IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2019] NZEmpC 31
EMPC 337/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TALBOT AGRICULTURE LIMITED Plaintiff
AND	FRANKLYN WATE Defendant

Hearing:	9 and 10 July 2018 and 10 August 2018 (Heard at Christchurch)
Appearances:	D Caldwell, counsel for plaintiff J Horan, advocate for defendant
Judgment:	22 March 2019

JUDGMENT OF JUDGE K G SMITH

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[1] Franklyn Wate was briefly employed by Talbot Agriculture Ltd as a mechanic, until his employment was terminated by the company relying on a 90-day trial provision in an employment agreement.

[2] Mr Wate pursued a personal grievance for unjustified dismissal and was successful. The Employment Relations Authority determined that he had been employed by Talbot Agriculture before entering into the written employment agreement containing the trial provision. That meant the Employment Relations Act 2000 (the Act) prevented the provision from being be relied on. The Authority held that Talbot Agriculture did not satisfy s 103A of the Act because of the way it

dismissed Mr Wate.[1] The company was ordered to pay him three months gross pay as reimbursement for lost wages, $10,000 as compensation for humiliation, loss of dignity and injury to feelings, wages of $3,751.50 and $300.12 gross holiday pay for the period from 2 May 2016 to 11 June 2016. For the period from 12 June 2016 to 29 July 2016 it was ordered to pay him wages of $6,750 and $540 gross holiday pay.

[3] Talbot Agriculture challenged that determination. It maintained that Mr Wate's employment was subject to a lawful trial provision and he was justifiably dismissed in reliance on it. The company said that any period of time in which Mr Wate undertook tasks for it before his employment began was either an unpaid assessment that the parties had agreed on and did not create an employment relationship, or work familiarisation undertaken as a volunteer. The company also said that, if it could not rely on those arguments, it had nevertheless justifiably dismissed Mr Wate.

Recruitment

[4] In early 2016 Talbot Agriculture advertised a vacancy for a mechanic to work in its farm machinery and farm business. An employee experienced in diesel and hydraulic work, who was able to assist with the company's farm, including tractor and truck driving, was required.

[5] In response to the advertisement Talbot Agriculture was approached by John Horan, who was then an immigration adviser and is now Mr Wate's advocate. Mr Horan was seeking to place Mr Wate in the job and suggested a work assessment be undertaken. Details of Mr Wate's training and experience were sent to Talbot Agriculture following which he completed the work assessment at its workshop in Temuka between 2 May and 4 May 2016. The purpose of the assessment was to consider his abilities and for him to understand how the business operated. Examples of Mr Wate's activities during this period were working on fixing a starter motor and a vehicle indicator light. During the few days of this assessment he was a house guest of Talbot Agriculture's Managing Director, Jeremy Talbot. When the assessment ended on 4 May 2016 Mr Wate left Temuka.

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1 *Wate v Talbot Agriculture Ltd* [2017] NZERA Christchurch 181.

[6] The assessment was successful. Mr Wate was offered the job subject to obtaining the work visa he required. Mr Horan prepared an employment agreement and it was signed by Talbot Agriculture on 5 May 2016 and by Mr Wate on 6 May 2016. Paragraph 3.1 of that agreement described the employment relationship as being of indefinite duration, but commencement of employment was deferred until Mr Wate obtained a visa. It read:

> **3.1 Individual Agreement of Ongoing and Indefinite Duration**
>
> This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The employment commences on approval of a Work Visa by Immigration New Zealand 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.

