

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2014] NZERA Auckland 17  
5435274**

BETWEEN                      GARTH CASTLE  
   Applicant  
  
AND                                LUXOTTICA RETAIL NZ  
   LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Fareena Ashton, Counsel for Applicant  
   Charlotte Parkhill, Counsel for Respondent  
  
Investigation Meeting:        On the Papers  
  
Submissions received:        18 December 2013 from Applicant  
   16 December 2013 from Respondent  
  
Determination:                20 January 2014

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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**Employment Relationship Problem**

[1]     The Applicant, Mr Garth Castle, commenced employment with the Respondent, Luxottica Retail NZ Limited (Luxottica) as Learning and Development Manager New Zealand on 22 April 2013.

[2]     Mr Castle signed an individual fixed-term employment agreement (the Employment Agreement) with Luxottica which contained a valid 90 day trial period in accordance with ss. 67A and 67B of the Employment Relations Act 2000 (the Act). On 11 July 2013 Ms Castle's employment was terminated under the 90-day trial period clause of the Employment Agreement.

[3]     Mr Castle is claiming unjustifiable disadvantage and the preliminary matter that is before the Authority is whether or not Mr Castle has a basis for proceeding with the disadvantage claims which are before the Authority.

[4] The parties agreed to the Authority determining this issue based on the Statements of Problem and in Reply and on submissions from the parties

### **Issues**

[5] The issues for determination are whether Mr Castle was unjustifiably disadvantaged by:

- A breach in the statutory duty pursuant to s 4 of the Employment Relations Act 2000 (the Act) to act towards him in good faith during the interview process, specifically not to mislead or deceive him
- Being treated differently to other employees
- A lack of support from Luxottica
- Not making his position redundant and as a consequence offering him an alternative position

### **Brief Background Facts**

[6] Luxottica is a large international retail optical retail chain which includes brand companies OPSM and Sunglass Hut.

[7] In early 2013 Luxottica identified the need for a new role of Learning and Development Manager (LDM). As the role had not been performed for over two years, Luxottica decided to advertise the role as fixed-term in order to determine viability.

[8] On 25 March 2013 Mr Castle was interviewed by Mr Robert O'Donnell, Head of Learning and Development at Luxottica, who recommended that Mr Castle's application be progressed to a second interview stage.

[9] Mr Castle was interviewed at the second interview stage by Ms Janelle Calder, National Sales Director of OPSM, on 28 March 2013, and a third interview stage was held with Ms Charlotte Perry, HR Manager at Luxottica, on 5 April 2013.

[10] On 6 April 2013 a formal offer of fixed-term employment was made to Mr Castle. Mr Castle was provided with an individual employment agreement (the Employment Agreement) which he signed on 9 April 2013, and Mr Castle commenced employment with Luxottica on 22 April 2013.

[11] The Employment Agreement included the statements:

***Fixed Term Employment***

*The terms and conditions of this agreement shall come into force on the Commencement Date set out in Schedule 1 and will continue in force until the 18 October 2013 set out in Schedule 1, unless sooner terminated in accordance with this agreement.*

*You understand that Luxottica has genuine reasons on reasonable grounds for employing you pursuant to a fixed term agreement. The reason for the fixed term of this agreement is:  
New Position within the NZ team.*

***Trial Period***

*Your employment is subject to a trial period of 90 days commencing from your first day of employment with the Company, in accordance with sections 67A and 67B of the Employment Relations Act 2000. This means that at any time during the trial period, notwithstanding the 'Termination of Employment' clause, we may give you one week's notice terminating your employment. We may require you to work that notice period, or we may, at our option pay you in lieu.*

*If your employment is terminated under this clause you will have no right to bring a personal grievance or other legal proceedings in relation to your dismissal, except in the limited circumstances set out in Section 103 (1)(b) (g) of the Employment Relations Act.*

***Whole Offer***

*This letter describes Luxottica's offer of employment to you and supersedes and replaces any previous contractual terms, conditions, representations, understandings or arrangements, whether written, oral, or resulting from custom or practices. Any other discussion that you may have had with us is not part of our offer unless it is described in this letter.*

[12] On 8 May 2013 Luxottica began internal consultation regarding the leadership team at OPSM, which had the potential to cause redundancies at Luxottica, however Mr Castle's position had not been affected, and he had been informed of this with confirmation by letter following on 10 May 2013.

