

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 28
5417845

BETWEEN NICHOLAS HENDRICUS
 HOGEBOOM VAN BUGGENUM
 KNOWN AS NICHOLAS
 HOGEBOOM
 Applicant

AND QUALITY FIREWOOD LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Phillip de Wattignar, Advocate for Applicant
 Christine McKay, Advocate for Respondent

Investigation Meeting: 28 January 2014 at Dunedin

Submissions received: At the investigaiton meeting

Determination: 19 February 2014

DETERMINATION OF THE AUTHORITY

- A I have found that Mr Hogeboom was unjustifiably dismissed.**
- B Before making an order for reimbursement of lost wages there should be an attempt to verify earnings received by Mr Hogeboom over the 13 week period. Either party can return to the Authority if agreement cannot be reached for an order as to the amount of lost wages to be reimbursed.**
- C I have ordered that Quality Firewood Limited pay to Nicholas Hogeboom the sum of \$4,500 compensation without deduction.**
- D I have reserved the issue of costs and timetabled for submissions.**

Employment relationship problem

[1] Nicholas Hendricus Hogeboom van Buggenum known as Nicholas Hogeboom was employed by Quality Firewood Limited (Quality Firewood) as a chainsaw operator/labourer. He says that he was unjustifiably dismissed from his employment on 18 April 2013.

[2] Quality Firewood says that Mr Hogeboom was subject to a 90 day trial period and it terminated the employment relationship within that period. It says that Mr Hogeboom is not able to bring a personal grievance in respect of the dismissal.

[3] Mr Hogeboom seeks reimbursement of lost wages in the sum of \$5,630 gross. This is calculated for 13 weeks at \$510 per week less part time earnings of \$1,000. He also seeks compensation in the sum of \$7,000 and costs.

[4] An issue about payment of time in lieu was able to be resolved by way of consent order, [2014] NZERA Christchurch 13.

Issues

[5] The Authority is required to resolve the following issues:

- (a) When did Mr Hogeboom become an employee of Quality Firewood;
- (b) Was the trial period in Mr Hogeboom's employment agreement in accordance with the requirements of s.67A of the Employment Relations Act 2000 (the Act)?
- (c) If it is found that the trial period in Mr Hogeboom's employment agreement did not comply with the requirements of s.67A of the Act, then was Mr Hogeboom unjustifiably dismissed?
- (d) If it is found Mr Hogeboom was unjustifiably dismissed then what remedies is he entitled to and are there issues of contribution and mitigation?

Background against which these issues are to be assessed

[6] Quality Firewood is a duly incorporated company having its registered office in Dunedin. There are two directors of the company, Christine McKay and her

partner Camerone McDougall. During the telephone conference the Authority held with respect to this matter Ms McKay advised that Mr McDougall may not be involved in the matter, at least not at the Authority stage of the proceeding. When the evidence was given at the investigation meeting, it became apparent that Mr McDougall had conversations with Mr Hogeboom at material times and it would have been helpful to have heard evidence from him. I gave an opportunity to Ms McKay during the investigation meeting for this to occur. She confirmed that the decision was not to involve Mr McDougall in the defence of the matter by Quality Firewood at this point and the Authority did not therefore hear from him.

[7] Mr Hogeboom attended a job seeker interview with a work broker, Donna Monaghan, at the Dunedin office of Work & Income New Zealand (WINZ). He was advised by Ms Monaghan of a vacant position at Quality Firewood for a chain saw operator/labourer. Mr Hogeboom said that Ms Monaghan suggested that the role may not be for him but he knew that it was the sort of work he had done before and was good at. Mr Hogeboom waited outside Ms Monaghan's office while she contacted Mr McDougall.

[8] Ms Monaghan then arranged for Mr Hogeboom to meet Mr McDougall at East Taieri, Dunedin in the morning of Wednesday, 16 January 2013. Mr Hogeboom said in evidence that he met Mr McDougall at 7.50am and followed Mr McDougall's vehicle to Quality Firewood's yard. Mr McDougall showed Mr Hogeboom the equipment and layout of the worksite.

[9] Mr Hogeboom then worked on the log splitter with another worker until he left the site about 4.30pm. The evidence supported that the initial formalities before Mr Hogeboom commenced with the log splitting did not take particularly long and I find in all likelihood were completed well within an hour. Mr Hogeboom said that he knew that he had the job and he just carried on working. I asked Mr Hogeboom when he knew it was time to finish for the day as Mr McDougall was not present. He said that another worker told him that it was time to finish. There appears to be no dispute that the minimum wage at that time of \$13.50 was known by Mr Hogeboom to be the rate for the job.

