provision that states or is to the effect that the employee is not entitled to bring a personal grievance or other legal proceeding by reference to ss 67A and 67B of the Act. Clause 3 does not contain a trial period in

accordance with ss 67A and 67B because of that omission.

7 Above n 5 at [51]

8 Above n 5 at [83]

9 *Wilson v Promotional Systems Limited* [2011] NZERA Auckland 166 (Member Dumbleton) and *Rix- Trott v The Freight People Limited* [2012] NZERA Auckland 55

[29] The consequence of that finding is that Mr Bartholomeusz can raise a personal grievance about his dismissal and Tradefog International are required to justify the dismissal in accordance with the test of justification under s 103A of the Act.

Justification for dismissal

[30] Section 103A requires an objective consideration of 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 of the dismissal.

[31] There are procedural fairness factors set out in s 103A (3) that must be considered by the Authority and these require concerns to be raised before dismissal and an opportunity for an employee to respond to the concerns and time for such response to be considered. A fair and reasonable employer could be expected to comply with good faith obligations in s 4 of the Act including where a dismissal is for reasons of redundancy, consultation and provision of information with a reasonable opportunity to respond.

[32] The reason for the dismissal advanced by Mr Ye to Mr Bartholomeusz both at Hinds and in the letter dated 17 September was the economic situation and the negative impact on the business. In his evidence Mr Ye said that he had performance concerns about the very limited sales made on the part of Mr Bartholomeusz and that Mr Bartholomeusz did not send any emails to customers and did not put his activity into the CRM system. He also referred to Mr Bartholomeusz undertaking a sale with an incorrect price. Mr Ye referred to the reasons for dismissal being a combination of the economic situation and the performance of Mr Bartholomeusz.

[33] I accept that Mr Ye had concerns about the level of sales but whilst he said that Mr Bartholomeusz would have known of these concerns the evidence does not support that Mr Ye clearly pointed his concerns out to Mr Bartholomeusz. I took from Mr Ye's evidence that instead he did his best to be encouraging about sales and gave advice about the closing of them. I do not find that Mr Ye clearly stated his concerns were such that a failure to improve sales may result in termination of employment. Mr Bartholomeusz said that he thought he was performing well. Mr Ye confirmed

that there was a delay in setting a sales target and one had not been set at the time of termination.

[34] The evidence supported discussion about the CRM system but Mr Bartholomeusz said in his evidence that he thought photocopying his diary showing daily sales calls and providing them to Mr Ye was satisfactory. If this was unsatisfactory there was no evidence that Mr Bartholomeusz understood failure to use the CRM system placed his role in jeopardy. The email issue seemed to have been an issue coming to light after termination and Mr Bartholomeusz said there was no discussion of that matter with him.

[35] I find that there were mixed motives for the termination. There were some commercial concerns but with underlying performance concerns which the evidence supports were not regarded as economic but rather as a performance problem of

Mr Bartholomeusz. Mr Ye said that he did not replace Mr Batholomeusz rather he performed sales in the South Island himself. There was limited evidence however to support that a redundancy was necessary for genuine commercial reasons. Mr Ye's evidence was to the effect that advising the termination was for economic reasons alone enabled Mr Bartholomeusz to save face.

[36] I am not persuaded that redundancy was the predominant motive or reason for the dismissal. I find that the predominant motive was performance concerns about the level of sales. With concerns about performance a fair and reasonable employer could be expected to communicate its concerns, advise the employee of the standards expected and the consequences if those standards are not met. That did not occur in this case.

[37] The procedural requirements in s 103A (3) are not satisfied in this matter. The procedural unfairness was such that I am not satisfied that the dismissal was substantively justified. A fair and reasonable employer could not I find have terminated Mr Bartholomeusz in the circumstances as set out above.

[38] Mr Bartholomeusz has a personal grievance that he was unjustifiably dismissed and is entitled to consideration of remedies.

Lost Wages

[39] Mr Bartholomeusz in his evidence said that he was without work for 89 days after 17 September 2015 which is 12 weeks and 5 days. I accept his evidence that he applied for a number of roles but was hesitant at applying for sales roles because his confidence had been so affected. He did I find make reasonable attempts to mitigate his loss and secured a role as a support worker on 14 December 2015.

[40] I need to consider whether the employment relationship would have lasted for the period for which lost wages are claimed. An allowance of a reasonable lead in time for sales to develop and increase is appropriate in the circumstances when considering performance and sales opportunities that may have been in the pipeline. I need to balance if there had been a performance plan and low sales had continued how long employment may have continued. I find that employment may not have continued in all likelihood beyond 10 weeks after 17 September 2015. I find it fair and reasonable that lost wages be considered for that period. That period of 10 weeks includes a notice period of two weeks of which only one week was paid and that one week should be taken into account.

[41] Subject to any issue as to contribution Mr Bartholomeusz is therefore entitled to reimbursement of 9 week's lost wages. His salary was $48,000 which divided by 52 is a gross weekly amount of $923.07. That weekly figure multiplied by 9 is the sum of

$8307.63 gross.

Reimbursement of lost benefit of holiday pay

[42] Mr Bartholomeusz seeks reimbursement of the lost benefit of holiday pay on the sum for lost wages under s 123 (c) (ii) of the Act. I accept that claim. Subject to any issue of contribution that is calculated as 8% of $8307.63 which is $664.61 gross.

Compensation

[43] The unexpected nature of the dismissal in this matter had a significant impact for Mr Bartholomeusz. He gave evidence that it impacted on his confidence about his own skills and ability. The degree of humiliation he felt shortly after the dismissal is demonstrated I find by his actions in returning company property. He could not face Mr Ye to return the company property and sent him a text that he would leave everything in the work vehicle parked outside his home with the keys in the letter box. He said he became anxious about ever getting another job and started to smoke more heavily. He expressed feelings of self-doubt and a loss of mana.

[44] Mr Bartholomeusz described himself as a proud man who had always worked and had never been on a benefit. I accept that to be dismissed and particularly without any warning had a significant impact.

[45] Subject to contribution a suitable award under this head is the sum of $12,000.

Contribution

[46] I am required under s 124 of the Act to consider whether any remedies should be reduced because of the actions of Mr Bartholomeusz that contributed to the situation that gave rise to the personal grievance. I accept that Mr Ye had some genuine concerns about sales and some other matters but failed to address those with Mr Bartholomeusz in a proper manner. I cannot therefore conclude whether any of those issues contributed in a blameworthy way to the personal grievance.

Orders

[47] Tradefog International Limited is ordered to pay to Christopher David

Bartholomeusz:

(a) Reimbursement of lost wages under section 123(1)(b) of the

Employment Relations Act 2000 in the sum of $8307.63 gross.

(b) Reimbursement of the lost benefit of holiday pay on the above sum under section 123 (1)(c)(i) of the Employment Relations Act 2000 in the sum of $664.61 gross.

(c) Payment of compensation under section 123 (1)(c)(ii) of the

Employment Relations Act 2000 in the sum of $12,000 without deduction.

Costs

[48] I reserve the issue of costs. Mr McDonald has until 12 May 2017 to lodge and serve submissions as to costs and Mr Beard has until 26 May 2017 to lodge and serve submissions in reply.

Helen Doyle

Member of the Employment Relations Authority
