IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 188
5412288

	BETWEEN	LISA MARTIN-PAYNE Applicant
	A N D	RESERVENEWZEALAND LIMITED Respondent

Member of Authority: James Crichton

Representatives: No appearance for Applicant
Roland Leemans, Advocate for Respondent

Investigation Meeting: 9 May 2014 at Tauranga

Date of Determination: 14 May 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] A statement of problem in this matter was filed in the Authority on 10 September 2013 and a statement in reply filed on 26 September 2013.

[2] A telephone conference was convened with the parties by my colleague Member Anderson on 11 October 2013. As part of the outcome of that telephone conference, a timetable was set for the filing and serving of briefs of evidence.

[3] Despite reminders from the Authority, Ms Martin-Payne failed to lodge her statement of evidence on the appointed dated (6 December 2013) and on 19 December 2013 Member Anderson issued the following Minute:

> *The Authority notes that the applicant, Ms Martin-Payne has not filed her witness statement by 6 December 2013, and despite a second*

> *reminder sent on 9 December 2013, the Authority has heard nothing from her.*
>
> *In regard to the investigation meeting set down for 30 January 2014, Ms Martin-Payne is required to indicate her intentions by not later than 5pm Monday 23 December 2013. In the event that the Authority does not receive any communication from Ms Martin-Payne by this time, it will be taken that she does not wish to proceed with her claims, the Authority's file will be closed and the investigation meeting will be abandoned.*

[4] Because Ms Martin-Payne took no steps in response to the Authority's Minute the investigation meeting set down for 30 January 2014 was vacated and the Authority's file closed. The parties were notified of those actions on 13 January 2014.

[5] Then, on 16 January 2014, Ms Martin-Payne filed a witness statement. In subsequent communication between the Authority's support officer and Ms Martin-Payne, she indicated she wished to proceed with her claim.

[6] Consequently, the matter was referred back to Member Anderson and by determination issued as [2014] NZERA Auckland 100 and dated 20 March 2014, Member Anderson granted Ms Martin-Payne's request that the Authority's investigation be reopened.

[7] The gravamen of that decision of the Authority is contained in para.[11] of his determination. That paragraph is in the following terms:

> *[11] Notwithstanding the very tardy behaviour of Ms Martin-Payne, the Authority is bound to apply its equity and good conscience jurisdiction and allow her the opportunity to have the merits of her claim that she was unjustifiably dismissed, examined by a independent decision making body. In regard to the obvious inconvenience that the respondent has, and may further be put to, that is a matter that can, eventually, be addressed by an appropriate order for costs following the investigation and determination of the merits of the claims being pursued by Ms Martin-Payne.*

[8] In his final paragraph, Member Anderson makes the point that Ms Martin-Payne is *expected to fully comply with all future directions and timetables set by the Authority*.

[9] Because Member Anderson had directed that the file be referred to another member it came on to my list. I convened a telephone conference with the parties on 1 May 2014. I am satisfied that both parties received proper advice about the date and time for that telephone conference but notwithstanding that, Ms Martin-Payne did not attend.

[10] I determined to proceed, concerned that further delay would only exacerbate the inconvenience to the respondent (RNZ) and accordingly set the matter down for hearing.

[11] Again, I am satisfied Ms Martin-Payne was properly advised of the time, date and place of the investigation meeting but again she has chosen not to engage in the Authority's process. I deferred the start of the investigation meeting for 15 minutes to give her any opportunity to attend if she was simply running late. Moreover, I have satisfied myself that there has been no message received from Ms Martin-Payne in respect to her non-attendance, either on the day of the hearing, or subsequently.

[12] It follows that I am satisfied I am able to proceed with the Authority's investigation and to subsequently determine the matter, and I now do so. I am conscious of the fact that Ms Martin-Payne has already had one indulgence from the Authority and in that reopening decision, my colleague Member Anderson quite properly emphasised the need for Ms Martin-Payne to comply with future directions of the Authority. Notwithstanding that clear injunction, she has chosen not to do so and I am not persuaded there is reason to preclude me from concluding the substantive matter once and for all.

