

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 202
5407059

BETWEEN JAMES MERVYN RADFORD
Applicant
AND SEPCLEAN LIMITED
Respondent

Member of Authority: Christine Hickey
Representatives: Heather Mckinnon, Counsel for the Applicant
Victoria Reid, Director of the Respondent
Investigation meeting: 25 and 26 June 2013 at Nelson
Submissions Received: At the investigation meeting from the Applicant
Date of Determination: 30 September 2013

DETERMINATION OF THE AUTHORITY

- A. James Radford has a personal grievance that he was unjustifiably dismissed in his employment.**
- B. Sepclean Limited is to pay James Radford two weeks lost remuneration.**
- C. Sepclean Limited is to pay James Radford \$3,000 compensation.**

Employment relationship problem

[1] James Radford was employed by Sepclean Limited on 31 August 2012 as a general operator having responded to an ad for a vacuum truck operator. Sepclean specialises in liquid waste disposal.

[2] Mr Radford's last day of employment with Sepclean was 19 September 2012.

[3] Mr Radford claims that he was unjustifiably dismissed. He claims that Sepclean breached its duty of good faith to him and that he was unjustifiably disadvantaged in his employment by:

- being misled as to the true nature and terms of his employment during the interview;
- a failure to provide an employment agreement reflecting the verbally agreed terms of employment;
- a failure to provide a job description;
- a substantial unilateral variation of his duties; and
- employing a new employee, Adam Ross, to take over from him.

[4] Sepclean resists all of Mr Radford's claims. Sepclean considers that Mr Radford's employment was subject to a 90-day trial period provision which prevents him from bringing a personal grievance for unjustified dismissal against it. In the alternative Sepclean says that he was not dismissed but abandoned his employment.

[5] Sepclean says that Mr Radford was sent a copy of an individual employment agreement on the day of his interview which reflected the terms discussed at the interview and that he did not ask for a written job description so it did not have to supply one to him.

[6] Sepclean also says that Mr Radford's duties were varied by agreement with him and that Adam Ross was not employed to replace him.

Issues

[7] The Authority needs to determine:

- whether there is a valid 90-day trial period under s.67A of the Employment Relations Act 2000 (the Act) which prevents Mr Radford from bringing a personal grievance of unjustified dismissal,
- if not, whether Mr Radford was unjustifiably dismissed or justifiably abandoned his employment. Consideration of unjustified dismissal requires

an examination of the reason for any dismissal and the process Sepclean used to decide Mr Radford would be dismissed;

- whether Mr Radford was unjustifiably disadvantaged in any way in his employment;
- whether Mr Radford is entitled to any remedies; and
- legal costs. However, that determination will be reserved.

Factual background

[8] As permitted under s174 of the Employment Relations Act 2000 this determination does not set out all evidence and submissions received but has stated the Authority's findings of facts and law and its conclusions on matters requiring determination. Those findings were made on the civil standard of the balance of probabilities, assessing the evidence to determine what was more likely than not to have happened.

[9] There were a number of factual disputes between the parties. I have only made findings on those disputes if they are materially relevant to the issues I need to determine.

[10] Mr Radford was interviewed on 25 August 2012 by Andrew Delaney and Malcolm Furness. There is a clash of evidence about what duties were discussed as forming part of the role. I find that Mr Radford was told at the interview there would be septic tank work as well as Class 5 driving work. He was also told that he would be required to do the sludge run. However, I find that he was not told that was the principal part of his job.

[11] Mr Radford wished to increase his driving hours and get more experience as a driver and understood that to be the job he was applying for. Mr Radford specifically wanted to leave behind the kinds of jobs he had done for many years in his farming career. Although septic tank work was mentioned in the interview Mr Radford did not understand that he would not just be the driver for that work but would also be required to be actively involved in the actual emptying and cleaning out of the septic tanks as a general operator.

[12] Mr Delaney and Mr Furness did talk about the varied kinds of jobs that Sepclean undertook, such as the ship work and emptying grease traps etc. However, Mr Radford remained clearly of the view that his main role would be as a driver.

