



[2] Ms Carter says that she was unjustifiably dismissed from her employment and seeks reimbursement of lost wages for 13 weeks and compensation in the sum of \$25,000, together with costs. She also seeks payment of holiday pay and a penalty for the failure to provide wage and time records.

### **The Investigation Process**

[3] The Authority has issued a preliminary determination in this matter. In the preliminary determination the Authority found that the parties did not enter into a full and final settlement under s 149 of the Employment Relations Act 2000 (the Act).<sup>1</sup> Ms Carter was not prevented from proceeding with her personal grievance and was given leave to lodge an amended statement of problem.

[4] I am satisfied that Mr Anderson was served with the amended statement of problem. He took no steps to lodge a statement in reply. Mr Anderson was subsequently advised of a case management conference with the Authority on 12 July 2021. There was an attempt by the Authority Officer to contact him by telephone at the start of the case management conference. Mr Anderson did not answer the phone and the conference proceeded in his absence. During the conference the matter was set down for an investigation meeting and there was a timetable for an exchange of statements of evidence and other documents.

[5] I am satisfied Mr Anderson was served with a notice of direction from the telephone conference on 12 July and the notice of investigation meeting. He did not in accordance with the timetable set out in the notice of direction lodge a statement in reply, wage and time records and a statement of evidence.

[6] The Authority delayed the commencement of the investigation meeting on 12 August 2021 to enable attendance by Mr Anderson if he was late. There was no attendance by Mr Anderson at the investigation meeting and no reason advanced for his non-attendance. On that basis the Authority proceeded to hear evidence from Ms Carter under clause 12 of the second schedule to the Act.

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<sup>1</sup> *Angie Carter v Mark Anderson* [2021] NZERA 126.

**The Issues**

[7] The Authority needs to determine the following issues in this case:

- (a) Was there a signed employment agreement between the parties?
- (b) What are the material clauses in the employment agreement?
- (c) How did the employment relationship start?
- (d) How long was the employment relationship?
- (e) How did the employment relationship end?
- (f) If Ms Carter was dismissed from her employment, then was that dismissal unjustified?
- (g) If the dismissal was unjustified then what remedies should be awarded and are there issues of contribution and mitigation?
- (h) Is holiday pay owing and if so in what amount?
- (i) Should a penalty be awarded for the failure to provide wage and time records?

**Was there a signed employment agreement?**

[8] Ms Carter was provided with a written individual employment agreement that had a 90 day trial provision with a 14 day notice period. Ms Carter said in her evidence that the employment agreement was never signed because agreement could not be reached about the pay period for wages and whether it was weekly, fortnightly or monthly. Ms Carter said that she then became too busy and didn't sign the agreement before her employment was terminated.

[9] The unsigned employment agreement supports Ms Carter's evidence because an option for the pay period is not selected. There was an email received by the Authority from Mr Anderson dated 6 September 2019. Mr Anderson's email confirms that the employment agreement was never signed.

[10] I do not find there was a valid trial provision under s 67A (1) of the Act because the employment agreement that contained a trial provision was not signed and entered into by Ms Carter and Mr Anderson before Ms Carter's employment was terminated.

### **Material provisions in the unsigned employment agreement**

#### *Identity of the employer*

[11] The first page of the employment agreement describes the employer as Mark Anderson under the heading "The parties." On the second to last page of the employment agreement under acknowledgement it states that "Lilley investments offer this employment agreement to Angie." Ms Carter said in her oral evidence that she considered Mr Anderson to be her employer and was not advised that her employer was other than Mr Anderson or a company.

[12] I accept that Mr Anderson was Ms Carter's employer.

#### *Salary*

[13] The employment agreement provided that Ms Carter was to receive a salary of \$52,000.

#### *Hours of work*

[14] The hours of work were stipulated to be 50 hours per week Monday to Friday between 6am and 4pm.

### **How did the employment relationship start?**

[15] Ms Carter had previously worked as a courier. The run she was working on came up for sale. She offered to purchase the run however it was purchased by someone else and her employment ended. She then obtained another role undertaking production line work. Mr Anderson picked up deliveries for her then employer several times a week. He approached Ms Carter about purchasing a courier run and suggested that she get a loan. Ms Carter was not able to secure a loan. Mr Anderson said he would purchase the run and employ Ms Carter to undertake the run.

**How long was the employment relationship?**

[16] Ms Carter could not recall the exact dates of her employment with Mr Anderson. Mr Anderson did not participate in the Authority process and had not responded to earlier requests for wage and time records. Following the investigation meeting Ms Carter provided her final payslip from her previous employer for the pay period ending 17 January 2019. She advised that she had gone to work for Mr Anderson the week after her employment with her previous employer ended on 17 January 2019.

