

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 101
5360461

BETWEEN PHILLIP HEALY
Applicant

A N D DBLSHOT LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: W Reid and R Rolston, Advocates for Applicant
C Andersen, Counsel for Respondent

Investigation Meeting: 19 September 2012 at Tauranga

Submissions Received: 9 October 2012 from Applicant
5 and 25 October 2012 from Respondent

Date of Determination: 25 March 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Phillip Healy, claims that he was unjustifiably dismissed on 31 August 2011. Mr Healy asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of lost wages for a period of six weeks and compensation of \$8,000.

[2] Conversely, the respondent, Dblshot Limited (Dblshot), says that the dismissal of Mr Healy was justifiable because he did not meet the expectations of the business during the trial period under his employment agreement.

Background

[3] Dblshot owns and operates Café Botannix. The directors of the company are Ms Theresa Eagle and Mr Charlie Self; both of whom have considerable experience in the hospitality industry, including the operation of cafés and restaurants.

[4] In May 2011, the directors made a decision to hire both a full time chef and a second cook to replace two other staff that were now unavailable for various reasons.

[5] Mr Healy was interviewed in 7 June 2011 and following two working interviews on 8 and 12 June 2011 respectively, he was offered the position of full time café chef. The offer is recorded in writing and it includes the following provision:

You will be required to serve a trial period of 90 days during which time you will receive advice and guidance in the completion of your tasks. The main purpose of the probation period is to give you an opportunity to establish your suitability for the job, and to help you become familiar with and competent in performing the work you have been appointed to do, the appointment is subject to the satisfactory completion of the probationary period. This period is its [sic] self subject to termination under the terms of you [sic] appointment.

[6] Mr Healy received an individual employment agreement and a standard terms document that he signed on 17 June 2011; he also initialled each page of the documents. Relevant to the matters before the Authority, the terms of employment include certain provisions. The first page of the individual employment agreement (IEA) informs that the duration of a trial period is 90 days. Then at clause 2,

Completeness and Variations:

- a. Your Individual Employment Agreement is comprised of these Individual Terms and the Standard Terms (together “the Agreement”).

[7] At clause 6 of the IEA, *STANDARD TERMS* there is provision for a:

Probationary Period of Employment

Duration and Application

- a. If you are a new employee you are engaged on a probationary period for the term specified in your individual terms.
- b. This clause does not apply to existing employees.

Consultations and Reviews

- c. During the probationary period we will review your employment with you. This will be done on a regular basis, where required. These reviews are intended to consider

performance, conduct, compatibility, fit and any other issues relating to employment.

Termination during Probationary Period

- d. Where any of the issues set out above are unsatisfactory they may result in termination of your employment, such termination may be summary where serious, or on notice where less serious, or at the expiry of the probationary period if any matter remains unsatisfactory.
- e. Instead of the notice period set out in your Individual Terms your employment may be terminated during the Probationary Period by either party giving one week's notice in writing.
- f. Any matter which is raised as unsatisfactory during any review shall be deemed as notice that the matter may result in termination if it remains unsatisfactory at the completion of the probationary period.

Duration Extension

- g. Where we have not carried out at least two reviews during the probationary period, or where the probationary period, for whatever reason, has in our opinion been insufficient to properly assess you we may extend the probationary period by the period we consider necessary, to properly assess you.

[8] But some confusion arises as there is a further clause 6 to the standard terms document:

Trial period

- a. If you are a new employee, you agree that you are employed on a trial period for 90 days, starting at the beginning of your employment.
- b. During this trial period, or at its end, we may dismiss you by giving you one week's notice, and if we do so, you are not entitled to raise a personal grievance or other legal proceedings in respect of the dismissal.

[9] However, while there are two separate provisions to the agreement, both numbered clause 6 (an apparent drafting mistake), relating to a probationary period and a trial period, which are quite different things, the parties agree that it is the operation and effect of the trial period terms of the agreement (as directly above) that applies to the dispute that has arisen.

Background

[10] Mr Healy commenced his employment as a full time chef at the Botannix Café on 22 June 2011. The evidence of Ms Eagle is that Mr Healy was required to manage the kitchen, order ingredients and manage the costing of the food produced, provide

cabinet food for the café each day, undertake short order cooking and prepare out-catering as and when required. Mr Healy was assisted by a second chef, Ms Rachelle Sutton.

[11] In regard to the operation of the café, Mr Healy was given some training by Ms Eagle. It had been arranged that the training would take place over two weeks, but Mr Healy was off work on sick leave during what would have been the second week of training but this does not appear to be of particular significance.

Issues arising

[12] The evidence of Ms Eagle is that a number of issues arose within the first month of Mr Healy's employment. Firstly, Mr Healy was speaking too loudly in the kitchen and loud conversations could be heard by customers of the café.

