

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 160/10
5280138

BETWEEN GAVIN ALFRED AMEY
Applicant

A N D ABSOLUTE INSURANCE
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in Person
 Scott Fairclough, Counsel for Respondent

Investigation Meeting: 13 May 2010 at Nelson

Submissions Received: On the day

Determination: 12 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Gavin Amey says he was unjustifiably dismissed actually or constructively from his employment with Absolute Insurance Limited (Absolute Insurance) on 8 July 2009. Mr Amey says that Absolute Insurance did not act in good faith when it offered him an employment agreement and following that he was dismissed. He set out in the statement of problem the remedies he wanted; \$5,000 for a failure to act in good faith, \$9,000 for embarrassment and humiliation and \$6,000 for his unjustified dismissal.

[2] Absolute Insurance says that it never dismissed Mr Amey because, with his agreement, his employment was of a casual nature and it decided to not offer him any further work. Further, it says that if it is found that he was dismissed, there was no personal grievance raised in terms of s.114 of the Employment Relations Act 2000.

Issues

[3] The issues for the Authority to determine are as follows:

- Was Mr Amey a casual employee;
- Was there a breach of good faith in the bargaining for a new employment agreement;
- Was a personal grievance of unjustified dismissal raised in accordance with s.114 of the Employment Relations Act 2000;
- If Mr Amey did raise his grievance within the timeframe set out, then was he dismissed;
- If Mr Amey was dismissed, then was the dismissal unjustified;
- If the dismissal was unjustified, then what remedies is Mr Amey entitled to and are there issues of contribution and mitigation?

History of employment and events leading to the end of the employment relationship

[4] Mr Amey commenced his employment with Absolute Insurance, a company selling insurance products, on or about 2 June 2008 as a telemarketer. He was party to a casual individual employment agreement. The agreement provided, under clause 1, that:

Unless otherwise agreed to and expressly provided for by signing an alternative written employment agreement, any work carried out by the Employee is on a casual basis and the conditions expressed in this agreement shall apply namely:

- *There is no obligation on the employer to offer work and no obligation on the employee to accept offers of work.*
- *Each occasion upon which work is offered by the employer and accepted by the employee is deemed to be a separate engagement, however the terms of every engagement are covered by this agreement and any variation thereto.*
- *There is no express or implied expectation of permanent employment under this agreement.*

[5] About two months after Mr Amey commenced employment, he focused in his role on farmers' insurance. Mr Amey would work a variable number hours each week but a perusal of the rosters shows that they were usually between 30-40 hours. At the start of his employment Mr Amey was rostered on and knew the hours he was to work and when he was to work them. The roster was put on his desk a few days before each weekly roster period was due to start. His holidays were paid at the rate of 8% each pay period and he was throughout his employment on a hourly rate of \$12.50.

[6] Towards the latter part of his employment, the rosters simply reflected Mr Amey's hours as 40 without setting out when the hours were to be worked. Mr Amey explained there was increased flexibility about when he performed those hours at that time.

[7] Chris Boon is a director of Absolute Insurance and he attended at the Authority's investigation meeting and gave evidence. Mr Boon explained that all of Absolute Insurance telemarketers were initially employed as casual employees. In or about March 2009, Mr Boon carried out an exercise to review the call centre operation and look at ways it could be improved. He said that one of the matters he looked at during the review was the issue about the employment agreements staff were on. He said that there had been indications that some employees wanted more security by way of a permanent agreement rather than a casual employment agreement. He also thought that permanent employment agreements would achieve more reliability from his staff, several of whom would simply leave in the middle of their shift. I am not satisfied that Mr Amey was amongst such staff.

Meeting 6 May 2009

[8] Mr Boon spent 6 and 7 May in Nelson and met separately with those employees with a casual employment agreement. He handed to Mr Amey a permanent agreement and explained that being a casual, Mr Amey had no expectation of ongoing work compared with a permanent employee. Mr Amey was advised he could seek legal advice. Mr Amey accepted that he told Mr Boon he was working on something on the side and that he was not going to be there (Absolute Insurance) for a long time and wanted to remain on his current employment agreement. Both agreed that that meeting was amicable.

20 May 2009

[9] On 20 May 2009 there was a further meeting between Mr Amey, Mr Boon and the then call centre manager, Chantelle Boon. I think it more likely that that meeting took place on 20 May rather than 14 May, as Mr Amey stated in his evidence, because Mr Boon made a file note following the meeting dated 20 May 2009. Mr Amey did not take significant issue with the file note. Mr Amey advised at the meeting he would not sign the new agreement because it was not fair or in good faith although when Mr Amey was asked to expand on why that was so he did not. Mr Amey confirmed at that meeting that he was basically happy with the agreement he was on because he could take leave when he liked and he mentioned wanting a collective agreement because *it is the most open and honest way*.

24 June 2009

[10] On 22 June 2009, Linda Paton commenced as the new call centre manager for Absolute Insurance in Nelson. She formed the view that some of the telemarketers were paid too low an hourly rate and on 24 June 2009 met with Mr Amey and offered him a pay increase from \$12.50 per hour to \$14 per hour. Mr Amey said he did not want to have to perform to a target and on that basis declined the pay increase. Ms Paton said she advised Mr Amey he would still have to meet the target irrespective of what pay rate he was on.

2 July 2009

[11] The evidence supports that it was likely that on 2 July Ms Paton met again with Mr Amey with a view to handing him a letter following up from the earlier meeting on 24 June. Mr Amey refused to accept that letter which provided, amongst other matters, that there was a requirement for all call centre staff to reach a minimum target of one confirmed appointment per hour, that Ms Paton was in the process of drafting employment agreements and that by the end of the week she would have a permanent agreement made available to him that would also include a schedule showing permanent and regular hours of work. The letter also provided that there would be a meeting to discuss hours of work that were agreeable to the company and Mr Amey.

6 July 2009

[12] On 6 July 2009, Mr Amey and Ms Boon had what could be described as a heated discussion. Ms Boon made a written note about the exchange and complained about the meeting to Ms Paton. Ms Boon did not give evidence at the Authority's investigation meeting.

[13] The concerns for Ms Boon in her written memorandum were about Mr Amey, during the meeting, not agreeing to training and that led to a heated discussion. Ms Boon recorded that she asked Mr Amey to leave his computer on after he advised he was going home because he was sick, so that she could ensure calls that needed to be made were made. Ms Boon said in her note that Mr Amey threatened to delete the calls and she advised that that would not be acceptable. It was also recorded in the note that Mr Amey advised he wanted to have a meeting the next morning as he was *sick of Ms Boon's emotional shit* and as he was leaving said he had broken his tools as his electric drill fell off the desk.

7 July 2009

[14] Mr Amey requested a meeting with Ms Paton and Ms Boon. He taped this meeting with their knowledge and, along with Mr Fairclough, I have received a copy of the recording and a transcript from that. I accept that it is a fairly accurate transcript although there are parts where it is difficult hear exactly what was said.

[15] There was some discussion during the meeting about the training. I think it likely that Mr Amey thought training would be about closing calls but not with respect to farmers' insurance. Mr Amey's main resistance to training, when the transcript is considered, is that he did not want to give knowledge to anyone about farming insurance. Some discussion then took place during the meeting about a concern Ms Paton had that Mr Amey thought it was all right to withhold knowledge from Absolute Insurance. Mr Amey said this was justified because it was his knowledge and not knowledge that Absolute Insurance had.

[16] Ms Boon then referred to the concern that Mr Amey had threatened to delete data from his computer. Mr Amey advised that that was just said in the heat of the moment and he was blowing hot air. There was also a discussion that Ms Boon felt uncomfortable when Mr Amey shut the door and continued swearing in a raised voice at her. Ms Paton in her own notes taken of the meeting and provided to the Authority,

considered that both Mr Amey and Ms Boon agreed at the meeting that they had behaved inappropriately during the discussion and both said and used words in the heat of the moment that were not professional or appropriate. Ms Paton told them that they should always behave professionally and not use offensive language or raise voices.

[17] The meeting then ended. Following the meeting, Ms Paton had concerns about Mr Amey and in particular the threat made to delete information from the company computer. Ms Paton said in her evidence that she felt Mr Amey could not be trusted and she had concerns about continuing to employ him.

[18] As a result of her concerns, Ms Paton spoke to Mr Boon. Mr Boon was immediately concerned about the threat to delete information from the computer and he said *alarm bells went off*. Mr Boon was also concerned that Mr Amey was bullying managers and becoming aggressive. As a result of the discussion with Ms Paton, Mr Boon telephoned the other director of Absolute Insurance, Craig Hudgell, and it was decided between them that they could not employ someone who was threatening managers and to delete information from the computer. It was decided that Ms Paton would advise Mr Amey the following day that there was no further work.

8 July 2009

[19] On 8 July 2009, Ms Paton met with Mr Amey and advised him that there was no further work. Mr Amey was then required to leave the office and was seen off the premises.

[20] After his dismissal, Mr Amey wrote to Mr Hudgell on 13 July 2009 asking for confirmation of his employment status and a copy of his personal file with Absolute Insurance. Mr Hudgell advised in writing on 20 July 2009 that he was currently in Australia until the end of July and would access the file on his return. He also advised that as a casual employee, there were no hours for Mr Amey.

[21] On 28 July 2009, Mr Amey wrote again to Mr Hudgell to ascertain if he was interested in attending mediation with the Labour Department. In his letter, he said that he wished to discuss the company not acting in good faith, his dismissal being unjustified and the embarrassment, humiliation and financial stress the company had brought upon him. Mr Amey said in his letter that he considered these things justified

a personal grievance. On 24 August 2009, Mr Hudgell responded to Mr Amey in writing and said that he saw no need for mediation.

Was Mr Amey employed on a casual basis?

[22] Mr Fairclough submits, relying on the wording of the employment agreement that Mr Amey entered into, that it was unnecessary to examine the hours Mr Amey was working or other aspects of his employment because Mr Amey made it clear that it did not suit him to enter into a permanent agreement and he wanted to remain on his existing terms and conditions.

[23] Is that the end of the matter? In *Jinkinson v. Oceana Gold* [2009] ERNZ 225, the Employment Court considered that Ms Jinkinson, although considered a casual employee in accordance with her employment agreement, was in fact permanent. The Court held in para.[29] of its judgment that counsel, in submissions about the status of Ms Jinkinson's employment, had started at the end rather than at the beginning and that the sounder approach in that case about whether an employee was casual or permanent was to look at the obligations assumed by the parties and then decide the nature of the relationship created.

[24] It was recognised in *Jinkinson* that the worker would be an employee for the purpose of the Employment Relations Act 2000 from the time each offer of a period of work was made and accepted until the work was completed. Rosters may therefore be significant in this regard if they are prepared and provided in advance. The other significant matter considered in *Jinkinson* was the manner in which the Court and Authority are to decide whether there is a contract of employment between the parties. That decision must be made on the basis of the real nature of the relationship and any statement by the parties describing the nature of the relationship is not to be treated as determinative – relevant but not conclusive. If the nature of that relationship is at odds with the label given to it by the parties, it was held in *Jinkinson* that *substance should prevail over form*.

[25] In *Jinkinson*, the distinction between casual employment and ongoing employment was found to be lying in the extent to which the parties had mutual employment-related obligations between periods of work. If the obligation only exists during periods of work, the employment will be regarded as casual, but if

mutual obligations continue between periods of work there will be an ongoing employment relationship.

[26] Mr Amey's employment agreement provided there was no obligation on Absolute Insurance to offer work and no obligation for him to accept work and, specifically, that there is no express or implied expectation of permanent employment under the agreement. Clause 14 of Mr Amey's employment agreement however dealt with the issue of punctuality and advised that it was his responsibility to check his rostered hours of work to ensure he started work on time. That clause also required Mr Amey to be at the workplace at least five minutes before his shifts commenced and if he was unable to report for duty, he was required to advise his supervisor or management at the earliest opportunity. This did impose some mutual obligations on the parties. Absolute Insurance to prepare a roster in advance of the shift, in this case a few days ahead of the following week, and for Mr Amey to adhere to the start times set out or if not to advise his supervisor of his unavailability at the earliest opportunity.

[27] The roster set out did change from about 26 January 2009, and alongside Mr Amey's name every week was simply '40.0' hours. From that point on, he worked the hours that he thought it would be most effective to do in order to maximise sales of insurance, when farmers would not be out on the farm. Every roster included Mr Amey's name and after a period of a few months Mr Amey's pattern of work and particularly the number of hours he worked was predictable enough to give rise to an expectation, on his part, that he would be provided with work and a corresponding obligation on Absolute Insurance to provide the work. The hours and days set out in a roster for Mr Amey to work was provided before the commencement of the next week and acceptance of these hours by Mr Amey meant that he became a person intending to work and an employee.

[28] Quite appropriately Absolute Insurance wanted to provide new agreements to the call centre employees reflecting their positions were permanent. I do not find that Mr Amey's refusal to enter into a new agreement because of his contentment with his old agreement changes my findings above. The fact that the parties chose to label the relationship as casual does not alter the requirement of the Authority to determine its real nature. In this case, I find the real nature of the relationship became different from, and inconsistent with, the casual description in the employment agreement and I

do not accept the mutual agreement argument advanced by Mr Fairclough, or that the requirement for any variation to the casual agreement to be in writing, is an impediment to such a finding.

[29] I find that, at the time of the termination of his employment, Mr Amey was a permanent employee.

Was there a breach of good faith in bargaining for a new employment agreement?

[30] Mr Amey clarified that the amount he was seeking in the statement of problem for a failure to act in good faith was a penalty for a breach under the Employment Relations Act 2000. He clarified that the alleged breaches of good faith were in relation to the presentation to him and then the discussion about a new employment agreement. I accept that Mr Amey was advised when presented with the new employment agreement that he could obtain legal advice. Mr Amey did take issue with aspects of the agreement, but that in itself is not uncommon or a breach of good faith.

[31] I am not satisfied Mr Amey was placed under any pressure to enter into the new agreement and he did not. Mr Boon did, during the meeting of 22 May 2009, attempt to understand what the alleged failings of Absolute Insurance were with respect to good faith, but Mr Amey did not clarify the concerns he had.

[32] In the circumstances, I do not find a breach of good faith by Absolute Insurance and make no award of a penalty.

Was a grievance of unjustified dismissal raised in accordance with s.114 of the Employment Relations Act 2000?

[33] In his submissions, Mr Fairclough states that Mr Amey did not raise a grievance as required under s.114 of the Act within 90 days from 8 July 2009.

[34] I accept Mr Amey's evidence that when he was advised he would no longer be given further work on 8 July 2009, he was told that if he wanted to make further contact it was to be through Mr Hudgell. He wrote to Mr Hudgell initially about his personal file and status, and wrote again (a letter dated 28 July 2009) with respect to the concerns he had and wanted to discuss, including that his alleged unjustified dismissal. Mr Hudgell received that and responded on Absolute Insurance letterhead declining mediation.

[35] Under s.114 of the Employment Relations Act 2000, a grievance is raised with an employer as soon as the employee has taken reasonable steps to make the employer aware that the employee alleges a personal grievance that they wish the employer to address. In order for a grievance to be properly raised, it should be specified sufficiently to enable the employer to address it - *Creedy v. Commissioner of Police* [2006] ERNZ 517 at para.[36]. I am satisfied that, in his letter of 28 July 2009, Mr Amey did specify his grievance sufficiently to enable Absolute Insurance to understand what it was that he wanted addressed. The facts around the end of the relationship were well known to Mr Hudgell.

[36] In conclusion, I find that a personal grievance that Mr Amey had been unjustifiably dismissed was raised within the timeframe in s.114 of the Act.

Was Mr Amey dismissed from his employment?

[37] I have found that Mr Amey was a permanent employee with an ongoing expectation of work as at the date of his termination. Absolute Insurance could not simply advise him there would be no further work offered. The reasons for Mr Amey's dismissal were, I find, as put by Mr Boon in his evidence.

[38] Following discussion with Mr Hudgell, Mr Boon and Mr Hudgell decided that to continue to employ Mr Amey was untenable, because they could not have someone intimidating managers and to threatening destroy information. Although they did not meet personally with Mr Amey, they advised Ms Paton to tell Mr Amey no further work would be offered to him.

[39] I find that Mr Amey was dismissed from his employment with Absolute Insurance.

Was the dismissal unjustified?

[40] Mr Fairclough properly accepted in his submission that if I got to the point of finding there was a dismissal, the process adopted for dismissal was flawed. Mr Amey was not aware that the exchanges that had taken place between him and Ms Boon on 6 July 2009 were considered a basis for disciplinary action. He was not given specific allegations to answer and he was not afforded a proper opportunity to be heard by the decision-maker. Mr Amey was advised that the reason for the ending the relationship was that he was a casual employee and that there was no other work.

This reason was other than that in the mind of Absolute Insurance. Mr Amey was not told the truth.

[41] Mr Amey did not have an opportunity to give an explanation for his conduct. He said at the Authority investigation that it was agreed during the meeting on 7 July that both he and Ms Boon were using inappropriate language and that, further, he elaborated on the computer matter and said that he used words like *amazing how old computers crash and lose data*. He did not accept that he was threatening as such.

[42] If there had been a proper and fair process, then I am not satisfied that a fair and reasonable employer would inevitably have concluded dismissal was an appropriate outcome on the basis of Mr Amey's explanation. A fair and reasonable employer would have considered whether an outcome short of dismissal was available.

[43] In conclusion, I find that Mr Amey's dismissal was unjustified because, under the test of justification in s.103A of the Employment Relations Act 2000, objectively assessed, Absolute Insurance's actions and how it acted were not what a fair and reasonable employer would have done in all the circumstances.

Determination

[44] Mr Amey has a personal grievance that he was unjustifiably dismissed from his employment with Absolute Insurance. He is entitled to remedies.

Remedies

[45] Mr Fairclough said that the remedies Mr Amey claimed that I set out earlier were all remedies under s.123(1)(c)(i) of the Employment Relations Act 2000, compensation.

[46] In his evidence, Mr Amey referred to both lost wages and compensation. I am satisfied that these could fairly be regarded as claims from the statement of problem and Mr Fairclough was able to question on these matters. I have treated the first claim as a penalty and so it does not fall to be considered at this stage.

Lost wages

[47] Mr Amey said that after his dismissal he looked for a few jobs and then went whitebaiting on 14 July 2009 to the West Coast where he stayed for 2½-3 months.

[48] I find that the period within which he can properly claim lost wages is from 9 July 2009 to 14 August 2009, after which he removed himself from further job searches and it cannot be said he adequately attempted to mitigate his loss.

[49] Toward the end of the employment, Mr Amey was usually undertaking 40 hours per week and I think that is an appropriate basis on which to calculate lost earnings for that period. The period in question is five weeks and one day and Mr Amey's hourly rate was \$12.50.

[50] Subject to any findings I may make about contribution, that is a total of lost wages in the sum of \$2,600 gross.

Compensation

[51] Mr Amey gave evidence about the financial stress that he suffered after his dismissal and emotional pressures arising from unemployment in terms of personal relationships. I accept that the loss of his employment was quite unexpected, and there was no opportunity for him to plan and there was stress as a result.

[52] Subject to any finding I may make about contribution, I assess compensation at \$5,000.

Contribution

[53] The Authority is required and must in all cases where it finds that a personal grievance is established, consider whether or not the employee's actions contributed towards the situation that gave rise to the personal grievance. If the Authority finds that the employee's actions did contribute, then remedies are to be reduced.

[54] In this case, Mr Amey's reference to the computer was particularly concerning because businesses are so reliant on data stored on computers. When I stand back and consider the evidence given by Mr Boon, I think the reference to the computer was the primary reason it was decided to end the relationship with Mr Amey. However Mr Amey's behaviour towards Absolute Insurance in other respects was also

somewhat concerning. There was a suggestion that the company was not entitled to knowledge that, in my view, he acquired in his role at Absolute Insurance. He used this as a reason not to undertake training in his area of speciality. That, though, has to be balanced by the fact that there was no formal instruction about that. Had there been, and Mr Amey had still refused to attend training, then my view of the level of contribution with regard to that would have been quite different. Mr Amey's behaviour towards managers was not that expected of an employee.

[55] That said, I am not satisfied that contribution should be so high as to deprive Mr Amey of any remedies. There was still the possibility, had Mr Boon properly investigated the matter and heard from Mr Amey and Ms Boon that Mr Amey may have retained his position, albeit with a final warning.

[56] Standing back and looking at all the circumstances, I assess contribution in this case at 40%. Applying that level of contribution to the amounts I have referred to in terms of lost wages and compensation I make the following orders:

- (a) I order Absolute Insurance Limited to pay to Gavin Amey the sum of \$1,560 gross being reimbursement of lost wages under s.123(1)(b) of the Employment Relations Act 2000;
- (b) I order Absolute Insurance Limited to pay to Gavin Amey the sum of \$3,000 for humiliation, loss of dignity and injury to feelings under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[57] Mr Amey was not represented. He is entitled to reimbursement of his filing fee in the sum of \$70.

[58] I order Absolute Insurance Limited to pay to Gavin Amey the sum of \$70 being disbursements.

