

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 4  
3074195

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| BETWEEN | JOHN FLETCHER<br>Applicant                  |
| AND     | PARKVALE MUSHROOMS<br>LIMITED<br>Respondent |

Member of Authority: Geoff O’Sullivan

Representatives: Tracy Campbell, advocate for the Applicant  
Dave Robb and Lance Peterson, advocates for the Respondent

Investigation Meeting: 25 November 2019

Submissions [and further Information] Received: 27 November 2019 and 4 December 2019 from the Applicant  
3 December 2019 from the Respondent

Date of Determination: 8 January 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] John Fletcher worked as a production worker for Parkvale Mushrooms Limited (Parkvale). He was employed pursuant to an individual employment agreement dated 19 January 2019.

[2] Mr Fletcher claims as follows:

- (a) He was dismissed on 2 May 2019 and that dismissal was unjustified;

- (b) His employment was affected to his disadvantage by the procedurally unfair manner in which Parkvale conducted the dismissal;
- (c) Parkvale provided him with an individual employment agreement which was in breach of the minimum standards and accordingly it should suffer a penalty;
- (d) Parkvale breached the duty of good faith owed to Mr Fletcher who seeks a penalty in respect of that breach.

[3] Parkvale, denies the claims and says as follows:

- (a) Mr Fletcher ended the employment relationship by resigning on Monday, 6 May 2019, and he was paid in lieu of a notice period;
- (b) Mr Fletcher was not disadvantaged by being employed as a production worker and was not disadvantaged at all throughout his employment;
- (c) There was no breach of good faith and the respondent acted in the very best of good faith by being communicative, open and honest with Mr Fletcher and at all times genuinely attempting to maintain the employment relationship;

[4] At the commencement of the hearing, Ms Campbell, advised that Mr Fletcher was no longer pursuing any claim that he was paid less than the minimum wage and therefore the remaining issues before the Authority were the claims for unjustified disadvantage, unjustified dismissal and penalties. It was left to the Authority to determine, if it found in favour of Mr Fletcher, what the appropriate level of hurt and humiliation in terms of s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) should be. As Mr Fletcher had found alternative employment more or less straight away there was no claim for lost wages.

### **Issues**

[5] The following are the issues for investigation and determination:

- (a) Did the employment agreement between the parties satisfy the requirements set out in s 65 of the Act?
- (b) What was the correct date of the termination of Mr Fletcher's employment?
- (c) How did Mr Fletcher's employment end? Namely:
  - (i) Did he resign?

- (ii) Was he dismissed?
- (iii) Was he constructively dismissed?
- (d) If the employment agreement did not meet the requirements of s 65 of the Act, should a penalty be imposed on Parkvale and, if so, in what amount?
- (e) What, if any, actions of Parkvale disadvantaged Mr Fletcher in his employment?
- (f) If it was found that Mr Fletcher was (constructively) dismissed, was the dismissal justified?

### **The Authority's investigation**

[6] At the investigation meeting I heard evidence Mr Fletcher, and his partner, Debbie Phelps. I heard evidence from Parkvale's witnesses, namely Clive Thompson (the "owner") of Parkvale, Shelley Crosby, Parkvale's Office Manager who was responsible for sales, accounts receivable, customer service, hiring, and health and safety. She also assisted with staff issues, record keeping, stock ordering and various other supportive roles for the respondent. I heard evidence from Marcus Bucknell who is the Senior Production Worker for Parkvale.

[7] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during the investigation meeting. Further, whilst I have not referred to all the submissions for the parties in this determination, I record I have fully considered them.

### **Did the employment agreement comply with the requirements of s 65 of the Act?**

[8] Section 65(1) of the Act provides that an individual employment agreement of an employee:

- (a) must be in writing; and
- (b) may contain such terms and conditions as the employee and employer think fit.

Sub section (2) (a) goes on to provide that an individual employment agreement must include:

- (i) the names of the employee and employer concerned; and
- (ii) a description of the work to be performed by the employee; and

- (iii) an indication of where the employee is to perform the work; and
  - (iv) any agreed hours of work specified in accordance with section 67C or, if no hours of work are agreed, an indication of the arrangements relating to the times the employee is to work; and
  - (v) the wages or salary payable to the employee; and
  - (vi) a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised; and
- (b) must not contain anything—
- (i) contrary to law; or
  - (ii) inconsistent with this Act

[9] Both Ms Crosby and Mr Thompson gave evidence regarding the employment agreement (the agreement). Ms Crosby advised that she prepared the agreement from a template and had not sought legal advice regarding the agreement. She said the template had been prepared before she started with Parkvale. Mr Thompson clarified the matter, stating that he had prepared the template some years before. He stated he had taken some steps to comply with the statutory standard and advised he had some 38 employees. The agreement provided amongst other things for a Probation end date: 16.04.2019. Both Ms Crosby and Mr Thompson said nothing happened on that date, and to their knowledge there had been never any need to consider the provision in respect of any employee.

[10] The agreement does not meet the requirements of s 65 of the Act. Whilst the agreement is in writing and names the parties, there is no proper description of the work to be performed by the employee. The agreement simply provides “Production worker, with aim to be team leader”. There is a reference to cultural duties “Consists of checking crops am and pm and watering as directed and keeping plant running (boiler etc) and cook out rooms. Normally one to two hours in the morning and three to five hours in the pm”. Significantly, there is no mention of forklift driving which seems to be an important part of the position.

[11] There is no proper plain English explanation of the services available for the resolution of employment relationship problems. The agreement at page 2 simply provides a two-step process:

- (a) Any grievances should initially be taken to management for resolution; and

- (b) If this does not resolve the problem then the Department of Labour can mediate to try to resolve the issue.

The agreement does not include a reference to the period of 90 days set out in s 114 of the Act within which a personal grievance must be raised.

[12] Other parts of the agreement are also unsatisfactory. For instance, the agreement provides:

A penal rate of one and a half applies for work done on a statutory day.

One and a half of what is not explained. Normally this would not create a difficulty, however, the agreement provides in respect of overtime:

A penal rate of 1 ½ on the base rate for time worked over eight hours per day [shall apply].

The base rate was set at \$15 and was not the rate used to calculate pay for statutory days. The arrangements regarding sick leave, especially accumulation, are also not explained in the agreement.

[13] Although the employment agreement between the parties does not comply with s 65 of the Act, Parkvale's evidence, which in essence was confirmed by Mr Fletcher, was that despite any shortcomings in the agreement, it was administered in accordance with the Act, and I accept that submission. Further, the evidence from both parties was that prior to signing the agreement the applicant did raise some questions about its operation and these were fully explained to him. Accordingly, the unsatisfactory agreement did not disadvantage the applicant in his employment.

### **The 2<sup>nd</sup> May meeting and the cause of Mr Fletcher's employment relationship problem**

[14] Mr Fletcher, was sworn in and spoke to a written brief of evidence. He advised the Authority that he had difficulty reading and because of this he had dictated his brief to his partner, Debbie, who then typed it out for him. Mr Fletcher advised that he was working on 2 May 2019 on the production line, when Mr Thompson approached him, advising he would need to see him at some stage that day. He stated he needed to see him in his office but gave no detail. Mr Fletcher said he thought he was going to get an update on how he was going and believes the meeting was held some two hours later.

[15] Ms Crosby in her evidence confirmed that Mr Thompson had approached her at approximately ten o'clock on the morning of 2 May 2019, advising her he wished her to set

up a meeting to speak to Mr Fletcher. Ms Crosby's evidence was that she knew the meeting was to be about performance. She referred to being aware that Parkvale needed to have a difficult conversation with Mr Fletcher. When questioned, she clarified she felt it was about Mr Fletcher not being up to team leader standard, but stated she was unaware of any conversation regarding his position as a production worker.

