# New Zealand Employment Relations Authority Decisions



## Brockett v Transpacific Technical Services (NZ) Ltd AA 382/07 (Auckland) [2007] NZERA 865 (4 December 2007)

Last Updated: 23 November 2021

**IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND**

AA 382/07 5075303

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| BETWEEN | STEPHEN BROCKETT<br>Applicant |
| AND | TRANSPACIFIC TECHNICAL SERVICES (NZ) LIMITED<br>Respondent |

Member of Authority: Robin Arthur

Representatives: Helen White for Applicant David France for Respondent

Investigation Meeting: 13 September 2007 at Auckland Determination: 4 December 2007

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

[1] The Applicant says he was unjustifiably dismissed by the Respondent the day after his father, then employed as a manager by the Respondent, had raised a personal grievance against it. He seeks lost wages and compensation for hurt and humiliation.

[2] The Respondent denies the claim and replies that the Applicant's employment was on a casual basis for a particular project that had been completed so that the termination of his employment was justified.

**The Investigation**

[3] The matter was not resolved in prior mediation. At the investigation meeting I had witness statements from the Applicant, his father Gary Brockett ("Mr Brockett Snr"), the Respondent's General Manager Manus Pretorius ("Mr Pretorius") and the

Respondent's Refinery Manager Trevor Scarborough ("Mr Scarborough"). Each witness answered questions from the Authority and additional questions from counsel. Counsel each spoke to a written synopsis of closing submissions.

**Issues**

[4] The following issues arise for resolution in this matter:

(i) What the nature of the employment relationship between the parties?
(ii) Was a project on which the Applicant was – at least in part – employed, complete?
(iii) Was the termination of the Applicant's employment on 17 November 2005, and how it was carried out, what a fair and reasonable employer would have done in all the circumstances at the time?
(iv) If not, what remedies are required, after allowing for any mitigation and contribution by the Applicant?

**The employment relationship**

[5] The Applicant had worked for the Respondent over a four year period. He began as a high school student working after school and during holidays. He worked under the direction of his father, Mr Brockett Snr, who was the Respondent's Technical Manager. This included cleaning glassware in a small laboratory at the Respondent's premises.

[6] By 2005 the Applicant was a first year university student in product design and aged 20.

[7] In early April 2005 he signed an employment agreement with the Respondent. Mr Brockett Snr and Mr Pretorius signed the agreement on behalf of the Respondent. Headed "Casual Employment" it stated, in part:

*This is a temporary assignment on a casual basis and the reason for your employment during this period has been discussed with you. This agreement will terminate when the project you are involved in is compete.*

*You will report to Gary Brockett and be based at the East Tamaki site.*

*Your hours of work will be flexible and be governed by work availability for the project and by arrangement with your manager.*

*Your commencing hourly rate will be $12 per hour which includes an amount of $0.78, which is for holiday pay based on 6% ...*

*At the termination of this employment agreement, neither party shall owe to the other any financial obligations other than an unpaid daily fee. ...*

[8] With the agreement of Mr Pretorius, Mr Brockett Snr had arranged in April 2005 for the Applicant to assist with work on a new treatment plant being built at the Respondent's premises. Mr Brockett Snr was the manager responsible for overseeing building of the new plant.

[9] Mr Pretorius accepted in questioning during the investigation that Mr Brockett Snr was authorised to make arrangements with the Applicant about the job and that Mr Pretorius did not know the content of all the representations made by Mr Brockett Snr to the Applicant. Mr Brockett Snr's evidence was that the Applicant was "*employed on a contract basis for the duration of the holidays*" and that, I find, was more likely than not, the mutual intention of the parties in making the employment agreement.

[10] I do not accept that the use of the word "casual" in the written employment agreement describes the proper nature of the employment relationship entered into. Rather I consider that the true nature of the arrangement was for the employment of the Applicant on a fixed term basis, expressly linked to work on the new plant, with an expected duration of at least the 2005-6 summer holidays. While the hours may have been intended to be flexible, it was not "casual" work. Alongside that fixed- term project ran what had become the Applicant's regular part-time job of cleaning glassware in the laboratory.

[11] From December 2004 s66(4) of the Employment Relations Act 2000 ("the Act") has applied to fixed term employment agreements, expressly requiring that the reasons for their ending and manner of ending be set out in writing. That provision was intended to avoid or reduce disputes, such as the present case, about the arrangements made. Compliance with the writing obligation is a responsibility of the employer as s66(6) makes clear, and failure to comply allows employees to elect to

treat a term to end their employment at an agreed time or point as ineffective. In the present case, failure to put the reason for ending the employment – at the end of a specified project or a specified date – in writing has resulted in some doubt about the arrangements entered into. In these circumstances, the benefit of that doubt falls to the Applicant.