[10] A matter in dispute is whether Mr Hogeboom was given a copy of an employment agreement by Mr McDougall on 16 January 2013. Mr Hogeboom was adamant that he was but Ms McKay in her evidence does not accept that the

employment agreement was provided on that day and says it was not provided until 21 January 2013. She explained that Mr Hogeboom must have been confused with another document that she attached to her statement of evidence headed applicant information and which Mr Hogeboom was asked to fill out that day.

[11] Mr Hogeboom accepted that he was given the applicant information form to fill out but that he said it was on top of the employment agreement. The Authority was only given one employment agreement that Mr Hogeboom signed on 23 January 2013. Mr Hogeboom says that he was asked to give the other employment agreement back once a higher hourly rate was negotiated and agreed. Ms McKay said in her evidence that Quality Firewood would not at that stage have had sufficient details to complete the employment agreement. There is no document before the Authority to conclude on the balance of probabilities that an earlier employment agreement was given to Mr Hogeboom.

[12] McKay in her evidence said that no one is employed by Quality Firewood until they have signed an employment agreement. Ms McKay said that what was occurring on that first day on 16 January 2013 was in the nature of an interview and she did not accept that Mr Hogeboom was employed when he undertook the day's work. She said that the method of interview is understood by WINZ because Mr Hogeboom was eligible for a flexi wage subsidy of \$200 for each week that he worked 30 hours or more for the initial 13 weeks of employment. Her evidence was that WINZ continued to pay the full unemployment benefit until an offer of employment was accepted and there was no intention on the part of Quality Firewood to pay Mr Hogeboom for work done at the interview process. Mr Hogeboom said that he was not on the unemployment benefit but was rather a job seeker so he was not in receipt of any benefit. I accept his evidence that he was not a beneficiary but rather was seeking employment.

[13] There is then another dispute. Mr Hogeboom says that at the end of the work trial on 16 January 2013, Mr McDougall telephoned him to discuss the work he had undertaken. Ms McKay says that that discussion did not take place until 17 January 2013. Although a dispute as to when the conversation took place there appears no fundamental dispute about what was discussed. Mr McDougall said that Mr Hogeboom had done a good day's work and Mr Hogeboom advised Mr McDougall that he would not undertake the work for less than \$17 per hour.

There was agreement to that rate although Mr Hogeboom says that he was told, for that money, Mr McDougall would also expect him to do chainsaw work which he accepted. He was advised that a new contract would be drawn up to reflect the agreed \$17 hourly rate and additional job requirement.

[14] I find it more likely than not that this conversation took place the evening after the work trial on 16 January 2013 rather than the evening of 17 January 2013. Firstly it seems more logical that Mr McDougall would make the call at that time. Secondly, I do not find it likely that Mr Hogeboom would have returned to work for Quality Firewood as I find he did for the following two days if such a discussion had not taken place on 16 January 2013.

[15] Ms McKay said there was no record of Mr Hogeboom working for those further two days. In the context of this case whether Mr Hogeboom did work those days and whether he did so as an employee is important. There is no formal record kept by Quality Firewood of Mr Hogeboom working the two days following 16 January 2013. Ms McKay suggested in her evidence Mr Hogeboom is confused with the following week when she says he only worked Wednesday, Thursday and Friday.

[16] Mr Hogeboom said that he did work both days following 16 January 2013. He said that he asked Mr McDougall if he could be given a cash advance on his wages on Friday 18 January 2013 as he needed to get groceries and had no other income. He says that he was given a cash advance although Mr Hogeboom said that he did not know if he was paid for the first three days of his employment at the rate of \$13.50 or \$17 per hour. He also said, and I accept his evidence about this that he did not receive pay slips on a regular basis despite making requests for them. I do not find that he had the ability therefore to check what hours he was paid for.

[17] Although Ms McKay did not accept Mr Hogeboom worked the two days after 16 January 2013, Quality Firewood's account of the relevant facts attached to the statement in reply referred in the second paragraph as follows *The Applicant completed two days in induction & training, as WINZ are aware of this they continue to pay the full unemployment allowance until an offer of employment is made.* I have placed reliance on that account in the circumstances to support that Quality Firewood, at least at the stage of preparing that response, recalled Mr Hogeboom undertaking not one but two days of induction on 16 and 17 January 2013. Mr Hogeboom can clearly recall also working the third day and I think it more likely that Mr Hogeboom continued working

after his work trial on 16 January 2013 for the remaining two days of the week. I am unable to conclude what he was paid for work he performed on 16,17 and 18 January 2013, although there is no claim in front of me about payment for those days.