[7] Schedule 2 to the agreement stated Mr Wate's wage was $25 per hour and repeated that the agreement began when a visa was granted. An unnumbered sentence on the signature page of the employment agreement reinforced delayed commencement of employment by providing that:

> This agreement becomes valid once INZ approves a work visa for the appropriate named mechanic and is signed and dated by both parties

[8] The 90-day trial provision was in paragraph 3.3 of the agreement. The trial was described as being to assess and confirm the suitability of the employee for the position, even though Mr Wate had already completed an assessment earlier in May. The trial period did not specify the total number of days of the trial, instead referring to "not exceeding 90 calendar days".[2]

Second assessment

[9] As is apparent from the employment agreement, Mr Wate did not start work immediately because he needed to obtain a work visa. From 10 May 2016, while waiting for the visa to be granted, he attended Talbot Agriculture's workshop daily. Mr Talbot described this period as a "familiarisation" process. It was said to involve Mr Wate becoming familiar with the business and its operations by "shadowing or

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[2] The statement of defence admitted the plaintiff's pleading that this paragraph complied with the Act and the case was conducted by the parties on the basis that this wording complies with s 67A.

tagging along" with Mr Talbot, or one of his fellow directors, or another employee. While explaining this process as largely observational, Mr Talbot said there were occasions when Mr Wate was asked to assist with workshop tasks, but on the basis that doing so was good training for him if he was able to start employment.

[10] Mr Talbot's recollection was that, during this time, Mr Wate was free to come and go as he pleased. He would spend time away from the business, travelling to and from Christchurch to deal with issues arising from his visa application. He was supplied with some petrol so he could travel between Temuka and Christchurch.

[11] During this period Mr Wate lived with Mr and Mrs Talbot and was not charged for board or lodgings. Each morning he left the Talbot family home, with Mr Talbot, at around 8.00 am and went to the company's workshop. He remained there until the end of the working day when he accompanied Mr Talbot home.

[12] Towards the end of May 2016 Mr Talbot's father died unexpectedly. As a temporary measure, to assist Mr Wate with accommodation, he was invited to move into Mr Talbot's father's house. This arrangement was mutually beneficial, providing Mr Wate with a place to live and the Talbot family had a measure of security by having the property occupied. The arrangement was that, at some point, rent would be charged as would the cost of electricity and Sky TV. It was apparent that the financial aspects of providing this accommodation were to be sorted out at a future time, once Mr Wate obtained his visa.

[13] Talbot Agriculture did not pay Mr Wate during either the work assessment in early May or during the familiarisation. That meant he did not receive a wage between 2 May 2016 and 15 June 2016, when the visa was granted. He was not paid after 15 June 2016 because he did not supply an IRD 330 form to the company despite being asked to do so.

[14] Three cash payments were made to Mr Wate, totalling $1,100. Mr Talbot paid him $300 on 13 May 2016 and again on 19 July 2016. Stephen Talbot, who is Jeremy Talbot's brother and also a director of Talbot Agriculture, paid him $500 on 29 June 2016.

[15] The statement of claim pleaded that those payments were not wages. Mr Wate's amended statement of defence agreed that he had not been paid wages and described these payments as gifts. That was a surprising pleading because of what was said by the company's solicitors in correspondence responding to the personal grievance raised for Mr Wate. In a letter to Mr Horan the solicitors described the payments as follows:

> The cash payments paid to your client were advances on his wages to tide him over until such time as his IRD number was provided. Those advances will be deducted from the wages due. ...

The dismissal

[16] Mr Wate's visa was issued on 15 June 2016. On 19 July 2016 Talbot Agriculture gave him a letter terminating his employment from 31 July 2016. The letter was dated the previous day. Mr Wate expected it because of discussions he had with Mr Talbot over the previous few days. The reason given for ending Mr Wate's employment was dissatisfaction with his skills.

The issues

[17] This proceeding raises the following issues:

(a) Did the termination of Mr Wate's employment comply with s 67A of the Act so that he was precluded from bringing a personal grievance claim for unjustified dismissal?

(b) If Talbot Agriculture could not rely on s 67A, was Mr Wate unjustifiably dismissed?

(c) If Mr Wate was unjustifiably dismissed what remedies, if any, are appropriate to award?

Section 67A: 90-day trial provision

[18] This case turns on the application of s 67A of the Act. If that section applies Mr Wate is precluded by statute from pursuing a personal grievance for unjustified

dismissal. Talbot Agriculture's case was that it was entitled to rely on the trial provision in the employment agreement because it satisfied the requirements of s 67A.