[13] Luxottica states that on 21 May 2013 Ms Tracy Kendall-Jones, National Director for OPSM, met with Mr Castle to discuss her expectations of him in his role, and on 30 May 2013 Ms Kendall-Jones and Ms Perry met with Mr Castle to raise concerns that he had not been meeting Luxottica's performance expectation.

[14] Prior to the termination of his employment, Luxottica submit that Mr Castle was advised on two occasions that his performance was not up to the expected standard, these being:

- On 4 June 2013 when Ms Russo, Mr Castle's Manager, advised him that his performance was still not up to standard; and
- On 14 June 2013 when Ms Russo provided negative feedback about Mr Castle's performance.

[15] Whilst Mr Castle denies that there were 'many' meetings to discuss his performance, correspondence between the parties provided to the Authority by Luxottica support Luxottica's claim that there were meetings held with Mr Castle to discuss his performance, and Mr Castle confirms that the 30 May 2013 meeting took place.

[16] As a result of Mr Castle's failure to meet the expected standard of performance, Luxottica decided to terminate his employment within the 90 day trial period.

[17] On 5 July 2013 Ms Russo met with Mr Castle and informed him that he had not passed his trial period. The termination of employment decision had been confirmed in a letter sent to Mr Castle signed by Ms Russo and dated 5 July 2013. The letter stated:

*Dear Garth,  
Re: End of 90 day trial*

*I am writing in regards to your 90 day trial, which ends on 14 July 2013.*

*Unfortunately, we have made the decision to terminate your employment under the 90-day trial clause of your Employment Agreement. This (sic) reason we have made this decision is due to the outcome of the evaluation of your performance during this period, which revealed your unsuitability for the position of Learning and Development Manager NZ.*

[18] On 9 October 2013 Mr Castle filed a Statement of Problem with the Authority claiming that he had been unjustifiably disadvantaged by Luxottica.

## **Determination**

### **Was Mr Castle unjustifiably disadvantaged by Luxottica?**

*Unjustifiable disadvantage in employment*

[19] Mr Castle is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

*That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;*

[20] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[21] Mr Castle must therefore establish that there was some unjustifiable action by Luxottica which affected his terms and conditions of employment to his disadvantage.

[22] The leading cases in this area are *Wellington Area Health Board v Wellington Hotel IUOW*<sup>1</sup> and *Victoria University of Wellington v Haddon*<sup>2</sup>. These cases clarify that the section of the Act governing disadvantage grievances is directed at grievances arising out of the employment activity or from the "on the job situation".

[23] The cases identify as relevant the physical environment in which the work is required to be performed, the amenities and facilities available, and the payment to the employee.

[24] In *Tranz Rail Ltd v Rail & Museum Transport Union (Inc)*<sup>3</sup> the Court of Appeal commented that:<sup>4</sup> "Broadly speaking, terms of employment are all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of the employment contract".

