IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 131
EMPC 440/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	FARRAND ORCHARDS LIMITED Plaintiff
AND	MICHAEL TANE Defendant

Hearing:	21 and 22 June 2022 (Heard at Auckland)
Appearances:	M Nicholls, counsel for plaintiff M Pollak, counsel and T Tudor, advocate for defendant
Judgment:	27 July 2022

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Farrand Orchards Limited (FOL) terminated Mr Michael Tane's employment on the basis there was a valid 90-day trial period entitling it to do so.

[2] Mr Tane did not accept FOL could take such a step. He therefore raised a personal grievance in the Employment Relations Authority.

[3] The Authority determined that the trial provision was not valid in the circumstances. It concluded that there had been an unjustified dismissal and that he was entitled to remedies.[1]

[4] The only aspect of the Authority's determination which is challenged by FOL is the conclusion that the trial period provision was invalid. If the court accepts FOL's submissions about the trial period, FOL invites it to find the termination of Mr Tane's employment was justified. If the challenge fails, then the Authority's findings as to unjustified dismissal and remedies will stand.

The Authority's determination

[5] It is necessary to summarise the key aspects of the Authority's determination, since these must be the starting point for the Court.

[6] After referring to preliminary matters, the Authority described the factual background. It recorded that on 8 March 2019, Mr Farrand, the relevant director of FOL, made Mr Tane a verbal offer of employment following an onsite interview which lasted about four hours. They discussed whether Mr Tane should be employed as a trainee orchard manager. The men shook hands on a verbal offer.

[7] Mr Farrand said that during the course of the interview he had made it clear any offer would be conditional on Mr Tane successfully completing a 90-day trial period. He told the Authority that over many years employing staff he had learnt this was a necessary requirement and he had made this clear to Mr Tane.

[8] Mr Tane accepted Mr Farrand outlined bad experiences with staff in the past and that he emphasised the importance of trust and integrity. However, he said there was no mention of a 90-day trial period and that Mr Farrand did not offer employment which was conditional on such a trial period.[2]

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1 *Tane v Farrand Orchards Ltd* [2021] NZERA 503 (Member Urlich).
2 At [14].

[9] I interpolate that at the time of the interview, Mr Tane and his family resided in Auckland. The kiwifruit orchard to which the matter relates, was situated in Kerikeri, Northland.

[10] The Authority went on to say that on 12 March 2019, Mr Farrand and Mr Tane had a telephone discussion regarding accommodation on the orchard. Mr Farrand proposed to provide the house as part of Mr Tane's remuneration. He agreed to this but said he first needed to see a written employment agreement. Neither recalled discussing any other terms of employment during this conversation, including as to a 90-day trial period.[3]

[11] On 17 March 2019, Mr Farrand emailed Mr Tane a written employment agreement. It was incomplete in that it was unsigned, undated, and did not have Mr Tane's name or job description or contain any pay details. It contained a 90-day trial period.

[12] The Authority noted that the covering email did not draw attention to the trial period and suggested that all terms of the proposed agreement were negotiable:

> Attached is the standard Permanent Employment Contract we have used in the past. Have a look thru it, and let me know if you want to add or delete any of it. I'm not big on contracts, but by law I must have one for all Employees. I rely more on getting along with people by discussing any issues that might arise, in a grown up and mature fashion.
>
> Picking is just around the corner now, so look forward to your help. …

[13] On 18 March 2019, Mr Tane replied by email:

> Thanks very much for the contract, and I couldn't agree more with your sentiments around contracts. I'll have a look through it tomorrow as have been flat out over the weekend and today.
>
> Logistics wise there's been a bit to get sorted. I'm awaiting confirmation from the removal firm but I expect to have my gear moved up Saturday or Sunday the 30th or 31st of March.
>
> The best part of it all is I have the total support of [Mrs Tane] and the [children] which is great.

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3 At [15].

> Thanks again for this opportunity Kerry, we're going to make a great team.
> …

[14] The Authority explained that Mr Farrand did not understand Mr Tane's email to be an acknowledgment that he was accepting employment with FOL. He recalled his wife asking him sometime between 17 and 30 March 2019 if Mr Tane was coming to work for FOL, and he said he did not know. He also said that in his industry it was not unusual for people not to turn up to work and that he was somewhat conditioned to this. Mr Farrand said he knew Mr Tane had accepted employment with FOL when he moved into the orchard accommodation. The Authority took from this that Mr Farrand had not understood that he and Mr Tane had reached accord before then.[4]

[15] Mr Tane said he acknowledged the employment agreement that was provided to him on 17 March 2019 had contained a 90-day trial provision, but he did not pick this up at the time.[5] On 30 March 2019, the Authority said Mr Tane travelled with his belongings and furniture to move into the orchard accommodation. Arrangements, he said, had been made for his family to finish the work and school year in Auckland before joining him in Kerikeri in 2020. There was some communication between Mr Tane and Mr Farrand advising of his arrival. The Authority said that Mr Farrand had not contacted Mr Tane further over the weekend to discuss the employment agreement or any other matter. This was because he did not wish to disturb Mr Tane when he was just settling in.[6]

[16] On 1 April 2019, Mr Tane started work with FOL. There was no dispute between the parties that he started working before he signed the employment agreement.[7]

[17] The Authority went on to say that the next event which concerned the employment agreement was when Mr Farrand handed Mr Tane an agreement with his name, job title and hourly rate completed, which was signed by Mr Farrand on behalf of FOL and dated 1 April 2019.

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4 At [18].
5 At [19].
6 At [20].
7 At [21].

[18] Mr Farrand said this had occurred on the morning of 1 April 2019. Mr Tane told the Authority, however, that Mr Farrand had handed him this document on Thursday 4 April 2019 and that he put it down and said he would look at it over the weekend. He said his recollection was consistent with the date he executed the document, which was Monday 8 April 2019.

[19] The Authority found it more likely than not that the completed employment agreement was handed to Mr Tane on 4 April 2019 as he recalled, because that was the most plausible explanation for his not completing it until 8 April 2019. However, not a lot turned on this finding because there was no dispute Mr Tane had not signed the completed employment agreement until after the commencement of his work.[8]

[20] After discussing performance matters which are not now in issue, the Authority said that on 21 June 2019, Mr Farrand told Mr Tane that he was giving him seven days' notice of dismissal. The reason Mr Farrand gave was that Mr Tane was "too tall". Mr Farrand said he did not elaborate on the reasons because he did not wish to cause Mr Tane further embarrassment. Mr Tane said the dismissal came as a complete shock.[9]

[21] FOL did not provide Mr Tane with written notice. His last day of employment was 28 June 2019. He vacated the accommodation on the same day, although FOL had given him some leeway as to the vacation date.[10]

[22] The Authority then turned to discuss the evidence outlined above.

[23] It recorded that Mr Farrand had said he had not insisted on Mr Tane signing an employment agreement before he started because he did not wish to disturb him while he was settling into his new accommodation and that in retrospect it was a mistake not to get him to do so before starting employment.[11]

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8 At [22].
9 At [26].
10 At [27].
11 At [28].

[24] Then the Authority said that, on the information before it, the parties written employment agreement could not have been executed before Mr Tane started his employment with FOL because one had not been provided in a form able to be executed. Mr Tane had not signed the 17 March 2019 employment agreement before starting because it was not complete. This was fair, in the Authority's assessment, because the 17 March 2019 document did not meet the requirements of s 65 of the Employment Relations Act 2000 (the Act). Mr Tane's name was not on the document, and the position and wage/salary sections were blank.[12]

[25] The Authority recorded FOL's submission that notwithstanding the employment agreement not signed by Mr Tane until after his employment commenced, the essential elements of employment had been agreed between the parties prior to commencement of work, and this included the trial period. The company's case was that it would be unconscionable for a party to promise something, in this case to sign the proposed employment agreement containing the trial period, and then seek to rely on delay in signing the document which contained terms to which the parties had agreed. FOL relied on an Authority determination, *Berea v Best Health Foods Ltd*, to support its submission that a valid trial period commenced when all of the essential elements of the bargain between the parties had been struck and both parties had definitively accepted by words, or deed, the terms offered.[13]

[26] However, the Authority considered that the circumstances in *Berea* were distinguishable from those arising in this case because there was insufficient evidence that the parties had agreed a trial period would form part of their terms of employment or even that FOL made clear to Mr Tane the offer was conditional on a 90-day trial period. This conclusion was supported by the following findings:[14]

(a) Mr Tane had denied Mr Farrand offered him conditional employment on 8 March 2019, and there was no direct evidence to corroborate Mr Farrand's evidence that he did;

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12 At [28].
13 *Berea v Best Health Foods Ltd* [2020] NZERA 474 at [27]–[33].
14 *Tane v Farrand Orchards Ltd*, above n 1, at [30].

(b) the next communication between the parties was on 12 March 2019, and neither witness suggested a trial period was discussed then;

(c) Mr Farrand's 17 March 2019 email suggested all terms of the attached blank employment agreement were negotiable, and it did not highlight the 90-day trial period condition as had been the case in *Berea*;

(d) Mr Tane said he did not notice the 90-day trial period in the 17 March 2019 employment agreement, and there was no evidence to contradict evidence of this specific provision being drawn to his attention; and

(e) the parties did not discuss the terms of employment over the weekend 30 to 31 March 2019.

[27] Drawing these threads together, the Authority found there was no dispute that the employment agreement was not executed prior to Mr Tane's employment and that there was insufficient evidence to establish there was accord between the parties that Mr Tane's employment was subject to a 90-day trial period. The Authority found that FOL's failure to ensure the written employment agreement containing the 90-day trial period was executed prior to Mr Tane's employment commencing was fatal to its reliance on that term.[15]

[28] The remainder of the determination dealt with issues that are not now in contention. The Authority found that the test for justification under s 103A of the Act was not met, a fact which had been conceded by FOL. The Authority went on to consider remedies and contribution, ultimately concluding that FOL pay Mr Tane these sums:[16]

(a) $15,000 for humiliation, loss of dignity and injury to feelings;

(b) $18,480 being three months lost remuneration; and

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15 At [31].
16 At [35] and [47].