[17] From that it is likely that Ms Carter would have commenced her work with Mr Anderson on Monday 21 January 2019. In her written evidence Ms Carter put the employment time frame a week earlier with the relationship ending on Friday 17 January 2019. I conclude it is likely the relationship ended on 25 January 2019 which is the Friday of the following week. That is supported by the deposit of \$400 into Ms Carter's bank account on Monday 28 January 2019 with respect to her employment with Mr Anderson. Ms Carter recalls that deposit having been made after her employment had been terminated.

**How did the employment relationship end?**

[18] Ms Carter said in her oral evidence that when she commenced working for Mr Anderson there was a "huge backlog" of deliveries and that it was not a normal situation. She said that the backlog did not decrease and she considered that the previous owner of the run had not been undertaking it properly.

[19] In her oral evidence Ms Carter said that she was given a verbal warning on the day before she was dismissed and advised that she was not performing properly. Ms Carter was told that she had to start and finish at a certain time and that she had to stop deliveries at a point and pick up regular pickups. Ms Carter said in her oral evidence that she asked if she could utilise her assistant better and if he could do the pickups towards the end of the day. She said that she was told she had to do the pickups.

[20] The day after the verbal warning Ms Carter commenced working at 6.30am as she was told to do. Towards the end of the day she stopped deliveries and went to do the pickups but as she arrived at each business she was told that her assistant had done the pickups. She had

not been told that and that was time that she said she could have spent on deliveries. About mid-afternoon she received a call from Mr Anderson who advised her that “it’s not going to work out.” Ms Carter was told to return the van and keys and her uniform. When she returned to the depot to hand in her keys and other items Mr Anderson was not present.

[21] I find that Ms Carter was dismissed from her employment.

### **Was the dismissal justified?**

[22] The test of justification in s 103A of the Act requires the Authority to determine on an objective basis whether what Mr Anderson did and how he did it were what a fair and reasonable employer could have done in all the circumstances.

[23] In applying the test the Authority must have regard to the procedural fairness factors in s 103A (3)(a) to (d) of the Act. These include an employer undertaking a proper investigation, raising concerns before dismissing an employee, giving an employee an opportunity to respond to the concerns and genuinely considering the response. A fair and reasonable employer could also be expected to act in accordance with the obligations of good faith.

[24] By virtue of the verbal warning given the day before dismissal Ms Carter became aware that Mr Anderson was dissatisfied with her performance. Ms Carter did not have an opportunity to respond to any concerns before the warning was issued. I could not conclude that it was clear to Ms Carter what standards she had to obtain so that any performance could be measured objectively. There was no reasonable time for improvement.

[25] In the email Mr Anderson sent to the Authority in September 2019 there is a suggestion that Ms Carter worked for four weeks before she was dismissed.<sup>2</sup> The evidence which I have already set out in some detail about the start and likely length of employment does not support that. This was a very short period of employment. The Authority was provided with copies of Ms Carter’s bank account statements from 16 January to 15 February 2019. The only deposit that could be attributed to Mr Anderson for payment during employment was \$400 on 28 January 2019. Ms Carter provided her Inland Revenue Department statements for the relevant

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<sup>2</sup> The email of 6 September 2019 refers to Ms Carter having two weeks training and two weeks driving by herself.

period. They do not show any payments and the Authority concludes it unlikely that PAYE was accounted for.

[26] There was an absence of any procedural fairness as required under s 103A (3) of the Act. Ms Carter was dismissed the day after the verbal warning. Mr Anderson did not raise his concerns with Ms Carter in a manner that gave her an opportunity for response. Ms Carter was not warned that her employment was in jeopardy. Mr Anderson simply advised her by telephone that her employment had been terminated.

[27] The dismissal was procedurally unfair. The absence of any process overlaps with the substantive justification of the dismissal.

[28] A grievance was raised about the unjustified dismissal in a letter from Mr Ingram to Mr Anderson dated 25 February 2019.<sup>3</sup>

[29] The dismissal was unjustified both procedurally and substantively. Ms Carter has made out her personal grievance claim that she was unjustifiably dismissed. She is entitled to consideration of remedies.

## **Remedies**

### *Lost wages*

[30] Ms Carter said in evidence that she fell into depression after her dismissal. She lost all motivation and confidence for a period of time. She was unable to commence properly looking for a new job until May/June 2019 when she worked together with an organisation on a strategy to get her back to work. I asked Ms Carter whether she would have been able to return to her previous role however she said that a new person had been hired to fill her position there.

[31] A medical certificate dated 15 June 2019 supports that the dismissal at short notice had the effect of causing significant emotional distress with stress related physical symptoms.

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<sup>3</sup> The letter also raised an unjustified disadvantage in respect of the warning.

[32] I accept that the impact of the dismissal was such that it took a while until Ms Carter was able to look for another role. This impacted on her ability to satisfy the obligations to mitigate loss. During this time Ms Carter was on a benefit.