[25] However it is not sufficient for an employee to be subjectively dissatisfied with their circumstances, there must be an act or omission by the employer leading to disadvantageous consequences to the employee as stated by the Chief Judge (then Judge Colgan) in the Employment Court case *Bilkey v Imagepac Partners*:<sup>5</sup>

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<sup>1</sup> [1992] 2 ERNZ 466

<sup>2</sup> [1996] 1 ERNZ 139

<sup>3</sup> [1999] 1 ERNZ 460

<sup>4</sup> Ibid at para [26]

<sup>5</sup> Unrep AC65/02, 7 October 2000 at para [33]

*Although I find Ms Bilkey continued to feel distressed and resentful that she had not been offered ongoing employment of indefinite duration ... a personal grievance claim depends upon an act or omission having disadvantageous consequences to the employee and not merely the employer's subjective dissatisfaction at her circumstances.*

(i) *Breach of good faith during the interview process*

[26] Mr Castle claims that he was unjustifiably disadvantaged by a breach of good faith on the part of Luxottica on the basis that on several occasions during the interview process he had been misled by Luxottica into believing that the LDM position was going to be a permanent position. As a result he had suffered a loss of opportunity based upon the fact that he had turned down an alternative job offer.

[27] I observe that the Employment Agreement had a "Whole Offer" clause which makes it clear that in its entirety, the Employment Agreement superseded any previous representations which may have been made. Mr Castle was provided with the Employment Agreement on 6 April and had signed it on 9 April 2013. There was therefore sufficient time for him to have obtained legal advice on the clauses contained therein.

[28] Even had such representations of the LDM position becoming one of permanent employment been made during the interview process, I find that the representations would have been replaced by the "Whole Offer" clause in Employment Agreement which states clearly that the LDM position is a fixed term position for a six month period.

[29] Mr Castle is claiming breaches of s 4 of the Act, specifically s.4(1)(b) which states that the parties to an employment relationship:

*(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything-*

*(i) to mislead or deceive each other; or*

*(ii) that is likely to mislead or deceive each other.*

[30] Section 4 of the Act is entitled: "***Parties to employment relationship to deal with each other in good faith***".

[31] In *Hayden v Wellington Free Ambulance Service*<sup>6</sup> the Employment Court clarified that the good faith obligations apply to those in an employment relationship i.e. employees, and not to applicants for a job, stating:

*[27] The Act makes it clear that good faith obligations only apply to those in an employment relationship and not to applicants for positions.*

[32] I find that at the time of his interviews with Luxottica Mr Castle was ‘an applicant’ and not an employee, such that the statutory duty of good faith owed by an employer to an employee was not at that time owed to him by Luxottica.

[33] I therefore find no unjustifiable disadvantage in respect of a breach of the good faith duty owed by Luxottica to Mr Castle during the interview process pursuant to s 103(1)(b) of the Act

(ii) *Different Treatment*

[34] Mr Castle claims that he was unjustifiably disadvantaged by being treated differently to other employees during the course of his employment, and that this undermined his trust and confidence in Luxottica.

[35] Mr Castle claims that during the interview process Ms Perry had referred to him as a ‘rogue’ and that being labelled in such a derogatory way had upset and embarrassed him, especially as no apology had been offered. The fact that the use of the term had allegedly become known to other employees in Luxottica in addition to a referee of his had caused Mr Castle injury to feelings and humiliation.

[36] Mr Castle further claims that as a result of this term becoming known, he was excluded from meetings which other employees would attend, and that he had been stopped from attending a conference in Australia after he had been confirmed as attending.

[37] In addition Mr Castle claims that during his last days of employment with Luxottica he had been prevented from saying good-bye to any of his work colleagues and made to feel humiliated.

[38] Whilst I accept that Mr Castle may have felt embarrassed, distressed or humiliated by the alleged use of the ‘rogue’ term and the alleged different treatment to other employees

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<sup>6</sup> [2002] 1 ERNZ 399

which he perceived, there is no causal link drawn between the alleged treatment claimed by Mr Castle and an unjustifiable disadvantage to his terms and conditions of employment.

[39] It is not sufficient that Mr Castle felt '*subjective dissatisfaction at [his] circumstances*' there must be identification of a term and condition of employment which has been unjustifiably disadvantaged, however I find that there is no term and condition of employment identified as having been adversely affected by the alleged different treatment Mr Castle claims.