[12] Mr Pretorius insists that the employment of the Applicant – as discussed with Mr Brockett Snr – was expressly

limited to the construction period of the plant, and not any subsequent work required for commissioning of the plant. That distinction becomes important later as there is a dispute over what could properly trigger the end of the employment. However I find that such a distinction between construction and commissioning was not clearly discussed by Mr Pretorius and Mr Brockett Snr, or, by Mr Brockett Snr in making arrangements with the Applicant for the job. Rather the employment was envisaged as continuing for a duration – that is throughout the summer holidays and that the Applicant was to work as directed by Mr Brockett Snr on any tasks associated with the construction and commissioning of the plant, as well as continue his regular part-time work of cleaning glassware in the laboratory as required.

**Completion of the project**

[13] Alternatively, if a term for the duration of the summer holidays were not the mutually agreed intention, the term of employment was, at the least, linked to completion of the plant. It is also more likely than not that completion referred to not just its construction, as Mr Pretorius alleges, but also its commissioning. That is because Mr Brockett Snr was responsible for the whole project.

[14] It was intended that he would see the whole process through. However on 10 October 2005 he went on sick leave – which he describes as stress leave – for a two week period that was then extended for a further two week period.

[15] On 10 October Mr Brockett Snr sent Mr Pretorius an email headed: "*Project is finished, and so is Gary [Brockett Snr]*". In the body of the email he states that "*the waste plant upgrade is now finished*" and complains that "*this project has taken its toll on me*".

[16] In a projects report dated September 2005 Mr Brockett Snr stated that "*the building is complete and most processes have been commissioned to full capacity*".

[17] From 10 October Mr Brockett Snr did not regularly attend work, although his evidence was that he did visit at least once a week in the period between late October and mid-November. However his son, the Applicant, did continue to work from that date.

[18] The Applicant's evidence was that he had a list of tasks provided by his father. This included mapping pipe work layout as installed, labelling pipes and tanks, ordering and installing safety signage and organising safety showers. He also continued to clean glassware in the laboratory.

[19] There was no complaint in the Respondent's evidence that the Applicant was not working or was not trying to do what he was asked to do as well as he could. Rather the Respondent says that it could not have allowed the Applicant to continue working alone and unsupervised as this was unsafe. It also disputes whether the Applicant would have been capable of properly fulfilling all the tasks set to have been set for him by his father and manager, Mr Brocket Snr.

[20] The Respondent says that some of this work – particularly that to do with mapping pipe work layout and labelling tanks and pipe work – needed to be completed by a more qualified employee. For that purpose, and after the Applicant's dismissal, it employed a graduate chemical engineer who used computer aided drafting software to complete the mapping task.

[21] From this evidence I conclude that the construction of the plant was complete but that not all tasks associated with its commissioning and completion of documentation was finished. For that reason the project cannot be said to have been entirely complete.

[22] That view of the state of affairs in late 2005 is confirmed by the wording used by Mr Pretorius in a letter given to the Applicant on the day of his dismissal: "*This project is now coming to an end and your services are no longer required.*" On that

day – 17 November 2005 – Mr Pretorius does not say the project has ended, rather he says an end has yet to occur.

**Was the termination fair?**

[23] Despite the absence of Mr Brockett Snr from 10 October onwards, the Applicant continued to attend work.

[24] Mr Pretorius took over responsibility for completion of the treatment plant project from 21 October, after a meeting with Mr Brockett Snr.

[25] Mr Pretorius was not aware that the Applicant was at work until he had a query from the accountant in late October about who should sign the Applicant's time sheets for his pay, a task previously done by Mr Brockett Snr.

[26] Mr Scarborough confirmed that the Applicant was still working and Mr Pretorius says he asked to be told when the Applicant was next back at work. Meanwhile he had talked to other members of his project management team about whether there was work that the Applicant could do. On the basis of that discussion Mr Pretorius concluded that the Applicant was no longer required.

[27] Although this was his view by the beginning of the November, Mr Pretorius did not speak to the Applicant until 17 November. He says that occurred when he noticed the Applicant walking past his office. He checked the employment agreement on the Applicant's file and then went and found the Applicant in the office of Mr Brockett Snr. He told the Applicant that Mr Brockett Snr had advised him that the project was complete and that after talking with the project management team he had decided that the Applicant's services were no longer required. Mr Pretorius then went back to his office and typed up the letter dated 17 November referred to above advising that the Applicant's employment was terminated. The Applicant was given that letter about ten minutes later.

[28] There is some dispute between the evidence of the Applicant, Mr Pretorius and Mr Scarborough at this point. There are differences over whether or not the Applicant attended work the following day and whether or not he was locked out of the office

from which he worked. However I do not need to resolve that difference as I have reached the firm conclusion on the basis of the evidence of Mr Pretorius alone that the termination of the Applicant's employment and how it was carried out was unjustified.

[29] Mr Pretorius accepts that when he talked to the Applicant on 17 November he did not inquire of him what work he was doing and had done. Rather he says that he "*didn't feel it was necessary to*". Neither did he ask the Applicant about what he had been asked to do by Mr Brockett Snr in the period from late October.

[30] A fair and reasonable employer in the circumstances at the time would not have ended the employment abruptly that day. Rather it would have inquired as to what work the Applicant had been set by his responsible manager, Mr Brockett Snr, and then considered and discussed with the Applicant whether the tasks set were necessary for completion of the project or would take the entire length of the summer holidays. It would also have inquired further into the Applicant's skills to ascertain what he could and could not do among the tasks set rather than, as subsequently alleged, maintain he was not qualified to do particular tasks when Mr Pretorius had not even inquired as to what those tasks were.

[31] A fair and reasonable employer, if aware of a potential problem with the Applicant's continued employment on 1 November would also not have waited until 17 November to raise it with him – and then only on the basis of a 'chance' sighting of the Applicant by Mr Pretorius. I do not accept the excuse offered by Mr Pretorius that this delay was occasioned by the Applicant only coming into work on a few days during that period. Even if that were the case, he could easily have left a telephone message at the Applicant's home, or left a note for the Applicant at work asking him to contact Mr Pretorius.

[32] The Respondent's actions, and how it acted, through Mr Pretorius, towards the Applicant on 17 November were unjustified and consequently the resulting dismissal of the Applicant was unjustified in all the circumstances at the time.

[33] The Applicant may have started working for the Respondent as a high school student through the good offices of his father and the company management

(including Mr Pretorius). However by the time of these events he was an adult who was engaged on the terms of an employment agreement with express and implied terms. He was entitled to be dealt with fairly and reasonably as an individual and not as a mere adjunct of his father and his father's work for the Respondent. In taking over management of completion of the project, Mr Pretorius also took over those contractual obligations to the Applicant as an employee.

[34] In coming to the conclusion that the Applicant's dismissal was unjustified, I have not needed to resolve the Applicant's allegation that the decision to dismiss him on 17 November was made because his father, Mr Brocket Snr, had raised a personal grievance with the Respondent on 16 November. I accept the evidence of Mr Pretorius that he was not aware, at the time that he spoke to the Applicant, of that event. Mr Brockett Snr, in answer to the Authority's questions, also accepted that he had made an assumption that Mr Pretorius was aware of the grievance at the time of dismissing the Applicant but there was no evidence to confirm this and that he could not say for sure. The grievance letter had been sent by fax to a senior manager of the Respondent in Australia on 16 November and I accept that Mr Pretorius was not necessarily aware of that for several days. Rather his actions have been judged here solely on their quality in relation to the obligations of the Respondent to the Applicant as an individual employee.

**Remedies**

[35] The Applicant has a personal grievance which requires remedies. He seeks lost wages for a period of 52 days and distress compensation.

[36] His letter raising his personal grievance sought compensation of $3000 for the humiliation and distress of his dismissal. The Applicant's evidence was that he found it distressing "*to be fired when I didn't see I'd done anything wrong*". While the Respondent never suggested the Applicant had done anything wrong, it has resulted in a sense of humiliation for him. Considering the abruptness of his dismissal I accept that the $3000 sought is a modest and appropriate amount of compensation under s123(1)(c)(i) of the Act.

[37] There are some difficulties with the Applicant's claim for 52 days of lost wages. The evidence from the limited time card and pay slip information provided by both parties does not clearly establish that the Applicant's pattern of work was such that he would have worked full days for all 52 working days between 17 November 2005 and when he was due to resume university studies in March 2006.

[38] In making the assessment of lost wages I also allow for the contingencies of life to award less than the full amount claimed: *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 (CA). If Mr Pretorius had discussed the issue properly with the Applicant I must allow for both the possibility that he may have agreed to finish earlier, or that the Respondent would have arranged alternative work for him. Similarly the Applicant may have secured another better paid job elsewhere.

[39] According to copies of pay roll information provided the Applicant worked a total of just over 180 hours in the pay periods ending between 3 October and 21 November, including more than 40 hours on a separate task which was paid (by agreement with Mr Pretorius) at overtime rates.

[40] On the basis of that pattern of work, I assess the Applicant's loss of wages for the period from 17 November 2005 to early March 2006 as being a total of 220 hours. At his hourly rate of $12 the Applicant is awarded $2640 in lost wages under s123(1)(b) in reimbursement of wages lost as a result of the grievance.

[41] I accept the Applicant made reasonable efforts to mitigate his loss by seeking alternative employment through the Student Job Search agency and that it was difficult to find suitable work at the time of year at which he was dismissed. No reduction of the lost wages awarded is warranted on that ground.

[42] I am also satisfied that the remedies awarded to the Applicant need not be reduced under s124 of the Act because he did not contribute to the situation giving rise to his grievance in any way that was blameworthy.

**Summary of remedies**

[43] The Respondent is to pay to the Applicant the following sums:

(i) $2640 in reimbursement of lost wages; and
(ii) $3000 in compensation for hurt and humiliation.

**Costs**

[44] The parties are encouraged to resolve any issue of costs between themselves. The usual range of awards is familiar to the experienced counsel of both parties. If they are not able to agree any issue of costs, the Applicant

may apply within 56 days of the date of this determination and the Respondent will have 14 days after that date to respond to any such application before the Authority determines costs. No application will be considered outside that timeframe.

Robin Arthur

Member of the Employment Relations Authority

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