[19] Mr Caldwell's submissions concentrated on s 67A(3); that the trial provision applied because Mr Wate had not been previously employed by Talbot Agriculture before being lawfully able to commence work when a visa was granted on 15 June 2016. Central to this submission was that the employment agreement was signed on 5 and 6 May 2016, several weeks before the visa was issued and prior to the familiarisation period described by Mr Talbot.

[20] The relevant parts of s 67A read:

> **67A When employment agreement may contain provision for trial period for 90 days or less**
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> (1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.
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> (2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that—
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> (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
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> (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.
>
> (3) **Employee** means an employee who has not been previously employed by the employer.
>
> …

[21] Mr Caldwell relied on the analysis of s 67A in *Smith v Stokes Valley Pharmacy Ltd* and *Blackmore v Honick Properties Ltd* to establish the application of s 67A.[3] While those cases were said to explain s 67A, the common feature of them was that work had started before the employee signed an agreement containing a trial provision.

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[3] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253; *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152, [2011] ERNZ 445.

The result, therefore, was that s 67A(3) was not satisfied, and the trial provision did not apply. Mr Caldwell's point was that, in this case, Talbot Agriculture was in a different position because the employment agreement had been signed before any work started. He also drew support from *Kumara Hotel Ltd v McSherry*, because in that case an agreement had been signed that did not contain a trial provision before one was signed that did contain one.[4] The key to that decision was said to be an employment relationship had been established once the first agreement was signed.

[22] Wrapped up in those submissions was that Mr Wate was not lawfully able to work until his visa was granted. Mr Caldwell acknowledged this argument was not determinative, but he considered it supported Talbot Agriculture's position. That was because both parties knew and understood work could not lawfully begin until a visa was issued and had acted accordingly.

[23] Mr Caldwell sought to establish that the two time periods when Mr Wate was present at Talbot Agriculture's premises were not employment. As to the first time period, from 2 May to 4 May 2016, the company said Mr Wate was undertaking an unpaid appraisal that was not employment. It pleaded that, between those dates, he underwent an assessment of his suitability for employment, with an understanding between them that no employment relationship was created or existed.[5] In the amended statement of defence Mr Wate responded to this pleading by saying that he had "no issues" with it. The case was conducted by both parties on the basis that no employment relationship existed during this time. Consistent with the pleading Mr Wate accepted that he did not expect to be paid for those few days because it was an appraisal.

[24] With that concession the company's case concentrated on the second time period, from 10 May to 15 June 2016. Mr Caldwell submitted that Mr Wate was not an employee during this time but was a volunteer within the meaning of s 6 of the Act. Section 6 excludes a volunteer from the definition of "employee" in the Act.[6] To come

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4 *Kumara Hotel Ltd v McSherry* [2018] NZEmpC 19, (2018) 15 NZELR 413.

5 To distinguish this situation from *Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152, [2013] ERNZ 326.

6 See Employment Relations Act 2000, s 6(1)(c)(i) and (ii).

within the exclusion the person said to be a volunteer must not expect to be rewarded for work to be performed and must not receive any reward for the work. Mr Caldwell supported this submission in two ways. First, because of the obvious impediment of being unable to lawfully begin work because a visa had not been granted. Second, because neither party had an expectation Mr Wate would be paid during this time.[7]

[25] The argument that Mr Wate was a volunteer rested on his presence at Talbot Agriculture's workplace coming about because of a request to assist him made by Mr Horan, and a desire to be helpful, not an intention to begin employment. This request was said to have been made because Mr Wate did not have anywhere else to go. The company, and by extension members of the Talbot family, were asked to help him while he was waiting for a visa to be issued, which it did. Examples were given of Mr Talbot, and his family, treating Mr Wate as a guest and behaving accordingly, such as by taking him out to dinner and assisting with winter clothes.