[16] Mr Thompson also gave evidence regarding the 2 May meeting. He stated that the 2 May meeting was a difficult situation because it was about the applicant not being up to the team leader role. He stated he had concerns about Mr Fletcher's performance in relation to the production worker role, but that in the 2 May meeting he was only discussing the team leader role. During that meeting, as evidenced by the minutes, Mr Fletcher was offered one month's salary to end his employment. Mr Thompson stated that he felt Mr Fletcher may wish to leave because he would be disappointed he wasn't going to be team leader. He stated he didn't think it was necessary to talk about the production worker role and the option of Mr Fletcher staying in it, as it was obvious this would continue. He stated that in hindsight he should have told Mr Fletcher that the production worker role would remain.

[17] It is difficult to accept Mr Thompson's perspective of the 2 May meeting. For instance, the minutes of that meeting record that Mr Thompson said to Mr Fletcher that he needed a manager for the production team, not another team member. When this obvious contradiction to his evidence was put to Mr Thompson, he replied he was thinking on his feet. He said he didn't think it was necessary to say to Mr Fletcher that he could stay on as a production worker because he wasn't firing him. The difficulty with that statement was that the minutes also record that there was a discussion regarding a lesser role as a picker as well as other statements inconsistent with Mr Fletcher's ongoing employment.

[18] There was disagreement between the parties in evidence as to who raised the idea of the picker role, however, it is unnecessary for me to determine that. What is telling, is that during the 2 May meeting there was a discussion regarding the picker role, and as Mr Thompson advised Mr Fletcher that it was lower paid and less structured, I find it is inconceivable that Mr Thompson would not have known that Mr Fletcher thought his employment was ending, i.e. he thought his role as production worker was ending and he was facing dismissal from his employment.

**When did Mr Fletcher's employment end?**

[19] Mr Fletcher claimed in his statement of problem that he felt his employment was terminated on 2 May 2019. It is clear that this is not correct. Matters were not finalised at that meeting, but Mr Fletcher's evidence was that he went home and explained to Ms Phelps that his employment was ending on one month's notice. Ms Phelps said that on 2 May 2019 she had received a call from Mr Fletcher who told her he had just been dismissed from his job and that they were both in shock. She did confirm that Mr Fletcher had said that Mr Thompson had advised him that he wasn't up to being team leader.

[20] Ms Crosby's recollection of the meeting on 2 May was that she remembered Mr Fletcher being offered a lesser paying job or one month's notice to leave. When Mr Fletcher had advised Ms Crosby that he wasn't coming in on the Friday, she gave evidence that she had spoken to Mr Thompson and told him that Mr Fletcher wasn't coming in, was upset and had thought he had lost his job. She stated that Mr Thompson told her that was not the case and wanted her to get him in to further discuss the matter. It is significant however, that after the 2 May meeting, Parkvale was aware that Mr Fletcher believed he was being dismissed.

**The 6 May meeting**

[21] On 6 May 2019 a further meeting was held at 4:00 p.m. The meeting was convened by Mr Thompson who was present along with, Ms Crosby, Mr Fletcher and Ms Phelps. Mr Fletcher stated to the Authority that he was very confused about what role was being discussed at the 6 May meeting i.e. the team leader role or some other role. He stated he remembered being told he was not right for the position. He stated the result of the meeting was that he left that day having been paid a month's notice in lieu of salary. Under cross-examination Mr Fletcher agreed that Mr Thompson hadn't complained about his work other than the forklift driving. Mr Fletcher also confirmed the meeting took about half an hour. It was put to Mr Fletcher in cross-examination that three options were given to him at the meeting, namely:

- (a) He could stay until he found another job;
- (b) He could leave; or
- (c) He could do the picking position.

[22] Mr Fletcher responded saying that in his view if one was being told you can have a month's training but it won't work out anyway, one is being told you have no job. Mr Fletcher commented what is the point of staying if training is pointless. In answer to a question as to whether or not he agreed to finish up, Mr Fletcher said he did not agree. Mr Fletcher said he believed that if he was not doing his job properly, he should have been told earlier and given a chance to rectify any concerns.

[23] Ms Crosby also gave evidence regarding the 6 May meeting saying that Mr Fletcher did not say much. She was asked for clarification regarding which role was being discussed i.e. team leader or production worker. Ms Crosby stated she was not one hundred percent sure of the order of the minutes but additional training and support could have been mentioned about both the production worker position and the team leader position. Ms Crosby also confirmed that the respondent had not hired a production worker to replace Mr Fletcher. Later, she confirmed that the training being discussed was only for the team leader position.

[24] In respect of 6 May meeting, Mr Thompson reiterated that in his view Mr Fletcher had the option to stay on as a production worker. He accepted however, he knew that following the 2 May meeting, Mr Fletcher felt he had been dismissed. He conceded that he should have made the option of staying on as a production worker clearer. In re-examination, Mr Thompson confirmed that Ms Phelps had said to him she thought there was little point in carrying on as he had already made up his mind. Mr Thompson confirmed that was indeed the case. He confirmed that in his view Mr Fletcher was incapable of doing the team leader role.

[25] The meeting on 6 May was well minuted. These minutes had been prepared by Parkvale although not given to Mr Fletcher until disclosure took place following the raising of the personal grievances. It was put to Mr Thompson in cross-examination that he couldn't say the discussion was only regarding the team leader position and that he thought it was obvious Mr Fletcher could stay on as a production worker because the minutes themselves recorded:

Clive feels sad that John doesn't suit the position as he really likes John and he is much liked part of the team at Parkvale Mushrooms but unfortunately he needs a manager for the production team not another team member".

Mr Thompson explained away the obvious inference by stating he was thinking on his feet at the time.

[26] It was put to Mr Thompson in cross-examination that he had not followed “the encouragement to improve” provision in the employment agreement. He confirmed this however said there was no cause to move to a second stage as they were only discussing the team leader role. Mr Thompson however confirmed he had concerns regarding Mr Fletcher’s performance and he confirmed that these were not formally raised with Mr Fletcher, explaining this was because they only related to his suitability for the team leader role.

### **Discussion**

[27] Section 103(1)(a) of the Act provides that an employee may have a personal grievance against his employer for unjustified dismissal.<sup>1</sup> The test of justification is provided for in s 103A of the Act. The section reads:

#### 103A Test of Justification

- (1) For the purposes of section 1031A and B, the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in sub-section 2.
- (2) The test is 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 the dismissal or action occurred.

[28] In applying that test, s 103A(3) requires consideration of a number of matters. That section reads<sup>2</sup>:

In applying the test in subsection 2, the Authority or the Court must consider:

- (a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) Whether the employer gave the employee a reasonable opportunity to respond to the employer’s concerns before dismissing or taking action against the employee; and
- (d) Whether the employer genuinely considered the employee’s explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

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<sup>1</sup> Section 103(1)(a).

<sup>2</sup> Section 103A(3).

[29] The evidence heard during the investigation meeting was straight forward. The employment agreement under the heading “Work Offered”, described Mr Fletcher’s position as “production worker, with aim to be team leader”. Mr Thompson called Mr Fletcher to a meeting on 2 May 2019 to discuss concerns he had about Mr Fletcher’s work. Although Mr Thompson has tried to say the discussion was only about Mr Fletcher’s ability to be team leader nonetheless, Mr Fletcher, without any warning, was called to a meeting to be told he was not going to be appointed as a team leader because of concerns regarding his performance. The 2 May minute records these concerns as:

John hasn’t picked up things quickly in the production area

and

Clive started the discussion with the fact that he has concerns about John’s ability to be a team leader

and further

Clive apologised for not speaking with John earlier but thought he needed to now.