(c) $1,478 in holiday pay, calculated at 8 per cent on the total lost wages award.

Nature and extent of hearing

[29] In its minute dealing with directions for the hearing of the challenge, the Court made the following directions as to the nature and extent of the hearing by agreement:

> (i) Did the Authority err in fact or law when it found:
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> a. The defendant did not have notice that the offer of employment was conditional on a 90-day trial period, even though the offers of employment made on 8 (first offer of employment) and 17 March 2019 (second offer of employment) included a 90-day trial provision.
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> b. The defendant moving into the plaintiff's orchard accommodation on 30 March 2019, as part of the second offer of employment, did not constitute his acceptance of the second offer of employment, including the 90-day trial provision.
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> c. The 90-day trial period had not been agreed between the parties prior to the defendant commencing work on 1 April 2019.
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> d. The plaintiff did not provide a signed offer of employment to the defendant before 1 April 2019.
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> e. The plaintiff did not require the defendant to sign a copy of the second offer of employment before he commenced work at 8 am on 1 April 2019.
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> (ii) Did the Authority err in law when it found that the 90-day trial provision in the defendant's individual employment contract was invalid?
>
> (iii) Did the Authority err in law when it determined that the defendant should not be estopped from relying on his alleged promise that he would sign the individual employment agreement prior to commencing work at 8 am on 1 April 2019?
>
> (iv) If the Authority did err in law, what are the appropriate remedies and costs awards in relation to the Court's finding?

[30] Comprehensive briefs of evidence were filed by both parties. Also before the Court were the several documents to which the Authority had referred in the determination. I also received submissions to which I will refer where relevant.

[31] At the commencement of the hearing I ruled that some paragraphs of the briefs of several intended witnesses, Mr Tane, Ms Tane, and Mr Vijee, related to matters that were not in issue and that the Court would accordingly not need to receive that evidence.

[32] Initially, there was no formal verification of the evidence which had been placed before the Authority. In the course of the hearing I was informed that the parties had not filed written briefs of evidence for the purposes of the investigation meeting, and that the information as to the parties respective positions was as given during the meeting itself, orally and remotely. It transpired that the representatives had provided written submissions to the Authority. In this Court, it was agreed that this material should be produced. Those documents have proved to be useful, since in their submissions each representative summarised the evidence which had been given at the investigation meeting.

[33] Mr Farrand and Mr Tane gave lengthy evidence to the Court. It was largely consistent with the evidence given to the Authority. This means that the Court has a sound basis for considering whether there were any material errors of fact in the Authority's determination.

[34] There were some differences of recall between Mr Farrand and Mr Tane. Accordingly, counsel submitted that credibility assessments would be required. Unfortunately, there are no contemporaneous notes of key conversations or confirmatory communications between Mr Farrand and Mr Tane which would assist when assessing credibility. This is surprising as both of them were relatively experienced business persons.

[35] In the result, each were attempting to recall events that occurred three years ago. Both were certain that their respective descriptions of events were correct, but each also made corrections to that evidence.

[36] Two examples will suffice. Mr Farrand initially said Mr Tane had sent him an email requesting a copy of an employment agreement on 16 March 2019. He had thought this email was the means by which an issue had arisen as to whether Mr Tane

would or would not rent orchard accommodation. Subsequently, he acknowledged that this topic had been the subject of discussion between the two in the telephone discussion which occurred on 12 March 2019, because he had been unable to find the email to which he had originally referred. Accordingly, he corrected his evidence. This indicated a degree of reconstruction of events, rather than reliance on memory, which was unsurprising given the lapse of time.

[37] Similarly, Mr Tane's account has altered. The parties debated as to when he received the employment agreement for signature and whether he saw the trial provision in it. His position changed in respect of both of these points. In the initial exchanges after the termination, Mr Tane said the employment agreement was signed on 4 April 2019. However, the document shows it was signed by Mr Farrand for FOL on 1 April 2019 and signed by Mr Tane on 8 April 2019. It transpired that a copy of the document was not retained by Mr Tane after he signed it. In fact, he did not receive a copy of it from FOL until after the statement of problem had been filed in the Authority. I infer that he was reminded of the actual dates of signature of each party at that point.

[38] On the issue of the inclusion of a trial period in the agreement, Mr Tane's position in the initial exchange of correspondence following termination was simply that the clause was invalid because he had started work before it was signed.

[39] However, at the investigation meeting he said, for the first time, that he had not known about the provision until Mr Farrand referred to it at the time of termination. Subsequently, when giving evidence to the Court, he was pressed as to when he became aware of it, and he said that he saw it when he signed the document, on or about 8 April 2019. Again, there was an element of reconstruction of events rather than reliance on memory.