[26] Agreeing to a familiarisation process, while waiting for a visa, was how the company said it accommodated Mr Horan's request. That description was not used when the arrangement was made and does not adequately explain what happened over the following five weeks or so until 15 June 2016. As has already been noted, this process was said to be so that Mr Wate could become familiar with the business and its "mode of operation", "shadowing or tagging along" and "looking and learning". Mr Talbot said, on occasions, Mr Wate may have been asked to assist with minor tasks or repairs, but that was on the basis of the activity being good training for him if and when he was able to begin employment.

[27] Mr Wate kept a personal diary in which he recorded his activities each day. The diary is a mixture of personal and work information. It included commentary about the work he was doing while at the workshop during the familiarisation period. The content of this diary was criticised by Talbot Agriculture as inaccurate and exaggerated, because it was not a record of work performed by him. The company's position was that Mr Wate had recorded all of the available work in the workshop while he was there, not work he had done. However, Mr Talbot described Mr Wate

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7 Relying on *Brook v Macown* [2014] NZEmpC 79, [2014] ERNZ 639.

working on one or two small jobs that interested him during this time. Talbot Agriculture said that the work performed by Mr Wate was not recorded in the company accounts and it was not part of any bill to a customer.

[28] While criticising Mr Wate's diary, Talbot Agriculture derived support for its argument, that he was a volunteer, from it by pointing to entries where the word "assessment" was used to describe the work he was doing. The company said those entries were regularly made during the familiarisation period and showed he knew he was not undertaking paid work. A contrast was drawn between those entries and ones made after 15 June 2016 that did not use "assessment" to describe the work. The diary is, therefore, seen by the company as corroborating its view that the parties knew and understood Mr Wate was not an employee between 10 May and 15 June 2016.

[29] It was put to Mr Wate that he knew he could not lawfully work until his visa was issued and, for that reason, he had accepted that any tasks undertaken by him before that happened were to be unpaid. It was also put to him that at no previous time, before issuing this proceeding, had he said he expected to be paid for this work. In other words, his evidence that he expected to be paid did not reflect what he knew had been arranged but was a convenient reconstruction of what had happened after he had taken advice.

[30] An example of this reconstruction was said to be an email Mr Wate sent to Mr Horan, on 31 July 2016, illustrating what he knew and understood. The email mentioned having no pay for almost one month and three weeks. By calculating backwards from the date of the email, the unpaid time he described would be from about mid-June 2016, when the visa was granted, not from 10 May 2016 onwards. Mr Wate acknowledged what was in his email, and some entries in his diary to similar effect, but maintained that he expected to be paid for working from 10 May 2016 onwards.

[31] The evidence about how and why this familiarisation was arranged was not as clear as it could have been, but Mr Wate said that, at the time he sent his email to Mr Horan, he was referring to the position as he understood it. On reflection, and after

taking advice, he realised he was entitled to be paid. He also said he had made an arrangement with Mr Talbot regardless of his visa.

[32] Mr Horan's submissions about this part of Talbot Agriculture's case concentrated on the chronology of events and were not troubled by attempting to analyse s 6, the definition of volunteer in that section, or to consider the application of s 67A. He submitted that whether this time was called a familiarisation period, assessment, or voluntary activity, was immaterial because a common sense or realistic explanation was that Mr Wate was performing work for reward.

[33] While Mr Horan touched on *Smith v Stokes Valley Pharmacy Ltd* his analysis was confined to passages from the judgment discussing ss 67B(4) and 4(1A)(c) of the Act. He was referring to the statutory requirement that employees whose employment agreements contain a trial provision are to be treated no differently from those employees whose employment agreements do not contain one, and to the part of the Act requiring an employer proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment to act in good faith. Those submissions were irrelevant.

[34] When asked questions by the Court about s 67A Mr Horan was unable to provide any further assistance because he had not reviewed the section. However, relying on s 4, he maintained that every employee enjoyed the right to raise a personal grievance.

