IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 101
56390167

	BETWEEN	FLORIAN PELABON Applicant
	AND	ZUMO RETAIL NELSON LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Bede Laracy, Advocate for Applicant Paddy Gerard, on behalf of the Respondent
Investigation Meeting:	11 April 2016 at Wellington
Further information received:	On 13 April 2017 from the Applicant[1]
Determination:	6 October 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Florian Pelabon claims he was unjustifiably dismissed by his former employer, ZUMO Retail Nelson Ltd (ZUMO). He also alleges ZUMO did not provide him with the hours of work the parties contractually agreed. He seeks remedies associated with each claim. He further says ZUMO failed to provide wage and time records when requested and did not attend mediation in accordance with the employment agreement. He requests the Authority orders penalties.

[2] ZUMO rejects Mr Pelabon's claims. It says Mr Pelabon was dismissed pursuant to a valid trial period provision agreed by the parties. It further denies it did

[1] Copies of ZUMO rosters dated between 18 January and 24 April 2016

not comply with Mr Pelabon's contractual 'Hours of Work' provision and says Mr Pelabon was frequently not available to work.

The issues

[3] The following issues need to be determined:

(a) whether the trial period provision in Mr Pelabon's employment agreement was lawful;

(b) whether the employment relationship ended by mutual consent or whether Mr Pelabon was dismissed;

(c) if Mr Pelabon was dismissed, whether the dismissal was justifiable;

(d) whether Mr Pelabon is owed wages under the employment agreement;

(e) whether ZUMO breached statutory and/or contractual obligations such that a penalty should be awarded.

Relevant information

[4] ZUMO has coffee houses in Nelson and Wellington. Mr George Chambers is the sole director of ZUMO. Mr Pelabon is an experienced barista. He first made contact with Mr Chambers in August 2015 in the hope of obtaining a positon. ZUMO did not open in Wellington until November 2015 so he took up work in another café until Christmas.

[5] The parties met for an interview on Wednesday, 13 January 2016. Mr Pelabon informed Mr Chambers that he had a small coffee cart business which would make him unavailable for work from time to time. He is uncertain whether they discussed a trial period or hours of work, but he recalls they talked about an hourly rate.

[6] Mr Chambers emailed Mr Pelabon on Saturday, 16 January 2016 and offered him a position starting 18 January 2016. A proposed employment agreement was attached. Mr Pelabon was informed of his entitlement to seek independent advice and to contact Mr Chambers if he wished to discuss or clarify the contents of the agreement.

[7] Text messages were exchanged over the remainder of the weekend. Mr Chambers queried when Mr Pelabon was available for work. Mr Pelabon advised he was free to start on Monday. On Sunday morning Mr Chambers messaged asking "*have you had an opportunity to read the contract*". Mr Pelabon replied he would look at it that night. Mr Chambers subsequently sent through a copy of the following weeks' roster "*on the assumption that you will be ok with it*". Mr Pelabon was scheduled to begin working the following day at 9:30am for two hours.[2] Between 7.27am and 7.59am the next morning (Monday 18 January 2016) the pair exchanged the following by text messages:

> Mr Chambers: Good morning Flo. Is the contract acceptable to you?
>
> Mr Pelabon: Good morning…Yes it's pretty much all good, is it only meant to be 35 hours a week? Cheers. Flo.
>
> Mr Chambers: It is close to full time and as I previously stated over the year there is generally good opportunity to work more due to various leaves.
>
> Mr Pelabon: Ok, thank you very much. See you on Friday, have a great week.
>
> Mr Chambers: Sorry – employment law forces me to be pedantic. Do you accept the contract terms in their entirety?
>
> Mr Pelabon: Yes I do.

[8] Mr Pelabon's written evidence suggests he agreed to terms of employment by text because Mr Chambers was "*quite pushy*". He says he intended to talk to Mr Chambers in person later that week about his hours of work but acknowledges he wanted to start work that day to obtain income. It appears Mr Pelabon queried his hours by email on 21 January 2015. Mr Chambers asked whether Mr Pelabon was seeking to renegotiate the contract, and the matter was not taken further. Mr Pelabon signed the unchanged contract on 25 January 2016. Mr Chambers signed the document on 18 January 2016.

[9] On 10 April 2016, Mr Chambers emailed Mr Pelabon to advise the trial period was about to finish. He was reserved about continuing with the employment relationship and set out instances where he considered Mr Pelabon's performance was dissatisfactory. He noted Mr Pelabon was expanding his cart business and questioned his availability for work. Arrangements were made to discuss those matters and the

[2] The parties now dispute whether Mr Pelabon was aware this was for the purpose of induction.

email noted that "*an outcome may be that the employment agreement is terminated*". The correspondence concluded as follows:

> Regardless of the outcome, you may prefer to offer your services through your company. This alternative arrangement may prove beneficial. Something to consider.
>
> Finally, I am looking to confirm 18 January as the effective date of our Agreement. As we were physically separated on 18 January, you agreed to the contract terms via text. I refer you to the signature page in the attached signed contract.

[10] The parties met on 12 April 2016. The conversation moved towards the future. Mr Chambers says they agreed that the nature of their dealings would be better suited to a business relationship. Mr Pelabon says nothing was agreed or finalised.

[11] The following day (being the 87th day since Mr Pelabon's employment began) Mr Chambers informed Mr Pelabon by email that the employment agreement was terminated. He asked that they explore how their respective companies could conduct business with each other.

[12] Over the course of Mr Pelabon's notice period of one week, Mr Chambers further suggested Mr Pelabon might provide his services through a labour hire agency. The parties continued to discuss a commercial arrangement. On 15 May 2016 Mr Pelabon sent an email he was "*sure something will work out*" and "*would be in touch soon*" about those matters.

[13] Mr Pelabon's employment finished on 20 April 2016. Mr Chambers says he received no further communication from Mr Pelabon until he received notice of a personal grievance on 16 May 2016.

The Authority's investigation

[14] I have not recorded all the information received by the Authority concerning this employment relationship problem but have stated findings of fact and law necessary to dispose of the matter.[3] This determination has been issued outside the timeframe set out at s 174C(3)(b).[4]

[3] As permitted by s 174(C)(4) Employment Relations Act
[4] Pursuant to s 174C(4)

Was the trial period in Mr Pelabon's employment agreement lawful?

[15] The trial period provision contained at cl.4.2 of the parties' employment agreement was expressed as follows:

> A trial period will apply for a period of 90 calendar days employment to assess and confirm suitability for the position. Parties may only agree to a trial period if the employee has not previously been employed by the employer.
>
> During the trial period the employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. The employee may pursue a personal grievance on grounds as specified in s.s103(1)(b) – (g) of the Employment Relations Act 2000 such as: unjustified disadvantage; discrimination; sexual harassment; racial harassment; duress with respect to union membership; and the employer not complying with Part 6A of the Employment Relations Act 2000.
>
> Any notice, as specified in the employment agreement must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the employer or the employee (including access to mediation services), except as specified in s.67A(5) of the Employment Relations Act 2000.

[16] Clause 1 set out definitions of words and phrases used in the employment agreement. Amongst other things it records "*Commencement Date means 18 January 2016".*

The law

[17] Sections 67A and 67B set out the requirements for a lawful trial period and the effects of those provisions. Section 67A(2) defines a trial period provision as follows:`

> "(2) Trial provision means a written provision in an employment agreement that states, or is to the effect, that-
>
> (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
>
> (b) during the period the employer may dismiss the employee; and
>
> (c) if the employee does so, the employee is not entitled to bring personal grievance or other legal proceeding in respect of the dismissal."

[18] For the purposes of the trial period provisions at 67A, subsection (3) defines an "employee" as an employee who has not previously been employed by the employer.

[19] In *Smith v Stokes Valley Pharmacy (2009) Ltd* the Employment Court signalled that a strict approach to the interpretation of ss 67A and 67B should be taken where it found the provisions removed longstanding employee protections and access to justice to resolve disputes.[5] As regards the contents of ss 67A and 67B the Court noted:

> They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for dismissal can be precluded. There is a risk of the employer of disqualification from those immunities if these steps are no complied with.[6]

Does Mr Pelabon's trial period provision comply with s. 67A(2)?

[20] Mr Pelabon's representative refers to *Du Plooy v Lighthouse ECE*[7]. In that case the Authority found the material trial period provision did not meet the requirements of s.67A(2) on the basis that the provision did not *"state",* nor was it *"to the effect"* that the trial period provision starts at the beginning of the employment.

[21] The trial period provision in Mr Pelabon's employment agreement is equally silent. It is notable that the trial period provision makes no mention about when the trial period would begin at all. It could be argued that it is obvious by the commencement date at cl. 1 as when the trial period would begin. But there is no express or stated reference to cl. 1 in the trial period provision at cl. 4.2 despite it being open to ZUMO to have done so.

[22] The effect of s. 67A(2) is that there must be sufficient information contained within a contractual trial provision to make it clear to a prospective employee when the trial period, under which the employee will be subject, begins. The words used at cl. 4.2 of Mr Pelabon's employment agreement go no further than advise that ZUMO will impose a trial period. The statutory requirements at s 67A(2) have not been met in this instance. It follows that Mr Pelabon may bring a personal grievance concerning his dismissal to the Authority for investigation and determination.

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[5] [2010] NZEmpC 111 at [48].
[6] Ibid at [83]
[7] [2016] NZERA Auckland 282

Comment on the additional challenges to the trial period

[23] Given my findings above it is not necessary to determine whether Mr Pelabon accepted the employment agreement by text message, or whether Mr Pelabon was given a reasonable opportunity to obtain independent advice about the employment agreement. I note that if the bargaining had been found to be unfair the parties would, in accordance with s 164, have been directed to mediation to attempt, in good faith to resolve the problem before the remedies of cancellation or variation of the agreement would have been available.[8]

Did the employment agreement end by mutual consent or was it terminated by Zumo?

[24] There is no dispute that at the meeting of 12 April 2016 Mr Chambers pursued the possibility that Mr Pelabon would provide services to ZUMO through his company. I am satisfied Mr Pelabon did not actively reject Mr Chambers' proposal to engage commercially.

[25] I consider it likely that Mr Chambers left the meeting with a view that the parties would progress negotiations to that end, and that Mr Pelabon would not challenge the end of the employment relationship. But I am not persuaded that Mr Pelabon agreed to end his employment and I am unwilling to find that he did.

[26] Mr Chambers understands the importance of documenting agreements made in an employment relationship. If Mr Pelabon had consented to his employment finishing I am certain Mr Chambers would have required Mr Pelabon to confirm that matter in writing. I note also that cl. 15.2 of the employment agreement obliged Mr Pelabon to provide the following when providing notice of termination of employment:

> Where employment is terminated by the Employee, the Employee agrees to provide, in writing at the time of the notice submission, an accurate and true account of the reasons leading to the termination.

[27] There is no evidence that Mr Pelabon furnished notice of his resignation in accordance with the above provision. Mr Pelabon was dismissed at ZUMO's initiative on 13 April 2016.

[8] At s 69 Employment Relations Act

Was the dismissal justified?

[28] Whether a dismissal is justifiable is determined by an inquiry into the employer's actions, both as to whether there were reasonable grounds for the dismissal and whether the process taken to reach that decision was fair. The Authority is required to objectively assess whether those actions were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.[9]

[29] Mr Pelabon's written statement to the Authority said the matters set out in Mr Chambers' email of 10 April 2016 had not previously been raised with him. These alleged that Mr Pelabon was failing to adhere to ZUMO's work practices and policies regarding use of cell phones at 'front of house', checklists and break times. It was also alleged Mr Pelabon had spoken about another staff member in a derogatory manner and had promoted a lower volume label. In its response, ZUMO provided two emails to refute Mr Pelabon's assertion that he was unaware of the concerns. Both emails relate to cell phone use when working.[10]