[40] As will be seen below, however, I do not consider these apparent discrepancies are necessarily relevant to the issues which the Court must resolve. It is evident from the submissions made to the Authority by the representatives that the discrepancies existed in the evidence tendered to the investigation meeting. The key differences of recall were recorded by the Authority. The issue which the Court must now consider

is whether the Authority acted erroneously when making findings and drawing inferences. Put another way, I am satisfied that the evidence placed before the Court by the parties aligns with the evidence given to the Authority. The question then becomes whether it could be said the Authority erred in the ultimate conclusions which were then reached.

The employment agreement

[41] It will be necessary to refer to some aspects of the employment agreement in more detail later, but it suffices at this stage to record the provisions relating to the nature and term of the agreement. The signed individual employment agreement (IEA) expressed these as follows:

> 3.1 The Employer and the Employee are entering into a permanent agreement for a fixed period. This period shall start on:
>
> 1-4-19 and shall end on 31-3-20
>
> 3.2 Probation
>
> A probation period will apply for the first 90 days of employment to assess and confirm suitability for the position. The employer will provide guidance, feedback and any necessary support to the employee. Both parties will promptly discuss any difficulties that arise, and the employer will appropriately warn the employee if he or she is contemplating termination. Any termination must comply with the termination clause in this agreement. This probation period does not limit the legal rights and obligations of the employer or the employee, and both parties must deal with each other in good faith.
>
> 3.3 Trial periods
>
> A trial period will apply for a period of 90 days employment to assess and confirm suitability for the position. Parties may only agree to a trial period if the employee has not previously been employed by the employer.
>
> During the trial period the employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. …
>
> Any notice, as specified in the employment agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the employer or the employee (including access to mediation services), except as specified in section 67A(5) of the Employment Relations Act 2000.

[42] Clause 12.1 provided that the employer could terminate the trial period by providing one day of notice to the employee within the trial period. By contrast, under cl 12.2 the employer could terminate the agreement for cause, by providing seven days' notice in writing to the employee. Likewise, the employee was required to give seven days' notice of resignation.

[43] Under cl 14.3 the employee acknowledged a right to take independent legal advice on the terms of the agreement and that there had been a reasonable opportunity to take such advice. The employee also acknowledged reading the terms of the employment agreement and that these were understood.

[44] There was also a declaration provision in the employment agreement. On behalf of FOL, Mr Farrand acknowledged that he had offered the employment agreement to Mr Tane. This declaration was dated 1 April 2019. For his part Mr Tane signed a declaration that he had read and understood the conditions of employment detailed above and accepted them fully. The declaration also stated that he had been advised of the right to seek independent advice in relation to the agreement and had been allowed a reasonable time to do so. This declaration was dated 8 April 2019.

Analysis

Issue One: Offer of employment on a conditional basis?

[45] In respect of the offer of employment on 8 March 2019, the Authority found there was no direct evidence to corroborate Mr Farrand's evidence that employment was conditionally offered on that date. It also determined that the next communication between the parties on 12 March 2019 did not refer to a trial period. The Authority then concluded that the 17 March 2019 email suggested all terms of the attached employment agreement were negotiable and did not highlight the 90-day trial period condition, as was the case in *Berea.*

[46] In order to determine whether there is any challengeable error, it is necessary to test these conclusions against the evidence.

[47] With regard to the initial four-hour interview of 8 March 2019, Mr Farrand said he told Mr Tane during the meeting that because of him not having relevant experience as an orchard manager, he was taking a "massive chance" on him so that any offer of employment would include a 90-day trial period. He said he remembers Mr Tane agreeing that this was a good idea. He went on to say it would have been "crazy" for him to offer Mr Tane a full-time job as the plaintiff's orchard manager without such a provision when he had just met Mr Tane and knew he had no experience.

[48] He said it was also standard practice for him to include such a provision when the position being filed was a management one.

[49] Before turning to Mr Tane's position on these issues, I note that Mr Farrand gave evidence of various persons, and in one case an entity, retained to supervise or manage FOL's orchards. Apart from Mr Tane, four examples were given. Only two were subject to a 90-day trial period. It does not follow, therefore, that it was always the company's practice to include such a provision.

[50] For his part, Mr Tane says he was not told during the interview that any job offer would be conditional upon successful completion of a 90-day trial period, or that his ongoing employment would be subject to such a condition. He also says that no reference was made to a "massive chance" being taken on him and that he never agreed to a 90-day trial period.

[51] He went on to say that had there been such a condition, he would not have accepted such a job offer, or if he had accepted a conditional offer, he would not have done several things. He would not have moved into an orchard house until the trial period was over, moved his furniture from Auckland to Kerikeri when he commenced work, downsized his family into an apartment, purchased new furniture for that apartment, and planted a substantial volume of plants and trees in the gardens of the orchard house. He says he did all these things on the understanding he was moving into the accommodation for at least a three-year period.

[52] Given this evidence, I am not satisfied that the Authority erred by stating there was no accord as to a 90-day trial provision at the initial meeting.

[53] There are two other aspects of this part of the chronology. The first arises from the evidence of two secondary witnesses called by FOL. One was a co-director of FOL, Mrs Kristin Farrand. In early March, she had a conversation with Mr Farrand as to the use of the orchard accommodation and whether it would be ready for a new tenant later that month. She said they discussed Mr Tane's background with her expressing surprise and concern that Mr Farrand was considering an employee with no experience in horticulture. In that context, she said Mr Farrand told her that any risk that Mr Tane would not work out was eliminated by him being employed on a 90-day trial period as part of his employment.

[54] I do not regard this evidence as confirming that there was in fact an accord on this issue of a conditional employment agreement. There is no doubt that prior to commencing work at the orchard, Mr Tane was sent a draft IEA which contained both a probation clause and a trial provision clause, each for 90 days. But it was not signed before he transferred north. I do not regard the conversation between Mr Farrand and Mrs Farrand as corroborating an accord about a 90-day trial provision.

[55] Mr Dennis Boggs, a contractor for FOL, said that Mr Tane must have realised his IEA would be subject to a 90-day trial provision. Similarly, this speculative evidence does not amount to corroboration of an accord.

[56] The final point to this aspect of the chronology relates to the composition of the draft IEA as submitted to Mr Tane on 17 March 2019. The position regarding the first 90 days was, even that document, confusing. Clause 3 contained both a probationary period of 90 days and a trial period of 90 days. Each was of different effect.

[57] Counsel for FOL, Mr Nicholls, submitted that in the circumstances the trial period provision clearly overrode the probationary period. It is not obvious as to why that would be the case. Indeed it is possible that what Mr Farrand had in mind when he referred to an offer being made on 8 March 2019 was that it was subject to him agreeing to the terms of FOL's standard employment contract agreement, which would include a trial period of 90 days. This would be in the nature of a probation period during which Mr Tane's suitability could be assessed and confirmed.

[58] As noted by the Authority, the email sent to Mr Tane of 17 March 2019 suggested all terms of the attached IEA were negotiable. The email did not highlight the 90-day trial period condition. The Authority considered that these facts made this case distinguishable from *Berea*.

[59] Before considering what was said by the Authority in *Berea*, I note that the determination in that case was challenged to this Court.[17] However, the finding that a valid trial period had been included in the relevant IEA was not put in issue. That said, the effect of the challenge under s 183 of the Act was that this Court's decision replaced the Authority's determination.[18]

[60] However, because in this case the Authority, and now the parties, have proceeded with reference to some of the points made in the *Berea* determination, it is appropriate to refer to its findings about a valid trial period.

[61] In that instance, the Authority referred to a sequence of events concerning Ms Berea in which the intended employer, when offering her a job with a proposed starting date, salary, hours of work, and days to be worked, stated: "[A]s usual, there will be a 90-day trial period". Ms Berea responded that she accepted the terms outlined and that she was looking forward to signing the offered IEA.[19] Subsequently, the Authority concluded that the employment agreement was formed between the parties "prior to the commencement of actual employment with no essential concerns being raised by Ms Berea and … the later signing of the agreement [did] not create a situation where the trial period [was] invalidated".[20]

[62] In the present case, the Authority distinguished *Berea* on the basis there was "insufficient evidence" that the parties had agreed a trial period before Mr Tane commenced work, pointing to the absence of corroboration, as already discussed, to the fact that the terms of the employment agreement were negotiable, and to the fact

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17 *Best Health Foods Ltd v Berea* [2021] NZEmpC 155, [2021] ERNZ 696 at [13].
18 At [100].
19 *Berea v Best Health Foods Ltd,* above n 13.
20 At [29].

that the email of 17 March 2019 had not highlighted the 90-day trial period condition as had been the case in *Berea*.[21]

[63] In the evidence before both the Authority and the Court, none of these findings are shown to be incorrect. *Berea* was correctly distinguished.

[64] Finally, neither in the email of 17 March 2019, or in the period from then until 30 March 2019, was there any attempt to resolve the dichotomy between the probation provision and the 90-day trial provision.

[65] In these circumstances, the Authority did not err in finding the evidence did not establish there was an agreement to include a 90-day trial provision.

Issue Two: Did Mr Tane moving into the orchard accommodation on 30 March 2019, constitute acceptance of the 90-day trial provision?

[66] The Authority found that Mr Tane did not notice the 90-day trial period in the 17 March 2019 employment agreement and that there was no evidence to contradict that, such as evidence of the specific provision being drawn to his attention. Further, the Authority concluded that the parties did not discuss the terms of employment over the weekend of 30 to 31 March 2019.

[67] To recap, on 12 March 2019, there were telephone discussions between Mr Farrand and Mr Tane regarding orchard accommodation. Mr Farrand had originally proposed that a house in the orchard could be used by Mr Tane for a rental of $400 per week. During the telephone conversation, Mr Tane said he could not accept the offer of employment on this basis. Accordingly, Mr Farrand responded by stating the house could be rent free for the first year of employment. Mr Tane said this might be acceptable and he would talk to his wife about it. Later that day the previous offer of employment was modified accordingly, although this was subject to Mr Tane agreeing to the terms of FOL's standard employment agreement as before.