[35] I am not persuaded by submissions that Mr Wate was a volunteer. Using the word "assessment" does not, by itself, suggest an arrangement had been made for Mr Wate to be a volunteer during this time, or that he was not expecting to be paid. The diary entries are silent about pay for this period. It would go too far to suggest the use of one word supports the company's argument that Mr Wate was a volunteer and not an employee.

[36] Both of Mr Caldwell's submissions are inconsistent with what Talbot Agriculture and Mr Wate did. I consider that little turns on Mr Wate's visa status in the period between 10 May 2016 and 15 June 2016. The issue is not the lawfulness

of the work, but whether he actually worked as an employee during that time. Mr Wate may have overstated activities he was responsible for, when he wrote in his diary, but he performed work for the company during this time. His tasks were integral aspects of the mechanical services provided by it. The fact that Talbot Agriculture may not have charged its customers for the services he performed is immaterial.

[37] The fact that Mr Wate was looking for paid work when he was introduced to Talbot Agriculture, the length of time he was present on Talbot Agriculture's premises, that he undertook tasks for the company, and his regular attendance pattern all point towards an arrangement having been made for him to work as an employee. I do not accept that this period of time could be called "familiarisation", if that means something short of being engaged in work as an employee. An assessment of his abilities had already been undertaken in early May. The evidence that Mr Wate was "tagging along", or was being shown the business operations over approximately five weeks, was unconvincing, especially when considering the period could have been longer if any further delay had been experienced in obtaining the visa. Furthermore, a wash up was clearly intended once the visa was granted as is evident from the letter from the company's solicitors quoted from earlier.

[38] I find that Mr Wate was employed as a mechanic by Talbot Agriculture from 10 May 2016 onwards in the expectation that he would be paid. That conclusion deals with the submission that Mr Wate was a volunteer, but does not resolve the issue about the application of s 67A.

[39] Talbot Agriculture's case about the trial provision boils down to saying it could lawfully include a 90-day trial in the employment agreement because Mr Wate had not previously been employed by it. When the agreement was signed on 5 and 6 May 2016, he had completed what they agreed was an appraisal not constituting employment.

[40] What was Mr Wate's status once he signed the employment agreement? In *Stokes Valley*, *Blackmore* and *McSherry*, s 67A was strictly construed. In *Blackmore* the Court provided a succinct explanation of s 67A(3):[8]

> In accordance with the conclusion in *Stokes Valley Pharmacy*, an employee employed previously includes someone who has worked at some time in the past for the employer but has ceased that employment. It also includes an existing or current employee of the employer.

[41] That observation preceded an analysis by the Court of the phrase "starting at the beginning of the employee's employment…" in s 67A(2)(a). The conclusion was that the section applied when the employee begins work not on the date when the parties reached agreement for work from a future date. That analysis allowed the Court to conclude the agreed trial provision simply became one of a number of terms and conditions of employment that would take effect at a future date when the job started.[9]

[42] In *Blackmore* there was a discussion of the extended definition of employee in s 6 of the Act to include "a person intending to work".[10] *Blackmore* explained that the extended definition was Parliament's response to decisions like *Auckland Clerical and Office Staff Employees IUOW v Wilson*, where intending employees had no recourse by way of a personal grievance when the job that had been accepted was withdrawn before work began.[11] In *Wilson* a person had been offered and accepted employment to begin on a future date. In reliance on that offer she resigned from her existing job. Before the new job started the intending employer withdrew it. The Arbitration Court held that there could be no personal grievance claim for unjustified dismissal because employment had not begun. It had been deferred to a future date by agreement and that date had not arrived before the offer of employment was withdrawn. That meant she was not an employee. Consequently, there was no ability to pursue a remedy for unjustified dismissal in the Arbitration Court.

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8 *Blackmore*, above n 3, at [46].
9 At [53].
10 Employment Relations Act 2000, s 6(1)(b)(ii).
11 *Auckland Clerical and Office Staff Employees IUOW v Wilson* [1980] ACJ 357 (AC).

[43] While the extended definition overcame situations like those in *Wilson*, it did not create an employment relationship beyond the limited purpose of providing access to a remedy that would not otherwise be available. In *Blackmore* the Court said a person who accepted an offer of employment was an employee for a limited purpose; to be able to bring a personal grievance if a situation, such as occurred in *Wilson*, arose but was not an employee for all purposes.[12] An illustration of an obvious difficulty that would arise if something other than a limited purpose was created was given, by showing how an employee working out a notice period, before moving to work for the employer's competitor, would not be placed in a position of having to comply with potentially conflicting duties of trust and confidence.

[44] In this case an employment agreement between Mr Wate and Talbot Agriculture was signed on 5 and 6 May 2016, but the commencement of work was deferred by them to a future date when the visa was granted. The agreement is very clear. The wording in paragraph 3.1, the second schedule, and the unnumbered sentence on the signature page clearly indicate the parties did not intend an employment relationship to commence until, and unless, a visa was obtained. An employment relationship would only exist if the visa was granted and not otherwise. This drafting means that employment was not intended to commence on 6 May 2016, but to begin at a later time. Conceptually it might not have begun at all, if the visa had been denied. On that basis, by agreement, the relationship came into existence on 15 June 2016.

[45] Even if that analysis is wrong, Talbot Agriculture's strongest position is that Mr Wate was an employee from 6 May 2016 because of the extended definition in s 6, but that does not assist its argument. He was an employee for a limited purpose only, to avoid the mischief that arose in *Wilson*. Otherwise his employment was not to commence until 15 June 2016 by which time he had already been working for the company.

[46] Separately, Mr Wate and Talbot Agriculture entered into a period of employment beginning on 10 May 2016. That means an employment relationship

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[12] See the example given in *Blackmore*, above n 3, at [55].

existed before the commencement of employment contemplated by the written agreement and, consequently, Mr Wate fell within s 67A(3). It follows that the company was not able to rely on a trial provision under s 67A.

Was Mr Wate unjustifiably dismissed?

[47] The test for justification is in s 103A of the Act. Subsection (1) reads:

> **103A Test of justification**
>
> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
>
> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[48] In applying subs (2), section 103A(3) requires the Court to consider a number of factors. They are:

> (3) In applying the test in subsection (2), the Authority or the court must consider—
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> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
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> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
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> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
>
> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[49] Section 103A(5) precludes the Court from determining that a dismissal was unjustified solely because of defects in the process followed by the employer if they were minor and did not result in the employee being treated unfairly.

[50] In determining justification for an employer's actions, the Court must determine what the employer did, how the employer did it, and what a fair and reasonable employer could have done in the circumstances, bearing in mind that there may be more than one justifiable process and/or outcome. The test is an objective one.[13]

[51] Talbot Agriculture maintains that, if the trial provision is invalid, it nevertheless justifiably dismissed Mr Wate. It said there were deficiencies in his work which were raised with him before he was dismissed. It also said that an opportunity for his performance to improve was given and he was in no doubt that his employment was in jeopardy if he did not improve.[14] Mr Horan's submissions were based on the decision being unfair but he did not address s 103A.

[52] I do not accept that Talbot Agriculture acted as a fair and reasonable employer in the circumstances and it has not satisfied s 103A of the Act.

[53] The difficulty facing Talbot Agriculture is the way in which it approached concerns it had with Mr Wate. They did not materialise before Mr Talbot left New Zealand on 3 June 2016 for a trip to the United Kingdom. Mr Talbot is an engineer. Before Mr Wate's employment the company relied on him, and his son Robert, to undertake mechanical workshop activities. Other Talbot Agriculture directors had limited dealings with the workshop and did not claim to have experience in mechanical or engineering work. Mr Talbot ran the workshop and was the only person in the company with sufficient skill and experience to assess Mr Wate's work. There were no other employees in a senior position in the workshop able to assess Mr Wate's ability. Robert Talbot worked in the workshop, and is a qualified mechanic, but he was not Mr Wate's supervisor.

