IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 158
5334087

	BETWEEN	RICHARD PEARSE Applicant
	AND	HOME VENTILATION HAWKES BAY LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	No appearance by or for the Applicant Ramendra Narayan for the Respondent
Investigation Meeting:	18 August 2011 at Napier
Determination:	14 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Richard Pearse, claims that he was unjustifiably dismissed and/or unjustifiably disadvantaged in his employment by the respondent, Home Ventilation Hawkes Bay Limited (HRV/HRV Hawkes Bay). He also claims that HRV breached its duties of good faith to him and failed to provide holiday and leave records when requested.

[2] HRV denies all Mr Pearse's claims, and notes in particular that Mr Pearse was employed subject to a statutory 90 day trial period, which means that he is unable to bring a grievance for unjustified dismissal or other such legal proceedings.

The issues

[3] The issues for determination are

- First, whether or not Mr Pearse's employment agreement precludes a claim for unjustified dismissal and if not, whether he was unjustifiably dismissed;
- Second, whether or not Mr Pearse was unjustifiably disadvantaged in his employment; or otherwise treated by HRV in breach of its duties of good faith; and
- Third, whether HRV has failed to provide holiday and leave records for Mr Pearse as required.

Non-Attendance by Mr Pearse

[4] Mr Pearse was represented until after the filing of the statement of problem. He did, however, represent himself subsequently, including attending on a directions conference. At that directions conference he agreed to the investigation meeting date and the timetabling of witness statements. Mr Pearse did not, however, comply with any of the directions previously agreed, in that he did not attend the meeting or provide any witness statements.

[5] An Authority Support Officer was unable to contact Mr Pearse on the day of the investigation meeting. Given the difficulties contacting him over the non-provision of witness statements, I was satisfied that no good cause had been shown for his failure to attend. I therefore proceeded with the investigation meeting pursuant to clause 12 of the Second Schedule of the Act.

Factual discussion

[6] I have accepted the evidence of Mr Dean Carran, HRV Hawkes Bay's Managing Director, and that of a co-worker of Mr Pearse. Both were questioned on Mr Pearse's claims as raised in his statement of problem and as covered in the issues section above. There is no reason to doubt their unchallenged evidence, and in particular Mr Carran gave evidence that did not necessarily help HRV's case. I

therefore accept that he was a genuine and honest witness, as was Mr Pearse's co-worker.

[7] I have therefore found the facts as follows. At the time HRV Hawkes Bay was an employer with less than 20 employees. Mr Pearse was employed by Mr Carran on behalf of HRV as a Direct Marketer. He had not previously been employed by HRV Hawkes Bay.

[8] On 22 June 2010 Mr Pearse was offered employment by letter, proposing that the terms of employment would be those in the attached draft individual employment agreement. Mr Pearse was told that he had the right to discuss this offer and seek advice, and that he could contact the Employment Relations Service for assistance. It was noted in the letter of offer that the agreement was subject to a trial period of 90 days duration, as per ss.67A and 67B of the Act. Mr Pearse was then asked to sign the letter and the employment agreement if he agreed with the proposed terms and wished to accept the offer of employment.

[9] Messrs Pearse and Carran signed the employment agreement on 24 June 2010, before Mr Pearse commenced work on 28 June.

[10] Under clause 2.5 of the employment agreement the trial period was set out. It states:

> *The employee and the employer agree that the employee's employment is subject to a trial period:*
>
> - *Of 90 days duration being a period (that is no longer than ninety days) and the trial period will commence on the first day of employment;*
>
> - *During that trial period the employer may dismiss the employee or give notice of dismissal; and*
>
> - *If the employer does so, the employee is not entitled to bring a personal grievance or any other legal proceedings in respect of the dismissal.*

[11] Clause 13.1 provides for *General Termination*. It states:

> *The Employer may terminate this agreement for cause, by providing one week notice in writing to the employee. Likewise the employee is required to give one week notice of resignation or forfeit one week*

> *pay in lieu of the notice. The employer may, at its discretion, pay remuneration in lieu for some or all of this notice period.*

[12] I note here in particular that the employment agreement provides for payment in lieu of notice. Clause 13.2 provides however for summary dismissal for serious misconduct, with non-exhaustive examples being given.