Discussion

[13] The Authority's standard notice of hearing, including the notice of hearing issued in relation to this matter, has appended to it a series of notes, the first of which is in the following terms:

> *If the applicant does not attend the investigation meeting, the matter may be dismissed and costs may be awarded against the applicant.*

[14] Notwithstanding that statement of the Authority's usual practice, it seems to me more appropriate that I address the merits of the application in so far as I am able, given the failure of the applicant to attend to prosecute her claim.

[15] Notwithstanding that failure to engage, I do have evidence before me both by way of sworn testimony from the respondent employer ReserveNewZealand and of course by way of Ms Martin-Payne' statement of problem and her subsequent filing of a statement of evidence. However, because of Ms Martin-Payne's unexplained absence from the Authority's investigation meeting, I have not had the benefit of getting sworn evidence from her nor have I been able to question her about the obvious differences between her various claims and the position of RNZ, who did attend the investigation meeting and did give sworn evidence.

[16] It is evident first of all that Ms Martin-Payne says that she has been unjustifiably dismissed.

[17] There is a written employment agreement which is relied on by both parties. Its terms include a commencement date of 9 January 2013 and a trial period clause in terms of s.67A of the Employment Relations Act 2000 (the Act). The effect of that section of course is that, where a trial period is properly activated by the effect of that section in the statute, an employee may serve a trial engagement with the employer and if the employer chooses to bring that engagement to an end within the trial period, then the employee has no statutory rights to bring a personal grievance for unjustified dismissal.

[18] However, it is clear law that those provisions in s.67A of the Act must be complied with strictly. In the present case, there are three apparent difficulties. The first is that the clause in the individual employment agreement does not seem to me to be drafted in accordance with the statute because it refers to three months trial rather than 90 days trial. They are not the same thing and the law construes this particular matter very strictly. On that basis alone, the employer could not exclude Ms Martin-Payne from bringing a personal grievance to challenge a dismissal made in reliance on the clause.

[19] However, there are two other issues that I need to refer to. In her statement of evidence, Ms Martin-Payne claims that the employment agreement was executed (by her anyway) after the employment commenced. If that is right then that infringes the rule in s.67A(3) of the Act which defines an employee as a person who has not previously been employed by the employer. Moreover, that conclusion is emphasised by reference to the words in s.67(A)(2)(a) which refer to the trial period starting at the

beginning of the employment. Plainly, if the employment started before the trial period did, then the trial period does not apply.

[20] Moreover, Ms Martin-Payne says the trial period was imposed on her without discussion or agreement. I deal with that claim at once. RNZ's evidence is quite different and I prefer their evidence. They say they went through the proposed agreement clause by clause with Ms Martin-Payne and they provide email traffic to confirm this. I am satisfied then that Ms Martin-Payne knew or ought to have known what she was signing, when she executed the agreement.

[21] Those aspects may seem a little extreme to employers seeking to rely on a trial period but the law requires strict adherence to the principles in the section of the statute precisely because the effect of s.67A is to remove the normal rights that an employee has to challenge a dismissal.

[22] On the fact of it then, the drafting of the relevant clause in the individual employment agreement is such as to be incapable of being relied on successfully by RNZ to exclude the possibility of a personal grievance claim in reliance on the trial period provisions. This is because of the reference to three months rather than the statutory requirement of *a specified period (not exceeding 90 days).* On this basis alone, I must conclude that Ms Martin-Payne could bring her claim for unjustified dismissal before the Authority.

[23] That position is further strengthened, or would be further strengthened more accurately, if Ms Martin-Payne had attended at the investigation meeting and satisfied me that she in fact signed the employment agreement after the employment started. If that is the case, then I would have to conclude that the employment pre-dated (even by a day or so) the execution of the employment agreement and thus she was employed before the trial period actually commenced at law. However, because Ms Martin-Payne did not engage with the Authority's process, I am unable to draw that conclusion.