[13] Mr Radford says he was told he was replacing the current sludge run driver, who at the time was principally Ronan Connell¹, although Mr Connell's name was not mentioned. I find it more likely that he was told he would be replacing the two drivers who had left Sepclean on 24 August 2012 and that Mr Radford misunderstood and assumed he was replacing someone who was going to be leaving.

[14] Mr Radford was told that there was plenty of work and that he would be able to work up to 50 hours a week. However, he was disappointed to find that the proposed employment agreement only guaranteed 36 hours of work a week.

[15] The proposed employment agreement, which is a generic one used by Sepclean, was sent to Mr Radford by email by Mr Furness on 25 August 2012 after the interview. He was concerned that there was no job description attached but nonetheless Mr Radford accepted the offer of employment as a general operator, not as a vacuum truck operator, and began work at short notice on 31 August 2012.

[16] Mr Radford began by working with a relief contract driver, Pat, on the first day. On 3 September 2012 he worked for the day with Mr Connell doing the sludge run. Over the next few days he drove the truck and trailer a number of times and then he began to do more general tasks, including cleaning out septic tanks and grease traps.

[17] Mr Radford made it clear to Mr Delaney and Mr Furness he was not happy about that as he understood that he had accepted a driving job. Mr Delaney and Mr Furness decided that Mr Radford was not really suited to the varied duties required, other than truck driving, and spoke to Ms Reid. Mr Radford, and Mr Delaney and Mr Furness disagree about Mr Radford's capacity and aptitude for the job and his attitude. However, it is clear that Mr Radford was disappointed with the job and Sepclean was disappointed with its choice of Mr Radford.

[18] At some point within the first week Ms Reid spoke to Mr Radford and told him that he was not suited to the role, apart from truck driving, and that instead

¹ Authority determination [2013] NZERA Christchurch 203 deals with Mr Connell's claims, including of unjustified dismissal.

Sepclean could offer him some other duties, such as labouring, yard work and building a horse shelter. She also suggested that he should look for other work and that since he had not yet signed the employment agreement she could offer him fixed-term employment instead. Ms Reid was keen to regain Mr Radford's driving ability in the medium term because Mr Delaney had leave booked for early October and without him only Mr Radford and Mr Connell had the requisite driving qualifications. She envisaged that Sepclean would employ him until the end of October, although details of an alternative/new employment agreement were never agreed – such as when the proposed fixed-term would end.

[19] Mr Radford was not happy to be doing what he considered to be farming type work again. However, he accepted the duties other than driving allocated to him and continued to work for Sepclean doing those duties and Class 5 driving when it was required.

[20] Adam Ross was employed on 11 September 2012 to train principally in septic tank work as well as other work required. Mr Ross had a dangerous goods endorsement and a Class 2 licence. He was also expected to gain the more advanced licences.

[21] The events of 14 September 2012 are key to whether Mr Radford was dismissed or abandoned his employment. Mr Radford was building a horse shelter. A truck was parked on a concrete bund more than 100 metres away from where he was working.

[22] A Tasman Council inspector attended the site in the morning. It is not clear who called the council but there is no evidence that it was Mr Radford. The inspector was shown around by Herman van Gessel, Sepclean's accountant who usually works in the office. He was informed that the inspector thought the operations might fall outside the *PA home occupation rules* and *raised concern about an accidental spill given the proximity of a small creek in the immediate area.*

[23] Ms Reid was not aware of that visit. After the inspector left Mr Furness and Pat were transferring oily water that had been pumped out of a ship into the truck's tank and there was a spill. Oily water spilled down the sides of the tank, over the back of the truck and onto the concrete ground area. There is a dispute about how much oily liquid was spilled but the amount is not material.

[24] Mr Radford was asked to help clean it up, although not by Ms Reid. He refused to do so. Mr Radford took photographs of the spill although Ms Reid was not aware that he had done so. Mr Radford sent a text to Mr Connell telling him about the spill.

[25] Sepclean staff cleaned up the spill as best they could on site and it was decided that the truck should be driven to the other Sepclean site to be washed. Ms Reid asked Mr Radford to drive the truck to be washed but he refused to do so. His concern was that the truck was not fit to be driven on roads in the state it was in. Ms Reid did not understand Mr Radford's objection to driving the truck. His refusal made her very angry but she did not convey that to him at the time.