[30] I am not satisfied that the conduct outlined in Mr Chambers' email is conduct that a fair and reasonable employer could, in all the circumstances, justify a dismissal. The conduct, if established, could, at first instance, be fairly met with a caution or warning from an employer. In any event I am not persuaded the concerns caused Mr Pelabon's dismissal. It remains unclear why Mr Chambers considered the parties were better suited to a commercial relationship but I have no doubt this was his preference. An employer's unilateral decision to alter the legal status of the relationship without the express consent of the employee is not the action of a fair and reasonable employer. Mr Pelabon's dismissal was unjustified.

Is Mr Pelabon owed wages?

[31] Clause 7.1 of the employment agreement provided Mr Pelabon "*with a minimum of 70 hours work per fortnight subject to the conditions set forth*…" as follows:

> **7.2 Conditions of minimum hours of work**
> The parties agree that the minimum hours as set forth in 7.1 above shall not apply during the roster period if –

[9] Section 103A Employment Relations Act 2000
[10] Emails dated 29/02/16 and 17/03/2016.

1 The employee is unavailable for any days or hours over the roster time period
2 The store operating hours are reduced for any reason over the roster time period
3 Demand for the employer's products has dropped by ten per cent or more as measured by the employer
4 The employee is unable to consistently as deemed by the employer perform duties with Exceptional skill and diligence.

[32] Mr Pelablon alleges he is owed $1,687[11] as a consequence of ZUMO's failure to provide him with the contractually agreed minimum hours of work.

[33] Here I note that over the course of his employment Mr Pelabon applied for, and ZUMO approved, 10 days' leave without pay (LWoP). I am not satisfied, as seems to be suggested by Mr Pelabon, that the employment agreement provided a minimum of 70 hours per fortnight, above any leave taken. The plain wording at cl.7.2 provides that the minimum hours of work were subject to Mr Pelabon's availability.

[34] Taking into account the hours Mr Pelabon was not available to work I have calculated the quantum of hours and corresponding pay Mr Pelabon received each fortnight against the terms of the agreement to assess whether there was a shortfall. I make the following findings:

[35] For the fortnight ending;

- 31/01/16: the applicant was paid equal to 51.4 hours. Taking into account LWoP of 14 hours, the overall shortfall against a minimum of 70 hours = **4.6 hours**.
- 14/02/16: the applicant was paid equal to 56.61 hours. Taking into account LWoP taken of 7 hours, the overall shortfall against 70 hours = **6.39** hours.
- 28/02/16: the applicant was paid equal to 57.27 hours. Taking into account LWoP of 12 hours, the overall shortfall against 70 hours = **0.63 hours**
- 13/03/16: the applicant was paid equal to 61.96 hours. Taking into account LWoP of 15 hours, no shortfall is established,
- 27/03/16: the applicant was paid equal to 71.49 hours. No shortfall is established.
- 10/04/16: the applicant was paid 63.45. Overall shortfall against 70 hours = **6.55**

[11] Comprising wages of $1,562.22 and holiday pay of $124.98 based on calculations furnished to the Authority, although there is a disparity between that sum and the quantum requested in Mr Pelabon's written evidence.

- 24/04/16; employment finished on 20 April: the applicant was paid 50.83. That sum prorated over 10 days does not establish a shortfall.

[36] The total shortfall of hours of work over the course of Mr Pelabon's employment equals 18.17 hours. He is entitled to $353.22 (gross) associated with that shortfall.[12]

The claims for penalties

[37] Mr Pelabon seeks penalties against ZUMO. He says it failed to provide wage and time records on request. He further alleges ZUMO breached cl.16.1 of the employment agreement which provided: "*The employer and the employee agree to actively participate in mediation if requested by either party*".

[38] The correspondence between the parties following the notice of a personal grievance reflects several requests on Mr Pelabon's behalf for ZUMO to provide wage and time records and to attend mediation.