[18] Mr Hogeboom said that on returning the earlier employment agreement on 17 January 2013 he was then provided with a further employment agreement with the new hourly rate, the signed copy of which is before the Authority. He recalls reading it over the weekend but not returning it signed until later the following week. Mr Hogeboom said that he noticed the 90 day trial period when reading the employment agreement over the weekend. Mr Hogeboom did not accept Ms McKay's evidence that he was given the employment agreement on 21 January 2013.

[19] Ms McKay said in evidence that Mr Hogeboom did not work on 21 January but did come to the yard to pick up his employment agreement on that day. She said that contact on that day must have been with Mr McDougall. Ms McKay says that the employment agreement was not signed and returned until Wednesday, 23 January 2013 on which date Mr Hogeboom commenced work for the company for the first time.

[20] It is persuasive that the letter offering Mr Hogeboom employment is dated 21 January 2013 although I do not find necessarily conclusive as to when the agreement was provided.

[21] For current purposes though I accept Ms McKay's evidence that 21 January 2013 is the most likely date that the agreement was provided to Mr Hogeboom. The letter of offer provides, amongst other matters, as follows:

Dear Nicholas

Offer of Employment

*I am pleased to offer you the position of **Chain Saw Operator/Labourer starting on the 21st January 2013**. I propose that the terms of employment will be those in the attached draft individual employment agreement.*

Please note that you are entitled to discuss this offer and to seek advice on the attached proposed agreement with your family, a union, a lawyer, or someone else you trust. ...

If you are happy with the proposed terms and wish to accept this offer of employment, please sign the duplicate copy of this letter and return

*it to me by **the 21st January 2013**. If I have not heard from you by that date, this offer will be automatically withdrawn.*

[22] It is common ground that Mr Hogeboom did not sign the employment agreement until 23 January 2013. It was signed on behalf of the company on 21 January 2013.

[23] Ms McKay supplied two documents to support that Mr Hogeboom did not actually start work until the day he signed his employment agreement. The first document is a record of hours worked by Mr Hogeboom the week commencing 21 January 2013 although not the days on which the hours were worked supplied to WINZ. The hours Mr Hogeboom is recorded as having worked that week is 26.5 hours. The second document was provided on the day of the investigation meeting. It showed Mr Hogeboom's hours and days worked for the period of his employment and was provided as a wage and time record and was prepared by Ms McKay from Mr Hogeboom's record of hours he had worked. At the top of that document it shows that Mr Hogeboom started on 23 January 2013 and that that is the first day that week that he worked. Mr Hogeboom did take issue with the accuracy of aspects of the records and as already found he did not get pay slips on a regular basis.

[24] The start date of 23 January 2013 is inconsistent with the date in the employment agreement of 21 January 2013 for commencement of employment. Ms McKay also advised WINZ, in an email dated 28 March 2013, that she was claiming a subsidy for Mr Hogeboom for a period from 21 January 2013. I find that the date of 21 January was used by Quality Firewood to calculate how much of the 90 day trial period had expired at the date of termination. Ms McKay said in her evidence at that time it was 87 days into the 90 day trial period. A trial period starts at the beginning of an employee's employment.

[25] There was also no evidence to satisfy the Authority why Mr Hogeboom would travel to work on 21 January 2013 to be given a written offer of employment and employment agreement only to leave and not return for 2 days. This is particularly so given my findings about Mr Hogeboom having worked on 16,17 and 18 January 2013. If it was not intended that Mr Hogeboom commence work on 21 January then it is unclear why the letter of offer provided he was required to sign the offer by 21 January 2013 otherwise the offer would be automatically withdrawn.

[26] In conclusion I find it more likely than not that Mr Hogeboom worked on 21 January 2013 for the reasons set out above.

[27] The employment agreement provided that employment was to commence on 21 January 2013 and contained a clause in 3.2 headed *Trial Periods*. It provided as follows:

*A trial period will apply for a period of **NOT EXCEEDING 90 CALENDER DAYS** employment to assess and confirm suitability for the position. Parties may only agree to a trial period if 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 sections 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 obligations of the employer or the employee (including access to mediation service) except as specified in section 67A(5) of the Employment Relations Act 2000.

[28] Clause 13 of the employment agreement is headed *Termination of Employment*". Clause 13.1 dealt with *Termination of trial period*:

*The employer may terminate the trial period by providing **1 days** notice to the employee within the trial period.*

[29] Mr Hogeboom signed the agreement on 23 January 2013 and there were no significant issues until the week commencing 15 April 2013. Mr Hogeboom was unwell that week at work. He described himself as having symptoms consistent with a stomach upset which was difficult as employees were required to drive a short distance to toilet facilities. Mr Hogeboom accepted that his production rate declined because he was unwell.