[26] An anonymous caller rang the local council to report an oil spill. Mr Radford emphatically denies that it was him. Graham, who had the required licence, but not the required dangerous goods endorsement drove the truck to be washed. Mr Radford believes that the truck was unlawfully driven but there is some evidence to suggest that Adam Ross, who does have a dangerous goods endorsement, accompanied Graham. However, nothing turns on this point. Soon after the truck left the council inspector arrived. Ms Reid was aware of that.

[27] Ms Reid was on her way to the office when she passed Mr Radford. She said *you didn't have anything to do with the council coming did you?* He denied it. She did not believe him. Mr Radford says she grabbed his phone out of his front pocket of his shirt. He thinks she probably misconstrued a text she saw. He says he had texted Mr Connell to see if he had called the council². Ms Reid denies grabbing his phone. It is not necessary to resolve that conflict of evidence.

[28] Mr Radford says that Ms Reid then yelled something about a conspiracy and:

*then dismissed me on the spot ... "pack up your stuff and get off my f***ing property". I asked if I was being fired and she said something like "you're f***ing right you are". I had no chance to explain anything.*

[29] Ms Reid denies dismissing Mr Radford and denies swearing at him. She says that would have been out of character in her dealings with employees. Ms Reid provided a witness written statement and wrote Sepclean's submissions which in part

² None of the texts were presented in evidence. Mr Radford says he is on his second new phone since the one he had then.

contained more evidence. She wrote that after she had asked Mr Radford about contacting the Council:

His manner was guarded and his reply carefully worded. I asked him again because I was surprised, and I got the same answer. "I did not phone the council". I knew then or at least suspected that James was connected with the visit from the council. I walked back to the office feeling wrong-footed. There was no doubt in my mind that we would be terminating James' employment but first, I had reports to finish and second, I needed to speak to Andy and Malcolm about the events of the morning.

[30] She also wrote:

..when James refused to drive the truck I decided then that I was going to discuss James with Andy and Malcolm and I was sure (at that time) that this would result in the termination of James' employment. I made this decision when James refused to drive the truck. I clarified that "the decision" was the decision to discuss the matter with Andy and Malcolm and not the actual decision to dismiss James.

[31] In response to my questions Ms Reid said that when Mr Radford told her he had not phoned the council she:

Was sickened by it and felt undermined. I felt like I'd done everything I possibly could to fix him up into an honest employment agreement. I felt I'd bent over backwards. At the time I knew it and it was the fact that he was lying to me.

[32] Ms Reid told me *I was glad he'd left – it'd been awful.*

[33] Ms Reid also says that she was under considerable pressure that day because the business was having *terrible cash flow problems* and she had an appointment with the bank at 2 pm that she had to attend along with Mr van Gessel and *nothing was going to distract me.*

[34] Ms Reid walked away. Mr Radford went into the office where he said angrily that he had been fired and gathered together his things. Mr van Gessel told him that Ms Reid was probably just over-reacting. Mr van Gessel says that he did not believe Mr Radford had really been dismissed.

[35] Mr Radford drove out of the yard, parked his car on the side of the road and rang Ms Sheppard and told her he had been fired. She invited him to come and have lunch with her, which he did. They discussed what he should do, including seeking legal advice and going to WINZ. She telephoned the community law centre that afternoon to get a list of employment lawyers.

[36] Mr Radford also rang Mr Connell to tell him that he had been *sacked*.

[37] After the meeting with the bank Mr van Gessel suggested that Ms Reid should get the work keys off Mr Radford. He says that was because Ms Reid lives at the Sepclean premises and Mr Radford had been very angry so he thought she should try and prevent Mr Radford coming to the premises over the weekend.

[38] Ms Reid telephoned Mr Radford and asked him to meet her at a petrol station to give her back the keys. They met and Mr Radford handed over the keys. Ms Reid did not tell him why she wanted the keys. Mr Radford did not return to Sepclean. No-one from Sepclean made an effort to contact Mr Radford after he handed Ms Reid the keys.

