

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 17
5458035

BETWEEN

WENDY BLINCOE
Applicant

AND

WASTE CONTRACTORS
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Anjela Sharma, counsel for Applicant
Stephen Steele, for Respondent

Investigation Meeting: 21 November 2014 in Nelson

Submissions received: From Applicant at the investigation meeting.
From Respondent on 23 November 2014
In reply from Applicant on 12 December 2014.

Determination: 12 February 2015

DETERMINATION OF THE AUTHORITY

- A. Wendy Blincoe was an employee of Waste Contractors Limited.**
- B. Wendy Blincoe was unjustifiably dismissed. Waste Contractors Limited must pay Wendy Blincoe:**
- (i) \$15,488.52 gross in lost wages, and**
 - (ii) \$2,769.24 gross holiday pay, and**
 - (iii) Interest on holiday pay and lost wages at 5% from 31 January 2014 until the date of payment, and**
 - (iv) \$8,500 compensation for humiliation, loss of dignity and injury to her feelings, and**
 - (v) Reimbursement of \$71.56 for the filing fee.**
- C. Legal costs are reserved.**



Employment relationship problem

[1] Wendy Blincoe was a driver for Waste Contractors Limited (Waste Contractors). Her work began in August 2011 and ended on 23 September 2013 when Stephen Steele, the director of Waste Contractors, handed her a letter terminating her engagement that day.

[2] Ms Blincoe claims that she was unjustifiably dismissed and unjustifiably disadvantaged in her employment by being treated as if she was an independent contractor and not an employee. By treating her as a contractor Ms Blincoe says Waste Contractors breached its duty of good faith to her.

[3] Waste Contractors says that Ms Blincoe was always an independent contractor and was never an employee and so the Authority has no jurisdiction to investigate and determine her claims.

[4] If the Authority determines that Ms Blincoe was an employee, Waste Contractors says that Ms Blincoe's claim of unjustified disadvantage cannot be determined because she raised it more than 90 days after the action alleged to be a personal grievance occurred or came to her notice. Waste Contractors does not consent to the personal grievance being raised after the 90-day period.

[5] If the Authority finds that Ms Blincoe was an employee and was unjustifiably dismissed then Waste Contractors submits that Ms Blincoe did not adequately mitigate her loss by looking for work actively enough. Waste Contractors also submits that Ms Blincoe is not entitled to any holiday pay and did not suffer any humiliation, loss of dignity and injury to her feelings as a result of being engaged as a contractor or post dismissal.

Issues

[6] The first issue I need to determine is whether or not Ms Blincoe falls within the definition in s.6(1)(a) of the Employment Relations Act 2000 (the Act) which defines an *employee* as *any person of any age employed by an employer to do work for hire or reward under a contract of service*.

[7] If Ms Blincoe was not an employee the Authority has no jurisdiction to determine her claims. However, if I determine that she was an employee I then need to enquire into whether her dismissal was justified and, if it was not, to determine what remedy or remedies she is entitled to.

[8] In addition, I will need to decide whether Ms Blincoe raised her personal grievance of unjustified disadvantage within the 90 day statutory period.

[9] I will also need to consider whether Waste Contractors breached its duty of good faith under s. 4(1) of the Act to Ms Blincoe and, if so, whether it should pay a penalty.

Relevant law

[10] The law requires the Authority to determine the real nature of the relationship between the parties.¹ This requires me to consider all relevant matters including any that indicate the parties' intentions.² However, I cannot treat any statement by the parties describing their relationship as determinative.³

[11] Ms Blincoe bears the onus of establishing on the balance of probabilities that she was an employee.

[12] The leading case is *Bryson v Three Foot Six Limited (No.2)*⁴ in which the Supreme Court endorsed Judge Shaw of the Employment Court's decision. All relevant matters that need to be considered in assessing the real nature of the relationship include:

- The written and oral terms of the contract between the parties.
- Any divergence from or supplementation of those terms and conditions.
- How the relationship operated in practice.
- Features of control and integration.
- Whether the contracted person has been effectively working on his or her own account; the fundamental test.