[13] One claim for disadvantage was that Mr Pearse was unable, having been dismissed and paid notice in lieu, to make his bonus that week. I accept that Mr Pearse was given a full induction and ongoing training and support in his role as a Direct Marketer. However, his performance in this role was never satisfactory. He had targets to meet in terms of the numbers of calls made, the ratio that would lead to appointments and the number of *value* appointments made (determined by whether or not the person was home for the appointment and other such factors). In the course of his employment, which was just over two months, Mr Pearse did not meet any of these targets on a regular basis. In fact it appears that the only target he ever made was the percentage of appointments made, and that was only on one week in his two months of employment. There can therefore be no grounds for a claim of disadvantage over not having the opportunity to make bonus.

[14] I also accept that Mr Pearse was counselled about his performance on numerous occasions. In particular, on one occasion when Mr Pearse complained at a staff meeting about the validity of the data used for monitoring performance, he was told that the data was transparent, that his negative attitude was disrupting the training meeting and that he should follow proven company procedures in future.

[15] Furthermore, Mr Pearse had problems meeting the dress code and was specifically taken to task about that.

[16] On two occasions at least Mr Pearse walked out of work during the course of his working day without authorisation. On one occasion he was told very clearly that this was inappropriate and that it should not happen again.

[17] Matters came to a head on 1 September 2010 when three of Mr Pearse's co-workers went to Mr Carran with concerns about Mr Pearse's behaviour. They were all concerned that he was a disruptive influence at work, in particular because of his negativity. However, their specific concern that day was that they had noticed alcohol on Mr Pearse's breath and that the glass he had been drinking from contained alcohol.

[18] Unsurprisingly, Mr Carran was very concerned about this, not wanting to have a potentially drunk person at work. He called Mr Pearse to a meeting in his office.

[19] Although Mr Carran was unclear about the specific order of events, I accept that he told Mr Pearse that he was concerned about his disruptive influence at work and in particular that he had been drinking at work that day. Mr Pearse did not respond. It is quite an acceptable inference for a fair and reasonable employer to draw that he did not respond because he was guilty of drinking at work that day.

[20] Mr Carran then informed Mr Pearse that he was under a trial period agreement and that he could be dismissed without the right to take any action about it, and that Mr Carran was dismissing him in reliance on the trial period. He further stated that Mr Pearse would be paid a week's pay in lieu of notice and his holiday pay. Again, Mr Pearse made no response.

[21] A personal grievance was subsequently raised on Mr Pearse's behalf in November 2010, which also asked for copies of his time and wage records. I accept, on Mr Carran's assurance, that such records were provided.

[22] Unfortunately, the problems raised by Mr Pearse remain unresolved, despite mediation. It therefore falls to the Authority to make a determination.

The law

[23] Under s.67A and 67B of the Act an employee whose employment agreement is terminated by being given notice before the end of the trial period may not bring a personal grievance or legal proceedings in respect of the dismissal, provided the terms of s.67A are met. However, this does not prevent employees from bringing personal grievances or legal proceedings for disadvantage. An employee whose employment agreement contains a trial provision is, in all other respects, to be treated no differently from an employee whose employment agreement contains no trial provision, except an employer is not required to comply with s.4(1A)(c) in making a decision whether to terminate an employment agreement under the trial clause, or to comply with requests for reasons for dismissal under s.120.

[24] In *Smith v. Stokes Valley Pharmacy (2009) Ltd* [2010] NZEMPC 111, para.[48], it was held that trial periods should be interpreted strictly and not liberally,

because they are an exception to the general employee protective scheme of the Act as it otherwise deals with issues of disadvantage in, and dismissals from, employment.

[25] At para.[62] it was held

> *Because a termination of which notice must be given may lawfully occur at any point over a span of time including during, at the moment of conclusion and after the end of a trial provision, "notice" must be more than simply advice of dismissal. Rather the subsection contemplates that it will be advice of when, in future, the dismissal will take effect. That accords with the long established common law requirements of dismissal on notice which can be either express or, if not, "reasonable notice".*

[26] I note that the *Smith* case was not dealing with summary dismissal but rather dismissal on notice, nor dealing with pay in lieu of notice.