[24] It follows from the foregoing that Ms Martin-Payne's claim is able to be considered by the Authority. However that is not an end of it because on the facts before me, it seems that in effect, there was not one dismissal but two.

[25] The first happened when Ms Martin-Payne was called to a meeting with RNZ on 12 February 2013 and told that her employment was being terminated in reliance

on the trial period in her employment agreement, which I have just discussed. RNZ told me that they were dissatisfied with Ms Martin-Payne's progress in her role and not satisfied that she could improve satisfactorily in order to make her a valuable employee. There is no question that that discussion took place well within the terms of the trial period provided by law (some five weeks after the employment commenced) but as I have already noted, the way in which the matter was expressed in the employment agreement (referring to three months rather than no more than 90 days) invalidated reliance on the provision for the purposes of avoiding a possible personal grievance claim.

[26] In any event, having dismissed Ms Martin-Payne in reliance on that provision, what happened next was that Ms Martin-Payne then returned to her desk and she claims that she then sent personal material from her work computer to her home computer. To the contrary, RNZ say that she proceeded to download confidential material belonging to them in breach of the relevant provisions relating to that class of material in her operative employment agreement.

[27] Ms Martin-Payne was remonstrated with by RNZ senior management, asked to stop downloading RNZ material and delete the stolen documents and leave the work premises immediately. On the evidence I heard from RNZ, I am satisfied that that is what happened, that Ms Martin-Payne refused to comply with RNZ's reasonable request, refused to meet with RNZ formally to explain herself, and that in consequence she was effectively ushered from the building.

[28] It is common ground that in the course of her exiting the building, Ms Martin-Payne was touched on the elbow by a senior manager with RNZ and she subsequently made a complaint to the Police in relation to that matter.

[29] After exiting the premises, Ms Martin-Payne subsequently received two letters from the employer, the first of which simply confirmed the dismissal in reliance on the trial period, and the second set out the circumstances relating to her theft of company property.

[30] The second letter identified the employer's concerns and repeated the request for a meeting in which Ms Martin-Payne could explain her actions and comment on the suggested conclusion that her actions amounted to serious misconduct which would justify summary dismissal.

[31] In the result, Ms Martin-Payne made no further attempt to engage with the employer and the dismissal, whatever its terms, stood.

[32] In conclusion then, I am satisfied that RNZ could not properly rely on the trial period in the employment agreement provided to Ms Martin-Payne because its drafting does not adequately meet the terms of the law for reasons that I have already made clear. However, I am also satisfied that as a matter of fact, it was available to RNZ to dismiss Ms Martin-Payne for the misappropriation of company material, a clear breach of Ms Martin-Payne's employment agreement in that regard, and that in the absence of any engagement from Ms Martin-Payne or any willingness on her part to talk with the employer about what she had done, the dismissal must be analysed as a dismissal for serious misconduct because of the misappropriation of company documents.

[33] Applying the test required by s.103A of the Act to the present circumstances, I have no hesitation in concluding that a good and fair employer could have dismissed Ms Martin-Payne for serious misconduct for the misappropriation of company property.

[34] In the unusual circumstances of this case, it seems to me that a correct analysis of the position is that RNZ purported to dismiss Ms Martin-Payne in reliance on the trial period in the employment agreement, that reliance on that trial period clause was misplaced for the reasons I have identified, and that if Ms Martin-Payne had not then misappropriated company documents, and she had engaged with the Authority in the usual way, as part of the prosecution of her claim, Ms Martin-Payne might have succeeded in satisfying the Authority that she had a personal grievance by reason of having been unjustifiably dismissed in erroneous reliance on an unsatisfactory trial period clause.

