

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 111
5539819

BETWEEN JON-PAUL MOSES
 Applicant

A N D FULLY SYNCED LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Eugene Morgan-Coakle, for the Applicant
 Nick Kane, Director of the Respondent

Investigation Meeting: 14 and 22 December 2015 at Auckland

Date of Determination: 12 April 2016

DETERMINATION OF THE AUTHORITY

- A. Jon-Paul Moses was unjustifiably dismissed by Fully Synced Ltd.**
- B. Fully Synced Ltd must pay Mr Moses within 14 days of the date of this determination the following remedies regarding his grievance:**
- (i) \$6946.87 gross as reimbursement for lost wages, and interest on that sum at the prescribed rate of 5% from 2 March 2015 (the date of filing) to the date of payment; and**
 - (ii) \$2,000 as compensation for humiliation, loss of dignity and injury to feelings.**
- C. Fully Synced Ltd must pay Mr Moses within 14 days of the date of this determination:**
- (i) \$34.20 holiday pay;**
 - (ii) \$3000 as a contribution to his costs of representation; and**
 - (iii) \$71.56 as reimbursement of the Authority's filing fee.**

Employment relationship problem

[1] Jon-Paul Moses (Mr Moses) claims alternatively that he was subject to unjustified disadvantage by his employer Fully Synced Ltd (Fully Synced), or that he was unjustifiably dismissed by it when he refused to sign an employment agreement. Mr Moses also claims that he was not paid any holiday pay at the end of his short employment with Fully Synced.

[2] Nick Kane on behalf of Fully Synced denies Mr Moses' personal grievance claims. During a case management conference on 15 October 2015 Mr Kane indicated that he would pay Mr Moses the holiday pay before the investigation meeting. That did not occur.

The Issues

[3] The issues for investigation and determination were:

- (a) Was Mr Moses dismissed by Fully Synced or did he leave of his own accord?
- (b) If Mr Moses was dismissed, was that dismissal unjustified?
- (c) If there was an unjustified dismissal, what remedies should be awarded?
- (d) If any remedies are awarded, should they be reduced under s 124 of the Employment Relations Act 2000 (the Act) for any blameworthy conduct by Mr Moses which contributed to the situation giving rise to the grievance?
- (e) If there is no unjustified dismissal, was Mr Moses subject to any unjustified disadvantage?
- (f) Is Mr Moses owed any holiday pay by Fully Synced?
- (g) Should there be any contribution towards the costs of Mr Moses' representation?

The Investigation

[4] There were difficulties with Mr Kane making himself available which meant that the investigation meeting process was affected.

[5] The investigation meeting commenced on 14 December 2015, when I heard evidence from Mr Moses' father, Jon Moses (whom I will refer to as Mr Moses snr), and Mr Moses' mother, Maryrose Morgan-Coakle. The meeting continued on 22 December to accommodate Mr Kane who attended by telephone, when I heard evidence from Mr Moses and Mr Kane.

[6] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during my investigation of Mr Moses' claims.

Fully Synced

[7] Fully Synced repaired mobile phones, tablets and other computer devices from a Parnell office. Mr Kane is the sole director and shareholder of the company. At the time of Mr Moses' appointment, there were no other employees.

[8] Mr Kane contacted Work & Income New Zealand (WINZ) in order to employ a staff member utilising a subsidy which WINZ can provide.

Ms Moses' interest in Fully Synced role

[9] Mr Moses had obtained a degree in business, marketing and sales from AUT finishing in about 2011. He had undertaken some work, largely of a casual or fixed term nature, between then and late 2014. Mr Moses was a WINZ client who expressed interest in the Fully Synced job.

[10] I was provided with little documentation about the appointment process. Mr Kane and Mr Moses agreed that they had met three or four times to discuss the prospect of Mr Moses working for Fully Synced, and that Mr Moses had undertaken a practical test set by Mr Kane, of putting a phone back together.

Verbal Employment Agreement

[11] On 23 November 2014 the parties met and reached a verbal agreement of employment. The agreement was that Mr Moses would work as a technician for the company, that he would have to undertake some studies in electronics, that his start

date was 1 December 2014 and that his initial pay rate was \$14.25 gross per hour with specified increments to that available as Mr Moses obtained qualifications. These figures were written on what Mr Moses described as a “random” piece of paper, not in the form of a letter of offer of employment, or written employment agreement. There was no mention of a written employment agreement at this meeting.

[12] Mr Kane mentioned that he planned to move to the South Island in the New Year and that Mr Moses could effectively take over running the Parnell store, with Mr Kane undertaking various marketing tasks from the South Island and running a similar repair office down there.

[13] Fully Synced suggested that Mr Moses may have been a contractor. However, this was on the basis that a written employment agreement had not been signed. The fact that Mr Moses had been referred to Fully Synced from WINZ and that Mr Moses was presented with a written employment agreement by Mr Kane, were sufficient to satisfy me that Mr Moses was an employee of Fully Synced.

[14] Mr Moses started work on Monday 1 December 2014, working the agreed hours of 9.30am to 6pm.

Discussions on Written Employment Agreement

[15] On Tuesday 2 December 2014 Mr Kane created a written employment agreement largely from material on the then Department of Labour website. Having discussed employment issues with a friend who was in a similar business, Mr Kane added a “return of service” clause which specified that given the level of training required to bring Mr Moses up to speed, a *“return of service of 15 months will commence after completion of the three month trial period”*. This appears to have been in the nature of a bonding requirement.

[16] The employment agreement contained an acknowledgement by the employee in clause 15, that they had been advised of their right to take independent advice and been given a reasonable opportunity to take that advice.

[17] Mr Kane presented the individual employment agreement (the agreement or the contract) to Mr Moses on the afternoon of Tuesday 2 December. There was no letter with it. At this point, Mr Moses had been working for the company for over a day and a half. Mr Moses said that he would need to take the agreement home and

read it. Mr Kane asked Mr Moses to sign and return it as soon as he could, without mentioning any specific time.

Review of Employment Agreement

[18] At this point Mr Moses was about 24 years old and was living at home with his parents. The next day Mr Moses told Mr Kane that his family were reviewing the agreement, including his father who lectures in finance and accounting, and his uncle who was a lawyer. He told Mr Kane that he needed more time. A full review looked like it was going to take a little while, possibly until Mr Moses' uncle could analyse the agreement in the upcoming weekend. However, some concerns were apparent early on. These included:

- (a) a trial period which removed Mr Moses' ability to bring a dismissal personal grievance claim. Mr Moses was told by his family that such a clause could not be valid as he had already started work;
- (b) a restraint of trade clause preventing Mr Moses from working within a certain radius of Fully Synced for 18 months; and
- (c) the "return of service" bonding provision, when Mr Kane was not contributing to the costs of Mr Moses' training.

[19] Mr Kane appears not to have understood why, in the circumstances of Mr Moses' employment having already started, the agreement could not contain an effective trial period, when the Department of Labour's material contained such a clause. However, there was no indication that he made any attempt to get advice on this issue.

[20] Mr Moses let Mr Kane know that he was getting advice and that some of the clauses needed to be discussed. Mr Moses felt that Mr Kane was pressuring him to sign the contract.

[21] Mr Moses said that Mr Kane told him to bring the contract in signed on Friday, or not to come in at all. Mr Moses found this upsetting.

Discussion with Ms Morgan-Coakle

[22] On Thursday 4 December in the early evening Ms Morgan-Coakle went into Fully Synced office, to pick up her son. Mr Kane then arrived at the office. Ms Morgan-Coakle says that Mr Moses said to Mr Kane something like; you don't want me to come in tomorrow? Mr Kane said no, you haven't signed the contract. Ms Morgan-Coakle said to Mr Kane that her son couldn't sign the contract until he have had a look at it and changed some things that were not normal things. She says that Mr Kane said to Mr Moses, you had better not come in tomorrow.

[23] When Ms Morgan-Coakle questioned why, she says that Mr Kane said that he would not waste his time teaching Mr Moses anything more until he signed the contract. Ms Morgan-Coakle made reference to the 90 day trial not being valid as her son had already started work.

Discussion with Mr Moses snr

[24] On the evening of 4 December, Mr Moses' snr phoned Mr Kane to say that his son's uncle would review the contract over the weekend. There was some discussion about particular clauses. Mr Moses snr says that Mr Kane told him that if Mr Moses wanted to come back he had to sign the employment contract.

[25] Mr Moses snr raised the concern about the trial period when work had already commenced. Mr Kane said that he would then require Mr Moses to sign a new contract with a 90 day clause in it, to "restart the whole thing". Mr Moses snr said that that would not be legal.

Discussions on Friday 5 December 2014

[26] On Friday morning Mr Moses, with Mr Moses snr with him, rang Mr Kane to ask him to go to urgent mediation regarding the contract. Mr Kane refused.

[27] Later in the day Mr Moses went into the Fully Synced office to pick up his belongings. Ms Morgan-Coakle drove him there and waited in the car for his return. When he arrived back Mr Moses was upset. There was some discussion between Mr Kane and Mr Moses that afternoon about the possibility of Mr Moses having until Saturday at 5pm to sign contract, or of a Saturday meeting with Mr Morgan-Coakle present. However, Mr Moses had a clear final impression at the end of the discussion

on 5 December that Mr Kane had told him that he did not have a job. This was conveyed by Mr Moses to his mother on the way home in the car and later to his father.

[28] Mr Moses snr said that when he came home late Friday his son told him that Mr Kane had said that he (Mr Moses jnr) no longer had a job as he had torn up the contract.

Was Mr Moses dismissed?

[29] The first issue is whether Mr Moses was dismissed by Fully Synced or left of his own accord.

[30] Mr Kane raised with the Authority the possibility that Mr Moses was not that keen on the Fully Synced job and that he had decided to leave for personal reasons. I do not accept that submission. By both his own and his mother's evidence, Mr Moses was pleased to have found work, and was interested in a career in electronics. He had been investigating the further study which Mr Kane wanted him to do.

[31] Rather, I find that Mr Moses was told by Mr Kane that if Mr Moses wanted to continue working he had to sign the employment agreement. Mr Moses did not want to sign the agreement in its current form, and whilst attempting to have discussions (both on his own and through his parents) with Mr Kane, Mr Moses did not agree to sign it in its current form.

[32] I find that on Friday 5 December 2014 Mr Kane on behalf of Fully Synced dismissed Mr Moses, by sending him away from his employment when Mr Moses was not prepared to sign the employment agreement within the time he specified.

Was Mr Moses' Dismissal Unjustified?

[33] The test of justification under s 103A of the Act is whether the employer's actions, and how the employer acted, were what a reasonable employer could have done in all the circumstances.

[34] In applying the test, I must consider amongst other things whether having regard to the resources available to Fully Synced, it sufficiently investigated the allegations against the employee before dismissing him (s 103A(3)(a) of the Act).

[35] I accept that Mr Kane was eager to have Mr Moses' employment agreement signed off. However, Mr Kane had allowed Mr Moses to start work without a written agreement being offered to him.

[36] Mr Moses was exercising his legal right to enter into discussion with his employer about the contents of his employment agreement. Although this process may have been taking longer than Mr Kane wanted, some progress had been made, as Mr Kane had agreed to remove the return of service clause.

[37] Mr Moses kept Mr Kane informed about the advice he had received and when his uncle's review was to occur. By Friday 5 December it was only three days after the agreement had been presented by Mr Kane.

[38] I find that Mr Moses had valid concerns regarding the inclusion of the trial period in the agreement when Mr Moses had already started work. Under s 67A of the Act trial periods can only be used where an employee has not previously been employed by the employer. In *Blackmore v Honick Properties Ltd*¹ the Employment Court held that a trial period was unenforceable as the parties had a verbal employment agreement and the employee had been working for an hour when the written agreement was presented.

[39] Although an alternative approach may have been for Mr Moses to sign the agreement and then fight about the enforceability of the clause later in the event that it became an issue, Mr Moses can hardly be criticised for wanting to get the trial period removed and therefore the situation clear before he signed the agreement.

[40] Once Mr Kane was told that there was a question about the legality or validity of the trial period clause, then I find that a fair and reasonable employer would have sought advice, including the possibility of phoning the then Department of Labour (DOL). Mr Moses had done so regarding the trial period clause and what to do about his situation. I accept that Fully Synced was a small employer, however, Mr Kane was aware of DOL's services, having used its agreement builder.

[41] I find that a fair and reasonable employer could not have dismissed Mr Moses three days after a proposed employment agreement being provided, when that agreement included a significant provision which the employee told the employer was

¹ [2011] ERNZ 445

invalid or illegal. A fair and reasonable employer in such circumstances would have agreed to attend mediation when offered by the employee, in an attempt to resolve the issues while Mr Moses was still in employment.

[42] The answer to the second issue is that Mr Moses' dismissal was unjustified.

What Remedies are Awarded?

Reimbursement of lost wages

[43] Mr Moses claims three months wages; 13 weeks at \$534.375 per week (37.5 hours x \$14.25). This makes a total claim of \$6,946.87 gross.

[44] Under s 128(2) of the Act, the Authority must order the employer to pay to the employee the lesser of lost remuneration or 3 months' ordinary time remuneration. This is subject to s 124 on contribution which is discussed below.

[45] Had Mr Moses claimed more than the three months specified in s 128 of the Act, I would have considered whether there was sufficient likelihood of Mr Moses remaining in that job for a lengthy period. However, there is very limited scope to consider that issue with a three month claim, given s 128.

[46] Mr Moses provided evidence of his attempts to mitigate his loss by finding other work. He applied for multiple jobs in the three months following his dismissal. He got in contact with WINZ, which would have put him in line for their job assistance programmes. His mother gave evidence of her involvement assisting Mr Moses with his letters of application.

[47] Interest was claimed on the amount of reimbursement sought. I order that interest is paid on the sum of \$6946.87 from 2 March 2015, being the date in which Mr Moses' claim was lodged in the Authority, until the date of payment.

Compensation for humiliation, loss of dignity and injury to feeling

[48] Mr Moses claimed \$4,000 compensation for humiliation, loss of dignity and injury to feelings. Mr Moses gave evidence regarding the upset and hurt which he felt as a result of not having a job which had taken him months to get. He said that it affected his mental health. He had big arguments with his parents which he found very stressful.