¹ Section 6(2) of the Act.

² Section 6(3)(a)

³ Section 6(3)(b)

⁴ [2005] ERNZ 372 (SC)

- Industry practice.

[13] I received written witness statements and heard affirmed evidence from Ms Blincoe and her husband, Graeme Blincoe, Stephen Steele, the director and operator of Waste Contractors and Sharon Boag, his life partner who assisted in the administration of Waste Contractors. I also received written statements which were sworn or affirmed from Jason Nicholls and Jackie McLeod, drivers for Waste Contractors who are currently engaged as independent contractors.

What did the parties intend?

[14] Waste Contractors has a contract with Transpacific Waste Management Limited (TWM) to use Waste Contractor's front load trucks to empty waste and recycling bins in the Nelson area for TWM customers, such as Sealord and Countdown.

[15] Ms Blincoe was employed elsewhere when she and Mr Steele began discussing Waste Contractors engaging her as a driver. Ms and Mr Blincoe and Mr Steele and Ms Boag were friends. Initially discussions were about Ms Blincoe's hope to become a driver and whether she felt confident enough to take on the role with Waste Contractors.

[16] Ms Blincoe and Waste Contractors gave different evidence about what their initial intention was with Ms Blincoe always wanting to be an employee and Mr Steele and Ms Boag's evidence being that Waste Contractors always intended to engage Ms Blincoe as a contractor and not to employ her.

[17] I find it proved that initial discussions with Mr Steele proceeded on the grounds that Ms Blincoe could either be an employee or an independent contractor but when Ms Boag became involved, in assisting Mr Steele with the paperwork involved with engaging Ms Blincoe, the only option presented to Ms Blincoe was to become a contractor.

[18] I accept Ms Blincoe's evidence that Mr Steele told her that he *would not put me wrong* as a contractor and that it was not significantly different from being an employee. Mr Steele explained to Ms Blincoe that another new driver was a

contractor and in order to make the roster work and for things to be fair she needed to be a contractor too.

[19] Ms Blincoe had only previously been engaged as an employee. She had never run her own business and did not completely understand what it meant to enter an independent contracting arrangement.

[20] I accept that Ms Boag went over the offered contractor's agreement with Ms Blincoe and pointed her to IRD information about the tax implications of becoming a contractor. Ms Boag also offered to do Ms Blincoe's tax return and did so for the first tax year Ms Blincoe was engaged by Waste Contractors.

The written contract

[21] Ms Blincoe signed a document headed *Agreement between Owner and Contractor*. While Ms Blincoe says she felt pressured to do so I do not consider there was undue pressure on her and accept that she chose to sign the agreement because she enjoyed her role and wished to keep it. It is an undated agreement.

[22] Ms Blincoe started work on 8 August 2011. Despite different evidence about when she signed the agreement I find Ms Blincoe has proved to the required standard she did not sign it before she began work and she signed it only after a new driver began on 5 September 2011. I also consider that even before Ms Blincoe started work there was already some pressure on her to accept the role was a contracting role.

[23] The relevant parts of the Agreement are:

1. EQUIPMENT PROVIDED

The Owner agrees to provide and pay for all materials, tools and equipment required for the prosecution and timely completion of the work. Unless otherwise specified, all materials shall be new and of good quality.

The Contractor will provide clothing to perform work described above, including work boots at own cost.

2. PAYMENT

The Owner hereby agrees to pay the Contractor, \$3,376.67 per month⁵ to perform the services listed above.

This is based on a 40 hour week and includes an extra \$1,000 per year for Public Liability Insurance and bookkeeping costs.

Monthly into nominated bank account of the Contractor. On 24 of the month.

⁵ Later increased to \$4,000 per month.

Included in this is 4 weeks holiday per year to be taken in agreement with the Owner and Contractor...

3. TAXATION

The Contractor is responsible for the payment of taxes to IRD on payments made to you by Waste Contractors.

