

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 85
5432002

BETWEEN SAM PULEIKU
 Applicant

A N D SPK INDUSTRIES LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Louise Darroch, Counsel for Applicant
 Garry McKenzie Contract General Manager of
 Respondent

Investigation Meeting: 11 March 2014 at Auckland

Date of Determination: 11 March 2014

DETERMINATION OF THE AUTHORITY

- A. SPK Industries Limited's (SPK Industries') dismissal of Sam Puleiku is unjustified.**
- B. SPK Industries is ordered to pay Mr Puleiku:**
- (a) \$6,950 lost remuneration;**
 - (b) \$5,000 distress compensation.**

Employment relationship problem

[1] Mr Puleiku withdrew his unjustified disadvantage claim at the investigation meeting today. He claims he was unjustifiably dismissed on 26 August 2013. Mr Puleiku is also concerned he was not been paid correctly and that he was not paid his annual holiday pay upon termination.

[2] SPK Industries says that Mr Puleiku was dismissed pursuant to *a trial period termination*. It was directed on 03 March to file its evidence in advance of the Authority's investigation but it did not do so. SPK Industries did not produce any evidence or witnesses at the investigation meeting today. Nor did Mr McKenzie ask Mr Puleiku any questions. I therefore accept Mr Puleiku's unchallenged version of events.

[3] The Authority has only investigated the dismissal grievance today because Mr Pulieku's Statement of Problem did not identify wage arrears claim and he has not filed any evidence in support of that.

[4] From the final payslip produced to the Authority it appears that Mr Pulieku's concerns about his final pay may have merit. However he will need to file a new Statement of Problem if he wants to pursue a wage arrears claim because SPK Industries must be given an opportunity to file a Statement in Reply and evidence in support of its position before the Authority investigates a wage arrears claim.

[5] Mr Pulieku says he has been hampered in pursuing a wage arrears claim because of SPK Industries' failure to provide him with the information he needs to understand his final payslip. SPK Industries was directed to produce to the Authority (copy to Ms Darroch) Mr Pulieku's wage and time records. It was also ordered to provide Ms Darroch with the information necessary to enable her to understand what payments were or were not covered in Mr Pulieku's final pay.

[6] If the wage arrears issues are not satisfactorily resolved within 7 days then the parties are directed to attending mediation on that issue with mediation to occur before the end of this month. If subsequent to mediation a wage arrears claim is filed then the Statement of Problem should identify that I have already had some involvement in wage arrears concerns.

[7] In terms of the current dismissal grievance, Mr Puleiku left school in 2011. He attended a Job Seekers Seminar at Work and Income New Zealand and it was through this that he found out about a job with SPK Industries, which is a plumbing supply company.

[8] Mr Puleiku was interviewed by the then General Manager Mr Mike Muir for a Storeman position and was offered the job by telephone later that day. He started work on 27 May 2013. In breach of the requirements of s.63A of the Employment

Relations Act 2000 (the Act) Mr Puleiku was not provided with a written employment agreement to sign until the second week in August. It was signed by the parties on 12 August 2013.

[9] On Monday 26 August 2013 Mr Pukeiku was told after lunch that Mr Mark George, the then new General Manager, wanted to talk to him.

[10] Mr Puleiku had no advance warning about this meeting. He was not told what it was about or that his ongoing employment was in jeopardy. He had no idea that one possible outcome of the meeting could be dismissal. Mr Puleiku was not given any information in advance of the meeting and he was not advised of his right to be accompanied to it by a representative.

[11] At this meeting Mr George said to Mr Puleiku words to the effect of “*We are here to talk about your employment. We are no longer carrying on with your trial period. We are restructuring the company. Here’s my card. You can call me for a reference. Please don’t take this personally.*”

[12] That was it. No information was given to Mr Puleiku about why a restructuring was necessary, or why he had been selected for redundancy. He was not given any opportunity to provide any response to the proposed termination of his employment.

[13] As Mr Puleiku was leaving the meeting he was handed a letter which says “*Due to a change in warehousing structure we are reassessing our resource requirements. As such I am advising you that SPK Industries will not continue your employment beyond the three months’ probation period.*”

Issues

[14] The following issues are to be determined:

- (a) Was Mr Puleiku subject to a trial period provision?
- (b) If not, was Mr Puleiku’s dismissal justified?
- (c) If not, what if any remedies should be awarded?
- (d) What if any costs should be awarded?

Was Mr Puleiku subject to a trial period provision?

[15] Section 67A of the Employment Relations Act 2000 (the Act) provides that the parties to an employment agreement may agree to enter into a trial period provision. Section 67A(2) of the Act provides that a trial period 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 that period the employer may dismiss the employee; and*
- (c) If the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*

[16] Section 67B applies if an employer terminates an employment agreement containing a trial period provision before the end of the trial period which means an employee whose employment is terminated in accordance with s.67B(1) may not bring a personal grievance or legal proceedings in respect of the dismissal.