[30] A conversation took place on the telephone between Mr McDougall and Mr Hogeboom on, I find more likely, Wednesday, 17 April 2013. I did not hear from Mr McDougall but it is clear from the evidence of Mr Hogeboom that the conversation became heated. Ms McKay confirmed that she could hear the

conversation as well and did not disagree with this description. It appeared Mr McDougall concluded that Mr Hogeboom may have been under the influence of drugs. There was discussion about a requirement of a medical certificate. There is some dispute whether Mr Hogeboom had already been to the doctor. I find from a record of relevant text messages at the time Mr Hogeboom had given Mr McDougall that impression. There was in all likelihood some discussion about Mr Hogeboom undertaking a drug test at his doctor's. I was not satisfied from the evidence I heard that Mr Hogeboom refused to do this, but he did want the employer to contribute to the cost of any test.

[31] During the heated exchange, the evidence supported that Mr Hogeboom suggested he resign and give one week's notice. Mr McDougall referred to ending or finishing Mr Hogeboom's employment under the 90 day trial provision.

[32] On 18 April 2013, Mr McDougall sent Mr Hogeboom a text message as below:

Good morning nick no need to work out notice as you are still under the ninety day trail [sic] period so I am giving you one days notice as per contract will organize toks money and will organize your final pay and holiday pay but will need to get chaps back before payment let me know how you want to do this. Cam

[33] The text messages provided to the Authority show that Mr Hogeboom confirmed on 18 April 2013 that the chainsaw safety chaps were with him and that he would be at home all day as he was still sick. He asked that he be provided with payslips as well as final pay as he had been waiting *4 weeks for them now*.

[34] On Thursday, 18 April 2013 at about 8.30am Ms McKay called to Mr Hogeboom's home and handed a letter to Mr Hogeboom's partner. It provided that it had been decided to terminate Mr Hogeboom's position on 18 April 2013 with one day's notice as required by his contract to be paid in lieu. The letter confirmed that this date fell within the 90 day trial period outlined in the contract. Mr Hogeboom was advised in the letter that he would receive directly to his account his final week's pay and one day in lieu of notice together with holiday pay less the balance outstanding on firewood, boots and earmuffs.

When did Mr Hogeboom become an employee of Quality Firewood?

[35] An employee is defined in s.6(1)(a) of the Act as any person of any age employed by an employer to do any work for hire or reward under a contract of service. The definition excludes a volunteer who does not expect to be rewarded for work and receives no reward. The Employment Court in its judgment in *The Salad Bowl Limited v Amberleigh Howe-Thornley* [2013] NZEmpC 152 considered the issue of a work trial and whether it was employment.

[36] Ms McKay said that it was never intended that Mr Hogeboom would be paid for his work trial of one day. This appeared to have been on the basis of a mistaken view that Mr Hogeboom was in receipt of a benefit. Mr Hogeboom on the other hand expected to be rewarded for the work he performed for Quality Firewood cutting firewood. There was no suggestion that Quality Firewood did not benefit commercially from his work cutting firewood that Mr Hogeboom was engaged in for most of the work trial day. I find that the work trial conducted on that day of almost a full day cutting wood was employment for a trial period. Mr Hogeboom was an employee of Quality Firewood on 16 January 2013.

[37] If I am wrong about that, the evidence supports the evening of the work trial Mr Hogeboom was offered a role with Quality Firewood by Mr McDougall on the basis of his satisfactory performance. Mr Hogeboom accepted the role with an hourly rate of \$17 per hour. He then continued to work as an employee of Quality Firewood for the remaining two days of that week. He asked for and received an advance on his wages on 18 January 2013. I accept Mr de Wattignar's submission that there had been an opportunity for Quality Firewood to assess Mr Hogeboom's suitability for the work on 16 January 2013, and he was found to have been a suitable candidate. As well as working on 16,17 and 18 January 2013 I have then concluded it more likely than not that Mr Hogeboom worked on 21 January 2013 before he signed the employment agreement on 23 January 2013.

[38] Ms McKay placed some emphasis on the subsidy Quality Firewood received from WINZ for employing Mr Hogeboom of \$200 per week and the fact that this commenced from 21 January 2013. I find this was a separate matter to the employment relationship with Mr Hogeboom. I find that the employment relationship between Mr Hogeboom and Quality Firewood started before the subsidy was claimed from WINZ.

