

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 213
3014833

BETWEEN LLOYD FOSS
 Applicant

A N D THE HOMEGROWN JUICE
 COMPANY LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: E. Moss, Advocate for Applicant
 M. McAleer, Advocate for Respondent

Investigation Meeting: 11 July 2018 at Auckland

Submissions Received: 11 July 2018 from Applicant
 11 July 2018 from Respondent

Date of Oral Determination: 11 July 2018

Date of Written Determination: 12 July 2018

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The trial provision contained in this employment agreement was valid and therefore Mr Foss was justifiably dismissed pursuant to a valid trial provision in his employment agreement.**
- B. The personal grievance for unjustified dismissal is dismissed.**
- C. Lloyd Foss is ordered to pay The Homegrown Juice Company Limited the sum of \$2,250 within 28 days of this determination.**

Employment Relationship Problem

[1] Lloyd Foss was employed as an Orchard Manager by The Homegrown Juice Company Limited (HJC) on or about 13 March 2017. Mr Foss managed three of the

respondent's orchards located in Gisborne, Nuhaka and Napier. He was also allowed to work for one week out of three from his home in Kerikeri. He reported to Stephen Brownlie, the respondent director.

[2] Mr Foss's employment agreement contained a 90 day trial provision as follows:

90 DAY TRIAL PERIOD

- 2.1 The employee will serve a trial period for a period **NOT EXCEEDING 90 CALENDAR DAYS** from the date of commencement in order to assess and confirm suitability of the employee for this position.
- 2.2 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 or any other legal proceedings in respect of the dismissal. The employer may, however, pursue a personal grievance on grounds as specified in section 103(1)(b)-(b) of the Employment Relations Act 2000.
- 2.3 Any notice of termination of employment (as specified in clause 10.1 of this employment agreement) given pursuant to this clause, must be given within the 90 calendar day trial period, even if the actual dismissal does not become effective after the trial period ends.
- 2.4 This trial period does not limit the legal rights and obligations of the employer or the employee (including access to mediation services), except as specified in section 67B of the Employment Relations Act. However, the employer is not required to comply with section 4(1)(A)(c) and 120 of the Employment Relations Act 2000 when making a decision whether to terminate an employment agreement under this clause.
- 2.5 The employee and employer acknowledge and agree that the terms of this clause constitute a trial provision within the meaning of section 67A(2) of the Employment Relations Act 2000.

[3] It is accepted Mr Foss signed the employment agreement and returned it to Mr Brownlie. Mr Brownlie signed the agreement on 6 March 2017 as well. He also entered a "date of commencement" of 13 March 2017. It is accepted Mr Brownlie did not give a copy of the agreement he signed to Mr Foss on or before 13 March 2017.

[4] Part way through the trial period, Mr Brownlie asked Mr Foss for a report about his work to date on the orchards. They met on 4 May 2017. Mr Brownlie expressed some unhappiness with Mr Foss's work and report. What Mr Foss didn't know was that Mr Brownlie had seen him in the work motor vehicle picking up his

partner from the Napier airport. Mr Brownlie also believed personal issues Mr Foss was experiencing meant that he was somewhat distracted in his work due to those issues. He did not raise these concerns with Mr Foss at the meeting on 4 May. Instead Mr Brownlie indicated he was unhappy and was considering termination.

[5] On 5 May 2017, Mr Foss received a termination letter. The letter advised that his employment was terminated pursuant to clause 2.3 being the trial provision.

Issues

[6] There is a single issue for determination. It is whether Mr Foss was justifiably dismissed pursuant to a valid 90 day trial provision.

Hearing

[7] I need to touch firstly on the structure of this hearing. Mr Foss currently resides permanently in Australia. His advocate is located in Auckland. Mr Brownlie and his advocate are located in Napier. The place of work for this employment was from Kerikeri to Gisborne to Napier. This matter has been filed in Auckland.

[8] It appeared likely that any single physical venue for hearing was going to be cost prohibitive for one or other party. The costs of some or all traveling to a central venue were prohibitive, especially when I had regard to the potential outcome of this case. Therefore all parties agreed to have this matter be conducted by audio-visual link, or Skype. Further, the parties agreed that their evidence may be taken orally, under oath at hearing without any requirement to file briefs of evidence in advance.

