

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 543
5416116

BETWEEN MICHAEL PETER CRAIG
 Applicant

A N D GRANT AND MARGARET
 BOLSTAD
 Respondents

Member of Authority: K J Anderson

Representatives: T de Lautour, Advocate for Applicant
 M Bolstad, Advocate for Respondents

Investigation Meeting: 27 August 2013

Date of Determination: 27 November 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Michael Craig, claims that he was unjustifiably dismissed on 1 May 2012. Mr Craig asks the Authority to find that he has a personal grievance and award him various remedies.

[2] The respondents, Mr Grant Bolstad and Mrs Margaret Bolstad, acknowledge that Mr Craig was dismissed but they say that Mr Craig was employed under a 90 day trial period and hence he is prevented from pursuing a personal grievance.

Background

[3] Mr and Mrs Bolstad (the Bolstads) own and operate a dairy farm. There was a vacancy for a farm assistant and on 9 February 2012, Mr Craig was interviewed for the position by Mr Bolstad.

[4] The evidence of Mr Bolstad is that during the interview with Mr Craig he outlined the responsibilities of the position and what would be expected. Mr Bolstad attests that he went through the main points contained in the employment agreement and “especially highlighted” the fact that there was a three month trial period, what the pay would be, and the farm bike safety rules. Mr Craig was then taken to inspect the accommodation that went with the job.

[5] On Friday, 10 February 2012, Mrs Bolstad telephoned Mr Craig and she offered him the farm assistant position. Mrs Bolstad attests that the offer of employment was subject to Mr Craig satisfying a Police criminal record check and signing an employment agreement.

[6] Subject to Mr Craig satisfying these two conditions it appears to have been anticipated that he would commence his employment with the Bolstads on Saturday 18 February 2012 and would move into the accommodation provided shortly before that date. In any event Mr Craig and his family moved into the farm house on or about 14 February 2012.

[7] The evidence of Mrs Bolstad is that Mr Craig came to her house on Monday 13 February 2012 to obtain the keys for the farm house. Mr Craig was then given a copy of his employment agreement (the Agreement) to take away and peruse. Mrs Bolstad attests that she drew Mr Craig’s attention to page 4 of the Agreement and the trial period provision (clause 2), and also where he should sign the Agreement if he agreed to its terms. It is commonly accepted that the Agreement given to Mr Craig indicated that he would sign it on 13 February 2012, but of course at this point he had not had the opportunity to peruse it and/or obtain advice; in the event he wished to do so.

[8] Mr Craig was also given the criminal record check form to complete. Mrs Bolstad says that the form was never sent to the Police because Mr Craig informed that he had to obtain a new copy of his drivers licence; but it appears that he never did do so during his employment with the Bolstads.

[9] Mr Craig acknowledges receiving the employment agreement but he does not accept that Mrs Bolstad drew attention to the trial period.

[10] On Friday 17 February 2012, Mr Craig came to the Bolstad home and asked to borrow a Holden car tyre as it seems that his visiting sister had a problem with a flat

tyre on her car and the spare was also flat. The evidence of Mrs Bolstad is that she asked Mr Craig if he could come into the house and sign the employment agreement. Mrs Bolstad says that she reminded Mr Craig that the agreement had to be signed before he started work. Mr Craig indicated that this would depend on how he got on with remedying his sister's car. Mr Craig did not return to the Bolstad house on 17 February 2012.

The signing of the employment agreement

[11] While it is established that Mr Craig commenced employment with the Bolstads on Saturday 18 February 2012, there is some conflict in the evidence in regard to when he signed the employment agreement.

[12] The evidence of Mrs Bolstad is that because Mr Craig had not signed the employment agreement as she had requested him to, she took it to the cow shed on the morning of 18 February 2012 for it to be signed. It is established that the Bolstads were milking two herds of cows and this required one herd to be milked early, with some staff commencing work at 5:30a.m; with the staff milking the second herd starting at 8:00a.m. The evidence of Mr Bolstad is that Mrs Bolstad helped with the milking of the first herd while he got the second herd in for milking. Mr Bolstad attests that Mr Craig had been asked to meet him at the cow shed at 8:00a.m. Mr Bolstad says that Mr Craig signed the Agreement before he started work.

[13] The evidence of Mr Craig is that on 18 February he went to the cow shed at 5:00a.m. for the early milking and this was finished between 8:00a.m. and 9:00a.m. Mr Craig says that this is when he signed the employment agreement and then he took it to the Bolstads house. Mr Craig says that Mr Bolstad asked him to change the date on the agreement from 13 February to 18 February.

