

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 419
3128257

BETWEEN KANAVALÉ PALU
Applicant

AND NZ ASSIST LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Applicant in person
 No appearance for respondent
Investigation Meeting: 27 September 2021 by Zoom
Date of Oral Determination: 27 September 2021
Written Record Issued: 28 September 2021

ORAL DETERMINATION OF THE AUTHORITY

- A. Kanavale Palu’s employment with NZ Assist Limited (NZAL) was not covered by a valid trial period.**
- B. Mr Palu was unjustifiably dismissed by NZAL.**
- C. As remedies for his grievance, within 21 days of the date of this determination, NZAL is to pay Mr Palu the following sums:
 - (i) \$6,014.25 gross lost wages; and**
 - (ii) \$8,000 as compensation.****

What is the employment relationship problem?

[1] Kanavale Palu worked for NZ Assist Limited (NZAL or the company) as a telemarketer. Within a month of him starting, his employment was terminated. Mr Palu claims that he was unjustifiably disadvantaged and dismissed by NZAL. The claims are based on the same facts.

How did the Authority's investigate?

[2] The statement of problem was served on the company. The Authority was contacted by NZAL's director Kylie Turgis who advised that the company did not have the financial means to defend the case and therefore did not intend to participate further. No statement in reply was lodged.

[3] Correspondence continued to be sent to NZAL and Ms Turgis informed the Authority that the company would not be participating in the case management conference for the same reason as previously offered.

[4] As Auckland was in COVID-19 Alert Level 3 at the time the investigation meeting was to be held, I proposed hearing this matter by way of Zoom call. No objection was received.

[5] The investigation meeting was held by Zoom on 27 September 2021. There was no appearance for NZAL. The company had received notification of the investigation meeting but having previously indicated that it would not be participating in the Authority's process, I proceeded with the meeting. I heard evidence from Mr Palu under affirmation.

What happened with Mr Palu's work for NZAL?

[6] Mr Palu had previous experience in the financial sector and the NZAL role was relevant to that. He was offered a role and received a written employment agreement from NZAL which included a start date of 7 October 2020. The agreement provided for a trial period of ninety calendar days to assess and confirm Mr Palu's suitability for the role. The clause allows the company to terminate the agreement on two days' notice with Mr Palu then being prevented from pursuing an unjustified

dismissal personal grievance claim. The termination provision allowed NZAL to elect to pay wages in lieu of Mr Palu working out part or all of his notice.

[7] Mr Palu was aware of the existence of a trial period in the proposed agreement before he started training with NZAL. His training commenced on 7 October 2020 but he did not sign the agreement until two or three days after he started.

[8] NZAL did not give Mr Palu any warnings during his employment.

[9] On 22 October 2020 Mr Palu's NZAL manager sent him a text message. The manager indicated he had been listening to Mr Palu's call. He messaged that Mr Palu had hung up on the client and was not "on script", without specifying in what way. The text also referred to not listening to instructions although it is not identified whether that was client instructions or NZAL instructions. Mention was also made of Mr Palu sitting on pause for 10 or 20 minutes at unspecified times.

[10] The text concludes:

Sorry Kana but we need to finish you up today. You will [be] paid for the full shift.

[11] Mr Palu replies that he is sorry and asked for another chance. The manager refuses to do that, messaging "we are done". He referred to having a recording of Mr Palu hanging up on a client. Mr Palu replies that he did not hang up and he did not know which call the manager was referring to. He suggested he could at least be given a written warning. The manager then referred to the pauses with Mr Palu replying that he paused because he had to email the manager and accidentally went on pause.

[12] The following day the manager emailed Mr Palu that his employment is being terminated under the trial period in the employment agreement. NZAL would pay out one week's wages as per the termination provision. Nothing more is said on the reason for dismissal.

Is the trial period valid?

[13] Trial periods which comply with the Act's requirements and are properly utilised by an employer prevent an employee from bringing an unjustified dismissal

personal grievance claim.¹ Given that rights are removed, a strict approach to compliance is needed.² Mr Palu claims that his trial period is not valid on several grounds.