Is there a valid 90-day trial provision preventing Mr Radford from bringing a personal grievance for unjustified dismissal?

[39] Sepclean submits that there was a 90-day trial period in Mr Radford's employment agreement which prevents him from being able to bring a personal grievance for unjustified dismissal. If that is correct then I would not have the jurisdiction to determine his claim for unjustified dismissal. However, Mr Radford's claims of unjustified disadvantage would still be able to be determined.

[40] The relevant clauses of the employment agreement sent to Mr Radford are:

3.1 Individual Agreement of Ongoing and Indefinite Duration subject to a Three Month Trial, if specified in the schedule

This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. This agreement is effective from 3rd September 2012 and replaces, if any, all previous agreements between the Employer and Employee. The agreement is effective from the date it is signed by both parties and shall continue until either party terminates the agreement in accordance with the terms of this agreement. The clauses in this agreement may be varied or updated by agreement between the parties at any time.

[Emphasis in the original]

3.2 Trial Period

A trial period will apply for a period of 90 CALENDAR DAYS. 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 the grounds as specified in sections 103(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, shall be given within the trial period, even if the actual termination date 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 section 67A(5) of the Employment Relations Act 2000.

[41] The heading to clause 3.1 of the employment agreement states that the employment agreement is *subject to a Three Month Trial, if specified in the schedule*. No three month trial was specified in the schedule. Also the clause itself does not refer at all to a three month trial and how that might work. However, clause 3.2 clearly outlines Sepclean's intention to have a *trial period for a period of 90 CALENDAR DAYS*. I understand Sepclean to be relying on clause 3.2 to establish that a trial period under s.67A of the Employment Relations Act 2000 (the Act) applied.

[42] The two sub-clauses (3.1 and 3.2) may be read together to mean that in the absence of a three-month trial period specified in the schedule clause 3.2 is negated. However, despite that possible impediment to a valid 90-day trial period it is important to determine whether section 67A was complied with.

[43] Section 67A of the Act provides:

- an employment agreement containing a trial provision may be entered into by an employee and an employer, if a trial period provision for a period not exceeding 90 days is included in the written individual employment agreement starting at the beginning of the employment of an employee who has not previously been employed by the employer,
- during that trial period the employer may dismiss the employee, and
- if the employer does so the employee is not entitled to bring a personal grievance or other legal proceedings in respect of that dismissal.

[44] Section 67B(1) and (2) provide that if an employer terminates an employment agreement containing a trial period provision under s.67A by giving the employee notice of the termination before the end of the trial period, whether the termination of the employment takes place before or after the end of the trial period, the employee may not bring a personal grievance or legal proceedings in respect of the dismissal.

[45] However, s.67B(3) says that neither s.67B nor the existence of a trial provision prevents an employee from bringing a personal grievance under any of the grounds specified in s.103(1)(b) to (g).

[46] Section 103(1) defines the term 'personal grievance' to include:

*(a) that the employee has been unjustifiably dismissed; or
(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or*

[47] Therefore, employees dismissed under a valid s.67A trial period provision are denied the ability to bring a personal grievance for unjustified dismissal only. Other personal grievance claims are still open to them.

[48] Mr Radford says he had no intention of agreeing to a trial period as he was leaving a steady job in Christchurch. He also says that at the interview he asked about a trial period and he was told not to worry about it. He says he took that to mean his employment would not be subject to a trial period.

[49] Ms Reid submits that I should find a trial period to exist because otherwise it is only a technicality, an unsigned employment agreement, that would prevent it from applying. She submits that Mr Radford accepted the trial period provision because he began work knowing that it was in the proposed employment agreement. Also after he got his girlfriend, Melonie Sheppard, who is a human resources manager, to look through it with him the only points he wanted to raise with Sepclean were his hours of employment and the absence of a job description.

[50] The Employment Court has considered the application of s.67A and s.67B trial periods and said that the provisions:

remove longstanding employee's protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally ... legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated³.

[51] Chief Judge Colgan went on to say:

³ *Smith v Stokes Valley Pharmacy (2009)Limited* [2010]ERNZ 253, page 265

The ... sections are neither simple nor the very broad and blunt prohibition against bringing legal proceedings that is sometimes portrayed rhetorically. They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with. Significant obligations of good faith dealing remain upon employers.⁴

[52] Also in the *Stokes Valley Pharmacy* case Chief Judge Colgan said that passages from Hansard of the Bill's reading in the House:

...confirm the statutory intention that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise settled during its course. Employees affected are to be new employees....⁵

[53] In that case there was a period of time that Ms Smith was working for the employer but had not signed the employment agreement containing the trial period provision. Chief Judge Colgan said:

...the employer's form of draft agreement contemplated its execution by signature. Once parties sign an employment agreement, they regard themselves and are regarded by others as being bound to the obligations and benefits contained in the agreement,. Conversely, until that symbolic but important act of signing, the form of agreement remains as a draft and, potentially, subject to further negotiation and alteration.

As with most contracts, and employment contracts or agreements in particular, I conclude that the parties did not intend that they each would be bound by the draft written agreement unless and until that was executed by the writing of their signatures.

[54] In *Blackmore v Honick Properties Ltd*⁶ Chief Judge Colgan considered whether it was unreasonable to require employers to ensure that a written employment agreement containing a s.67A provision is signed before the new employee begins working. He concluded:

Employers have or ought to have been aware that trial periods must be agreed in writing before the affected employees begin work if they are to be regarded as not having been employed previously by the employer, which is an essential pre-condition of a trial period.

It is not too onerous an expectation that employers will get the correct paper work and do things in a correct sequence. ...For those reasons, I do not think it could be said that the requirements on an employer

⁴ *Smith*, page 271

⁵ *Ibid*, page 265

⁶ [2011] ERNZ 445

seeking to have those advantages are either impractical or onerous.

...

Parliament's intention is clear that neither a former nor an existing employee of an employer can be put onto a trial period. ...

What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss 67A and 67B must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee.

[55] Mr Radford became an employee either when he verbally accepted the role or when he started working for Sepclean on 31 August 2012. Neither Mr Radford nor Ms Reid signed the individual employment agreement at any time either before or after he commenced work. Therefore, Mr Radford was not employed under a written employment agreement containing a s.67A trial period, as required under s.67A. A s.67A trial period does not apply to Mr Radford's employment and the Authority is able to investigate and determine his claim of unjustified dismissal.

Was Mr Radford unjustifiably dismissed?

Was he dismissed?

[56] Mr Radford says that he was unjustifiably dismissed. Ms Reid says that he abandoned his employment.

[57] If I find that Mr Radford was dismissed Sepclean must be able to prove to the Authority that the decision made and how it was reached were what a fair and reasonable employer could have done in the circumstances that existed at the time⁷.

[58] There is a significant clash of evidence between Ms Reid and Mr Radford on what happened the day he alleges he was dismissed. No contemporaneous record was available to assist in determining whose version of the evidence to accept. There were no observations from independent witnesses of their discussion on 14 September.

[59] A useful summary of other factors relevant in assessing credibility was set out in a determination of the Authority in *Van As v Auckland Airport Kiwi Hotel Limited*⁸. That determination in turn drew from a judgment of the Employment Court in *Griffith v Sunbeam Corporation Limited*⁹. Factors include:

⁷ Section 103A Employment Relations Act 2000.

⁸ [2013] NZERA Auckland 73

⁹ EMC Wellington WC 13/06, 28 July 2006.

- inconsistencies and contradictions;
- prevarication;
- concessions being made where they are due, but not to the extent that they substantially change the tenor of the witness' evidence;
- clarity and reliability of recollection;
- consistency with other evidence including contemporaneous documentary evidence; and
- degree of accord with reality or common sense.
- The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.¹⁰

[60] I found Mr Radford's account of the discussion he said amounted to his dismissal to have been materially consistent. Ms Reid's explanation of events as she saw them contained some contradictions. She says she did not dismiss Mr Radford but that he walked out. However she also says that she had no doubt that she would dismiss him.

[61] I find the greatest assistance from applying the last three factors together. Although there was no contemporaneous documentary evidence the evidence of Mr van Gessel, Mr Connell and Ms Sheppard was relatively contemporaneous and has a degree of accord with reality and common sense. It supports Mr Radford's evidence that he had been dismissed, or at least that he believed he had been dismissed.

[62] I have also taken into account Ms Reid's admission that she initiated meeting Mr Radford to get back his keys, although it was at Mr van Gessel's suggestion. If Ms Reid had not dismissed Mr Radford already it would have been a wholly unusual step to ask an employee to return his keys. If the purpose was merely to ensure that Mr Radford did not come to the premises over the weekend I would have expected Ms Reid to tell Mr Radford that and to say that she would return the keys when he came to work on Monday. She did not do so. Nor did she check whether having walked off the job earlier in the day he intended to come to work on Monday.

¹⁰ *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603

[63] Instead Ms Reid says that Mr Radford abandoned his employment. Although Mr Radford had not signed the employment agreement Sepclean's agreement contains the following clause on abandonment, which applies to the situation:

In the event the Employee has been absent from work for three consecutive working days without any notification to the Employer, and the Employer has made reasonable efforts to contact the Employee, this agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

[64] Even if Mr Radford had 'abandoned' his employment by walking out Sepclean was still required to act reasonably as set out in the above clause before the employment can be deemed to have been abandoned. Ms Reid made an attempt to contact Mr Radford but it was not to discover why he had walked out, and if he had abandoned his employment, but to recover Sepclean's keys not just for the weekend, but for all time. That is not consistent with the actions of an employer who considered her employee to have walked out after an incident or disagreement. Just because an employee walks off the job after a disagreement with his employer that does not amount to abandonment of his employment. How did Ms Reid know Mr Radford was not going to turn up for work on Monday morning? Even if Ms Reid did not dismiss Mr Radford verbally at the Sepclean premises, which I find she did, her taking back of the keys could itself have amounted to a dismissal.

[65] Ms Reid says that she would not have dismissed Mr Radford because at the time they were in desperate need of his driving qualifications. However, even after Mr Radford's employment had ceased the only remaining driver with a Class 5 qualification, Mr Connell, was dismissed by Ms Reid within a week. Ms Reid said in answer to questioning by Ms Mckinnon that at the time Mr Radford was dismissed they were trying to get the sludge run contract back.

[66] Mr Radford was dismissed by Ms Reid. It is not necessary to decide whether she swore at Mr Radford when she did so.

Was the dismissal justifiable?

[67] I now need to consider whether the dismissal was justifiable. I must consider whether Sepclean acted fairly and in particular whether, before deciding to dismiss Mr Radford, it:

- sufficiently investigated the allegations against him,
- raised its concerns with him,
- gave him a reasonable opportunity to respond to the concerns, and
- genuinely considered any explanation regarding the allegations.¹¹

[68] Only an employee's serious misconduct justifies summary dismissal. I also need to consider whether Sepclean had reasonable grounds for concluding that the misconduct in question occurred and it amounted to serious misconduct. I must also consider whether there are any other relevant factors.

[69] Ms Reid decided to dismiss Mr Radford on 14 September because he had refused to drive the truck and because she considered he had called the council inspector about the oily water spill and then lied to her. There are serious procedural flaws in the process. Sepclean did not sufficiently investigate its allegations against Mr Radford. Although Ms Reid knew that Mr Radford had refused to drive the truck because it was oily she did not understand why that was an issue for Mr Radford. She did not try to find that out. Also she did not investigate her belief that Mr Radford had called the council.

[70] Nor did Ms Reid fairly, and in a calm and measured way, put her suspicions to Mr Radford and give him an opportunity to respond to them. Mr Radford was not forewarned that Ms Reid considered that his refusal to drive the truck and his (allegedly) calling the council amounted to serious misconduct the outcome of which could be his dismissal.

[71] It follows that Sepclean could not have genuinely considered Mr Radford's explanations before making a decision to dismiss him.

[72] Sepclean's lack of a fair process, by breaching all four of the s.103A(3) tests, also means that it did not have reasonable grounds for concluding that Mr Radford had committed serious misconduct.

[73] I have considered whether Sepclean was such a small employer that it affected its ability to act as a fair and reasonable employer in all the circumstances. However, that is not the case. Sepclean was going through a period of great change, particularly with its staff. It could have sought professional advice on its obligations

¹¹ Section 103A(3) of the Act.

and rights in relation to engaging employees, especially when it intended to impose s.67A 90-day trial periods, and on whether it was entitled to dismiss Mr Radford in all the circumstances. I consider Sepclean's failures of process were more than minor and affected Mr Radford unfairly.

[74] The process undertaken and the resulting decision Sepclean made to dismiss Mr Radford were not actions that a fair and reasonable employer could have made in all the circumstances. Therefore, Mr Radford was unjustifiably dismissed and is entitled to remedies.

Was Mr Radford unjustifiably disadvantaged by:

- *being misled as to the true nature and terms of his employment,*
- *not getting an employment agreement reflecting the verbally agreed terms of employment, and/or*
- *a failure to have a job description provided?*

[75] These three claims are intimately intertwined. They are all aspects of what Mr Radford says led him to start in a role that was not what he wanted or had expected. Mr Radford says that he answered an ad for a vacuum truck operator and that is what he expected to be. Mr Furness and Mr Delaney were relatively inexperienced employees of Sepclean, given that Mr Furness himself had only been appointed about a month earlier. However, I am not satisfied that Mr Radford was actually misled at the interview about the true nature of the role he would be expected to undertake. He had only had experience of one kind of vacuum truck operation in Christchurch in the aftermath of the earthquakes with all the underground infrastructure damage that occurred. It was not reasonable to expect exactly the same kind of work in the Nelson/Richmond area. Further I am satisfied that he was told that Sepclean did a lot of septic tank work. I do not find that Sepclean unjustifiably disadvantaged Mr Radford or breached its duty of good faith to him even if he did not come away from the interview with a clear understanding of the role he had been interviewed for.

[76] In relation to terms of employment discussed at the interview differing from the proposed written employment agreement once received I do not accept that Mr Radford was led to believe there would not be a trial period. I accept Mr Furness' evidence that he told Mr Radford he would be on a trial period. In any event, that did not apply. Mr Radford was free to negotiate his terms of employment before

accepting the job or to decline the offer of employment as a general operator, as opposed to a vacuum truck operator. The hours he was told he would be likely to work were lower in the employment agreement than he had been led to believe. However, I accept that at the time if Mr Radford had wanted to be a general operator, rather than simply a driver, he was likely to have had more than the 36 hours minimum set out in the employment agreement. I do not consider Mr Radford was unjustifiably disadvantaged by terms of employment discussed at the interview being different to those in the proposed written agreement. He was not an employee until he accepted the job and that was after the interview and after he saw the proposed written agreement which described him as a general operator and not as a driver or even as a vacuum truck operator. Nor did Sepclean breach its duty of good faith to Mr Radford.

[77] I accept that the provision of a job description may have assisted the parties to understand one another at an earlier point in their relationship, and perhaps that Mr Radford would not have accepted the job if it had been clearly spelled out in the job description that he was expected to do an amount of septic tank and other very dirty and smelly work. The position description provided is somewhat vague and does not mention, for example, septic tank work. However, it is not mandatory for an employer to provide a job description and I am not satisfied that a failure to do so even after Mr Radford asked for one amounts to an unjustified disadvantage in his employment or a breach of Sepclean's duty of good faith.

Was Mr Radford disadvantaged by a substantial variation of his duties?

[78] Generally speaking an employer is not entitled to unilaterally vary terms and conditions of an employee's employment. Ms Reid mistakenly believed that because no written employment agreement had been signed Sepclean was free to alter Mr Radford's terms of employment.

[79] There were two significant alterations imposed or proposed by Ms Reid. The first was an alteration to the types of duties and work Mr Radford was to undertake. Mr Radford says he did not want to do general labouring or yard work or what he referred to as farming type of duties, yet that is what he was offered in addition to the small amount of Class 5 driving necessary. This change happened within a week of his employment beginning.

[80] I consider that Sepclean did breach Mr Radford's employment agreement by unilaterally imposing a significant change of duties on him. However, Mr Radford continued to work in the new role without protest. Employers and employees owe each other a mutual duty of good faith under s.4 of the Act. Both of them must be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. Mr Radford should have been more open with Ms Reid about how unsatisfactory the change in duties was to him.

[81] He was disadvantaged by the imposition of farming style duties but I am not sure that was actually unjustified in all the circumstances. Mr Radford did not want to do any septic tank work, unless it was just as the driver and operator of the vacuum truck. However, that is what the job of general operator entailed and there was not and would never be enough pure driving work for him.

[82] The second potential disadvantage was the attempted imposition of a fixed-term agreement. However, I consider that Mr Radford never agreed to this and therefore there was not a fixed-term employment agreement and so it was not a disadvantage to him in his employment or to the conditions of his employment.

Was Mr Radford disadvantaged by Mr Ross being employed to take over from him?

[83] There is insufficient evidence to prove that Mr Ross was employed to take over from Mr Radford as opposed to being employed with a view to the long term viability of the business by employing a younger man than the other staff as a general operator. Mr Radford complained that Mr Ross was trained on septic tank work while he was not. However, that cannot be of disadvantage to Mr Radford who was adamant at the investigation meeting that he never wanted to and would not do septic tank work. Mr Radford was not disadvantaged by Mr Ross being employed.

Remedies

Lost remuneration

[84] Mr Radford claims lost remuneration until 31 September 2012 because he gained other work on 1 October 2012, which was a temporary role until February 2013. That new job required him to move from the Nelson area and to return to

farming. I am satisfied that Mr Radford adequately mitigated his loss by seeking work.

[85] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Sepclean of the whole or any part of wages Mr Radford lost as a result of his grievance. Section 128(2) of the Act provides that I must order Sepclean to pay Mr Radford the lesser of a sum equal to his lost remuneration or 3 months' ordinary time remuneration. Since Mr Radford obtained work within the three months after his dismissal I need to award him his actual lost remuneration for the thirteen weeks after his dismissal.

[86] I am satisfied that Mr Radford should be paid for two weeks work at \$20 per hour for the average number of hours per week he worked over the period of his employment. I leave this to the parties to calculate and agree on but Mr Radford may come back to the Authority for a determination if agreement cannot be reached.

Compensation

[87] Mr Radford has claimed \$12,000 compensation under s.123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to his feelings.

[88] Much of Mr Radford's evidence about the negative effect on him of his time with Sepclean related to what he considered to be unjustified disadvantage. I have not found him to have been unjustifiably disadvantaged.

[89] Mr Radford also said that he was distressed by his employment being terminated in the way it was and that it caused him stress and anxiety as well as contributing to the break up of his relationship. He was puzzled about why he was summarily dismissed without an opportunity to be heard.

[90] I consider that Mr Radford is entitled to \$3,000 by way of compensation.

Cost of diesel

[91] Mr Radford claims that Sepclean should reimburse him relocation costs for his shift to Nelson which were essentially wasted when he was dismissed after only two weeks of work. However, I consider that Mr Radford chose to move to Nelson for his own personal reasons and it cannot be said that his relocation costs were directly money lost as a result of his grievance.

Contribution

[92] Under s.124 of the Act I must consider whether Mr Radford contributed to the situation which gave rise to his dismissal and if so reduce remedies accordingly. The evidence fails to establish that Mr Radford engaged in any blameworthy conduct contributing to the situation leading to his dismissal, so remedies are not to be reduced on the grounds of contribution.

Costs

[93] Costs are reserved. Mr Radford as the successful party is entitled to a reasonable contribution towards his actual legal costs. The parties are encouraged to resolve costs themselves. However, if that is not possible, then Mr Radford has 28 days within which to file a costs memorandum and Sepclean has 14 days within which to respond.

[94] In order to assist the parties to resolve costs by agreement I can indicate that the Authority usually adopts a notional daily tariff based approach to costs. The notional daily tariff is \$3,500. The investigation meeting took two days. However, I note Mr Radford is on legal aid and his actual costs may be lower than the notional daily rate. The parties are therefore invited to identify any factors which they say should result in an adjustment upwards or downwards to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority