

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 136  
3028171

BETWEEN                      ANDREW CEDERMAN  
Applicant

A N D                              BF7 TRADING LIMITED T/A  
FILLED ROLES.COM  
Respondent

Member of Authority:        Helen Doyle

Representatives:              Andrew Marsh, Counsel for applicant  
Roy Bishop, Advocate for respondent

Investigation Meeting:        22 August 2018

Submissions Received:        On the day from Applicant  
Timetabled but Respondent advised it did not intend to  
lodge submissions.

Date of Determination:        17 September 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A        Andrew Cederman was unjustifiably dismissed.**
- B        BF7 Trading Limited is ordered to pay to Andrew Cederman the following amounts:**
- (a)       Reimbursement of lost wages in the sum of \$10,710.63 gross under s 123 (1) (a) of the Employment Relation Act 2000 (the Act).**
- (b)       Compensation in the sum of \$15,000 without deduction under s 123 (1)(c)(i) of the Act.**
- (c)       Costs in the sum of \$1500 together with reimbursement of the filing fee of \$71.56.**

**Employment Relationship Problem**

[1] Andrew Cederman was employed by BF7 Trading Limited trading as Filled Roles (BF7 Trading) as a Journeyman Carpenter in Queenstown in or about early September 2017. He had previously been living in Motueka and was provided with free accommodation in Queenstown. BF7 Trading is a recruitment/placement company having its registered office in Palmerston North.

[2] Mr Cederman was party to a written employment agreement with a company called Bishop Family Holdings Limited. Both parties accept that there was a change to the name of the company from Bishop Family to BF7 Trading on 26 July 2017 before employment commenced but the employment agreement remained in the previous name of the company.

[3] Mr Cederman said that he had been placed with three companies during his time with BF7 Trading. The first placement was the longest and lasted until after December 2017. The other two placements were for much shorter periods.

[4] Towards the end of January 2018 there was a period of about a week where Mr Cederman was not assigned any work.

[5] Mr Cederman said that on or around 29 January 2018 he received a phone call from Spencer Bishop the sole director of BF7 Trading. Spencer Bishop advised him that there was no more work available and that they had done their best to find him work. He gave Mr Cederman one week's notice of termination.

[6] Mr Cederman says that his dismissal was unjustified and he seeks reimbursement of lost wages and compensation together with an award of costs. Mr Marsh confirmed that penalties were no longer sought.

[7] BF7 Trading did not lodge a statement in reply and did not attend a telephone conference with the Authority although I am satisfied the company was advised of when it was to be held.

[8] After service of the notice of direction and notice of investigation meeting the General Manager of BF7 Trading, Roy Bishop, provided a statement of evidence and was joined by agreement to the investigation meeting by telephone.

[9] Mr Bishop relied on a letter he had written to Mr Marsh sent on 9 March but dated 14 March 2018. I will paraphrase the letter as follows. There is reference to the phone call and a conversation about Mr Cederman "heading home." Mr Bishop states that there was an agreement about that and that Spencer Bishop had given Mr Cederman one week's notice to "get sorted with all his gear and head back to his home." Further the letter provides that Mr Cederman had been removed from three different sites because of his actions and that after speaking to clients personally on two different occasions Mr Cederman was sent home with the smell of alcohol on his breath.

[10] BF7 Trading does not accept the dismissal was unjustified. The parties did not attend mediation. In his letter of 14 March Mr Bishop said that the company was not prepared to do so.

### **The Issues**

[11] The issues for the Authority to determine in this matter are as follows:

- (a) How did the relationship end?
- (b) If there was a dismissal then what were the reasons for that?
- (c) If the reasons for the termination were performance concerns or misconduct then was there a full and fair procedure preceding the dismissal?
- (d) Could a fair and reasonable employer have reached a decision to dismiss?
- (e) If the dismissal was unjustified then what remedies should be awarded and are there issues of contribution and mitigation?

### **How did the relationship end?**

[12] I do not find the evidence supports that the employment relationship ended by mutual agreement. I find that during the telephone conversation on 29 January 2018 Mr Cederman was dismissed. There was a sending away.

**If there was a dismissal then what were the reasons for that?**

[13] I accept Mr Cederman's evidence that the only reason given to him by Spencer Bishop for his dismissal was that there was no more work. Mr Cederman in his oral evidence said that Spencer Bishop told him he had done his best to find work. One week's notice was given.

[14] It was only after the dismissal that reasons for the dismissal were set out in the letter from Mr Bishop dated 14 March 2018 and in his statement of evidence. The letter referred to Mr Cederman being removed from sites because of his own actions as did the statement of evidence. Further that Mr Cederman was sent home because of the smell of alcohol on his breath from two sites. The statement of evidence from Mr Bishop did not refer to the alcohol issue but focussed on attitude and performance concerns.

**If the reasons for the termination were performance concerns or misconduct then was there a full and fair procedure preceding the dismissal?**

[15] Mr Cederman said that there were no performance/attitude concerns raised with him by a representative of BF7 Trading before his employment was terminated. Further nothing was said to him about alcohol concerns. He said that he did not drink on site and did not attend work affected by alcohol.

[16] At the investigation meeting Mr Bishop said in answer to questions from Mr Marsh that he did not investigate the concerns but that the "clients complained and that was enough for him." Mr Bishop also referred to all concerns and issues being logged into the system and that Mr Cederman would have been told site by site. He said that he felt that where "a pattern of smoke there is generally fire." The Authority was not provided with any log of issues and concerns as they may pertain to Mr Cederman.

*Procedural fairness*

[17] Section 103A (3) of the Employment Relations Act 2000 (the Act) sets out procedural factors that the Authority must consider when objectively considering the justification of a dismissal.

[18] If the reasons for the dismissal were performance related then I am not satisfied from the evidence that Mr Cederman was told BF7 Trading was dissatisfied with his performance before his dismissal. A fair process would include putting those performance concerns to Mr Cederman and advising that an improvement was required with reasonable information about what was required. There would need to be a reasonable time given for such improvement before a fair and reasonable assessment as to whether there has been performance to the level expected.

[19] If the reason for the dismissal was related to misconduct there was no investigation of the concerns. They were not raised with Mr Cederman so that he could have an opportunity to respond and therefore BF7 Trading did not consider any response before dismissal. The procedural factors in s 103A have not been satisfied.

### *Substantive fairness*

[20] Procedural and substantive fairness often overlap. This is one of those cases. I am not able to be satisfied that there is a substantive basis for the dismissal. For completeness there was no dispute that there was more than enough work in Queenstown for a person with Mr Cederman's qualifications at the time of his dismissal.

### **Could a fair and reasonable employer have reached a decision to dismiss?**

[21] I have found an absence of procedural and substantive fairness. The decision to dismiss was not one a fair and reasonable employer could have reached in all the circumstances.

[22] Mr Cederman has made out his personal grievance that he was unjustifiably dismissed and is therefore entitled to an assessment of remedies.

### **Remedies**

#### *Lost Wages*

[23] Mr Cederman seeks lost wages until he obtained new employment on 28 May 2018 in which his average pay is slightly greater than what he was receiving for BF7 Trading. Prior to that he had 3 weeks work with two builders and received a benefit from WINZ.

[24] Mr Cederman set out in his statement of evidence that he received the gross sum of \$19,342.50 over the 22 weeks he was employed by BF7 Trading and that included the one week's notice. I am not satisfied after my investigation that Mr Cederman was paid notice. His evidence was that he was not and the pay slip supports this. I find that he was simply given a week's notice that his employment was to end from 29 January 2018 but no payment in respect of notice. I have assessed his start date from 4 September 2017 which is a Monday and then calculated that to 29 January 2018. That period is exactly 21 weeks. Gross earnings of \$19,342.50 divided by the shorter period of 21 weeks shows average weekly earnings of \$921.07 gross from BF7 Trading.

[25] At the end of the evidence Mr Marsh raised an issue that Mr Cederman had not been paid for a week shortly before his dismissal and he wanted to claim that amount as there was no ability to not pay wages in the employment agreement.

[26] That was a late raised claim which BF7 Trading was not expecting. There was no clear evidence about the exact period that Mr Cederman was without work. I do not intend to allow that late claim.

[27] Very shortly after Mr Cederman was dismissed he spent a period of time in hospital for matters essentially unrelated to work. I intend to reduce his claim for wages by a period of two weeks as I could not be satisfied that the loss of wages for the period he was hospitalised was as a result of the dismissal. He had not worked six months for BF7 Trading that would have entitled him to sick leave. Mr Cederman had deducted WINZ amounts however I have not taken those into account as case law confirms that is a matter between Mr Cederman and WINZ.

[28] I find that this is an appropriate case to exercise my discretion under s 128(3) of the Act and order BF7 Trading to pay to Mr Cederman for lost remuneration a sum greater than that in s 128(2) of the Act. I am satisfied that the effect of the dismissal was such that Mr Cederman did not for a period of time feel able to search for a role but once able to do so diligently applied himself to job searching and obtained some building work before he obtained his current role. I have taken into account that there was a period of hospitalisation.

[29] I have assessed lost wages from 29 January 2018 to 28 May 2018 which is a period of 17 weeks. I reduce the period by two weeks when Mr Cederman was in hospital to leave 15 weeks for reimbursement of lost wages.

[30] 15 weeks multiplied by \$921.07 is the sum of \$13,816.05 gross. I need to take money received by Mr Cederman within the period into account but on the basis set out above I have not deducted the benefit received.

[31] Mr Cederman set out in his evidence that he received 3 weeks' work with two builders, for the net pay of \$2642.91. In order to match like with like I have multiplied that sum by 17.5% for tax to obtain a gross amount and added the sum of \$462.51 to earnings to arrive at a figure for deduction of \$3105.42 gross.

[32] The amount of lost wages to be reimbursed subject to any findings about contribution is the sum of \$10,710.63 gross being \$13,816.05 gross less earnings in the sum of \$3105.42.

### *Compensation*

[33] Mr Cederman explained that he suffers from mental health issues which are controlled by medication. He said in his evidence that he was quite shocked to be dismissed and described it as a "hard one". Mr Cederman said that when he first obtained the role he understood there would be work for two to four years in Queenstown for him. After being dismissed he did not have a lot of funds and rent was so expensive in Queenstown he decided to go home.

[34] He went to live with his parents in Motueka and said that the dismissal knocked his confidence and it was tough to get out of bed.

[35] I also heard from Mr Cederman's father. He said that when Mr Cederman came home at Christmas all was well and there was the confidence of permanent employment. He said that when Mr Cederman was dismissed his son struggled to come to terms with finding another role. He said that he confined himself to his room and it had taken him a while to regain confidence and he went from living independently to living at home. Even at the date of the investigation meeting he described Mr Cederman as slightly reclusive.

[36] I have also taken into account that holiday pay was only paid on 8 March 2018 after Mr Marsh requested it to be paid. Reasons for the termination were I find only provided on 14 March 2018. Both those matters exacerbated the humiliation and loss of dignity in all the circumstances in this matter.

[37] Subject to any issues of contribution I accept from my assessment of all matters that the sum of \$15,000 without deduction is an appropriate award.

### *Contribution*

[38] The Authority is required to consider when it determines that an employee has a personal grievance the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance, and if required, reduce the remedies that would otherwise have been awarded.

[39] I accept there may have been some areas of performance concerns for BF7 Trading with Mr Cederman from client complaints. I am not satisfied from the evidence that there were issues with alcohol. The answer to the concerns was to undertake a fair and reasonable process. It was within the control of BF7 Trading to do so. Unfortunately that did not occur and Mr Cederman was simply dismissed. The lack of a fair process gave rise to the personal grievance. I do not find in those circumstances that Mr Cederman contributed to the events that gave rise to the personal grievance.

[40] The remedies therefore are not to be reduced.

### **Costs**

[41] Mr Marsh wants indemnity costs. In submissions it is suggested that this is rather than seeking penalties. I do not consider in the exercise of my discretion that is a proper approach to costs. In any event I am not satisfied that the Act provided penalties for the provisions relied on.

[42] Mr Cederman has been successful and is entitled to a contribution towards his costs but the grounds set out in submissions do not satisfy the test for indemnity costs. I find that costs should be assessed on the basis of the daily tariff.

[43] The investigation meeting occupied less than two hours. I find it is appropriate to make an award of costs on the basis of a third of a day based on the daily tariff of \$4,500 which is costs in the sum of \$1500 together with reimbursement of the filing fee of \$71.56.

**Orders made:**

[44] BF7 Trading Limited is ordered to pay to Andrew Cederman:

- (a) Reimbursement of the sum of \$10,710.63 gross for wages lost by Mr Cederman as a result of the grievance.
- (b) Compensation in the sum of \$15,000 without deduction for humiliation, loss of dignity and injury to feelings.
- (c) Costs in the sum of \$1500 together with reimbursement of the filing fee of \$71.56.

**Helen Doyle**  
**Member of the Employment Relations Authority**