[17] Section 67A(3) of the Act defines “*Employee*” as an employee who has not been previously been employed by the employer.

[18] Mr Puleiku’s employment agreement does not contain a trial period provision. SPK Industries’ view that it does is incorrect. A “*trial period*” is not referred to at all in Mr Puleiku’s employment agreement.

[19] Even if Mr Puleiku’s employment agreement had contained a valid trial period provision SPK Industries’ failure to comply with the bargaining requirements for an individual employment agreement requirements (as per s.63A of the Act) is a breach of s.68(2)(d) of the Act.

[20] SPK Industries’ failure to provide Mr Puleiku with a written copy of the proposed employment agreement until after he had accepted the offer of employment and had actually started work means that he was no longer an employee who had not previously been employed by SPK Industries so s.67A cannot apply to him.

[21] The absence of a valid trial period provision which complies with the requirements of s.67A of the Act means Mr Puleiku is not prevented from pursuing his personal grievance claim.

Was Mr Puleiku's dismissal justified?

[22] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time that Mr Puleiku was dismissed.¹

[23] In applying the justification test the Authority is required to consider the four procedural fairness tests set out in s.103A(3) of the Act in addition to any other factors it considers appropriate.² A fair and reasonable employer is expected to comply with its statutory obligations including the good faith obligations set out in s.4 of the Act. Failure to do so undermines an employer's ability to justify its actions.

[24] SPK Industries did not present any information to the Authority to suggest that Mr Puleiku was dismissed as a result of a genuine restructuring. It is also evident that SPK Industries did not comply with any of the four procedural fairness tests in s.103A(3) of the Act or with any of its good faith obligations set in s.4 of the Act.

[25] I find that SPK Industries' actions and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time Mr Puleiku was dismissed.³ Mr Puleiku's dismissal was unjustified.

What if any remedies should be awarded?

Mitigation

[26] Mr Puleiku provided the Authority with a list of jobs that he had applied for and places that he had approached for work. He also has 107 emails relating to jobs that he has applied for. I am satisfied he has attempted to mitigate his loss.

¹ Section 103A of the Act.

² Section 103A(4) of the Act.

³ Section 103A(2) of the Act.

Lost remuneration

[27] It appears from Mr Puleiku's final pay slip that he was summarily dismissed. His employment ended immediately and he did not receive the two weeks' notice he was contractually entitled to under clause 11.1 of his employment agreement. Mr Puleiku's final pay slip does not show any amount for pay in lieu of notice.

[28] Apart from two 8 hour shifts he did in December 2013 Mr Puleiku has not worked since his dismissal. I am satisfied he has lost remuneration as a result of his grievance and that it is appropriate for him to be compensated with that.

[29] SPK Industries is ordered under s.128(2) of the Act to pay Mr Puleiku \$6,950 (being \$7,280 as three months' lost remuneration less \$330 being the amount he earned for two days work in December 2013).

[30] No separate award is made in respect of Mr Puleiku's claim for two weeks' notice because that amount is covered in the lost remuneration has been awarded.

Distress compensation

[31] I am satisfied Mr Puleiku suffered distress and humiliation as a result of his unjustified dismissal. He suffered a severe blow to his confidence being dismissed from his first job. Mr Puleiku has suffered considerable shame and embarrassment in front of family and friends and he was obviously still distressed when recalling these events today. This distress has been compounded by the financial pressure he has faced and his inability to contribute towards family expenses.

[32] I order SPK Industries to pay Mr Puleiku the sum of \$5,000 under s.123(1)(i)(c) of the Act to compensation him for the humiliation, loss of dignity, and injury to feelings he suffered as a result of his unjustified dismissal.

Contribution

[33] Having determined Ms Puleiku has a dismissal grievance s.124 of the Act requires me to determine whether he contributed to the situation that gave rise to his dismissal grievance and if so reduce remedies accordingly. I find Mr Puleiku did not contribute in any way to his grievance so his remedies are not to be reduced.

What if any costs should be awarded?

[34] I am satisfied that Mr Puleiku has incurred legal costs of \$800. Mr Puleiku is the successful party so it is appropriate that SPK Industries be ordered to contribute towards his legal costs.

[35] I adopt the Authority's usual notional daily tariff based approach to costs with the current notional daily tariff being \$3,500. This is to be pro-rated to reflect the one hour investigation meeting so the notional starting point is \$500. Neither party raised any factors which should result in the notional starting tariff being increased or decreased and I am not aware of any.

[36] I therefore order SPK Industries to pay Mr Puleiku \$500 towards his legal costs together with \$71.56 to reimburse him for his filing fee.

Rachel Larmer
Member of the Employment Relations Authority