[14] But Mr Bolstad says that as a new employee, Mr Craig would not have started early as it is the practice to have new employees start work at the later time when other workers are there. Mr Bolstad was specific about where the Agreement was signed: in the office at the cow shed, hence there would have been no need for Mr Craig to take the Agreement to the Bolstad's house. Mr Bolstad acknowledges that he asked Mr Craig to change the date on the Agreement from 13 February to 18 February as the latter was the first day of Mr Craig's employment.

Clause 2 of the Agreement

[15] This provides for a trial period of employment thus:

A trial period will apply for a period of three (3) months employment to assess and confirm suitability for the position. Parties may only agree to a trial period if:

- (i) the employer employs fewer than 20 employees at the beginning of the day the employment agreement is entered into; and
- (ii) the employee has not previously been employed by the employer.

During the trial period the employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. The employee may pursue a personal grievance on grounds as specified in ss.103(1)(b)-(g) of the Employment Relations Act 2000 (such as: unjustified disadvantage; discrimination; sexual harassment; racial harassment; duress with respect to Union membership; and the employer not complying with Part 6A of the Employment Relations Act 2000).

Any notice, as specified in the employment agreement must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligation of the employer or the employee (including access to Mediation Services), except as specified in s.67A(5) of the Employment Relations Act 2000.

[16] The notice period is set out in SCHEDULE A of the Agreement being: “Two (2) weeks notice by either party”.

[17] The employment relationship between Mr Craig and the Bolstads was not particularly successful. Various matters arose, particularly the alleged unsafe operation by Mr Craig of the farm bike, and he was dismissed with two weeks’ notice on 1 May 2012; as evidenced by the letter of that date.

Discussion

[18] While the Authority heard evidence pertaining to all of the circumstances relevant to Mr Craig’s claim that he was unjustifiably dismissed, it is commonly accepted that the preliminary issue for the Authority to determine is:

Whether Mr Craig is disqualified from pursuing a personal grievance as a consequence of the trial period provision in his employment agreement.

[19] Section 67B(2) of the Employment Relations Act (the Act) provides that:

An employee whose employment agreement is terminated in accordance with sub-section (1) may not bring a personal grievance or legal proceedings in respect of the dismissal.

[20] However, disqualification from bringing a personal grievance is dependant upon lawful termination of the employment agreement under sub-section (1) and if there is not a lawful termination under that section then the personal grievance barrier provided by sub-section 2 does not apply.¹ Section 67B(1) provides that:

This section applies if an employer terminates an employment agreement containing a trial provision under ss.67A by giving the employee notice of termination before the end of the trial period, whether the termination takes effect before, at, or after the end of the trial period.

[21] Notwithstanding that Mr Craig moved into the farm house a few days earlier, it is beyond doubt that the employment relationship did not come into effect until 18 February 2012. Possibly in anticipation of this rather predictable finding, the further argument advanced for Mr Craig is that he had actually commenced his employment before he signed the employment agreement on 18 February and hence the trial period provision is not effective. And while Mr Craig's evidence is at odds with that of Mr Bolstad in regard to whether Mr Craig had commenced his employment before he signed the Agreement on 18 February, I prefer the evidence of Mr Bolstad about this. I conclude that it is more probable than not that Mr Craig did sign the Agreement before he commenced his duties. But in any event, it seems to me that in arguing otherwise, Mr Craig is splitting hairs as he was in possession of the employment agreement for some days and he never raised any issues about its suitability before signing it; and he had not been previously employed by the Bolstads.

[22] Finally, there is the matter of whether Mr Craig was given notice of the termination of his employment before the end of the trial period. I find that a proper notice was given in writing (two weeks pursuant to the Agreement) and hence the requirements of s.67B(1) are satisfied.

Determination

[23] I find that pursuant to s.67A of the Employment Relations Act there was a valid trial period provision in the employment agreement. The effect of this provision

¹ *Smith v. Stokes Valley Pharmacy Limited* (2010) ERNZ 253 para.62.

is that pursuant to s.67B(2) of the Act, Mr Craig is prevented from bringing a personal grievance for unjustifiable dismissal to the Authority for determination. It follows that the Authority does not have jurisdiction to investigate that matter any further and is unable to assist Mr Craig.

Costs

[24] Costs are reserved. The parties are invited to resolve the matter of costs. In the event that they are unable to do so, the respondent has 28 days from the date of this determination to file and serve submissions. The applicant has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority