IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2019] NZEmpC 116
EMPC 418/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WATTS & HUGHES CONSTRUCTION LIMITED Plaintiff
AND	PHILIP DE BUYZER Defendant

Hearing:	1-2 July 2019 (Heard at Christchurch)
Appearances:	L Mathieson and S Conner, advocates for plaintiff P Cahill and K Murray, advocates for defendant
Judgment:	4 September 2019

JUDGMENT OF JUDGE J C HOLDEN

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[1] The plaintiff, Watts & Hughes Construction Ltd (Watts & Hughes), has challenged a determination of the Employment Relations Authority (the Authority) on a non-de novo basis.

[2] The Authority found that the defendant, Mr de Buyzer, was not subject to a trial period at the time that he was dismissed by Watts & Hughes, and that Mr de Buyzer's dismissal was unjustifiable. Watts & Hughes also made a counterclaim to recover the fee it says it paid to a recruitment agency at the time it employed Mr de Buyzer. That counterclaim was unsuccessful.[1]

[1] *De Buyzer v Watts & Hughes Construction Ltd* [2018] NZERA Christchurch 155.

[3] The issues raised in the challenge are:

(a) whether the Authority erred in its determination as to the effect of the 90-day trial clause in Mr de Buyzer's individual employment agreement, as a matter of fact and/or as a matter of law; and

(b) whether the Authority erred as a matter of fact and/or as a matter of law when it rejected Watts & Hughes' claim for financial loss, namely the recruitment fee that it paid when employing Mr de Buyzer.

The Authority found the trial period clause was invalid

[4] It is common ground that Mr de Buyzer signed his individual employment agreement with Watts & Hughes on 13 December 2016 and commenced employment with Watts & Hughes on 9 January 2017.

[5] He acknowledged that he had been informed he was entitled to seek independent advice about the agreement before he signed it, and that he had a reasonable opportunity to do so.

[6] Mr de Buyzer was advised by letter dated 25 March 2017 that his employment was being terminated, effective 3 April 2017.

[7] Watts & Hughes advised him that the dismissal was in reliance on the trial period provision in his individual employment agreement, and on ss 67A and 67B of the Employment Relations Act 2000 (the Act).

[8] The clause on which Watts & Hughes was relying provided:

> **3 Trial period**
>
> 3.1 The Employee's employment is subject to a Trial Period of 90 days in accordance with S 67A of the Employment Relations Act 2000.
>
> 3.2 The Employer may terminate the Employee's employment during the Trial Period. If the Employer does so the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

> 3.3 One week's notice will be given to an Employee dismissed during or at the end of the Trial Period. In respect of any dismissal occurring within the 90 day trial period the Employer will act in good faith and be open and communicative with the Employee.

[9] The Authority determined that Watts & Hughes could not rely on that clause because the clause did not state when the trial period was to commence.

[10] As a result of that finding, the Authority proceeded to consider whether the dismissal was unjustifiable, finding that it was and awarding compensation to Mr de Buyzer.

Trial periods provided for by the Act

[11] At the time of Mr de Buyzer's employment, the Act provided:[2]

> (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
>
> (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.

[12] The effect of a trial provision is that if the employer dismisses the employee on notice before the end of the trial period, the employee may not bring a personal grievance or legal proceeding in respect of the dismissal.[3]

[13] Section 67A does not require any particular form of words in the trial provision. The inclusion of "to the effect that" in s 67A(2) means a provision in an employment agreement complies with the section if the provision has the same general meaning and leads to the same result as specified in the section.[4] The clause in Mr de Buyzer's

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2 Employment Relations Act 2000, s 67A(2), Historic Version (6 March 2015 to 5 May 2019).
3 Employment Relations Act 2000, s 67B(2), Historic Version.
4 See, for instance, Bryan A Garner ed*, Black's Law Dictionary* (10th ed, Thomson Reuters, USA, 2014): "1. Something produced by an agent or cause; a result, outcome or consequence."

employment agreement did not say the trial period started at the beginning of his employment. The issue is whether the clause in Mr de Buyzer's employment agreement was *to the effect that*, for the first 90 days of his employment, he was subject to a trial period.

[14] Although the clause does not state a start date for the 90 days, it does say that the trial period was "in accordance with s 67A of the Employment Relations Act 2000". A similar formulation is used in other parts of the employment agreement: for example, public holidays are given and paid "in accordance with the provisions of the current legislation"; accumulation of sick leave is "in accordance with the Holidays Act 2003".

[15] In the present context, "in accordance with" means to be in harmony or conformity with. A trial period in accordance with s 67A is one that is for a specified period (not exceeding 90 days) starting at the beginning of the employee's employment.[5]

[16] On that basis, there is no ambiguity in the clause in Mr de Buyzer's employment agreement. It was to the effect that, for the first 90 days of his employment, he was subject to a trial period.

[17] That is also what the clause would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties to the agreement at the time they entered into it; the language the parties have used must be read in the context of the document as a whole and the surrounding circumstances.[6] In this case, both parties understood from the outset that the employment was subject to a 90-day trial period. Mr de Buyzer raised no issue with that. Mr de Buyzer started work on 9 January 2017 with no pre-employment induction or training. It follows logically that the trial period started then too. In the circumstances that existed, there was no other time at which the trial period could reasonably have commenced.

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5 Employment Relations Act 2000, s 67A(2)(a), Historic Version.

6 *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 All ER 98, [1998] 1 WLR 896 (HL) at 912-913; *Vector Gas v Bay of Plenty Energy* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

[18] Accordingly, cl 3 of Mr de Buyzer's employment agreement complied with s 67A of the Act and so, by virtue of s 67B, Mr de Buyzer is not able to bring a personal grievance for unjustifiable dismissal.

[19] The Authority's determination on this issue is set aside and this judgment stands in its place. It follows that the remedies awarded by the Authority for unjustifiable dismissal also are set aside.

[20] It also follows that Watts & Hughes is entitled to the return of the $32,562.48 it paid into Court as a condition of a stay of the Authority's determinations, together with accrued interest.[7] The Registrar is to disburse those moneys to Watts & Hughes.

The counterclaim fails

[21] Watts & Hughes claims that Mr de Buyzer lied on his curriculum vitae, regarding his work history. It says, for that reason, he is liable to reimburse Watts & Hughes for the fee it paid its recruitment agent for their services with respect to the appointment process.

[22] Watts & Hughes says that, in his curriculum vitae, Mr de Buyzer left out a period of employment that he had with another construction company and overstated the experience that he had with the Ashburton District Council. Mr Gamlin, the South Island Manager for Watts & Hughes, said that, had Mr de Buyzer's employment history been accurately given to Watts & Hughes, it would have sought references from the construction company and Ashburton District Council. He says that without satisfactory references from those employers, Watts & Hughes would not have employed Mr de Buyzer.

[23] The evidence did not establish Mr de Buyzer lied in his curriculum vitae or to the recruitment agent. He provided the recruitment agent with a curriculum vitae that said he had worked for "a national construction company (tba) involved in educational projects in Canterbury" from 2014. The evidence from the recruitment agent was that she asked Mr de Buyzer where he currently was working and, when he truthfully said

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7 *Watts & Hughes Construction Ltd v de Buyzer* [2018] NZEmpC 152, at [30].

the Ashburton District Council, she finalised the curriculum vitae that was then provided to Watts & Hughes. The finalised curriculum vitae referred to Mr de Buyzer working for the Ashburton District Council in 2014-2016 and omitted the reference to the "national construction company", it seems because the recruitment agent misunderstood the situation.

[24] Mr Gamlin's evidence was that, in the interview for the job, Mr de Buyzer confirmed his work history as in the curriculum vitae provided, including the most recent entry covering two-years' service with the Ashburton District Council. Mr de Buyzer did not recall specifically saying he worked at the Ashburton District Council for two years. He says the meeting was very short – about 20 minutes. On balance, while there are indications that Mr de Buyzer was content not to have his time with the national construction company examined, the evidence was not strong enough to find deliberate deception. Mr Gamlin was working off the curriculum vitae finalised and provided by the recruitment agent.

[25] The counterclaim fails.

[26] The counterclaim would have failed in any event. A party that is induced to enter into an employment agreement by a misrepresentation is entitled to damages in the same manner, and to the same extent as if the representation was a term of the employment agreement that had been breached.[8] To be successful in its claim for damages, Watts & Hughes would need to show not only that Mr de Buyzer misrepresented his qualifications and experience, but also that the misrepresentation caused its loss.

[27] On the evidence presented, that is not the case here. Watts & Hughes elected to engage a recruitment agent to assist it to fill the role it had available, and incurred a fee for that. Mr de Buyzer is not responsible for that choice. The fee did not flow from any alleged misrepresentation. Mr de Buyzer then undertook work for Watts & Hughes in accordance with his employment agreement, until Watts & Hughes chose to end the employment.

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[8] Contract and Commercial Law Act 2017, s 35; Employment Relations Act 2000, ss 162, 190.

Costs should reflect mixed result

[28] Given the mixed result before the Court, my inclination is that costs (including in the Authority) should lie where they fall. If either party disagrees with this, and the parties are unable to reach agreement between them, an application for costs may be made to the Court within 20 working days of the date of this judgment. Any response to such an application must be filed and served within 15 working days of service of the application, with any reply then filed and served within a further five working days.

J C Holden
Judge

Judgment signed at 10.30 am on 4 September 2019