[40] I therefore find no unjustifiable disadvantage in respect of alleged different treatment pursuant to s 103(1)(b) of the Act

(iii) *Lack of Support*

[41] Mr Castle claims that he was unjustifiably disadvantaged by Luxottica not providing him with support or precedents, and not giving him directions which he sought on several occasions from his managers.

[42] In *Smith v Stokes Valley Pharmacy*<sup>7</sup> (*Smith*) the Chief Judge held that Ms Smith had been unjustifiably disadvantaged by the employer's failure to provide feedback on her performance which prevented her from performing to a standard which would have avoided her dismissal.

[43] I find that this case can be distinguished from that of Mr Castle on the basis that in *Smith* there was a contractual commitment on the part of the employer (as set out at clause 10.1 of Ms Smith's employment agreement) to provide her with regular appraisal meeting to notify her on her performance. There is no corresponding contractual commitment contained in the Employment Agreement between Mr Castle and Luxottica.

[44] Employers are still required to act in good faith during a trial period, and the good faith obligations require both employers and employees to be pro-active and constructive in all aspects of the employment relationship.

[45] However, whilst the number of meetings to discuss Mr Castle's performance is disputed, I accept that Luxottica had raised concerns with Mr Castle's performance about his performance during the course of his employment and I find that Mr Castle's failure to successfully address these concerns lead to the termination of Mr Castle's employment.

[46] This is confirmed in the letter terminating Mr Castle's employment dated 5 July 2013 which states the reason for the termination of Mr Castle's employment as being: *the*

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<sup>7</sup> [2010] NZEMC 111

*evaluation of your performance during this period, which revealed your unsuitability for the position of Learning and Development Manager NZ.*

[47] There is consensus between the parties that Mr Castle's employment was subject to a valid trial period pursuant to s 67A and 67B of the Act. In accordance with s 67B of the Act:

*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.*

[48] Accordingly Mr Castle was statutorily barred from bringing legal proceedings or a personal grievance in respect of his dismissal. I find that this includes unjustifiable disadvantage claims that are fundamentally tied to the termination of his employment.

[49] I find that the lack of support claim is intrinsically linked to the termination of Mr Castle's employment.

[50] I therefore find no unjustifiable disadvantage in respect of alleged lack of support pursuant to s 103(1)(b) of the Act

(iv) *Redundancy*

[51] Mr Castle claims that he was unjustifiably disadvantaged in that his position was affected by the restructuring undertaken by Luxottica, and as such he should have been made redundant rather than dismissed.

[52] On this basis, in accordance with the Redundancy clause in the Employment Agreement, Mr Castle claims that he should have been offered alternative employment, or provided with redundancy notice and, potentially, a redundancy compensation payment.

[53] Mr Castle had been appointed as LDM, a new position, and the reason for the fixed term nature of the appointment. Mr Castle was a new employee and appointed subject to a valid 90-day trial period clause.

[54] In *Smith* the Chief Judge clarified that:<sup>8</sup>

*The new provisions in ss 67A and 67B were intended to address the circumstances of "new" employees. ... The scheme of the provisions, as it was promoted, was to allow employers some latitude in engaging*

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<sup>8</sup> [2010] NZEMC 111 at para [42]

*and dismissing new employees in respect of whom there might be some risk of compatibility or other work performance issues.*

[55] Even were Mr Castle's role as LDM affected by the restructuring such that it was deemed to be surplus to requirements, Luxottica was entitled to assess Mr Castle's suitability for the LDM role and if it considered Mr Castle to be unsuitable for that role to terminate his employment on this basis in accordance with the trial period provision in the Employment Agreement.

[56] I therefore find no unjustifiable disadvantage in respect of the restructuring and redundancy claim pursuant to s 103(1)(b) of the Act

[57] In conclusion, I determine that Mr Castle has not been unjustifiably disadvantaged by Luxottica. I am unable to assist him further.

#### **Costs**

[58] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave

**Eleanor Robinson**  
**Member of the Employment Relations Authority**