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21 *Tane v Farrand Orchards Ltd*, above n 1, at [30].

[68] Mr Tane said that he was accordingly surprised to receive an incomplete, unsigned and undated employment agreement that did not contain a job description or the specific pay details which had been discussed. He noted that there was no tenancy agreement attached to the email. He also said that the email did not include a statement indicating that the offer of employment was conditional on completing a 90-day trial period before his role would become permanent. He did not notice either that provision or the conflicting 90-day provisions.

[69] Mr Tane also said that since the email made it clear that the terms in the pro forma employment agreement were negotiable, he decided to wait for an employment agreement specific to him before negotiating any additional or varied terms. As a result, he did not see any benefit in seeking independent legal advice on the draft form of the employment agreement.

[70] This was the context for him sending his response the next day, which made it clear that he was focused on the logistics of moving his family, who were supportive of the move, and that he was looking forward to working with Mr Farrand.

[71] He felt he had verbally accepted a permanent full-time job as a trainee orchard manager on 8 March 2019, but the written terms and conditions of that employment needed to be finalised, and this had not occurred by 17/18 March 2019.

[72] From this time onwards he was still working in Auckland, a situation which continued until the weekend of his transfer to Kerikeri. He said he was busy packing and making necessary arrangements. He considered Mr Farrand to be a man of his word who he could trust to do the right thing. He felt certain that all the terms and conditions of employment would be finalised once he arrived on site and he had received a specific written employment and tenancy agreement.

[73] On 29 March 2019, he rang Mr Farrand to advise him of his impending arrival in Kerikeri the next day. There is no evidence of any relevant conversation between the two as to the formal terms and conditions of his employment, although Mr Tane did say that he did see the work opportunity as being "more of a partnership rather than a job" and assured him that negative experiences he had with previous managers

would not recur. He said to Mr Farrand that he had his back. Mr Farrand told him that he was excited as no one had taken on such a position for him previously. There was no mention in this conversation, however, of a 90-day trial period or a probation period, or that it was intended his offer of permanent employment would be conditional.

[74] On 30 March 2019, Mr Tane travelled to Kerikeri with his belongings and furniture to move into the orchard accommodation, which was in the process of being finalised for him. His wife came with him to help set up house and returned to Auckland on the afternoon of the following day. Mr Tane said his wife and daughters were to remain in Auckland so they could finish up work and university before joining him in Kerikeri the following year. He had made arrangements for them to move to a smaller premises in Auckland, for which he had purchased new furniture.

[75] On 30 March 2019, Mr Tane rang Mr Farrand to tell him he had moved in. Again, there was no discussion as to the formal arrangements. Mr Farrand said he did not wish to disturb Mr Tane when he was settling into new accommodation.

[76] Mr Farrand said, however, that by this time he considered all the terms of employment had been agreed and were either as recorded in the pro forma document or as known to the parties as a result of their previous express agreement.

[77] Accordingly, in his evidence to the Authority and to the Court, he said that he believed there was a concluded employment agreement when Mr Tane arrived in Kerikeri for the purposes of his employment with FOL, both by word and deed. He said this occurred on 30 March 2019. Yet, when speaking to Mr Tane over the weekend, he did not tell him there was now a binding employment agreement.

[78] By contrast, Mr Nicholls, in his closing submissions, said that the agreement was concluded on the previous day, 29 March 2019, when Mr Tane rang Mr Farrand to tell him he would be travelling to Kerikeri the next day.

[79] In respect of these circumstances, the Authority concluded that there was no evidence to contradict Mr Tane's evidence that he did not notice the 90-day trial period

provision in the pro forma agreement. Nor was there evidence of the trial provision being drawn to Mr Tane's attention. Further, the parties did not discuss the terms of the agreement over the weekend of 30 to 31 March 2019.

[80] In the absence of any evidence establishing that Mr Tane was aware of the requirement to submit to a 90-day trial provision – as opposed to a 90-day probationary provision – it must follow that the Authority did not err. Rather it reached a correct conclusion. That means that when Mr Tane moved into FOL's orchard accommodation on 30 March 2019, he did not accept a trial provision; he was unaware that this would be a required term.

Issue three: Did FOL provide a signed offer of employment to Mr Tane before 1 April 2019?

[81] Neither party provided evidence to suggest that FOL provided a signed offer of employment to Mr Tane before 1 April 2019. The Authority did not make a finding about this because it was not required to.

Issue four: Was the 90-day trial period agreed between the parties prior to Mr Tane commencing work on 1 April 2019?

[82] The Authority found that Mr Farrand signed the agreement on behalf of FOL and dated it 1 April 2019.

[83] The Authority recorded there was a dispute between the parties as to whether the document was then given to Mr Tane on the morning of 1 April 2019 as Mr Farrand said, relying on the date in the document; or whether it was handed to Mr Tane on 4 April 2019 as he said, on the basis that he then completed and returned the document a few days later on 8 April 2019. The Authority found that it was more likely that Mr Tane's account was more plausible, but that not a lot turned on it because there was no dispute as to the fact he had not signed the document until after his employment started.

[84] Detailed evidence was given by the parties to the Court as to what occurred on the morning of 1 April 2019. It is common ground that Mr Farrand met Mr Tane in

his office. Mr Farrand says he handed the document to Mr Tane at the time and then left for a short period to provide instructions to some nearby workers.

[85] Mr Tane said this did not happen, and he did not believe there were nearby workers.

[86] Mr Farrand also stated in his evidence that he told Mr Tane to sign the document before he started work and that Mr Tane took the agreement confirming he would do so before he started work and would leave it on Mr Farrand's desk. Mr Farrand said he left the office at that point. Moreover, he would not have allowed Mr Tane to start work if he had said he was not going to sign the contract.

[87] I will explain this exchange in more detail shortly as it is relied on for the purposes of a claim of proprietary estoppel. However, it is also part of the chronology that leads up to the signing of the IEA.

[88] Mr Tane said, not unreasonably, that he would not have promised to sign a document that had just been handed to him and which he had not read. I have no reason to doubt Mr Tane's evidence on this point even though he had previously confirmed that, like Mr Farrand, he was not "big on contracts".

[89] The history to this point suggests that both considered it appropriate to have a written and legal framework for the employment relationship. As noted, both were experienced in business affairs. I find it inherently unlikely that a promise was made on 1 April 2019 that Mr Tane would sign the document without having read it.

[90] This conclusion is reinforced by two other points. The first relates to the fact that Mr Farrand had still not informed Mr Tane that he considered there was already a binding agreement which had taken effect when Mr Tane moved into the orchard accommodation. This fact tends to suggest that at the time he did not in fact believe this was the case. This has implications as to the reliability of his evidence to the Court, including that Mr Tane promised to sign the document.

[91] The second point relates to Mr Tane's right to seek independent legal advice. This was a statutory requirement of which he was not reminded.

[92] Mr Tane subsequently signed a declaration to the effect that he was aware of this right and that he had been given a reasonable opportunity to obtain advice. It was open to him to waive the requirement, but until he did so, it would have been inherently unreasonable for Mr Tane to be expected to sign his IEA immediately before starting work.

[93] Mr Farrand said he was relaxed about whether Mr Tane started work that day if he needed time to consider the IEA. But any delay might well have had implications for the date when the employment commenced, and thus wages.

[94] There is perhaps some support for the proposition that Mr Farrand *asked* Mr Tane to sign the document on 1 April 2019. That is because it was the expected commencement date of employment, and it is the date on which FOL apparently signed the document.

[95] The Authority considered it was more likely that the document may have been handed to Mr Tane on 4 April 2019. Mr Tane appears to have had a recollection that this was the date on which the document was actually signed, a fact to which he referred in correspondence raising his subsequent personal grievance, and in a statement of problem filed in the Authority. As already mentioned, he says he had not been given a copy of the signed IEA and did not receive this until the relationship problem had been raised. I accept this is a plausible explanation. It follows that he did not have the advantage of being able to refer to the written document when recalling when it was signed, and perhaps when it was provided to him.

[96] On the basis of this fresh evidence, I think it is more likely that the document was first provided to him on 1 April 2019 and that it was returned to Mr Farrand a week later, on or about 8 April 2019.

[97] The Authority stated there was no dispute the employment agreement was not executed prior to Mr Tane's employment. On the evidence I have reviewed, this was a correct conclusion.

[98] In discussing the statutory provisions relating to trial periods, under ss 67A and 67B of the Act, the Authority noted that strict compliance with the requirements of the first of these provisions is required. This was because trial provisions removed long-standing employee protections, and access to dispute resolution and justice, citing *Smith v Stokes Valley Pharmacy (2009) Ltd*.[22]

[99] In the same case, former Chief Judge Colgan said in support of the proposition that a strict approach extended to the execution of written IEAs:

> [100] On the other hand, 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.
>
> [101] As with most contracts, and employment contracts or agreements in particular, I conclude that the parties did not intend that they would each be bound by the draft written agreement unless and until that was executed by the writing of their signatures. That was the defendant's intention when Mr King met with Ms Smith on 2 October for this purpose. The application of signatures, in this case and generally, signifies both mutual agreement to the written provisions and a solemn intention to be bound by them. Therefore, those legal consequences do not apply beforehand, at least not if, as in this case, there is an express exclusion of retrospectivity or even if there is an absence of reference to retrospectivity.

[100] In reviewing the authorities, the Authority also referred to a recent judgment where Judge Beck found that the failure to have the employee sign the agreement before he started work was fatal: *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper*.[23]

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22 *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111, [2010] ERNZ 253 at [48].

23 *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper* [2021] NZEmpC 45, [2021] ERNZ 133 at [43].

[101] The Authority determined that FOL's failure to ensure the written employment agreement containing the 90-day trial period was executed prior to Mr Tane's employment commencing was fatal to its claim to rely on that term.

[102] Subject to the estoppel point to which I shall come shortly, that was a conclusion well open to the Authority, both in fact and in law.

Estoppel?

[103] An issue arose as to whether such a claim had been pleaded.

[104] Mr Nicholls referred to the company's statement of claim, which asserted that the Authority had made an error by finding "that [Mr Tane] did not promise [FOL] that he would sign the [17 March 2019 offer] of Employment before he started work and the plaintiff relied on the defendant to do so".

[105] In discussion with the Bench, counsel was unable to refer to any express finding in the determination which would confirm the Authority dealt with an issue of estoppel. Moreover, no counter-claim for proprietary estoppel was raised in the Authority, as should have been pleaded if it was FOL's intention to raise such a cause of action.

[106] A further paragraph in the statement of claim filed in the Court stated that Mr Tane could not now seek to rely on "his broken promise that he would sign the [17 March 2019] offer of Employment before he started work on 1 April 2019 in order to now avoid the 90-day trial period clause; see *Smith v Muir* [2018] NZERA 205".

[107] The Authority's determination in *Smith v Muir* involved a set of facts where two employees were found to have engaged in unconscionable behaviour.[24] The employees had deliberately delayed signing an IEA because they were aware that a 90-day trial provision would be invalid if it was signed after they started work. The Authority found since the employees had intentionally not told the employer that the

[24] *Smith v Muir* [2018] NZERA 205 at [59].

trial provision would be invalid through a late signing, they induced him into believing he could terminate them in reliance of the provision, without following due process.[25]

[108] As a result of the delayed signing, the Authority had to determine that the trial clause was invalid. However, it took the employees' egregious conduct into account when assessing remedies; it concluded that because of that conduct, no remedies should be awarded.[26]

[109] I note this determination was footnoted in the written submissions made by Mr Nicholls to the Authority, but no doubt due to the fact that the Authority was of the view that no promise to sign was made by Mr Tane on 1 April 2019, the issue of reliance did not fall for consideration at the remedies stage.

[110] In summary, I am not satisfied that an adequately pleaded counter-claim in estoppel was raised.

[111] Moreover, even if it had been, the Authority was not wrong to conclude that no such promise was given by Mr Tane on 1 April 2019 for the reasons to which I have already referred.[27]

[112] There are three further factual issues which reinforce the Authority's conclusion, and which would have been relevant to the claim in estoppel if raised. First is the point already mentioned to the effect that there was a significant inconsistency in the IEA provided to Mr Tane; that is the discrepancy between the 90-day probationary clause, and the 90-day trial provision. I have already found against Mr Nicholls' submission that the latter must have been regarded, in light of the parties discussions, as overruling the former.

[113] Second, s 67A(2)(a) of the Act requires the employment agreement to state that the trial provision applies: "for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment". Mr Nicholls submitted that because Mr Farrand regarded the employment agreement as having been finalised on

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25 At [62].
26 At [73].
27 Above at paras [84]–[89].

30 March 2019 (Mr Farrand's evidence) or 29 March 2019 (Mr Nicholls' submission), that was the date that was specified for the commencement of the trial provision clause. However, Mr Tane was not told at the time that FOL regarded the commencement date as being commenced on 29 or 30 March 2019.

[114] Third, Mr Farrand did not explain to Mr Tane that he had a right to obtain advice when he was about to sign the completed document. As indicated earlier, Mr Tane ultimately waived this right by signing the declaration, but before he did so, the employer was not entitled to assume this would be the case. It would be unreasonable for the employer to rely on an alleged promise where that party had not complied with the statutory obligations that fell on it, as recorded in the IEA.

[115] In summary, a counter-claim in proprietary estoppel was not raised and was not the subject of findings by the Authority. FOL cannot therefore argue the Authority erred in fact or in law on this point. Alternatively, any such claim could not be made out on the facts.

Remedies and costs

[116] Mr Nicholls accepted that if this point were reached, then the remaining elements of the determination would stand. Thus the finding of unjustified dismissal remains, as do the remedies ordered by the Authority.

[117] A costs order in favour of Mr Tane has also been made by the Authority.[28] Compliance orders have also been made against FOL.[29] The outstanding payments should now be addressed promptly.

Result

[118] I find that the Authority did not err in fact or in law in any of the pleaded respects. The challenge is accordingly dismissed. The remedies and costs orders made by the Authority stand.

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28 *Tane v Farrand Orchards Ltd* [2021] NZERA 531.
29 *Tane v Farrand Orchards Ltd* [2022] NZERA 309.

[119] Costs in this Court are reserved. Previously they were assigned on a 2B basis. Counsel are invited to use their best endeavours to resolve this issue directly. If that does not prove possible, Mr Tane may apply for costs within 21 days, and FOL may make any response within a like period thereafter.

B A Corkill
Judge

Judgment signed at 2.15 pm on 27 July 2022