[35] But in the present case, it is the subsequent conduct of Ms Martin-Payne that effectively changes the balance back in favour of the employer. It is difficult to see what else a good and fair employer could do when faced with a departing employee misappropriating confidential information in circumstances where that departing employee, failed to engage with the employer, failed to explain, refused to meet, and subsequently refused to delete and/or furnish an affidavit confirming no material was still held.

[36] I am satisfied then that Ms Martin-Payne has no viable personal grievance against RNZ and that their actions in attempting to protect their company property were actions that a good and fair employer could have taken in the particular circumstances of the case.

[37] Because Ms Martin-Payne did not bother to attend the Authority's investigation meeting, despite the Authority's warnings that if she failed to comply a second time with timetables, she risked having her matter struck out, I have, of necessity had to place more reliance on the sworn evidence RNZ than on the unsworn statements made by Ms Martin-Payne. Lest the matter be in any doubt, I confirm that I prefer the evidence of RNZ to the evidence of Ms Martin-Payne for that reason.

Determination

[38] For reasons already advanced, Ms Martin-Payne's application before the Authority is now dismissed. Because Ms Martin-Payne did not attend the investigation meeting I was not able to consider her evidence in regard to the claims that she makes against RNZ. I have read the brief of evidence that she filed but given that none of that evidence has been able to sworn before me or tested in the usual way in an Authority investigation, I cannot properly weigh her claims, when measuring them against the sworn evidence of RNZ.

[39] Conversely, RNZ did attend the investigation meeting, did provide witnesses who swore their evidence on oath but of course that evidence could not be properly set against the evidence of Ms Martin-Payne because she simply did not bother to turn up and prosecute her claim.

[40] I am grateful to the staff and consultants of the respondent ReserveNewZealand Limited for attending the investigation meeting and allowing me to have their evidence confirmed as sworn testimony. I understand their frustration about the long running nature of this particular claim but as I endeavoured to make clear to them, the law gives employees who feel they have a personal grievance for unjustified dismissal, the right to bring their claim to the Authority and have it considered. The only proper way in which such a claim can be considered is on the footing that the employer responds to the claim in a formal way.

[41] This is so even where, as in this case, RNZ rely, at least in part, on a trial period of employment.

[42] Moreover, this matter was more complicated than a straight forward dismissal within a trial period and simple reliance on that. Here, in effect there were two dismissals, one after the other. Ms Martin-Payne was dismissed first in terms of the trial period and then, when she was observed downloading confidential intellectual property belonging to RNZ for her own use, she was dismissed again, this time for serious misconduct. The paper trail for this second dismissal suggests that RNZ wanted to engage with Ms Martin-Payne to seek her explanation about what she was up to in taking this material, but that she refused to engage with them and as a consequence had to be ushered from the employer's building.

[43] In any event, I simply make the observation that in a case such as this which is not a simple reliance on a trial period engagement and a dismissal within that trial period, there is an ability for an employee to bring her claim before the Authority and have it considered. If Ms Martin-Payne had engaged with the Authority on one of the two occasions that she has had to prosecute her action, the Authority could have heard the matter in the usual way, with both parties engaged in the process, considered the evidence of both parties and issued a determined on the merits.

Costs

[44] Member Anderson rightly drew attention in his determination of 20 March 2014 to the issue of costs incurred by RNZ. There is no question that RNZ have been put to trouble and expense in defending a claim brought by Ms Martin-Payne which she has not even bothered to prosecute. The fact that she has not taken the trouble to engage in the Authority's process does not mean that RNZ has not incurred cost.

[45] If RNZ have incurred costs in defending Ms Martin-Payne's claim, they are entitled to have those costs fixed by the Authority if they wish. Accordingly, I grant leave for ReserveNewZealand Limited to apply to the Authority to have costs fixed. That application should be made within 14 days of the date of this determination. The application should be provided to Ms Martin-Payne as well as to the Authority.

[46] Ms Martin-Payne then has 14 days from the date of her receipt of RNZ's application to file a response.

James Crichton
Member of the Employment Relations Authority