

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 26
5635134

BETWEEN NICHOLAS DUNCAN
 Applicant

AND PALMERSTON NORTH SCRAP
 METALS LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Kelly Coley, Advocate for Applicant
 No appearance by or for Respondent

Investigation Meeting: 20 April 2017 at Palmerston North

Submissions Received: At the investigation meeting

Determination: 20 April 2017

**ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Nicholas Duncan, claims he was unjustifiably dismissed by the respondent, Palmerston North Scrap Metals Limited (PNSML), on 15 February 2016.

[2] Mr Duncan also says he is yet to receive holiday pay (\$816.00). There was also a claim regarding payment for Mr Duncan's notice period but this has been subsumed within the s 123(1)(b) claim and is no longer being pursued separately.

[3] There is no statement in reply and PNSML has not participated meaningfully in the Authority's process. That said Mr Duncan's dismissal letter, along with an e-mail to Ms Coley on 15 April 2016, indicates PNSML relies on the existence of a 90

day trial clause¹ which implies it thinks Mr Duncan is precluded from pursuing his grievance.

Non-appearance of the Respondent

[4] PNSML was neither present nor represented at the investigation meeting which raised the question of whether or not I proceed.

[5] The claim as initially filed identified the respondent as Strong Metal Recycling Limited. While wrong that is not surprising given Mr Duncan's letter of dismissal was on the letterhead of Strong's Metal Recycling and signed by Brett Hall of Strong's Metal Recyclers Limited. The letter raising the grievance was sent to the later and a response was received from brett@strongsmetal.co.nz. It outlined a substantive defence but made no reference to the identity of the employer.

[6] After some difficulty the statement of problem was served on Mr Hall, a director of and shareholder in PNSML, at his private address. Receipt was acknowledged in an e-mail he sent to the Authority on 15 November 2016.

[7] It was then Ms Coley realised there were issues with the citation if for no other reason there is no such company as Strong Metal Recycling (or Recyclers) Limited. She prepared an amended statement of problem identifying PNSML as the respondent which Mr Hall agreed to accept by e-mail.

[8] All companies are required to have an address for service.² PNSML's is KPMG, Chartered Accountants, Level 9, 2-10 Customhouse Quay, Wellington, 6011. A copy of the notice of investigation meeting was sent to both that address and Mr Hall's private address. Receipt was acknowledged by signature at both though the package delivered to KPMG was subsequently returned to the Authority. I do not consider KPMG's inability to forward the documents to PNSML detracts from the fact notice was served at the registered address. It is PNSML's duty to ensure its address for service is operable.

¹ Sections 67A and 67B of the Employment Relations Act 2000

² Section 192(1) of the Companies Act 1983

[9] Given the provisions of the Employment Relations Authority Regulations 2000 and the fact notice was also served on one of PNSML's officers I conclude notice of the investigation meeting has been properly served.³

[10] The notice contains advice that should the respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant without hearing from the respondent.

[11] Given the circumstances I chose to proceed. Mr Duncan is entitled to have his claim determined.

Background

[12] Mr Duncan commenced employment with PNSML on 3 November 2015. He was engaged as a truck driver.

[13] In December Mr Duncan dented a truck door while unloading steel. Having reported what happened he was told, by way of a text from Mr Hall, *Mate i don't think its working out to well... You havnt got the experience we need.*

[14] Mr Duncan then protested he only had one accident and offered to pay for repairs but was told via another of Mr Hall's texts he needed more driving experience which meant he could not drive bigger trucks. The text ends *Your a good guy but our company needs someone to drive the volvos.*

[15] Mr Duncan says notwithstanding that he continued to work for PNSML and nothing further was said. He says he was understood that once he completed a 90 day trial he had a full time job and would get a pay rise of 50 cents an hour. He says having passed 90 days he asked about the rise but was told no.

[16] Mr Duncan goes on to say a couple of days later he was asked to meet with Mr Hall. He says he was told he did not meet PNSML's requirements and was being given two weeks' notice. He says *This came out of the blue and I had no idea it was coming.*

[17] The dismissal was then confirmed with a letter which read:

Your employment with our company commenced on the 3rd of November 2015 and your standard 3 month trial period expired on

³ Regulation 16(3)(iii) of the Employment Relations Authority Regulations 2000

the 3rd of February 2016. As you will recall on the 17th of December 2015 we informed you that we felt that perhaps you were not suited to our company as a large aspect of our work involves physical lifting, and your level of confidence in operating larger trucks was not satisfactory.

As you also will be aware, in accordance to clause 13.6A of your employment contract, provisions allowed for your 3 month trial period to be extended by a further calendar month in order to facilitate further learning and development.

As we now approach the end of the 4th month of trial, we still feel that you are not at a satisfactory level of experience to safely operate some of our vehicles and therefore regret to inform you that we will not be offering you full time employment with our company.

We wish you the best with your future endeavours and thank you sincerely for your hard efforts to date.

Yours sincerely (Brett Hall)

Determination

[18] The initial citation raises a question about whether or not the current respondent, PNSML, was Mr Duncan's employer. As already said the identities used by Mr Hall in the letter of dismissal are not registered companies. The registered identity of which Mr Hall is a director and shareholder is PNSML and having reflected on the issue Mr Duncan is of the view that was his employer.

[19] I also note Mr Duncan does not have a copy of his employment agreement and PNSML's lack of participation means I do not have it. I do not, therefore, have any documentary evidence about who the employer party was.

[20] Having considered Mr Duncan's evidence, Mr Hall's willingness to accept the amended statement of problem in the name of PNSML and the lack of any objection to the claim PNSML was the employer, I accept it was.

[21] As already said the letter of dismissal indicates PNSML relies on the existence of a trial period as justifying its action. That appears to be confirmed by both the dismissal letter and the e-mail of 15 April 2016 ([3] above) which refers to s 67A of the Employment Relations Act 2000 and asserts that in PNSML's view its terms *have been satisfied*.

[22] Mr Duncan accepts he signed an employment agreement but says while he cannot be completely sure he has no recollection of doing so prior to commencement. He accepts he understood the agreement had a 90 day trial period but says it may not have been valid given the lack of prior signature. As already said, I have not seen it.

[23] Fortunately Mr Duncan's uncertainty as to when he signed the agreement need not be investigated. That is because Mr Hall's e-mail of 15 April 2015 says PNSML relies on the 90 day trial provision when attempting to justify its actions. There is no other justification either express or implied. The e-mail also states Mr Duncan was given notice on 15 February 2015. That is some 105 days after Mr Duncan's commencement and beyond the 90 day period specified in s 67A.

[24] In explaining this the e-mail says:

At Mr Duncan's request – the trial period was extended on a causal basis. We agreed to this to this as we felt dismissal at a point so close to Christmas would be unfair to the employee.

[25] The e-mail indicates the discussion during which the extension was agreed occurred after the text exchange of 17 December 2015 in which Mr Hall was told it wasn't working and he had insufficient skill (paragraphs [13] and [14] above).

[26] Mr Duncan denies any such conversation occurred. In the absence of contrary evidence from PNSML I accept that but, in any event, it is irrelevant.

[27] In *Smith v Stokes Valley Pharmacy (2009) Ltd*⁴ the Court said ss 67A and 67B should be interpreted strictly and not liberally. The sections only give an employer protection from an unjustified dismissal claim for 90 days. There is no ability under the Act to extend the period so even if PNSML's assertions regarding an extension are correct the protection would no longer exist. PNSML would have to justify the dismissal in the normal way and the benefits it could get from the extended trial would be those that existed before ss 67A and 67B were enacted. The trial would allow less serious deficiencies to have greater meaning but would not excuse PNSML from monitoring Mr Duncan's progress and trying to address perceived deficiencies.⁵ It is Mr Duncan's evidence there were no attempts and I accept that.

[28] The absence of a operable 90 day trial clause means PNSML is required to comply with the requirements of s 103A and justify its actions and offer evidence it did so. PNSML's absence means there is no such evidence so the dismissal must be unjustified.

⁴ [2010] ERNZ 253 at [48]

⁵ For example *Nelson Air Limited v New Zealand Airline Pilots Association* [1994] 2 ERNZ 665 (CA) at 669

[29] The conclusion the dismissal is unjustified raises the question of remedies. Mr Duncan seeks lost wages, \$8,000 as compensation pursuant to s 123(1)(c)(i) and costs.

[30] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration.

[31] The evidence shows Mr Duncan was actively seeking another job and while he obtained some casual work a permanent replacement was not sourced within three months. Mr Duncan has limited his wage claim to the three month period and says the difference between what he would have received from PNSML and what he earned through the casual work totals \$6,632.00. Section 128(2) mean this is payable.

[32] Mr Duncan also seeks \$8,000 as compensation pursuant to s123(1)(c)(i). He supports his claim with evidence of the emotional toll suffered as a result of the dismissal and the effect it had on both himself and his relationship with others. Mr Duncan also evidenced financial stress and a feeling of inadequacy engendered by the dismissal. In my view his evidence supports an award of the magnitude sought and Mr Duncan should not be disadvantaged as a result of tabling a realistic claim. \$8,000 is appropriate.

[33] These conclusions mean I must, in accordance with s124 of the Act, address whether or not Mr Duncan contributed to his dismissal in a way that warrants a reduction in remedies. There is no evidence he did.

[34] There is then the holiday pay. In the absence of any contrary evidence I accept Mr Duncan's claim this has not been paid. It is payable.

Costs

[35] Mr Duncan also seeks a contribution toward his costs with Ms Coley suggesting \$2000. Although the investigation was relatively quick this was only due to PNSML's absence. The matter still had to be prepared for as if the respondent were present. In the circumstances I consider the amount sought, which equates to approximately half a day at the daily rate currently being used by the Authority, very reasonable. To that I add disbursements which total \$247.25. These cover the Authority's filing fee and the costs of having to use a document server both of which I consider it reasonable to recompense.

Conclusion and orders

[36] For the above reasons I conclude Mr Duncan has a personal grievance in that he was unjustifiably dismissed. He also has arrears due in respect to holiday pay.

[37] As a result I order the respondent, Palmerston North Scrap Metals Limited, pay the applicant, Nicholas Duncan;

- a. \$6,632.00 (six thousand, six hundred and thirty two dollars) gross as recompense for wages lost as a result of the dismissal; and
- b. a further \$8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i); and
- c. a further \$816.00 (eight hundred and sixteen dollars) being unpaid holidays; and
- d. a further \$2,318.81 (one thousand dollars) as a contribution toward the costs Mr Duncan incurred in pursuing his claim.

M B Loftus
Member of the Employment Relations Authority