[27] It was further held:

> *[63] Subsection (2) does not purport to bar access to any personal grievance but only to such personal grievance as is "in respect of the dismissal". … In particular, still available to an employee dismissed lawfully under subs.(1), is access to what is generally described as the procedure for an unjustified disadvantage grievance under s.103(1)(b) …*
>
> *[69] The effect of s.67B(5)(a) therefore is to relieve an employer in the making of a decision whether to terminate an employment agreement containing a trial provision pursuant to the terms of that provision, only from providing the employee with information relevant to the continuation of the employee's employment about that decision and an opportunity to comment on the information before the decision is made. Other s.4 good faith obligations apply and are enforceable, but other than by personal grievance for unjustified dismissal. Even absent subs.(1A)(c) good faith obligations, those remaining under s.4 are significant and enforceable by trial period employees …*
>
> *[72] So the effect of subs.(5) of s.67B is to relieve an employer of any obligation to advise of proposals for a prospective dismissal or an opportunity for the employee to comment on those before the dismissal takes place and, after the event, to give reasons in writing for the dismissal. …*
>
> *[78] …To refuse to give an employee being dismissed otherwise lawfully, any explanation about why that is happening, is not only inconsistent with the statutory obligation to be "responsive and communicative" but is arguably the antithesis of that requirement of good faith behaviour between the parties in the employment relationship. This obligation is unaffected by ss.67A and 67B …*

> *[81] So whilst an employer is not obliged to notify an employee of the employer's proposal to end the employee's employment or to offer the employee an opportunity to comment thereon, this does not preclude an employee seeking and being entitled to receive an explanation for the dismissal at the time when notice of it is given.*
>
> *[82] Interpreting the s.67A and s.67B obligations strictly and against the removal of rights of access to justice unless clearly so expressed as set out earlier in this judgment, I consider that an employer, upon giving notice of termination of an employment relationship in reliance on s.67B, is not entitled in law to refuse to give an explanation of such a significant decision. Nor is the employer entitled to give an explanation that is misleading or deceptive or that may tend to mislead to deceive the employee.*

Determination

[28] I accept that the trial clause was effective. It was agreed upon in writing in an employment agreement signed by both parties before or at the commencement of the employment relationship.

[29] Because there was serious misconduct warranting summary dismissal, payment was made in lieu of notice, although no notice at all is required for summary dismissal. Where notice as here has been provided for, it need not be the usual form of notice required, such as what is provided for in the employment agreement of one week. Instead, the notice terms of the employment agreement were met by payment in lieu. In effect Mr Pearse was told that his dismissal was to take effect in a week's time, but that he would not be required to work until then, although he would be paid as if he did, consistent with clause 13 of the employment agreement. In such cases the characterisation of such payments has been held to be *more a matter of semantics than substance* (*Land Transport New Zealand v Mackay* unreported Couch J WC14/06 9 August 2006). Thus the facts in *Smith* can be distinguished.

[30] It therefore follows that no claim for unjustifiable dismissal may be brought and I dismiss that claim. In any event, even were there to be no statutory trial period protections, this dismissal was justified on its particular facts. Mr Carran had a serious issue to deal with at work, and it had to be addressed immediately. He asked Mr Pearse about the claim of him drinking at work and received no response. This was Mr Pearse's opportunity to respond, and if the claim was not true, a denial could have been expected. In such circumstances a fair and reasonable employer would conclude, as Mr Carran did, that serious misconduct had occurred and that dismissal was an appropriate response. Drinking on the job during working hours, otherwise

than in an approved social context, is clearly a recognised form of serious misconduct. Thus the dismissal, though extremely rushed, was justified in all the circumstances at the time.

[31] There are two potential claims in respect of disadvantage or breaches of good faith. However, on the facts no such claims can lie because first, Mr Pearse would not, in all likelihood, have got any bonus; and second, because there can be no breach of good faith in respect of the dismissal when he did not ask any questions as to why he was being dismissed. There were no other forms of disadvantage that appear to have been claimed and I therefore dismiss the claims for disadvantage and/or breach of good faith.

[32] Finally, I note that on the facts no claim for failure to provide copies of time and wage records can succeed, and I therefore dismiss that claim.

[33] I therefore dismiss all claims by Mr Richard Pearse against Home Ventilation Hawkes Bay Limited.

Costs

[34] On behalf of HRV Mr Narayan seeks $2,000 in costs, as a consultant to the company, and $542.35 in travel costs. I accept that Mr Narayan's costs as a consultant to HRV are reasonable. It would certainly have cost HRV a great deal more than this to engage local counsel. In the particular circumstances of this case I am therefore also able to accept the claim of $542.35 in disbursements.

[35] No information has been provided by Mr Pearse that would suggest he can not afford to pay such a sum. Given that the sum is reasonable, and is consistent with the usual tariff range applied by the Authority, I order that it be met in full.

[36] I therefore order the applicant, Mr Richard Pearse, to pay to the respondent, Home Ventilation Hawkes Bay Limited, the sum of $2,542.35 in costs and expenses.

G J Wood
Member of the Employment Relations Authority