[54] Concerns about Mr Wate's performance were raised with Mr Talbot while he was in the United Kingdom in June 2016. He received reports from his fellow directors, by telephone. The nature of those reports was not fully explained but

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13 *Angus v Ports of Auckland* [2011] NZEmpC 160, [2011] ERNZ 466 at [59].

14 See generally the discussion in *Angus v Ports of Auckland*, above n 13.

probably included some general dissatisfaction with Mr Wate. One example that was relayed to him was a criticism of the way Mr Wate drove a company vehicle that had a faulty clutch. His driving was witnessed by the company's other directors, Warren and Stephen Talbot. They were unhappy with this driving and relieved Mr Wate of the task. The incidence was reported to Jeremy Talbot. This incident was one matter Mr Talbot said had caused him to consider Mr Wate to be unsatisfactory but he did not discuss it with Mr Wate.

[55] Shortly after Mr Talbot's return to New Zealand, on 5 July 2016, he told Mr Wate that his work was unsatisfactory and needed to improve. However, no records about the cause, or causes, of this dissatisfaction were maintained by the company. Mr Talbot maintained that Mr Wate's work suggested a lack of basic knowledge, distinguishing between elementary tasks a qualified mechanic would be able to undertake and the other specialist work handled by the company. But his dissatisfaction was relayed to Mr Wate in a perfunctory manner without an adequate opportunity for him to explain. Mr Talbot acknowledged that Mr Wate's experience was primarily with cars, not agricultural equipment, but little allowance seems to have been made for him to adapt to this kind of work.

[56] Mr Talbot also said that there were occasions when Mr Wate seemed incapable of following instructions, because he failed to differentiate between equipment calibrated in metric or imperial measurements. He was also concerned about whether Mr Wate might have had a sight or hearing problem and mentioned that to him. That was because, he said, there were occasions when Mr Wate did not appear to hear instructions and, on one occasion when he did hear them, seemed unable to differentiate between parts stored in colour-coded storage bins. There is a disagreement about how Mr Talbot's remarks were relayed, because Mr Wate said he was often spoken to dismissively and abusively, but that does not need to be resolved.

[57] Mr Wate acknowledged that he was told his work needed to improve and that he knew he faced dismissal if it did not. That message left him in a quandary, because he did not know where his skills were lacking and he was not told what steps had to be taken by him to improve his performance.

[58] It is well established that an employer is required to identify performance issues with an employee, advise that employee of the need for improvement, and then provide a sufficient period of time to address the issues that have been brought to his or her attention.[15]

[59] The impression I have is that Talbot Agriculture's performance concerns were raised with Mr Wate in a manner that did not enable him, and Talbot Agriculture, to address them. They were raised vaguely and unhelpfully. For example, in one instance, Mr Talbot relied on Mr Horan to relay his dissatisfaction to Mr Wate, which was done on 13 July 2016. That was not a satisfactory way to draw attention to any problems or to have them addressed. The nature of the perceived problem, any response to it, and training to improve could not be handled in this remote way. Some concerns could only have arisen as a result of the reports provided to Mr Talbot while he was overseas, in circumstances where he was only receiving second-hand information.

[60] It was difficult for Mr Talbot, or his fellow directors, to identify the aspects of Mr Wate's performance that were inadequate, and that they raised with him, aside from saying he seemed to lack a grasp of the basic work of a mechanic. That was surprising, because he had successfully completed an assessment in early May 2016 before being offered the job. Had Mr Wate's skills been as deficient as they are now said to have been, it is surprising he passed that assessment. The company did not explain why he had been satisfactory in early May but had become unsatisfactory by mid-July.

[61] Talbot Agriculture did not assist Mr Wate to improve. He was not provided with instructions on how the tasks said to be deficient should be undertaken, to meet the company's expectations. It was content to inform Mr Wate that his work was deficient and then, without doing anything more, wait for him to improve. That was insufficient.