[39] ZUMO did not provide the payroll information directly but Mr Pelabon was advised that he was able to access that material electronically via ZUMO's kiosk. I have no evidence that Mr Pelabon was unable to do so.

[40] As regards the contractual obligation to actively participate in mediation, ZUMO appears to have initially resisted participating in the event. That response may be explained by its requests for further particulars about Mr Pelabon's claims. That information was provided in Mr Pelabon's statement of problem lodged with the Authority in July 2016. The parties were directed to mediation soon after.

[41] The wording of cl. 16.1 may be interpreted in several ways. Mr Pelabon takes the view that ZUMO was required to participate in mediation if requested. The inference is that ZUMO was obliged to consent to attend mediation on request. An alternative interpretation is that once in mediation the parties were required to actively participate. Even if it could be said that ZUMO was in breach of its contractual obligation there is no evidence of loss or material disadvantage as a consequence. Any breach was remedied when the parties attended mediation in September 2016.

[12] $327.06 plus holiday pay at 8% = $353.22

[42] The events for which Mr Pelabon seeks penalties demonstrate at best minor and/or technical breaches. I am not persuaded these are matters for which it is appropriate to award penalties and decline these claims.

Remedies corresponding to the personal grievance

Lost wages as a consequence of the dismissal

[43] Where the Authority determines that an employee has been unjustifiably dismissed, and subject to a findings regarding contributory behaviour, it is obliged to order the lessor of either remuneration proved to be lost or 3 months' ordinary time remuneration.[13]

[44] I am satisfied that Mr Pelabon did not contribute to the situation which gave rise to his personal grievance in a way that is blameworthy and causative.

[45] Mr Pelabon's evidence is that before his employment ended ZUMO had approved his taking annual leave beginning 25 August 2016 to travel to Europe to see family. Having committed to the travel he says he found it difficult to find an employer who was willing to accommodate his impending absence. He obtained a part-time position for 5 weeks or thereabouts and earned $2,441.81 before travelling overseas. I accept Mr Pelabon sought to mitigate his losses.

[46] Taking into account ZUMO's obligation to provide 70 hours of work per fortnight against Mr Pelabon's pattern of leave, Mr Pelabon worked an average of 31.31 hours per fortnight whilst employed at ZUMO. He was entitled to 3 months' wages based on that weekly figure minus the amount he earned over the 3 month period. I calculate this amount to be $5,470.85.[14]

Compensation

[47] When Mr Pelabon initially raised his personal grievance he sought $7,000 in compensation. That sum was increased to $10,000 in his statement of problem although the basis for that uplift is unclear. Mr Pelabon says he felt upset with Mr Chambers and depressed. The evidence does not entirely support his assertions. The correspondence he sent to Mr Chambers following notice of his dismissal was

[13] Section 128 Employment Relations
[14] 31.31 hours of work per week plus holiday pay = $608.66 x 13 weeks = $7,912.58 – $2,441.81 = $5,470.85(gross)

amicable and upbeat with no hint of distress. There is additional unchallenged evidence that he continued to frequent ZUMO after his dismissal.

[48] On balance I consider it likely Mr Pelabon experienced some level of hurt following his dismissal.[15] I consider $5,000 is an appropriate award in compensation.

Orders

[49] ZUMO Retail Nelson Limited is ordered to pay Florian Pelabon the following:

(i) $353.22 (gross) in wages including holiday pay for the short fall in the contractual minimum hours of work he should have received;

(ii) $5,470.85 (gross) pursuant to s 123(1)(b) and s123(1)(c)(ii) as reimbursement of lost wages and holiday pay following dismissal; and

(iii) $5,000 pursuant to s 123(1)(c)(i) as compensation for humiliation, loss of dignity and injury to feelings.

Costs

[50] It is appropriate to reserve costs. The parties are encouraged to reach agreement on these.

Michele Ryan
Member of the Employment Relations Authority

[15] From Paddy Gerard