[33] Reimbursement of a sum equal to 3 months' ordinary time remuneration is sought. I accept that is appropriate in all the circumstances where the manner of dismissal was such that it caused damage to Ms Carter's mental health impacting on her ability to work. That is the sum of \$13,000 based on the salary of \$52,000.

[34] Subject to any issues of contribution Ms Carter is entitled to reimbursement of the sum of \$13,000 under s 123(1)(b) of the Act.

#### *Compensation*

[35] Ms Carter seeks the sum of \$25,000 for compensation.

[36] I asked Ms Carter why she wanted to work for Mr Anderson when she was in a job which she enjoyed. Ms Carter said that she loved driving, delivering and meeting people and she was an experienced courier driver. The role she was in was not driving.

[37] Ms Carter said that after dismissal she fell into depression for about six months. She had suffered from depression several years earlier however had managed to get back into the work force. Ms Carter said that she went backwards in all areas of her life following her dismissal and felt that she was "no good and useless." There is a medical certificate as set out above that supports significant emotional difficulties as a result of the dismissal.

[38] Ms Carter said that if she had made mistakes and failed then she could have understood but she was not given a chance before she was dismissed. She said that she felt embarrassed that she had left a good job to start work with Mr Anderson. She isolated herself from other people and found it difficult to explain to others why she had lost her role. There were significant financial difficulties caused as a result of the dismissal.

[39] The duration of employment before dismissal was very short however the impact of the dismissal in this case was serious and the emotional impact long-lasting for about six months.

It is clear that Ms Carter was humiliated and suffered loss of dignity and injury to her feelings as a result of how she was treated when she was dismissed.

[40] Weighing all matters I conclude an appropriate award under this head is \$14,000.

[41] Subject to any contribution Ms Carter is entitled to payment of compensation in the sum of \$14,000 under s 123(1)(c)(i) of the Act.

#### *Contribution*

[42] The Authority is required under s 124 of the Act where it finds that an employer has a personal grievance to consider the extent which the employee contributed towards the situation that gave rise to the personal grievance.

[43] I do not consider that Ms Carter contributed towards the situation that gave rise to the personal grievance. If Mr Anderson considered there were performance issues then he could and should have undertaken a fair process.

#### **Holiday pay**

[44] Ms Carter is entitled to be paid holiday pay under s 23 of the Holidays Act 2003 where her employment ended within 12 months and before she became entitled to annual holidays.

[45] I have found it likely that Ms Carter worked a week for Mr Anderson between 21 January and 25 January 2019. She was entitled based on her salary of \$52,000 to payment of \$1000 gross. 8% of \$1000 is the sum of \$80.

[46] For completeness there was no claim for recovery of unpaid wages. Ms Carter only received \$400 net for the week's work however it is appropriate that holiday pay is assessed as above using gross figure based on the evidence about the likely period of employment.

#### **Penalty**

[47] A penalty has been claimed for the failure to provide wage and time records. Wage and time records were requested by Mr Ingram by letter dated 13 September 2019. Mr Anderson was asked to provide the records by 16 September 2019. These dates are important because of

s 135(5) of the Act. That section requires an action for recovery of a penalty must be commenced within 12 months after the date when the cause of action first became known to the parties. Commencing an action for the recovery of a penalty means the lodging of a statement of problem. The failure to comply with the requirements of s 130 of the Act would have been known after 16 September 2019.

[48] The first time a claim was made for a penalty for failing to comply with the requirements to provide access to, or copies of, the records under s 130(2) of the Act was in the amended statement of problem lodged on 9 June 2021.

[49] Therefore I do not find that the action was commenced within the 12 months after the cause of action became known. The Authority cannot consider a penalty in those circumstances.

### **Costs**

[50] The investigation meeting occupied a little over an hour however there was an earlier issue about whether there was a binding settlement. Whilst the Authority did not uphold Ms Carter's claim that there was a binding settlement Mr Anderson did not engage at all at that time. Had he done so then the matter may have been able to have been resolved before the need for telephone conferences, submissions and determination of that issue. His failure to engage at that point increased costs.

[51] On that basis I consider it appropriate to assess costs in line with the daily tariff of \$4,500 for one third of a day. That is the sum of \$1500 together with reimbursement of the filing fee of \$71.56.

### **Orders made**

[52] Mark Anderson is ordered to pay to Angie Carter the following amounts:

- (a) The sum of \$13,000 gross being reimbursement of lost wages under s 123(1)(b) of the Act.
- (b) The sum of \$14,000 without deduction being compensation under s 123(1)(c)(i) of the Act.

- (c) The sum of \$80.00 gross being holiday pay.
- (d) The sum of \$1500 being a contribution towards costs and \$71.56 being reimbursement of the filing fee.

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