

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 522
3252999

BETWEEN LESLIE MCALLEY
Applicant

AND NW & M MCFALL
Respondent

Member of Authority: Peter van Keulen

Representatives: No appearance by the Applicant
Nigel McFall for the Respondent

Investigation Meeting: 30 August 2024 in Christchurch

Submissions Received: Nothing received from either party

Date of Determination: 30 August 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Leslie McAlley was employed by NW & M McFall as a security guard from 6 May 2023 until 17 May 2023. During this time, Mr McAlley only attended work on three days due to a combination of illness and injury.

[2] When Mr McAlley sought further unpaid leave on 17 May 2023, Nigel McFall terminated Mr McAlley's employment; activating the right to dismiss him within a 90-day trial period.

[3] Mr McAlley claimed that NM & M McFall could not rely on the trial period provision in his employment agreement as he had not agreed to it and had not signed his employment agreement before commencing employment. Mr McAlley lodged a statement of problem in the Authority based on unjustified dismissal.

The Authority's investigation

[4] Mr McAlley was represented by an advocate; they lodged his statement of problem in the Authority and dealt with the directions set to progress this matter to an Investigation Meeting.

[5] On 20 August 2024, the day before the Investigation Meeting for this matter, Mr McAlley's advocate advised that they no longer had instructions having not had contact with Mr McAlley for several weeks.

[6] On 21 August 2024, the day of the Investigation Meeting for this matter, Mr McAlley did not attend the meeting.

[7] I adjourned the Investigation Meeting and rescheduled it for 30 August 2024. I then produced a minute recording the adjournment and advising Mr McAlley that if he did not attend the rescheduled Investigation Meeting, I would proceed without him. This minute was served on Mr McAlley, together with a Notice of Investigation Meeting, using the email address for Mr McAlley that the Authority had on file.

[8] On 30 August 2024, Mr McAlley failed to attend the rescheduled Investigation Meeting and he failed to contact the Authority to explain his absence.

[9] I am satisfied that Mr McAlley had been advised of the new Investigation Meeting date and that I would proceed without him if he failed to attend. On this basis I was satisfied that I could proceed in Mr McAlley's absence, with Mr McFall.

[10] In my investigation meeting, under affirmation, Mr McFall confirmed his written statement and gave oral evidence in answer to questions from me.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Analysis

Issue

[12] Mr McAlley's claim is based on unjustifiable dismissal. In particular Mr McAlley's claim is that he was unjustifiably dismissed because Mr McFall could not rely on the trial period provision in circumstances where he had not signed his employment agreement prior to commencing work.

[13] Mr McFall says the trial period provision was valid and agreed by Mr McAlley prior to him commencing work. And Mr McFall says the termination of Mr McAlley's employment was carried out correctly in terms of the trial period provision.

[14] I must determine if the trial period provision in Mr McAlley's employment agreement is valid and the termination of his employment was implemented in line with the provision. If it is valid and termination was implemented correctly, then Mr McAlley's claim for unjustifiable dismissal cannot proceed as he is unable to bring a personal grievance or legal proceedings in respect of the dismissal.¹

What happened?

[15] In early 2023 Mr McAlley contacted Mr McFall enquiring about work as a security guard.

[16] In April 2023 Mr McFall offered Mr McAlley employment on a casual basis. Mr McAlley did not accept this work.

¹ Section 67B(2) of the Act.

[17] Mr McAlley then contacted Mr McFall on 28 April 2023 enquiring again about work as a security guard.

[18] Mr McAlley and Mr McFall then met on 1 May 2023 to discuss possible employment. In this meeting Mr McFall explained to Mr McAlley that he was prepared to offer employment to him but given his track record any employment would have to be subject to a 90-day trial period. Mr McFall then offered Mr McAlley employment; he produced an employment agreement for Mr McAlley and both of them worked through this to ensure Mr McAlley understood the terms of employment being offered. Mr McAlley was given a copy of the employment agreement to take away to review and take advice on if required.

[19] Later, on 1 May 2023 Mr McAlley sent an email to Mr McFall asking for a further copy of the employment agreement as he needed proof of employment for a new tenancy he was seeking to enter into.

[20] Mr McFall emailed a further copy the employment agreement to Mr McAlley. In the email Mr McFall advised Mr McAlley that he could respond to the email accepting the agreement once he had had an opportunity to read over it. Then when he attended to start work there would be other paperwork that would be required to be completed and signed.

[21] Mr McAlley responded by email on 1 May 2023 advising that he accepted the employment agreement.

[22] Mr McAlley was due to start work on 6 May 2023 but before he attended work Mr McAlley advised Mr McFall that he was unwell and would not be at work that day.

[23] Mr McAlley was absent from work on 6 and 7 May 2023. Mr McAlley was not rostered to work on 8 and 9 May 2023, and then he attended work on 10 May 2023. Mr McAlley did not sign his employment agreement before he commenced work on 10 May 2023.

[24] Mr McAlley worked on 10, 11 and 12 May 2023 and on 13 May 2023 he advised Mr McFall that he had injured his ankle and was unable to attend work. Mr McAlley then had 13 and 14 May 2023 off work because of this injury.

[25] Mr McAlley was then due to work again on 17 May 2023. On that day he contacted Mr McFall and advised that due to a family bereavement he would require further leave.

[26] Later, on 17 May 2023 Mr McFall gave Mr McAlley notice of termination of his employment relying on the 90-day trial period provision in the employment agreement.

Assessment

[27] On the basis of the documents that have been submitted in this matter and the evidence of Mr McFall I am satisfied of the following:

- (a) The trial period provision contained in the employment agreement that Mr McAlley accepted was a compliant provision; that is, it met the requirements of the Act.
- (b) Mr McAlley must have known that the trial period provision would be included in the employment agreement as this was discussed with him in the meeting on 1 May 2023.
- (c) Mr McAlley was advised of his right to obtain legal advice in respect of the employment agreement that he received. Whether Mr McAlley sought legal advice or not is unknown but after receiving the employment agreement he advised, by email, that he accepted the terms of that agreement.
- (d) Both Mr McAlley and Mr McFall intended the employment agreement to become binding on the exchange of emails; evidenced by Mr McFall's email and the fact that Mr McAlley sought to rely on his acceptance of the terms and conditions of employment as proof of employment for the new tenancy he was entering into.

[28] For these reasons I am satisfied that the trial period provision in Mr McAlley's employment agreement was valid and could be relied on to terminate Mr McAlley's employment.

[29] I am also satisfied that Mr McFall terminated Mr McAlley's employment in reliance on, and in accordance with, the trial period provision.

[30] Therefore, pursuant to s 67B of the Act Mr McAlley cannot bring a claim of unjustifiable dismissal; I do not have jurisdiction to determine the claim.

Summary

[31] Mr McAlley's unjustifiable dismissal claim cannot proceed and is dismissed.

Costs

[32] As NW and M McFall did not incur any legal costs in responding to Mr McAlley's claim there is no basis to award costs to them.

[33] There is no order for costs.

Peter van Keulen
Member of the Employment Relations Authority