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15 *Candyland Ltd v Jervois* [2013] NZEmpC 206 at [38], endorsing *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) at 681. See also *Ho v Chief of Defence Force* [2005] ERNZ 93 (EmpC).

[62] There was also an insufficient amount of time between when Mr Talbot raised these matters with Mr Wate, after 5 July 2016, and informing him on 19 July 2016 that his employment would end. In fact, Mr Talbot was considering dismissal only a week after returning to New Zealand, because he sent an email to Mr Horan on 13 July 2016 telling him it was being considered. At the most that was an interval of about two weeks for problems to be identified and addressed. It was insufficient to enable improvement to be demonstrated.

[63] What is troubling about these concerns over Mr Wate's performance, and undermines the company's case, is that after he was given notice of dismissal it offered him a period of further employment as a casual employee. The company said this offer was for a limited time to enable him to complete a job he was working on, one he was interested to see finished. The offer was at a lower pay rate. It is difficult to accept that the performance concerns bothering Mr Talbot could have been such that he wanted to end the employment relationship, but in some way Mr Wate remained sufficiently skilled to be able to remain, even briefly, as a casual employee.

[64] I conclude that a fair and reasonable employer could not have dismissed Mr Wate in all the circumstances at the time his dismissal occurred. Talbot Agriculture has not satisfied the test in s 103A of the Act.

Remedies

[65] The way in which Mr Wate's evidence was presented was as a commentary on each of the briefs of evidence for Talbot Agriculture's witnesses. It was disjointed and lacked a coherent narrative. Mr Wate did not give evidence about his lost remuneration, or the impact on him of being dismissed beyond that it was distressing.

[66] Not surprisingly, because Talbot Agriculture was seeking to set aside the Authority's determination, it did not present evidence about the wages and holiday pay ordered by the Authority.

[67] The absence of evidence about Mr Wate's income presents a significant problem for calculating the amount he is entitled to, given that the Authority's award

covered different time periods than this decision does. As will be apparent from this judgment, an adjustment to the orders made by the Authority will be needed, because the period from 2 May to 4 May 2016 can no longer be included. It follows that an adjustment to gross holiday pay is also required.

[68] No further evidence was given about the claim for compensation for humiliation, loss of dignity and injury to feelings. The Authority's order was for a payment of $10,000 suggesting that this compensation was considered to be in the low band referred to in *Waikato District Health Board v Archibald*.[16]

[69] I have reached the conclusion that, instead of the Court attempting to undertake possibly detailed calculations, the proper approach is to direct the parties to do so while reserving leave for them to apply to the Court if there is disagreement. The Registrar is holding all of the sums the Authority ordered Talbot Agriculture to pay in an interest-bearing account. Pending the parties reaching agreement about the remuneration payable to Mr Wate under this judgment, there is no reason to retain the whole of that amount. The Registrar will be directed to pay to Mr Wate, from the funds currently held, the $10,000 awarded to him under s 123(1)(c)(i) of the Act plus accumulated interest. The Registrar is to disburse from the remaining funds the amount required to satisfy an agreement in writing by the parties.

Conclusion

[70] Talbot Agriculture's challenge is partly successful because the remedies awarded by the Authority need to be adjusted but is otherwise unsuccessful. Because of this limited success the Authority's determination is set aside and replaced with this judgment.

[71] The Registrar is to disburse $10,000 from the sums held on interest-bearing deposit, plus accumulated interest, to Mr Wate.

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16 *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62].

[72] The Registrar is directed to disburse to Mr Wate from the remaining funds an amount the parties agree on in writing for his remuneration in accordance with this judgment.

[73] Leave is reserved for either party to apply to the Court for further orders if agreement is not reached on the remaining amount due to Mr Wate.

[74] Costs are reserved. Both parties have had a measure of success and my preliminary view is that costs should lie where they fall. However, if either party seeks costs memoranda may be filed and directions will be issued.

K G Smith
Judge

Judgment signed at 5.00 pm on 22 March 2019