[13] Ms Eagle says that Mr Healy's production levels were also of concern as he was not managing to keep up with the required production necessary pertaining to the cabinet food, and the short orders were not leaving the kitchen fast enough. Ms Eagle attests that this was of concern due to the time of the year being quiet but the café was about to enter into the busiest part of the trading year. Ms Eagle refers to various examples of problems arising with the general performance of Mr Healy including delays in short order food leaving the kitchen on one particular Sunday and a deficiency of cakes, sandwiches and savoury food being produced as back up for when various food lines ran out.

[14] Ms Eagle says that there was some informal discussion with Mr Healy and his response was that he was still becoming familiar with the café's systems. In order to assist him, Ms Sutton was given extra hours of work.

[15] However, it was then noticed that Mr Healy was ordering too much stock that was not being used. Ms Eagle says that ingredients were "rotting and expiring" in the fridge and had to be thrown out. Ms Eagle says that the café operates on tight margins and too much money was being spent on food that was going to waste. The matter was addressed by requiring Mr Healy to complete a weekly cost of goods sheet, for the purpose of controlling the food costs.

[16] The further evidence of Ms Eagle is that there were quality issues with the food being produced by Mr Healy in that he was not meeting the standards required.

Because the various issues were not being adequately addressed via informal performance management, Ms Eagle and Mr Self arranged a “coaching meeting” with Mr Healy on Sunday, 7 August 2011.

[17] The evidence of Ms Eagle is that the various matters of concern relating to Mr Healy’s performance were addressed and Ms Eagle recalls reminding him that he was on a 90 day trial period. Ms Eagle has produced to the Authority notes of the matters that were discussed with Mr Healy.

[18] The evidence of Mr Self is that Mr Healy stated that many of the issues of concern were associated with Ms Sutton and hence a meeting took place with her, Mr Healy and Mr Self. Subsequently, further training was given to Ms Sutton. However, production and quality problems continued to arise even though Ms Sutton was given extra hours of work in order to assist Mr Healy, and further informal coaching sessions took place with him.

Matters leading to the dismissal of Mr Healy

[19] The café took a booking on 15 August 2011 for an out-catering order to be provided to the customer on 25 August 2011. The request was for the provision of Asian/Vietnamese themed food. The evidence of Mr Self is that due to the regularity of orders received from the organisation involved, the quote to them was “significantly less” than might have applied to other clients; hence there was a very small profit margin.

[20] The evidence of Mr Self is that because of the problems that had arisen with Mr Healy, he sat down with him and designed the menu for the Asian themed food. The original menu was to use pawpaw (papaya) as one of the ingredients for the food order, but this was subsequently changed and tinned mango was eventually used because Mr Self was unable to have the time to pick up the necessary ingredients for the menu from a local Asian store.

[21] In order to allow Mr Healy to work on the out-catering order, Ms Sutton was rostered on to take care of the normal café food preparation. Mr Self says that he spoke to Mr Healy on 24 August about preparing the vegetables for the out-catering that day in order to be better prepared for the next day. However, Mr Healy indicated he would do it all on 25 August.

The events of 25 August 2011

[22] The evidence of Mr Healy is that he came into work an hour early so he would have the time required to prepare the catering order. Mr Healy says that at 9:00a.m. he was informed that the order had “substantially” increased in regard to the number of people being catered for. Mr Healy says that he understood the café would be catering for 15 people initially and then this number increased to 23 to be catered for and hence extra food had to be found. However, Mr Self’s oral evidence is that the original order was for 23 people and that this was increased to 25 people¹. It appears that Mr Healy’s version of the numbers may be more probable as the handwritten menu indicates that 15 people are to be catered for, along with the details of the price per head. In the event it seems that this then went to 23 people; possibly 25 people. The conflict in the evidence regarding the number of people to be catered for is relevant in that Mr Healy points to this being a factor that put him under pressure when preparing the order.

[23] It is established that Mr Healy was having some trouble in regard to rolling the rice paper rolls for the order. Mr Self says that he showed Mr Healy how to roll them and then went back to his front of house duties.

[24] The catering order was due to be delivered by 12 noon and needed to be completed by 11:45a.m. The evidence of Mr Self is that he became aware that Mr Healy had not prepared the salads as of about 11:00a.m. and so Mr Self told Mr Healy that he needed to start “hauling arse”. Mr Self went into the kitchen to assist.

[25] Subsequently, Mr Self had to call the organisation that was being catered for and inform them that the food would be late in being delivered. Mr Self then told Mr Healy he needed to hurry up. Mr Healy responded: “*now you’re pissing me off*” or words to that effect.

[26] The food was duly delivered. Mr Self says that when he arrived the people were standing around waiting for the food and this was embarrassing. Furthermore, the quality of the food was not up to the café’s usual standard and an apology was made to the organiser of the function.

¹ But Mr Self’s written evidence is that three more people needed to be catered for albeit he does not refer to specific numbers.

The dismissal

[27] After delivering the food to the customer, Mr Self consulted with Ms Eagle. The decision was made to terminate the employment of Mr Healy under the 90 day trial provisions of the employment agreement. Upon arriving back at the café, Mr Self went to the kitchen and spoke to Mr Healy. There are some differences in the evidence of Mr Self and Mr Healy as to what was said, but it is commonly accepted that Mr Self made it clear that due to the problems that had arisen with the catering order, Mr Healy's employment was terminated forthwith, with one week's notice to be paid in lieu.

[28] By a letter dated 25 August 2011, the termination of Mr Healy's employment was confirmed thus:

Dear Phillip,

RE: Employment with Dblshot Limited

Your employment started with us on 17/06/2011² and as agreed, you have been on a 90 day trial period.

Sadly we feel that you are not the right fit for our team, hereby we are terminating your employment under Section 6.b of your Individual Employment Agreement.

We are hereby giving you one week's notice. Your final day will be 31st August 2011.³ We would like to pay out this notice period so you can begin looking for a new job. Please post us our Gilmour Traders card so that we can pay out your final pay. We wish you the best for the future.

Regards,
Charlie Self and Theresa Eagle
Directors
Dblshot Limited

Discussion

[29] Notwithstanding the drafting of the employment agreement and the rather confusing provision of a probationary period and a trial period with both having the same clause number 6, it seems to be commonly accepted that Mr Healy was employed under a trial period pursuant to s.67A and s.67B of the Employment Relations Act 2000 (the Act). It also appears to be accepted by Mr Healy that the trial

² This date is incorrect as it is commonly agreed that Mr Healy started his employment on 22 June 2011 with the employment agreement being signed on 17 June 2011.

³ This was the final paid day. The final day of work was 25 August 2011.

period term of the employment agreement meets the requirements of the above two sections of the Act and that if Dblshot is offered the protection offered by s.67B(2) of the Act, then Mr Healy is not entitled to pursue a personal grievance relating to his dismissal.

[30] Section 67B(2) of the Act provides that:

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.

[31] However, disqualification from bringing a personal grievance is dependent upon lawful termination of the employment agreement under subsection (1) and if there is not a lawful termination under that subsection, then the personal grievance barrier provided by subsection (2) does not apply⁴. Section 67B(1) provides that:

This section applies if an employer terminates an employment agreement containing a trial provision under section 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. [Emphasis added by the Authority.]

Notice

[32] As set out in *Stokes Valley Pharmacy*, s.67B requires, as part of the circumstances to be established, if access to the personal grievance procedure is precluded, that notice of termination of employment must be given. But as the Court observed:

There is no statutory indication how this may or must be done, the length of notice or whether the employer may make a payment in lieu of notice.

[33] Therefore, given the absence of statutory guidance, the logical place to begin is the employment agreement.

[34] Mr Healy's employment agreement provides that he can be dismissed during the trial period by Dblshot giving him one week's notice. And then at clause 11 of the agreement, notice must be given in writing (11a.) and Dblshot has the right to pay in lieu of working out the notice period (11b.). Both of these contractual obligations were met by Dblshot. A submission for Mr Healy is that notice must mean notice in

⁴ *Smith v Stokes Valley Pharmacy Ltd (2009)* [2010] ERNZ 253 para.[62]

advance of dismissal/termination. But there is no authority for that proposition and as held by Chief Judge Colgan in *Stokes Valley Pharmacy*; at para.[107]:

... it would be irrational to interpret the statutory reference to notice as being other than the contractual notice in any particular case.

[35] It follows, I believe, that the contractual term in regard to payment in lieu of notice must also be appropriate. Hence I conclude that Dblshot has met the statutory and contractual requirements in regard to the issue of notice. It follows then that Dblshot is entitled to the immunity from a personal grievance action as provided by s.67B(2) of the Act.

Good faith

[36] It is submitted for Mr Healy that the manner in which he was dismissed was a breach of the good faith provisions of the Act in that the employer failed to be “*active and constructive*” in regard to maintaining the employment relationship during the trial period. And further, the employer failed to be “*responsive and communicative*”⁵. It is argued that there was an obligation to give an oral explanation as to the reasons for the termination of Mr Healy’s employment; albeit there is no evidence that Mr Healy sought any explanation, nor has any authority been provided for this proposition.

[37] Any analysis of whether the good faith provisions of the Act apply to the circumstances of Mr Healy’s trial period must begin at s.67B(4):

An employee whose employment agreement contains a trial provision is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement contains no trial provision or contains a trial provision that has ceased to have effect.

[38] And then at s.67B(5):

Subsection (4) applies subject to the following provisions:

- (a) In observing the obligation in section 4 of dealing in good faith with the employee, the employer is not required to comply with section 4(1A)(c) in making a decision whether to terminate an employment agreement under this section; and

⁵ Section 4(1A)(b) of the Act

- (b) The employer is not required to comply with a request under section 120 that relates to terminating an employment agreement under this section.

[39] The above proviso, taken at face value, appears to exempt an employer from having to provide “*access to information relevant to the continuation of the employee’s employment ...*”. Additionally, under s.67B(5), the employer is not required to allow an employee an opportunity to comment on any information relating to a pending termination of employment before the decision is made; as confirmed by *Stokes Valley Pharmacy*:

- [69] The effect of section 67B(5)(a) therefore is to relieve an employer in the making of a decision whether to terminate an employment agreement containing a trial provision pursuant to the terms of that provision, only from providing the employee with information relevant to the continuation of the employee’s employment about that decision and an opportunity to comment on the information before the decision is made. Other section 4 good faith obligations apply and are enforceable, **but other than by personal grievance for unjustified dismissal**. Even absent subs (1A)(c) good faith obligations, those remaining under section 4 are significant and enforceable by trial period employees.

[Emphasis added by the Authority.]

[40] This would include the enforceability of s.4(1A)(b) which:

... requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are among other things responsive and communicative; ...

[41] It is argued for Mr Healy that the manner in which Dblshot implemented his dismissal was not active and constructive in regard to maintaining the employment relationship. Nor was the employer responsive and communicative. Mr Healy says that he was required to leave the premises of the café without any opportunity for rational discussion pertaining to why his employment was being terminated.

[42] It seems to me that the circumstances that applied to Mr Healy in regard to the termination of his employment are on point with the following statement from the Employment Court in *Stokes Valley Pharmacy* at para.[78]:

To refuse to give an employee being dismissed otherwise lawfully, any explanation about why that is happening, is not only inconsistent with the statutory obligation to be “responsive and communicative” but is arguably the antitheses of that requirement of good faith

behaviour between the parties in the employment relationship. This obligation is unaffected by ss67A and 67B.

[43] However, it seems that the employee in such circumstances is required to be proactive in regard to seeking reasons for a dismissal and this appears to be confirmed by Chief Judge Colgan at paras.[81] and [82] of *Stokes Valley Pharmacy*:

[81] So whilst an employer is not obliged to notify an employee of the employer's proposal to end the employee's employment or to offer the employee an opportunity to comment thereon, this does not preclude an employee **seeking** and being entitled to receive an explanation for the dismissal at the time when notice of it is given.

[Emphasis added by the Authority.]

[82] Interpreting the s67A and 67B obligations strictly and against the removal of rights of access to justice unless clearly so expressed as set out earlier in this judgment, I consider that an employer, upon giving termination of an employment relationship in reliance on s67B, is not entitled in law to refuse to give an explanation for such a significant decision. Nor is the employer entitled to give an explanation that is misleading or deceptive or that may tend to mislead or deceive the employee.

[44] The evidence of Mr Healy is that he only raised with Mr Self the issue of notice and was informed that he would be paid for one week in lieu of notice. The submission for Dblshot is that if a request is not made by the employee, there is no obligation on the employer to provide information to the employee. I accept that this is probably correct, legally speaking, albeit much less than best practice from an employment relations perspective.

Determination

[45] Upon conducting a close analysis of the issues presented by both parties, I find the following:

- (a) Mr Healy is prevented from pursuing a personal grievance as he was employed under a trial period that meets the requirements of ss.67A and 67B of the Act. Hence the Authority does not have jurisdiction to consider a personal grievance claim;
- (b) It may be arguable that an alternative action is available to Mr Healy in regard to a breach of s.4(1A)(b) of the Act, but this is not a particularly strong ground. But even if I had been inclined to find otherwise, the

only remedy available to Mr Healy would be a penalty for a breach of this particular provision of the Act. This has not been sought by Mr Healy but even then, to be liable for this sanction under s.4A of the Act, the failure to comply with a duty of good faith by the employer must be:

- (i) Deliberate, serious and sustained; or
- (ii) Be intended to undermine the employment relationship⁶.

[46] I conclude that the neither of the above criteria has been met and hence a penalty would not be appropriate in any event.

Costs

[47] Costs are reserved. The parties are invited to resolve this issue if they can, taking into account the overall outcome and the daily tariff approach of the Authority. In the event that a resolution cannot be reached, 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

⁶ Section 4A(a) and (b)