Was the trial period in Mr Hogeboom's employment agreement in accordance with the requirements of s.67A of the Act?

[39] Section 67A of the Act provides:

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) ...
- (5) *To avoid doubt, a trial provision may be included in an employment agreement under-*
 - (a) *Section 61(1)(a), but subject to section 61(1)(b);*
 - (b) *Section 63(2)(b.)*

[40] I do not find that the trial period in the individual employment agreement was in accordance with the requirements of s. 67(A) of the Act. That is because Mr Hogeboom was an employee of Quality Firewood at the time he entered into the individual employment agreement. Applying the definition in s.67A(3) he was not an employee able to enter into an employment agreement containing a trial provision – *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253 and *Blackmore v Honick Properties Limited* [2011] ERNZ 445.

[41] Mr Hogeboom is able to bring a personal grievance to the Authority that his dismissal was unjustified.

Was Mr Hogeboom unjustifiably dismissed?

[42] The Authority is required to apply the test of justification in s.103A of the Act whether Quality Firewood's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[43] The decision to dismiss Mr Hogeboom followed a heated exchange. Mr Hogeboom talked of resigning. Ms McKay says that Quality Firewood decided that it would be best to terminate under the 90 day clause rather than Mr Hogeboom resign so that Mr Hogeboom could go straight onto a benefit without a stand down period. I accept that Ms McKay thought at that time Quality Firewood could rely on the 90 day clause.

[44] Ms McKay may well have had good intentions but a fair and reasonable employer could and should have organised a meeting after the heated exchange to talk through the issues before taking any further steps. I am not satisfied that it could have been clear to a fair and reasonable employer after a heated exchange that Mr Hogeboom actually intended to resign. His evidence was that he thought even after the heated conversation with Mr McDougall that he was going back to work. Mr Hogeboom had been quite unwell during his final week. He said that this was the reason for low production. Mr McDougall it seems did not understand this and concluded drugs were involved. These things could have been talked through and probably resolved and the employment relationship could then have continued. Mr Hogeboom said that he really enjoyed the job.

[45] A decision was made to simply rely on the 90 day clause in Mr Hogeboom's employment agreement without any meeting or discussion. The procedural requirements in s.103A of the Act in s.3(a) to (d) were not satisfied and the defects were not minor. They resulted in Mr Hogeboom being treated unfairly.

[46] I find that Mr Hogeboom has a personal grievance that he was unjustifiably dismissed and he is entitled to remedies.

Remedies**Reimbursement of lost wages**

[47] I am satisfied that Mr Hogeboom looked for other work after he was dismissed and got a part time role after two weeks. Mr de Wattignar said that the 13 week claim for lost wages should be reduced by \$1,000 to account for earnings received. The difficulty is that there is nothing before the Authority from the Inland Revenue Department (IRD) or by way of bank statements to support that was the amount actually received by Mr Hogeboom for the 13 week period.

[48] Mr Hogeboom is entitled, subject to any findings about contribution, to reimbursement of 13 weeks lost wages calculated on the basis of \$17 per hour for a 30 hour week less any money received for that period. That is \$510 gross per week or \$6,630 gross. Mr Hogeboom says that he received \$1,000 which should then be deducted. Before making any order for lost wages I would like Mr de Wattignar to attempt to obtain verification of earnings either from the IRD or bank statements for that 13 week period. If agreement about lost wages cannot then be reached I reserve leave for Mr de Wattignar or Ms McKay to return to the Authority and the Authority will make an appropriate order for reimbursement.

Compensation

[49] Mr Hogeboom said that he felt quite depressed about the loss of his work which he had enjoyed. I find that subject to any findings about contribution Mr Hogeboom is entitled to compensation in the sum of \$4,500.

[50] I order Quality Firewood Limited to pay to Nicholas Hogeboom the sum of \$4,500 without deduction.

Contribution

[51] The Authority is required in deciding the nature and the extent of any remedies to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance. If it is found that the actions so require then the remedies are to be reduced. I am not satisfied in this case that Mr Hogeboom contributed towards the situation that gave rise to the personal grievance. Although he talked about resigning this was clearly at the time of a heated argument when he thought he was being accused unfairly of being on drugs when he was sick. I do not make any reduction to the remedies awarded.

Costs

[52] I reserve the issue of costs. Mr de Wattignar has until 5 March 2014 to lodge and serve submission as to costs and Ms McKay has until 19 March 2014 to lodge and serve submission in reply.

Helen Doyle
Member of the Employment Relations Authority