4. COMPLETION OF THE WORK

The Contractor agrees that the various portions of the above-described work shall be completed as per the workload required daily as notified by Waste Contractors Ltd.

5. MODIFICATIONS TO THE WORK

All changes and deviations in the work will be directed by the Owner.

6. ACCESS

The Owner, Owner's representative and public authorities shall at all times have access to the work.

7. CONFORMITY WITH SPECIFICATIONS

The Contractor agrees to remedy any defects resulting from faulty workmanship which become evident during completion of contracted duties.

8. INSURANCE COVERAGE

The Owner agrees to maintain full insurance on equipment & vehicles.

The Contractor agrees to obtain insurance to protect himself (sic) against claims for property damage, bodily injury or death due to his (sic) performance of this agreement.

9. INDEMNITY

In the event work is delayed due to neglect of the Contractor, the Contractor agrees to pay the Owner, or make up the time so deadlines are still met.

Problems or incidents must be reported to the Owner immediately.

10. TERMINATION OF CONTRACT

Both Owner and Contractor are required to give 6 weeks written notice upon decision to end the contract.

Instant termination will occur in situations of serious misconduct. Includes, though is not limited to: dishonesty, serious or repeated failure to follow reasonable instruction, deliberate destruction of property or reputation of the Owner, the use of illegal drugs or alcohol at work.

[24] The agreement also included a confidentiality clause, a non-competition clause and non-solicitation of clients and employees clauses.⁶ While non-competition and non-solicitation clauses are more usual in employment agreements their presence in this agreement is a neutral factor, not pointing towards an employment relationship or away from one.

⁶ It is unlikely these would have been enforceable given that their duration is expressed to be for 3 years.

[25] Mr Steele explained at the investigation meeting that he wanted all his drivers to be contractors. He was unclear on why that was so but thought it may have been because TWM required its drivers to be contractors. Mr Steele agreed that Waste Contractors had employed a driver earlier in 2011. He explained that by saying the driver had left secure employment to drive for Waste Contractors and did not sign an agreement when he began work or for the next 6 months and so Mr Steele offered him an employment agreement.

[26] There is ambiguity within the agreement. The fact that the agreement between Ms Blincoe and Waste Contractors describes her as a contractor is not conclusive. The agreement contains some provisions that are not usual in a contract for services. These include:

- Ms Blincoe being paid the same amount per month even when for part of the month she had been on holiday.
- Ms Blincoe having to obtain agreement from Waste Contractors about when she could take her holidays.
- Waste Contractors paying towards her public liability insurance and bookkeeping costs.
- Instant termination is possible if there is *serious misconduct*. That is terminology that points to an employment relationship rather than a contracting relationship. A contract would be more likely to say the contract could be cancelled by Waste Contractors if Ms Blincoe breached the contract.

Those aspects of the relationship are more indicative of an employment relationship than that of an arm's length contracting arrangement.

[27] Ms Blincoe did not have to, and did not, submit invoices. That is not indicative of a contracting relationship even when payment did not differ from month to month.

[28] Ms Blincoe was not responsible for finding another driver to do her work when she went on holiday. That is indicative of an employment relationship. There was evidence from Mr Steele that it would have been difficult for Ms Blincoe to find such a driver in any event because of a shortage of properly qualified drivers. However, I am satisfied that if Ms Blincoe had arranged a suitably qualified driver,

who was not already engaged or employed by Waste Contractors, to cover all or some of her work Mr Steele would have 'vetted' that person because they were to drive a Waste Contractors' truck and do work under the direction of Waste Contractors. That is a factor that points away from an independent contracting arrangement.

Control test

[29] The control test involves an assessment of whether Waste Contractors had the right to control Ms Blincoe, and if so, to what extent it did so in practice.

[30] Ms Blincoe drove a truck owned by Waste Contractors. The provision by Waste Contractors of the truck and other necessary materials, tools and equipment points towards an employment relationship especially when viewed alongside Waste Contractor's ability to direct the daily workload and schedule. In practice, the daily work requirements were set by TWM and advised to Mr Steele who then instructed Ms Blincoe. During the day those instructions would be updated by direct communication to Ms Blincoe and the other driver/s from TWM.

[31] Mr Steele objected to Ms Blincoe making her own decisions about the order in which she completed the customers' emptying requirements, for example, when she drove too early to New World Stoke that required bins to be emptied after 6.30 am only. Waste Contractors required Ms Blincoe to follow TWM's directions and comply with its own requirements and made sure that she did so.

[32] Mr Steele submitted that Ms Blincoe was able to structure her day as she liked and at times was able to visit her nephew during her working day. I accept that but also accept that was within the daily limits put on her ability to structure her work by Mr Steele. For example, there was a practical order in which emptying bins needed to be done to save on fuel and kilometres driven as well as time limits within which Mr Steele expected Ms Blincoe to complete the run/s.

[33] Waste Contractors also required Ms Steele to complete certain daily paperwork beyond Ms Blincoe's regulatory obligations as a driver to, for example, accurately record her driving hours.

[34] Mr Steele's says that when Ms Blincoe refused to drive an older "loaner" truck for a period of time when her usual truck was being repaired he did not insist that she

do so as he did not consider that he could instruct her to do so when she was not an employee. He submits that is evidence that Ms Blincoe was not an employee.

[35] However, the Authority's task is to examine the real nature of the relationship overall and that is not defined by the parties' individual understandings of the nature of the relationship. Ms Blincoe's refusal to drive the truck which she says was based on her concerns about her competence at driving a truck which she considered old and difficult to drive and Mr Steele's reluctance to insist she drove it are neutral and do not point either towards or away from an employment relationship.

[36] I consider overall that Waste Contractors exerted the kind of control over Ms Blincoe that points more to her being in an employment relationship than acting as an independent contractor.

Integration test

[37] This involves an assessment of the extent to which Ms Blincoe was integrated into Waste Contractors' business.

[38] The requirement in the agreement that Ms Blincoe provide her own clothing was, apart from her boots, overtaken by the requirement of Waste Contractors that Ms Blincoe wore a TWM uniform. Because this was a requirement TWM imposed on Waste Contractors any employed driver would also have been required to wear the uniform. This is a neutral factor.

[39] However, the work performed by Ms Blincoe was an integral part of the Waste Contractors' business.

[40] All drivers were expected to work a regular roster pattern and to cover for any driver that was away on holiday. Mr Steele sent a fax to Ms Blincoe on 9 March 2013:

To clarify

Holidays

When someone is on holiday the other two drivers combine to look after the run until there (sic) return, this means Mondays and Saturdays, inclusive of theses (sic) days and the odd public holiday that's (sic) falls during the year, the gifted 2nd Monday off from me over covers the times when a person is away and continually in numbers remains in the drivers benefit financially and fairly.

Now have an awesome break and relax ...

[41] Ms Blincoe was integrated into Waste Contractors business overall by the regular roster pattern and by the instruction from Mr Steele that she provide cover on the three day weekend, which she had every fortnight, when another driver was on holiday. That arrangement is more in the nature of an employment relationship than that of an arm's length independent contracting business arrangement.

Industry practice

[42] A consideration of industry practice is of no assistance to me in this case. Apart from Mr Steele's evidence that Mainfreight contracted with its drivers I heard no other evidence about industry practice.

Fundamental test

[43] Ms Blincoe did not undertake any other paid work, whether driving work or any other kind of work, on her own account while she worked for Waste Contractors. The initiative for her to be an independent contractor was not from her but from Waste Contractors.

[44] Ms Boag and Ms Blincoe's evidence was that Ms Blincoe claimed some expenses off her tax such as her public liability insurance and her boots and her travel to and from home to the truck. Those tax benefits were pointed out to Ms Blincoe by Ms Boag on behalf of Waste Contractors when it presented Ms Blincoe with contractor's agreement. In seeking work as a driver with Waste Contractors Ms Blincoe did not set out to obtain tax advantages for herself over and above those she would have enjoyed as an employee.

[45] Overall when I stand back and ask whether fundamentally Ms Blincoe acted as if she was in business on her own account the answer is that she did not.

Conclusion on employment status

[46] The real nature of the relationship between Ms Blincoe and Waste Contractors was that of employee and employer.

Was Ms Blincoe's dismissal justified?

[47] Section 103A of the Act sets out the requirements in determining whether a dismissal is justified as follows:

(1) For the purposes of section 102(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[48] In applying that test I need to consider:

- whether, having regard to the resources available to Waste Contractors, it sufficiently investigated the allegations against Ms Blincoe before dismissing or taking action against her; and
- whether Waste Contractors raised the concerns that it had with Ms Blincoe before dismissing or taking action against her; and
- whether Waste Contractors gave Ms Blincoe a reasonable opportunity to respond to the Waste Contractors' concerns before dismissing or taking action against her; and
- whether Waste Contractors genuinely considered Ms Blincoe's explanation (if any) in relation to the allegations against her before dismissing or taking action against her; and
- any other factors I think appropriate.

[49] In addition, I must not determine a dismissal to be unjustifiable solely because of defects in the process followed by Waste Contractors if the defects were minor and did not result in Ms Blincoe being treated unfairly.

[50] Mr Steele considered that Ms Blincoe was an independent contractor and that Waste Contractors had the right to sever that relationship in the way that it did.

[51] It was difficult to understand what allegations of serious misconduct Waste Contractors had against Ms Blincoe. The letter of dismissal handed to Ms Blincoe on 23 September 2013 says that her termination which took effect that day was because of breaches of clauses, 4, 5 and 10 of her contract. They were said to be serious breaches and could not *be tolerated and continue any longer*. They were not described in any more detail. I accept Ms Blincoe's evidence that when she asked Mr Steele what she had done he told her that she should already know.

[52] In his evidence at the investigation meeting Mr Steele said that Ms Blincoe had damaged Waste Contractors' trucks, and her attitude to him had changed for the worse from about March 2013, she failed to complete all paperwork required and was not cleaning her truck so well.

[53] Mr Steele prepared a list which was attached to his witness statement of three breaches of clause 4, five breaches of clause 5 and what he considered were eight breaches of clause 10, although some of those alleged breaches occurred after he had terminated Ms Blincoe's employment. Waste Contractors did not notify Ms Blincoe at any stage before Mr Steele's witness statement was filed on 13 November 2014 that it considered she had breached her obligations in any of those listed ways or that disciplinary action might be taken.

[54] In a letter Mr Steele wrote to TWM on 28 June 2013, three months before Ms Blincoe was dismissed, he outlined a number of allegations against her including in relation to what he calls the *Sealord saga*. He alleged that Ms Blincoe and Mr Blincoe had a *personal vendetta* against him. He also complained of the accident Ms Blincoe had in the truck in March 2013 and of noise made by her working in the early hours and wrote:

To date I've never had a (sic) apology from her for anything, not even the \$40,000.00 damage to the truck. I think this says something about a person. Since the 6th of June letter I've had the silent treatment, and of course the rest of everything you know, and still I've bitten my tongue and been the nicest I can be, dam (sic) hard though.

[55] Ms Blincoe was not aware of this letter before she was dismissed.

[56] Mr Steele denies that the reason he dismissed Ms Blincoe was his suspicion she and her husband were behind the Sealord investigation into the accuracy of Waste Contractors records of bins emptied for Sealord which led to Mr Steele being banned from the site. However, in his witness statement he thought it relevant to write that a named person, who I did not hear evidence from, who worked at TWM said he believed that Mr Blincoe had victimised Mr Steele or Waste Contractors. I conclude the *Sealord saga* and the souring of the out-of-work relationship between Mr Steele, Ms Blincoe and Mr Blincoe in particular in regard to the Nelson Car Show were an operative part of Waste Contractors' decision to dismiss Ms Blincoe.

[57] The dismissal was an unjustified one for the following reasons:

- There was no real attempt to investigate Mr Steele's suspicions of Ms Blincoe beyond asking her if she knew who had *narked* on his business to Sealord, which she denied knowing. That is an entirely inadequate investigation even taking into account that Waste Contractors is a small business. Mr Steele did not seek any professional assistance when he came to considering Ms Blincoe's future with Waste Contractors. Waste Contractors had a lawyer who Mr Steele had consulted about various matters previously, including the restraint of trade clauses he included in Ms Blincoe's agreement.
- Mr Steele's numerous apparent dissatisfactions with Ms Blincoe's work were not raised with her as being matters that could lead to her dismissal.
- Because of that Ms Blincoe was denied an opportunity, let alone a reasonable one, to respond to the concerns.
- Waste Contractors could not take Ms Blincoe's explanation into account before making its decision to dismiss her because it did not give her any opportunity to explain.
- Mr Steele made his decision to dismiss Ms Blincoe two to three weeks before he did so and communicated that decision to two people at TWM who told Ms Blincoe that she was to be dismissed and even the date on which it would happen. It was a pre-determined decision.
- Because of Mr Steele's belief that Ms Blincoe was a contractor and because of the complete lack of fair process there is no way that I can determine whether Ms Blincoe was dismissed for any substantively justifiable reason.
- The defects in the process were more than minor and resulted in Ms Blincoe being treated unfairly.

A fair and reasonable employer could not have dismissed Ms Blincoe in all the circumstances for the reason/s or in the way that Waste Contractors did.

Did Waste Contractors breach its duty of good faith to Ms Blincoe?

[58] The Court of Appeal recently re-emphasised, in *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, the importance of the requirements of good faith under s.4 of the Act, described as the "overarching duty of good faith". The duty of good faith requires, amongst other things, clear communication.

[59] Given my findings about the dismissal being unjustified it is clear that Waste Contractors breached its duty of good faith to Ms Blincoe. However, I consider it unnecessary and inappropriate to consider imposing a penalty against Waste Contractors for this breach. That is at least in part because its breach of good faith was based genuinely, although incorrectly, on its view, through Mr Steele, that Ms Blincoe was an independent contractor.

Was Ms Blincoe unjustifiably disadvantaged?

[60] Ms Sharma submits that Ms Blincoe was unjustifiably disadvantaged by being offered a contractor's agreement when Waste Contractors had previously engaged an employee driver.

[61] Ms Blincoe's claim of unjustified disadvantage is subsumed by, and in fact a part of, her successful claim for unjustified dismissal.⁷ The remedies for unjustified dismissal and the successful claim for unpaid holiday pay dealt with below make up for any disadvantage Ms Blincoe may have suffered by being treated as an independent contractor. Therefore, I do not need to consider whether or not Ms Blincoe raised the personal grievance of unjustified disadvantage within 90 days of becoming aware of the facts she says mean she was disadvantaged.

Remedies

[62] By way of remedy Ms Blincoe claimed lost wages of \$20,242 gross until she obtained work in April 2014, payment of \$4,000 outstanding holiday pay, compensation for humiliation, loss of dignity and injury to her feelings for unjustified disadvantage at \$7,000 and for unjustified dismissal at \$15,000, a penalty of \$10,000 for breach of good faith, interest on the amounts owed and legal costs.

Lost wages

[63] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Waste Contractors of the whole or any part of wages Ms Blincoe lost as a result of her grievance.

⁷ Section 122 of the Employment Relations Act 2000 allows the Authority to find that a personal grievance is of a type other than that alleged.

[64] Section 128(2) of the Act provides that I must order Waste Contractors to pay Ms Blincoe the lesser of a sum equal to her lost remuneration or to 3 months' ordinary time remuneration.

[65] In addition, s.128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s.128(2); that is, for more than thirteen weeks.

[66] Ms Blincoe seeks 29 weeks of lost wages less the amount of \$8,758.00 gross she earned over that period in various jobs she had; a total of \$20,242 gross. Ms Blincoe was employed beginning 22 April 2014 as a Packaging Coordinator for Turners and Growers in the industry she worked in before she was employed by Waste Contractors.

[67] Ms Blincoe and Ms Sharma have calculated the amount Ms Blincoe earned at Waste Contractors as \$1000.00 per week. However, that is incorrect. Ms Blincoe was paid \$4,000 per month x 12 months = \$48,000 per year divided by 52 weeks = \$923.08 per week gross.

[68] Mr Steele submits that Ms Blincoe did not adequately mitigate her loss and says that he knows there were a number of jobs going after her dismissal she would have been qualified for.

[69] Ms Blincoe's evidence is that she was adversely affected by her dismissal emotionally⁸ and also physically during the first few months after her dismissal and that she did what she could to look for work over that period. She says her confidence in herself as a driver was low after being dismissed and not being given any reason for her dismissal.

[70] Ms Blincoe says she looked on TradeMe for suitable jobs, looked in the Nelson Mail and approached everyone she knew for work opportunities. She put herself forward to TWM as a driver and undertook a trial driving for them but ultimately there was no job for her there.

[71] I consider that Ms Blincoe adequately mitigated her loss.

⁸ This is dealt with below under the Compensation heading.

[72] Since Ms Blincoe obtained some work within the three months after her dismissal I need to award her actual lost remuneration for the thirteen weeks after her dismissal, up to and including 23 December 2014.

[73] In the three months⁹ after her dismissal Ms Blincoe would have earned \$12,000.04 had she remained employed by Waste Contractors. Over that period Ms Blincoe earned \$1,395.00 gross according to pay slips supplied by her. Therefore under s.128(2) of the Act Waste Contractors must pay her \$10,605.04 gross in lost wages¹⁰.

[74] That leaves me to assess whether the circumstances mean that Ms Blincoe should be reimbursed by Waste Contractors over and above the thirteen week post-dismissal period until the day before she began her new role on 22 April 2014.

[75] Ms Sharma submits that Ms Blincoe and her husband had trouble keeping up with their regular outgoings, such as their mortgage, and that without such reimbursement they could never recover from the consequences of the unjustified dismissal.

[76] To work out whether to exercise my discretion to award more than three months of lost wages I need to assess whether Ms Blincoe was likely to have remained employed by Waste Contractors for more than three months after her dismissal. It is impossible to know for sure whether if Waste Contractors had followed a fair process of inquiry into its allegations of misconduct, and unsatisfactory performance by Ms Blincoe what the outcome would have been. However, given the shortage of properly qualified drivers attested to by Mr Steele, the fact he personally was banned from the Sealord site and the fact that TWM was satisfied with Ms Blincoe's performance of its contract with Waste Contractors I consider it more likely than not Ms Blincoe would have remained employed beyond the end of September had there been a fair process. However, given Mr Steele's personal views of Mr and Ms Blincoe and the ongoing bad feeling about the Nelson Car Show and being such a small workplace I do not consider it would have been possible for Ms Blincoe and Mr Steele to remain working together beyond about 4

⁹ Which is equivalent to thirteen weeks.

¹⁰ It is up to Ms Blincoe to account to the IRD for the tax on the amounts I have ordered to be paid to her by Waste Contractors. In addition, as a consequence of being found to be an employee she may have to work with the IRD to correct her tax position over the years she was employed by Waste Contractors.

months after 23 September 2013. Waste Contractors must pay Ms Blincoe for wages lost until the end of January 2014.

[77] Under s.128(3) of the Act Waste Contractors must pay Ms Blincoe \$923.08 x 6 weeks to 31 January 2014 = \$5,538.48 gross less her earnings over that period of \$655.00 gross = \$4,883.48.

[78] The total lost wages to be paid is \$15,488.52 gross.

Holiday pay

[79] Ms Blincoe's says the first week of annual leave she took should not be counted in her total of 4 weeks paid leave a year. Therefore, she is owed pay for four weeks of annual leave accrued and not taken. However, while I accept that Mr Steele offered that she could take a week of paid annual leave early on in her employment without having any leave accrued, and she took that week, I do not accept that it was agreed between them that was an extra week over and above the four weeks allowed for in her agreement and under the Holidays Act. Waste Contractors must pay Ms Blincoe for three weeks of annual leave not taken in the amount of \$2,769.24 gross.

Interest

[80] Ms Blincoe has claimed interest on her lost wages and outstanding holiday pay. The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by s.87(3) of the Judicature Act 1908, which is currently 5% per annum.

[81] Ms Blincoe should not have been dismissed in the way she was. If she had been paid as an employee, as she should have been, she would have had the use of the money Waste Contractors is now ordered to pay her at the very latest by 31 January 2014. I consider it just and equitable that Waste Contractors pay interest on the amounts of wages and holiday pay outstanding from 31 January 2014 until payment in full is made.

Compensation

[82] Ms Blincoe seeks \$15,000 in compensation for humiliation, loss of dignity and injury to her feelings.

[83] In an envelope with the letter of dismissal Mr Steele gave Ms Blincoe on 23 September was a trespass notice that stated Ms Blincoe was trespassed from his own home, the Waste Contractors' yard and from TWM's offices and yard. In fact TWM had not agreed to or decided to trespass Ms Blincoe from its site but Ms Blincoe did not know that. The issuing of the trespass notice was an unnecessary and inflammatory step by Mr Steele and increased Ms Blincoe's sense of distress at having been dismissed. Prior to that she understood TWM to have been happy with her work, which it had been.

[84] Ms Blincoe believes the stress from the dismissal led her Crohn's disease to flare up necessitating a course of medication to be prescribed, when she had been medication free for some years. I do not consider that I can attribute Ms Blincoe's worsening of her Crohn's disease to be a direct result of the dismissal in the absence of medical evidence supporting Ms Blincoe's belief.

[85] However, I accept that Ms Blincoe's confidence and mood was affected by her dismissal. She describes feeling a sense of worthlessness and low self-esteem as a result of the dismissal. Her sleep was also affected. She was prescribed sleeping tablets to help with her sleep and low mood problems.

[86] I also accept that Mr and Ms Blincoe's relationship was adversely affected by the effect on Ms Blincoe of the dismissal.

[87] The post-dismissal discovery that Mr Steele had written to TWM about his concerns with Ms Blincoe's work during her employment but had not raised the issues with her added to Ms Blincoe's hurt, humiliation and loss of dignity.

[88] Ms Blincoe also gave evidence that Mr Steele had spread untrue rumours about her dismissal, including that he had told someone that she had threatened to take *do him* for sexual harassment. Mr Steele gave evidence that when she was dismissed Ms Blincoe said something that suggested that to him. She denies ever having made such a threat or saying something about sexual harassment to Mr Steel when he dismissed her. I did not hear any evidence from the person who was alleged to have told Mr Steele that Ms Blincoe had made such a threat.

[89] I do not accept that Ms Blincoe had any part in spreading rumours about the reasons for her dismissal but it is not proved that Mr Steele did either. Nevertheless, the sudden and unexpected unjustified dismissal did lead to speculation, gossip and rumours about why Ms Blincoe was dismissed which increased Ms Blincoe's humiliation.

[90] I consider compensation of \$8,500 is reasonable for Ms Blincoe's hurt, humiliation and loss of dignity.

Contribution

[91] Having determined Ms Blincoe has a personal grievance s.124 of the Act requires me to consider whether she contributed to the situation which gave rise to her dismissal and if so reduce remedies accordingly.

[92] Given the needs for an investigation and other fair processes it is not possible to be sure what serious misconduct was alleged by Waste Contractors. It is not proved that Ms Blincoe engaged in any blameworthy conduct, so remedies are not to be reduced on the ground of contribution.

Costs

[93] Costs are reserved. Legal costs are usually paid by the unsuccessful party to the successful party. Ms Blincoe has been successful in her claims. The parties are invited to agree on the matter of costs.

[94] If they are unable to do so the party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

[95] In order to assist the parties I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is \$3,500 per day and the investigation meeting took a day. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.



Christine Hickey
Member of the Employment Relations Authority