Determination

[9] Trial provisions are prescribed by s 67A of the Employment Relations Act 2000. This sets out the requirements for a valid trial provision as follows:

67A When employment agreement may contain provision for trial period for 90 days or less

(1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.

(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.

(3) **Employee** means an employee who has not been previously employed by the employer.

(4) *Repealed.*

(5) To avoid doubt, a trial provision may be included in an employment agreement under section 61(1)(a), but subject to section 61(1)(b).

[10] The trial provision in this employment agreement states Mr Foss will serve a trial period “*from the date of commencement*”. The date of commencement in the employment agreement Mr Foss has produced is blank. However, Mr Brownlie gave uncontested evidence he signed the contract on 6 March and entered the date of commencement that same day as 13 March 2017. He produced a copy of that employment agreement that shows both parties signed it and also includes his handwritten date of 13 March 2017.

[11] There is also email correspondence that supports the following findings:

- There was an agreed start date of employment on 13 March 2017;
- The agreement was signed by Mr Foss on 6 March 2017;
- Mr Foss had some problem sending and receiving email on or about 6 March 2017;
- Mr Brownlie offered to give Mr Foss a copy of his signed agreement on 13 March instead.

[12] It was agreed Mr Foss had problems landing at Gisborne at 9am on 13 March 2017. He did not arrive until after 1pm. By then Mr Brownlie was required elsewhere. It is accepted Mr Brownlie did not provide a copy of the signed agreement with the date of commencement on 13 March 2017. Mr Brownlie alleges he emailed or posted a copy the following Friday.

[13] Under examination by the Authority, Mr Foss accepted he was aware there was a trial provision and that it would start on 13 March 2017. However, he believed the trial provision was unenforceable because he never received the final signed copy with the written date of commencement. He believes if he had received the final signed copy there would have been an enforceable trial provision starting from 13 March.

[14] Section 67A requires the trial provision state that there is a 90 day trial period starting at the beginning of the employee's employment. The employment agreement produced by Mr Brownlie meets that criteria, given the handwritten notation of 13 March 2017 next to the date of commencement. The trial provision is not invalidated because a written copy of the employment agreement was not given to Mr Foss at the time. This is because Mr Foss was well aware of the written terms and conditions of his employment, including the specific start date of the trial provision.

[15] Ms Moss has referred me to Employment Authority cases of *Welch v Auckland Glass Limited* [2017] Auckland NZERA 279 and *Clark v Lighthouse ECE Limited* [2016] Auckland NZERA 281. Both of these can be distinguished. *Welch* is distinguished because the agreement never had a commencement date inserted. This agreement does. *Clark* may be distinguished because the trial provision there did not refer to a commencement date at all. This trial provision does.

[16] Given Mr Foss was aware at the time he started working the date of commencement of the trial period was 13 March 2017, there is sufficient evidence of a written agreement to meet the requirements of s 67A. As long as the trial provision containing a commencement date is in a signed written agreement prior to the date an employee commences employment, it is a valid trial provision. The validity of the trial provision does not require receipt of the contract signed by the employer to make the trial provision enforceable.

[17] Therefore my finding is the trial provision contained in this employment agreement was valid and therefore Mr Foss was justifiably dismissed pursuant to a valid trial provision in his employment agreement. The personal grievance for unjustified dismissal is dismissed.

[18] There was an allegation of unjustified disadvantage. It is difficult to understand the actions that give rise to that allegation. It seems to be around a failure by the employer to raise concerns prior to dismissal. There may have been some issues about the adequacy of the equipment he was given when he started his job. However, those were not linked to a condition of his employment that he states was perhaps dealt with to his disadvantage. If there is a link it is tenuous and I cannot see how that creates, if not a disadvantage, any damage that should be compensated. In

the circumstances the application for unjustified disadvantage such as it is must also be dismissed.

Costs

[19] After hearing from both parties in respect of costs, costs of \$2,250 are to be awarded, therefore Lloyd Foss is ordered to pay The Homegrown Juice Company Limited the sum of \$2,250 within 28 days of this determination.

T G Tetitaha
Member of the Employment Relations Authority