[49] Mr Moses felt humiliated in front of his friends and family, as he had to tell them that he had got a job and then been dismissed after a few days of work. He was extremely embarrassed when he had to go back to WINZ and get back on the benefit.

[50] Mr Moses became depressed and this led to him having to seek medical assistance. He produced a letter from his general practitioner whose view was that the dispute over the contract and loss of work had caused Mr Moses to spiral into depression.

[51] Mr Moses' mother also gave evidence that Mr Moses was terribly upset after his last meeting with Mr Kane, as he had pinned his whole hopes on starting a career (in electronics at Fully Synced). Mr Moses was on the verge of crying, when she said he was not a person who cried often. Ms Morgan-Coakle said that her son had been very excited to get this job. She said that after finishing his confidence was totally knocked, and he seemed to become more and more depressed and withdrawn over the months. He was not socialising very much with his friends and he would become upset after job interviews as he was not confident to know whether it had gone well.

[52] I recognise that Mr Moses had had a very short period of employment. However, he had also been largely without permanent or significant work since he finished his degree about three years before. His mother confirmed his excitement at the possibility of a career in electronics.

[53] There is authority that employees must be taken as they are found in terms of the impact of events on them. However, there are also considerations of remoteness and foreseeability of the harm suffered. It appears from Mr Moses' general practitioner's letter that a pre-existing personal situation may well have been a significant contributing factor to the extent of Mr Moses' depression.

[54] I accept that Mr Moses was deeply affected by his dismissal. However, I also consider that the personal situation, made Mr Moses' reaction significantly more extreme than might otherwise have been the case. Balancing these factors I award Mr Moses \$2,000 compensation under s 123(1)(c)(i) of the Act.

Contribution

[55] Should the remedies be reduced under s 124 of the Act for any blameworthy conduct by Mr Moses which contributed towards the situation which gave rise to the grievance?

[56] It was clear that Mr Kane became irritated and annoyed by what he saw as the delay in Mr Moses signing the agreement and the involvement on more than one occasion of Mr Moses' parents in discussion on the content of the proposed employment agreement. Without needing to consider how Mr Moses' parents dealt with their concerns, I am not satisfied that actions on their part can be seen as being those of Mr Moses for the purposes of s 124.

[57] I consider it reasonable for Mr Moses to get his parents and uncle involved in the process. He is a relatively young man with little experience of the employment process. Mr Kane was aware of this to some extent, having decided that Mr Moses would be worth taking on as a "blank canvass", lacking in any serious work experience.

[58] The issues which were raised on Mr Moses' behalf, particularly regarding the effect of an attempt to introduce a trial period restricting personal grievance rights after employment had started, were legitimate issues. An employer is required under s 63A(2) (b) to (d) of the Act to advise the employee that they are entitled to seek independent advice, to give them reasonable opportunity to do so, and to consider any issues raised. I do not consider that Mr Moses' actions in this regard should be considered to be blameworthy.

[59] I find that there was no contribution on Mr Moses' part to the situation giving rise to the grievance.

Does Mr Moses have a Disadvantage Claim?

[60] As I have found that Mr Moses was unjustifiably dismissed, I do not need to consider the fifth issue, the alternative claim of unjustifiable disadvantage.

Is Mr Moses owed Holiday Pay?

[61] Mr Moses claimed \$34.20, being 8% of his total earnings with Fully Synced (\$427.50). Mr Kane's offer to pay prior to the investigation meeting was not actioned. However, at the meeting on 22 December 2015 Mr Kane said that he did not dispute the holiday pay claimed.

[62] I find that Mr Moses is entitled under the Holidays Act 2003 to the sum of \$34.20 from Fully Synced.

Costs

[63] The final issue is whether there should be a contribution to costs. Mr Moses has been successful in his dismissal claim. He has not been found to have contributed to the situation giving rise to the grievance. Mr Moses has been awarded remedies for his grievance, as well as holiday pay outstanding as at termination of employment.

[64] Submissions on costs were made at the end of the investigation meeting. Clarification was sought regarding Mr Morgan-Coakle's representation, as he is Mr Moses' uncle. Mr Morgan-Coakle informed the Authority that he had a contingency fee arrangement with Mr Moses.

[65] Costs are discretionary but must be exercised in accordance with principle and not arbitrarily. Costs will generally follow the event are frequently based on the Authority's notional daily tariff (currently \$3,500 per day).

[66] The investigation meeting on 14 December 2015 took a little over an hour. The meeting on 22 December lasted almost four hours. I order Fully Synced to pay Mr Moses \$3000 as a contribution to his costs for two part days of meetings.

Nicola Craig
Member of the Employment Relations Authority