[30] This is not the action of a fair and reasonable employer. If Mr Thompson had concerns regarding Mr Fletcher’s performance, these needed to be clearly put to Mr Fletcher and he needed to be given a reasonable opportunity to respond to those concerns before any action, including non-appointment to the team leader role, was taken. Mr Thompson would have needed to genuinely consider any explanation put forward by Mr Fletcher in respect of those concerns. Neither the minutes of the 2 May or 6 May give any indication that that was the process followed. Further, the employment agreement provided under the heading “Encouragement to improve performance”:

If your performance or conduct is not satisfactory you will be spoken to by management to point out the problem and encourage improvement.

If no improvement occurs then a meeting with you and a support person if you wish and management would take place and this could result in a formal written warning if deemed necessary.

If a third meeting is necessary for the same or other reason then this could result in a written notice of termination.

[31] Mr Thompson called Mr Fletcher to the meeting on 2 May 2019 because he had concerns regarding his performance. Mr Thompson has said that those performance concerns only related to the team leader role and decided therefore he did not need to follow the

performance procedure set out in the agreement. That does not detract from the unfairness of the situation confronting Mr Fletcher. The evidence before the Authority does not support Mr Thompson's view. The minutes make it clear the discussion was wider than just the team leader role before it moved to discussing termination of employment. For instance, the 2 May minutes record:

Clive feels that even with more time and training John will not be team leader material and he really needs someone that he can leave to run the team (without supervision or assistance from him). He wants to know that he can go to India or be away from Carterton and the production side will run smoothly and that he doesn't need to worry about things.

Clive expressed that he didn't think John had a good understanding of the crop side of things yet either.

[32] In other words, the minutes give a strong indication that the discussion was about Mr Fletcher's ongoing employment not just about a team leader position. The minutes also record:

Clive offered to pay John for a month, regardless if he is here or not so he has financial stability while looking for a new job. John thought he would like to try to improve if possible. There are picking jobs available here at the factory BUT the money is less. Clive offered this to John. There are no other jobs going in production at the present.

[33] The understandable conclusion Mr Fletcher took from this conversation was that he was being told his job was coming to an end. Indeed, that is the nature of the conversation the minutes record. I do not accept, as Mr Thompson states, that there was just a conversation about the team leader role. For a start, the 2 May 2019 minutes record the offering of a picking job for less money. This begs the question as to why, if it was open to Mr Fletcher to stay in the production worker role, would he be offered or want a lesser role. Further, the statement that Mr Thompson needed someone that he could leave to run the team is highlighted in the minutes of 6 May 2019 which record Mr Thompson stating:

Clive feels sad that John doesn't suit the position as he really likes John and he is much liked part of the team at Parkvale Mushrooms but unfortunately he needs a manager for the production team, not another team member.

[34] It is significant that Mr Thompson states he does not need another team member. Afterall, that was the role Mr Fletcher currently occupied. There is the statement in the minutes of 2 May:

There are no other jobs going in production.

[35] A further indication that Mr Thompson was in effect discussing the termination of employment is found in the employment agreement where under the heading wage hourly rates, the comment is made:

Once you are trained and able to fill the leader role then the wage rate will be lifted to reflect this.

[36] Accordingly, based on the minutes and the employment agreement, it is likely Mr Thompson wanted someone who would start in his business as a production worker then quickly move to fulfil a team leader role. He had reached a conclusion that this was not to be Mr Fletcher, with no input from Mr Fletcher, and accordingly he wished to discuss the termination of Mr Fletcher's employment. It could be said that the deliberate and dominant purpose for the meetings on 2 May and 6 May was to terminate Mr Fletcher's employment, perhaps by obtaining his resignation.

#### **How did Mr Fletcher's employment end?**

[37] I accept the evidence of Mr Fletcher and his partner that they felt the only options for them were either that Mr Fletcher's employment ended immediately with Mr Fletcher being paid one month's payment in lieu or Mr Fletcher worked out a notice period of one month. In other words, Mr Fletcher was being told his employment was over and the only issue to discuss was his finishing date. If this was a misunderstanding on Mr Fletcher's part, then the Mr Thompson, who had already been made aware that Mr Fletcher believed he was being dismissed, took no steps to fix this misunderstanding.