[14] To be effective, a trial period must be agreed before work starts.³ Here the agreement specified that employment commenced on 7 October 2020. However, Mr Palu had already begun paid training with NZAL at the time the agreement was signed and I conclude that there was no agreement about the trial period before Mr Palu commenced work.⁴

[15] Even if I am wrong on that point there is another basis on which the trial period is invalid. On Mr Palu's evidence NZAL appears to have had slightly more than 20 employees. From 6 May 2019 trial periods preventing dismissal claims may only be entered into by small-to-medium sized employers.⁵ Those employers are ones with fewer than 20 employees on the day the employment agreement was entered into.⁶ On the evidence I have, NZAL was not able to use a trial period provision.

[16] Even if the trial period was valid, NZAL has difficulty establishing that it dismissed Mr Palu properly under that clause, as it did not give him the two days' notice required by the clause when it dismissed him by text. The text only refers to payment for the full shift (that day). The email offering a week's wages was only sent after Mr Palu's dismissal had already been completed the day before on 22 October 2020.

[17] Having concluded that the trial period is not valid, I am able to consider Mr Paul's dismissal claim.

Was Me Palu's dismissal unjustified?

[18] NZAL must establish that it acted as a fair and reasonable employer could have done in all the circumstances. This includes looking at the steps in s 103A(3) of the Act.

¹ The Act, ss 67A and B.

² *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpC 111.

³ *Blackmore v Honick Properties Limited* [2011] NZEmpC 152.

⁴ *Senate Investment Trust Through Crown Lease Trustees Limited v Cooper* [2021] NZEmpC 45.

⁵ The Act, s 67A(1), as amended by s 36 of the Employment Relations Amendment Act 2018.

⁶ The Act, s 67A(2).

[19] NZAL took advantage of a trial period by acting in a way which was not fair and reasonable in the absence of such a provision. Performance concerns should be properly raised with an employee in sufficient detail, a response heard and taken into account, any training or support needs considered and, if appropriate, a warning given. NZAL did not take these steps before it told Mr Palu by text that he was dismissed. Its failings were not minor.⁷

[20] There was some text communication about NZAL's concerns at the time and after the dismissal decision was advised but that was too late.

[21] NZAL unjustifiably dismissed Mr Palu. Having found the dismissal grievance established, I do not need to deal with the disadvantage grievance.

What remedies should Mr Palu receive?

[22] Mr Palu claims lost wages and compensation for humiliation, loss of dignity and injury to feelings.

[23] Mr Palu was on \$22 an hour with NZAL, working on average 30.375 hours a week. He attempted to mitigate his loss by finding other work and was successful in January 2021. So his lost wages claim covers a period of nine weeks. I assess his lost wages on the basis of those average weekly earnings as totalling \$6,014.25 gross.

[24] Mr Palu was panicked and stressed by losing his job. He had financial commitments which he had to rearrange as a result of not having wages coming in. He felt as if he had not been treated professionally by NZAL. It was upsetting for him having to go to WINZ for a benefit. He also had to ask his parents for financial assistance which was difficult at his age. I assess the appropriate level of compensation before assessing any contribution by Mr Palu as \$8,000.

[25] I have considered whether Mr Palu contributed to the situation which gave rise to his dismissal. To lead to a reduction in remedies the conduct must have been blameworthy and contributory to the situation giving rise to the dismissal. The text messages outlined above refer to performance matters. Mr Palu said sorry and suggested a written or verbal warning. That could be seen a sign of acceptance of blameworthy conduct but is not necessary so. Given the power imbalance in the employment relationship, Mr Palu could simply have been doing anything to keep his

⁷ The Act, s 103(5).

job. That interpretation is supported by later texts showing Mr Palu denying hanging up on the client and providing explanations for pauses. Mr Palu says he was just trying to find a way to save his job.

[26] In addition, Mr Palu admits hanging up on a client but says that this was because the client was beginning to get abusive and he did not want the situation to worsen.

[27] In the absence of evidence from NZAL or any warnings given to require improved performance, I cannot conclude that Mr Palu's actions were blameworthy. I make no reduction for contribution.

[28] I order NZAL to pay Mr Palu, within 21 days of the date of this determination, the following amounts as remedies for his grievance:

- (a) \$6,014.25 gross as lost wages; and
- (b) \$8,000 as compensation for humiliation, loss of dignity and injury to feelings.

Certificate of Determination

[29] I order that a certificate of determination be issued along with this determination. In the event of non-payment, the certificate can be used for enforcement in the District Court. Alternatively there is a process through the Employment Court.

Costs

[30] I have considered the question of costs but in the absence of evidence that Mr Palu actually paid any relevant costs I make no award.

Nicola Craig
Member of the Employment Relations Authority