[38] Mr Thompson had developed serious concerns regarding Mr Fletcher's performance but had taken no steps to properly raise these with him. It is difficult not to conclude he had reached a predetermined view and called Mr Fletcher to a meeting during which he hoped to secure the termination of Mr Fletcher's employment. It may not have been his initial intention to dismiss Mr Fletcher but this is what he did and these were not the actions of a fair and reasonable employer. The complete lack of mention of Mr Fletcher's production worker position remaining open to him to continue in if he wished, the discussion regarding a lesser role, and the comment in the minutes that there were no other jobs going in production, lead me to conclude that it was more likely than not it was Mr Thompson's intention to secure the end of Mr Fletcher's employment. Mr Fletcher was dismissed.

[39] Having found that Mr Fletcher was dismissed, the obligation on justifying that dismissal in terms of s 103A of the Act falls to Parkvale. Not surprisingly, because it was Parkvale's view that Mr Fletcher had resigned freely, no justification was proffered for the dismissal which is I find unjustified.

[40] The process leading up to the termination of Mr Fletcher's employment disadvantaged Mr Fletcher and made the termination of his employment inevitable. However, the disadvantages, although significant in terms of the factual matrix, are inextricably linked with the termination of his employment and accordingly I have not treated these as separate grievances in terms of remedies.

### **Summary and conclusions**

[41] In a nutshell:

- (a) Mr Fletcher without warning was called to a meeting when Parkvale had already made a decision that because of performance concerns, Mr Fletcher would not be appointed to a team leader position and could not remain in his current position. Those concerns had not been raised with Mr Fletcher beforehand nor was he given a chance to rebut them. Parkvale did not wish Mr Fletcher to stay on as a production worker. He was not given that option;
- (b) The purpose of the meetings was to secure the end of Mr Fletcher's employment. A fair and reasonable employer could not have:
  - (i) reached negative conclusions regarding Mr Fletcher's performance without first raising these with him; and
  - (ii) dismissed Mr Fletcher.

[42] Even if I had found that Mr Fletcher had resigned, I would have found Parkvale had followed a course of conduct with a deliberate and dominant purpose of coercing Mr Fletcher to resign. In any event, I find that Mr Fletcher did not resign. He was dismissed.

### **Remedies**

[43] Mr Fletcher and Ms Phelps gave evidence of the effect the sudden end of his employment had on him. He talked about how he had lost confidence in himself and initially took a position immediately following the termination of his employment, at minimum wage

and working nightshift. Mr Fletcher stated that he'd felt he'd bottled up feelings and his emotions were all over the place.

[44] Ms Phelps gave evidence that Mr Fletcher became very stressed and upset. He had explained to her that he was worried about the future and had no idea what was going to happen. Ms Phelps also confirmed that Mr Fletcher had lost all confidence in himself and in his abilities.

[45] I order Parkvale to pay Mr Fletcher a sum of \$18,000 without deduction as compensation pursuant to s 123(1) (c) (i) of the Employment Relations Act 2000. S124 of the Act requires me to consider whether or not Mr Fletcher contributed in any way to his dismissal. I find that he did not.

[46] I make no order for penalties in respect of the noncompliant employment agreement. The shortcomings in the agreement were discussed with Mr Fletcher at the commencement of his employment to ensure there was compliance with the Act. Parkvale has taken steps to remedy the deficiencies in the agreement by taking specialist advice and redrafting its employment agreements.

### **Costs**

[47] Costs are reserved. As Mr Fletcher has been successful, under normal circumstances he will be entitled to costs. The parties are encouraged to resolve any issue of costs between themselves. The Authority commonly uses a tariff based approach to costs. The hearing and the provision of submissions by the parties, has effectively occupied one day. Tariff costs accordingly would be a sum of \$4,500.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**